Note from the Attorney General's Office:

1911 Op. Att'y Gen. No. 11-241 was overruled by 2009 Op. Att'y Gen. No. 2009-018.

1911 Op. Att'y Gen. No. 11-66 was overruled by 1966 Op. Att'y Gen. No. 66-014.

(To the United States Senators)

305.

SENATE BILL PROVIDING FOR APPORTIONMENT OF REPRESENTATIVES IN CONGRESS—CONSTITUTIONALITY—REPRESENTATIVES EXCEEDING CONGRESSIONAL DISTRICTS—EXTRA MEMBERS ELECTED AT LARGE—NOMINATION LIKE GOVERNORS AND STATE OFFICERS.

A United States senate bill having for its object the apportionment of representatives in congress, assigns to Ohio and several other states, a greater number of representatives than there are congressional districts in such states and provides that such additional members may be elected at large.

An amendment to such bill stipulating that such extra members, for whom the state provides no elections, may be nominated in the same manner as candidates for governor are nominated in such states, would be without objection, as such regulations are within the powers of congress under article I, section 4 of the constitution of Ohio.

COLUMBUS, OHIO, July 27, 1911.

HON. THEODORE E. BURTON, *United States Senate, Washington, D. C.*

DEAR SENATOR:—I have given careful attention to the question which you ask in your letter of July 20th, as follows: "A bill now pending in the United States senate provides an apportionment of representatives in congress, which, if enacted into law, will assign to several states, among them Ohio, a greater number of representatives than the number of congressional districts in such states. To meet the obvious difficulty, the bill provides that if no apportionment is made by the states, the additional member or members allotted to such states under the remaining provisions of the bill may be elected at large.

"The state of Ohio has no law providing for the nomination of members at large of congress. Would it be sufficient and proper for congress to enact by way of amendment to this bill in effect that such additional member or members for the election of whom no provision is made by the states, and who are to be elected at large, by virtue of the provisions above referred to, may be nominated in the same manner as candidates for governor are nominated in such states?"

The form of your question suggests two inquiries, perhaps independent, namely, the effectiveness of such a regulation, and the power of congress to pass it.

As to the first inquiry which your question suggests, I am of the opinion that an amendment, such as that suggested, would be entirely effective and would meet all the difficulties which might arise by virtue of the passage of an apportionment act allows to the state of Ohio a greater number of representatives in congress than there are congressional districts therein. The election laws of this state provide the method for nominating all candidates for governor and other state officers. For congress to adopt this method and make it applicable to representatives at large would, on the one hand, meet the emergency

that might otherwise arise, and, on the other hand, it would not preclude the state from legislating in the future, if it saw fit, with regard to the nomination of such representatives at large.

The second inquiry which your question suggests presents an interesting legal problem.

Article I, section 4 of the constitution of the United States provides in part:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but congress may at any time by law *make or alter* such regulations, except as to the places of choosing senators."

If there were ever any doubts as to the plain meaning of this provision, and as to the vesting by it in congress of power to regulate the manner of electing representatives in congress, such doubts have all been dispelled by the repeated decisions of the federal courts:

Ex parte Siebold, 100 U. S., 371.
Ex parte Yarbrough, 110 U. S., 651.
Ex parte Coy, 127 U. S., 731.
Ex parte Geissler, 4th Federal, 188.
United States vs. Gale, 109 U. S., 75.
United States vs. Quinn, 8 Blatchf., 48.
United States vs. Badder, 4 Woods, 189.

It is also settled that congress may adopt and enforce by its own peculiar sanctions state laws relating to elections for the purpose of regulating the manner of holding elections for representatives, which elections are held at the same time at which state elections are held.

Ex parte Siebold, supra.
Ex parte Clarke, 100 U. S., 399.

This, the only unsettled question presented in your second inquiry is as to whether or not the power to regulate nominations of candidates for congress can be by implication derived from the express grant of power to regulate the manner of holding elections for representatives.

The recognition of political parties, the requirement of official ballots, and in general all regulations pertaining to the nominations have, wherever their validity has been questioned been justified as measures tending to insure the purity of elections. Numerous state decisions might be cited upon this point, but it is sufficient for the present purpose to cite:

State vs. Taylor, 55 O. S., 391.
State vs. Poston, 58 O. S., 620.

It is equally well settled that congress has not only the powers expressly granted to it by the federal constitution, but also all powers necessary and proper to carry into effect the powers expressly conferred and to further any end which congress may constitutionally seek to attain.

Legal Tender Cases, 12th Wallace, 379.

For all of these reasons, it is my opinion that the proposed amendment would not exceed the constitutional powers of congress.

I assure you that it is a great pleasure to me personally to be of any assistance to you in this matter, but I am constrained to remark that I have felt some slight trepidation in assuming to pass upon the constitutional questions above referred to for the reason that in questions relating to the powers of congress, I suppose that the opinion of the attorney general of the United States might properly be solicited. For this reason I have not elaborately discussed the questions involved, but I have no hesitancy in saying that in my judgment the conclusions reached are amply sustained by the authorities cited.

I am at least certain if congress chooses to pass the amendment described to you, no exceptions to such action will be taken by any of the state authorities of Ohio.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

(To the Governor)

B 263.

COLUMBUS, OHIO, June 2, 1911.

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

DEAR GOVERNOR:—I have considered the question presented in the letter of Rev. B. F. McKinnon, of Middletown, Ohio, enclosed herewith. Although it is not clear from the correspondence I assume that the question is as follows:

> "May an infirmary physician lawfully charge a fee for filling out insurance company blanks for the enforcement of a policy on the life of an inmate?"

The relation between the infirmary directors and the physician employed by them is clearly contractual and the terms of such contract are not prescribed by law. There is nothing, therefore, in the law to prevent the exaction of such a fee.

Furthermore, the service in question is rendered, not to the deceased or to his estate, but to the beneficiary of the life insurance policy, and while the fee may be unreasonable in amount I do not know of any rule of law which would prevent its exaction, or which would compel the physician to perform the services in question without being paid for them.

I herewith return the correspondence submitted to me.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the General Assembly)

55.

ELECTION OF JUDGES—SEPARATE BALLOTS—CONSTITUTIONALITY OF ARRANGEMENT OF BALLOTS IN SERIES AND ALPHABETICAL ORDER.

The senate bill, with reference to the election of judges of the supreme court and other courts of this state, is not objectionable on the grounds; first, that it seeks to impose in effect, an educational requirement; second, that it imposes conditions which are not uniform and not impartial in effect as to all electors.

COLUMBUS, OHIO, January 23, 1911.

HON. JAMES A. REYNOLDS, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department as to the constitutionality of Senate Bill No. —, relating to the election of judges of the supreme and other courts of this state.

My particular attention is directed to that provision of the bill which requires that there shall be separate ballots for all judicial offices, and that the names of all the candidates for such offices shall be arranged thereon in alphabetical order and printed in series so that the order in which the names appear on such ballot shall be different in each series.

It is obvious that the effect of such provisions is to conceal the partisan allegiance or nomination of all candidates for judicial office, so that an elector desiring to vote for the candidates nominated by his party must know who they are.

The only conceivable constitutional objection to this scheme is that it tends to impose an educational qualification not authorized by the constitution. Section 1 of article V of the constitution of 1851 provides that:

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

Section 2 of the same article provides that:

> "All elections shall be by ballot."

It is clear that the general assembly may not in the exercise of its general legislative power impose any qualifications upon the exercise of the elective franchise other than those embodied in section 1 above quoted, or regulate the manner in which such franchises shall be exercised so as to conflict with the mandate of section 2 above quoted. Yet the general assembly has undoubted discretion in the matter of regulating the exercise of the legislative franchise so as to prevent its abuse. In so legislating, however, the general assembly must not enact laws which are unreasonable, partial or which lack uniformity. Monroe vs. Collins, 17 O. S., 665; State ex rel. vs. Bode, 55 O. S., 229.

The questions then for determination in connection with this specific bill are as follows:

1. Does the bill seek to impose in effect an educational qualification whatever may be its professed purpose?

2. Does the bill, under the guise of regulating the mode of the exercise of the legislative franchise, impose conditions thereon which are not uniform and impartial in effect as to all electors?

With respect to the first of these questions, the answer must, in my judgment, be in the negative. It would be just as reasonable to say that the present Australian ballot law, which provides for straight tickets, headed by party emblems, is unconstitutional because it restricts the illiterate elector to the "straight ticket," as it would be to hold that this bill is unconstitutional because it presents such an elector from voting for the candidates of a particular political party as such. The supposed inference that the free choice of the elector is the same in both instances.

As a matter of fact it is physically impossible to provide any method of voting which will not seem to discriminate in a sense against some particular class of voters. Thus if *viva voce* voting were permitted under the constitution, and the general assembly should choose to provide for the election of public officers by this method, it might be objected thereto that dumb persons, possessing the qualifications of an elector could not exercise their franchise by this method. While this contention seems rediculous, it has been actually made. In the same manner those who are crippled and those who are blind might be said to be discriminated against by the present laws which require each elector to mark his ballot with a lead pencil. This is but another way of saying that the effect of a *viva voce* election law would be to add the qualification of audible speech to those defined in the constitution, and that the effect of the present Australian ballot law would be to add to the constitutional qualifications that of ability to make the lead pencil mark required by statute.

As above suggested, such difficulties are inherent in any scheme of voting which may be adopted by the general assembly, and especially inherent in the scheme required to be adopted by the constitution, viz., that of elections by ballot. The general assembly, however, has recognized these difficulties and has so safe-guarded the constitutional rights of qualified electors as to obviate all such objections.

It is provided by section 5078, General Code, that:

> "Any elector who declares to the presiding judge of elections that he is unable to mark his ballot by reason of blindness, paralysis, extreme old age or other physical infirmity, and such physical infirmity is apparent to the judge to be sufficient to incapacitate the voter from marking his ballot properly, may, upon request receive the assistance in the marking thereof of the two judges of elections belonging to different political parties, and they shall thereafter give no information in regard to the matter. * * * *Such assistance shall not be rendered for any other cause which the voter may specify.*"

A close examination of this section discloses that inability to read is not such an infirmity as will justify the rendition of assistance thereunder.

It follows, therefore, that under the present laws, even if the elector desires to vote other than a straight party ticket, he must either be able to read the printed ballot or he must by an exercise of his memory, and upon an examination of an unofficial ballot, fix in his mind the positions thereon of all the candidates for whom he desires to vote. The only difference then between the situation which such a voter would find himself under existing laws and that in which such a voter would find himself under existing law and that in which he would find himself under the proposed law is that such a voter would be unable

to fix in his mind the positions upon the official ballot of the candidates for which he desired to vote. He would still be able to fix in his mind the appearance of the printed name of the persons for whom he desires to vote, and to do this would, it would seem, require the exercise of no more native mental ability, and certainly no more education than the only method now available to such an elector. In other words the proposed bill goes no further in the direction of requiring educational qualifications for electors desiring to vote for particular individuals or for partisan candidates than the existing law goes toward requiring such educational qualifications if electors desire to vote other than a straight ticket.

In view then of the wide discretion which the general assembly undoubtedly has in the regulation of the exercise of the electoral franchise, I am of the opinion that so far as the first objection above referred to is concerned, the bill is constitutional.

All the foregoing discussion applies with equal force to the second of the above suggested objections. The bill requires in effect that each elector shall be obliged to single out from all the names on the special judicial ticket the names of the persons for whom he desires to vote, and this he may do through his ability to read or by any device of the memory which will enable him to fix in his mind the appearance of the printed name. To require all electors to make this independent choice, and thus presumably to make it more difficult for an illiterate elector to do so than for one who can read, is certainly no more of a discrimination against such an illiterate elector than is afforded by the present ballot law.

I have not, of course, considered other possible objections to the constitutionality of this law. I have, however, considered the only ones which have occurred to me. I have given the entire subject careful consideration and am satisfied that there is no valid constitutional objection to the bill.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

68.

CONSTITUTIONALITY OF ACT FOR APPOINTMENT OF TEACHERS—PERMANENT APPOINTMENT AFTER SIX YEARS SERVICE—PROVINCE OF COURTS, OF ATTORNEY GENERAL AND OF LEGISLATURE—PUBLIC BENEFIT.

The question of the constitutionality of an act being for the courts and it being the custom of the attorney general to withhold judgment except in cases of manifest clearness, it is simply stated in the way of suggestion that in amending section 7691, General Code, relating to the appointment of teachers in the public schools, the question should be borne in mind whether such act, in making a teacher's position permanent after six years service, "promotes the efficiency of the schools" as stipulated in article VI, section 2 of the constitution of Ohio.

The questions also figure as to whether such provision conflicts with the right of the school boards to contract for teachers' services, and whether such act would be contrary to the best interests of the public.

COLUMBUS, OHIO, January 25, 1911.

HON. JOHN H. BROWDER, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I am requested for an opinion regarding the constitutionality of

House Bill No. 42, being an act to amend section 7691 of the General Code of Ohio, relating to the appointment of teachers in the public schools.

The question as to whether this act is constitutional or not depends upon the following paragraph, to-wit:

> "except that when a person has served as a teacher in the public schools in the same school district for six years his next appointment shall be permanent, such teacher being removable only under and in accordance with section 7701 of the General Code."

It is not within the province of this department, nor would it be proper for me to pronounce proposed acts, which have been introduced but which have not passed either house of the legislature, constitutional or unconstitutional. This is exclusively the province of the courts; and the rule is that acts of the legislature will only be pronounced unconstitutional when it clearly appears that they are so, but as you have requested an opinion, I can simply indicate my views on this matter.

Under the constitution it is the duty of the legislature to provide by suitable laws for the government of the schools, and the legislature has placed the management of the public schools exclusively under the control of directors, trustees and boards of education.

Section 2 of article VI of the constitution provides:

> "The general assembly shall make such provision by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

It will be noted that under this section the general assembly shall make such provisions as will secure a thorough and efficient system of common schools throughout the state. Now the question would arise under the proposed bill, whether such an enactment as this would tend to promote the efficiency of the schools? If it does not do so, the act would probably be unconstitutional. It would be opening the door wide to make an absolute provision of this nature under which a person, no matter what his qualifications might be, if he had taught in the same school district for six years, would, solely on account of the fact that he had served for that period, be permanently employed. The word "permanent," of course, would mean for the balance of his or her life, or until removed under section 7701 of the General Code. This section is directly contrary to the provisions of the school laws relative to granting time certificates, and might be held to obviate them.

Another question that arises is whether such a provision does not conflict with the right of school boards to contract with teachers; that is after the teacher has served six years under this act, all school boards after he became eligible to the permanent employment, would have no power to employ or not employ such teacher.

The question also arises as to whether such an act would be contrary to the best interests of the public.

However, under the constitution the legislature is vested with the power and duty of making the laws under which the schools shall be operated and gov-

erned, and it is a question for the legislature, and in the first instance solely for it, to decide what laws shall be passed.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 98.

APPROPRIATION LAW—CLAIM—WHEN A MAJORITY AND WHEN A TWO-THIRDS VOTE NECESSARY—PROVISION BY PRE-EXISTING LAW.

If an act making an appropriation deals with "a claim, the subject-matter of which has not been provided for by pre-existing law" a two-thirds vote is necessary to pass the same. If otherwise, an appropriation may be passed by a majority vote.

COLUMBUS, OHIO, February 4, 1911.

HON. CHARLES W. KEMPEL, *Clerk of House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of February 3d, which is as follows:

"What vote is required for the passage of bills carrying an appropriation?"

Section 9, article II, of the Constitution provides that:

"No law shall be passed in either house without the concurrence of a majority of all members elected thereto."

Section 22 of article II, 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."

Section 29 of article II, is as follows:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; *nor shall any money be paid, on any claim, the subject-matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.*"

Now the test to be applied to each bill providing for an appropriation to ascertain whether or not it requires a two-thirds vote of the members elected to each branch of the general assembly is, first, is the appropriation in fact a claim, and, second, if it is a claim, has the subject-matter of such claim been provided for by a pre-existing law? If it is not a claim, it only requires a majority vote.

If it is in fact a claim, and yet has been provided for by pre-existing law, still it only requires a majority vote. But if it is in fact a claim and has not been provided for by pre-existing law, it will require for its passage the vote of two-thirds of the members elected to each branch of the general assembly.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

108.

ACT PROVIDING FOR ELECTION OF MEMBERS OF CONSTITUTIONAL CONVENTION — CONSTITUTIONALITY — SIMILAR TO NON-PARTISAN JUDICIARY ACT — CONSTITUTIONAL REQUIREMENT FOR REGULATIONS SIMILAR TO THOSE APPLIED TO ELECTION OF REPRESENTATIVES.

Section 7 of Senate Bill No. 15, providing for election to and assembling of a constitution is in form, substantially similar to the recently passed non-partisan judiciary bill and its constitutionality is supported by the reasons given in an opinion, with reference to the similar act.

Article XVI, section 2, of the constitution, providing that members shall be chosen in the same manner as members of the house of representatives, refers only to those regulations upon the election of such members as are made in other sections of the constitution itself and does not refer to regulations established by legislative act. There is, therefore, no apparent constitutional objection to the bill under consideration.

COLUMBUS, OHIO, February 10, 1911.

HON. WILLIAM H. GREEN, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—You have asked me to state my opinion as to the constitutionality of section 7 of Senate Bill No. 15, being a bill "To provide for the election to, and assembling of a convention to revise, alter or amend the constitution of the state of Ohio."

Said section 7 is in form substantially identical with the corresponding provision of what is known as the non-partisan judiciary bill recently passed by the senate. I was asked to express my opinion as to its constitutionality in that bill, and my opinion then was, and still is, that the same is constitutional. As the supreme court said in the case of State ex rel. vs. Bowman, 55 O. S., 229, per Burket, J.:

> "No form of ballot is prescribed by the constitution, and therefore the general assembly is free to adopt such form as in its judgment shall be for the best interests of the state. * * *
>
> "It is argued that the voters have the right to have the names appear upon both 'partisan' ballots so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice by placing the names once in *plain print* upon the ballots, it is all that can in fairness be required. The ballot is the same for all and gives equal protection and benefit to all. There is no discrimination against or in favor of any one; and if any inequality arises, it arises, not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable.
>
> "But grant * * * that some voters may be somewhat inconvenienced by reason of the name of each candidate appearing but once upon the ballot, yet such voters are not thereby deprived of any protection or benefit in casting their ballot. The inconvenience is only that which is experienced by any one who votes other than a straight ticket."

It will be noted that this case fully supports the conclusions which I expressed in the opinion above referred to, viz.: That a ballot law requiring a non-

partisan and separate ballot, does not in law, and under the constitution, discriminate against any class of voters, and does not amount to the imposition of an educational qualification for the exercise of the electoral suffrage. So far then as this aspect of the case is concerned it is my opinion that section 7 of Senate Bill No. 15 does not conflict with the constitution.

The most serious question is presented by a consideration of article XVI, section 2, of the constitution, under which Senate Bill No. 15 is presented, and will, if at all, be enacted. Said section 2 provides in part:

> "Whenever two-thirds of the members elected to each branch of the general assembly shall think it necessary to call a convention to revise, amend or change this constitution, they shall recommend to the electors to vote * * * for or against a convention: and if a majority of all the electors * * * shall have voted for a convention the general assembly shall, at their next session, provide by law, for calling the same. The convention shall consist of as many members as the house of representatives *who shall be chosen in the same manner* * * *"

What is the meaning of the italicized portion of the above quoted section? So far as the question now under consideration is concerned there are but two possible and antithetical meanings, viz:

1. Delegates to the convention must be elected in the same manner as representatives are required *by law, at the time of the convention*, to be elected.

2. Delegates to the convention are to be elected in the same manner as representatives are required by the constitution to be elected.

Under the first meaning, the general assembly would be without power to legislate especially concerning the manner of the election of delegates to the convention; that is to say, the general assembly could merely provide by law for calling the convention and for the time of its meeting, etc., but may not make any provisions of law for the manner of election delegates. Such manner of electing delegates would be the manner that at the time was prescribed by law, for electing representatives.

I believe it to be true that constitutions, like other written instruments, are to be construed by themselves so far as possible, and that, wherever in a constitution there is an adoption, in one provision, by reference of another provision, such adopted provision will be held to be the appropriate provision of the constitution itself; so here, the words "same manner as members of the house of representatives (are chosen)" must refer to and adopt by reference some other provision. It might adopt the provision of the constitution if there were any such provision, or, it might adopt the provisions of law which might be in force whenever the necessity of applying the section might arise. If then, there are any such sections of the constitution which could be adopted they, in my judgment, would be preferred.

Before seeking for such other provisions of the constitution, however, let it be observed that section 2 does not provide for the *election* of delegates. Section 3 of article XVI, which provides for the submission of a similar question to the electors every twentieth year, authorizes the general assembly to "provide, by law, for the election of delegates, and the assembling of such convention as is provided in the preceding section." The preceding section does not authorize the general assembly directly to provide for the election of delegates, although this provision of section 3 tends to throw some light upon the real meaning of section 2. Section 2, however, merely requires that delegates shall be *chosen* in the same manner as members of the house of representatives are chosen. If the

authority of the general assembly were, to provide how members of the convention were to be *chosen* merely, without limiting that power in any way, it might, with some force, be urged that the general assembly might lawfully provide for the calling of mass conventions or any method of choosing, other than what is familiarly known as an election. Article II, section 2, however, provides that representatives "shall be *elected * * * by the electors of the respective counties,*" while article V, section 1, prescribes who shall be electors, and article V, section 2, provides that all elections shall be by ballot. It will be seen, therefore, that the constitution itself imposes several limitations upon the manner in which representatives shall be chosen, they must be elected; such election must be by the electors; such election must be within the several counties, and such election must be by ballot. It seems to me most reasonable to believe that the intention of section 2 of article XVI is, that delegates to the constitutional convention shall be selected in such manner as the general assembly shall prescribe, except that such provisions of the constitution itself as define and limit the manner of electing representatives shall also apply to the manner of choosing such delegates.

In my opinion, therefore, section 7 of Senate Bill No. 15 and related sections are constitutional.

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

116.

VILLAGE COUNCIL—FILLING VACANCY BY "MAJORITY OF COUNCILMEN ELECTED" AND REMAINING QUALIFIED.

When a vacancy occurs in a village council, such vacancy, under section 4237, General Code, may be filled by a majority of the council elected and remaining qualified.

February 13, 1911.

HON. O. J. EVANS, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have asked my opinion and construction of section 4236 of the General Code, and which is as follows:

> "When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

And of section 4237 of the General Code, which is as follows:

> "Council shall be the judge of the election and qualification of its members. A majority of all the members elected shall be a quorum to do business, but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. The council shall provide rules for the manner of calling special meetings.",

relative to the following situation, to-wit:

That in a certain village council being composed of six members who had been duly elected one of the members died, or removed from the town, thereby a vacancy is caused in the office of councilman, and you wish to know whether the vote of the three of the remaining five members of council would be sufficient to elect a councilman to fill the vacancy; or whether it would take the vote of four, to-wit: A majority of the members originally elected.

This question has practically been decided by the supreme court of Ohio in the case of The State of Ohio ex rel. vs. Orr found in 61 O. S., 384. This case after defining what creates a vacancy, in the third paragraph of the syllabus holds:

> "Where there is such a vacancy, a quorum will consist of a majority of all the members elected and remaining qualified."

In this case the council consisted of ten members, one of whom removed, thereby creating a vacancy; and at the next meeting five councilmen were present and organized the council and elected a president and the court held (page 385):

> "After such removal and failure to fill the vacancy, the council consisted of only nine members, only that number having been elected. Section 1675, Revised Statutes, provides that 'a majority of all the members elected shall constitute a quorum for the transaction of business.'
>
> "Five being a majority of nine, it follows that a quorum was present, and that Mr. Orr was elected president of the council by a majority of all the members elected to the council, and that his election was therefore valid."

So section 4237 provides:

> "A majority of all the members elected shall be a quorum to do business,"

and, therefore, in the situation you refer to three would be a majority of five, and, therefore, three votes only would be necessary to elect a councilman to fill the vacancy.

Therefore, it is my opinion that in case a vacancy exists in council a quorum will consist of a majority "of all the members elected and remaining qualified;" in this case the majority would be three, and the mayor would have no authority to fill the vacancy by appointment unless council failed to exercise its prerogative within the thirty days prescribed by sections 4236.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

124.

NO POWER IN BOARD OF PUBLIC WORKS TO SELL LANDS WITHIN CANAL LINES—BRIDGE ON OHIO CANAL AT MASSILLON—ABUTMENT ON BERME SIDE OF CANAL.

The board of public works has no authority to surrender any property within the canal lines, and therefore would not have authority to permit the Massillon

bridge to have its main abutment upon the berme side of the canal. Such authority must come from the legislature.

COLUMBUS, OHIO, February 20, 1911.

HON. BERNARD BELL, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—In reference to the jurisdiction of the board of public works to grant permission to the commissioners of Stark county, Ohio, to occupy canal land for the purpurse of constructing a bridge across the Ohio canal at Main street in the city of Massillon, I beg to submit herewith copy of the opinion of Assistant Attorney General Miller upon the subject, dated August 29, 1910, and the opinion of Mr. Follett, special counsel in my office, supplementary thereto, dated February 20, 1911.

I concur fully in Mr. Follett's conclusion. This after a very careful examination. My opinion is, as stated by Mr. Follett, that the board of public works does not have authority to surrender any of the property embraced within the *canal lines*, and, therefore, would not have authority to permit the bridge in question to have its main abutment upon the berme side of the canal, but that such authority would have to come from the legislature.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

178.

CORRUPT PRACTICE ACT—EXAMINATION AND CONSTRUCTION—CIVIL AND CRIMINAL PROVISIONS.

A construction of the contemplated corrupt practice act (Amended House Bill No. 250) presents a possible inconsistency in the seeming modification of the criminal provision by the requirement of the element of wilfullness in the provision for civil process.

COLUMBUS, OHIO, March 13, 1911.

HON. B. F. KIMBLE, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have examined Amended House Bill No. 200, entitled "A bill to prevent corrupt practices at elections," and in particular, the inter-relation of sections 2, 13, 14 to 21 inclusive, and 31 thereof. The particular questions which I have considered are as follows:

> "1. What are the penalties prescribed by section 2 of the act for failing to file a statement of election expenses?
>
> "2. What is the effect of the provision of section 21 requiring an investigation by the grand jury, in view of the provisions of sections 14 to 20 inclusive?"

Section 2 of the act makes it the duty of candidates voted for at any election or primary election to file a certain statement of election expenses and contributions. Section 13 provides that "any persons who shall violate any of the provisions of this act shall be held to be guilty of a corrupt practice." Section 31 provides that "any person convicted of a corrupt practice * * * shall be

fined." Upon consideration of these three sections I am of the opinion that, if enacted into law, they would make it an offense to fail to file a statement showing a detail of expenses and contributions.

Sections 14 to 20 inclusive, provide for the filing of a petition in case statements or accounts have not been filed by persons whose duty it is to file the same, or that statements and accounts actually filed are false or incomplete, in courts of common pleas, probate courts and courts of insolvency, and for the summary hearing of certain issues to be raised by such petition, as follows:

1. The duty of the person in question to file a statement.
2. Whether a statement has been filed.
3. Whether the statement filed is false or incomplete.
4. Whether the failure to file a correct statement is wilful and intentional.

Section 21 provides that any of such courts in which such proceedings are brought may render judgment requiring the filing of a statement or amendment thereto within ten days, on penalty of contempt of court, but that, if the court is satisfied that the failure to file a correct statement is due to a wilful intent to defeat the provisions of the act, the court shall in addition transmit a copy of its decision to the prosecuting attorney for presentation to the grand jury.

It is apparent from the related sections already cited, and from section 25 of the act, that the procedure outlined in sections 14 to 21 inclusive, is civil in its nature, designed to enforce compliance with the law rather than to punish for violation of it. While this procedure is decidedly novel I know of no constitutional objection to it.

I know of no objection to the method outlined in section 21, that, while the findings of a court in such a civil proceeding are in a certain event to be transmitted to the grand jury, there is nothing in the section which attempts to invade the province of the grand jury in any way.

There is one difficulty which has occurred to me in the examination of this bill, however. As above stated, sections 2, 13 and 31 read together, make any violation of the requirement that a full and correct expense account be filed, a misdemeanor. Under section 21, however, the court in a civil case, while satisfied that a full and correct account has not been filed, is not to transmit its finding to the grand jury, unless satisfied that the failure to file such account was wilful, and with intent to defeat the provisions of the act. This sentence of section 21 then, could have one of two possible effects. That is to say, it might be construed as modifying by implication, the general provision of section 13, so that a person could not be found guilty of a corrupt practice on account of failing to file a correct statement unless such failure was *wilful*. Again, the result of this sentence might be that, while a person might be prosecuted and convicted of a corrupt practice through failure to file a correct statement regardless of the wilfulness of such failure, yet, the matter could not be brought to the attention of the grand jury in the manner outlined by section 21, unless his offense was wilful. I am inclined to doubt the validity of the first of these two possible constructions for the reason that the law leaves something to be desired in this particular.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

217.

CORONER AND INFIRMARY PHYSICIAN—EFFECT OF REMOVAL OF EITHER FROM COUNTY.

The removal of a coroner from the county creates a vacancy in the office. A physician employed as infirmary physician occupies such position only by virtue of contract, however, and his removal does not affect his position.

COLUMBUS, OHIO, April 10, 1911.

HON. JOHN C. COOPER, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have handed to me copy of the opinion of Hon. U. G. Denman to the bureau of inspection and supervision of public offices, holding in effect that if a person occupying the office of coroner of a county removes from the county and becomes a resident of another county, such removal creates a vacancy in the office, and that if the same person is employed by the infirmary directors as infirmary physician, his removal from the county forfeits his employment. You have also handed me copy of a letter addressed to you by George T. Farrell, attorney-at-law, Lisbon, Ohio, in which Mr. Farrell questions the correctness of my predecessors ruling on the second of the two points above recited. You ask me to consider this question and you furnish me an opinion thereon.

I have carefully considered the opinion of my predecessor on the second point above referred to and I have concluded that it is incorrect. The authority of the infirmary directors to employ a physician is found in section 2522, General Code, under the broad grant of power "to make all contracts and purchases necessary for the county infirmary." There is no such office as that of infirmary physician, and the relation between such a physician and the directors is purely contractual. There is no requirement that such a physician be a resident of the county, and I know of no public policy such as that referred to in the opinion in question, which would require that such a physician be a resident of the county in which the infirmary is located.

For all the foregoing reasons I am of the opinion that the removal of a person employed as infirmary physician, from the county in which the infirmary is located does not operate as a recision of his contract, nor otherwise terminate his rights thereunder.

There might be some question as to whether or not the infirmary directors under such fact might lawfully elect to regard the contract as terminated and refuse to permit the physician to perform services further thereunder, and to compensate him for services that he might voluntarily perform. The facts which Mr. Farrell's letter discloses, however, are in effect that the infirmary directors did not regard the removal of the physician as ground for a recision of the contract on their part, and that they both permitted him to render his services at the infirmary and caused him to be paid for such services. Under these circumstances I am clearly of the opinion that the amount paid to such physician may not be recovered from him.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

218.

BOILER INSPECTION—STATE PROVISION NOT INCONSISTENT WITH MUNICIPAL POWERS—MUNICIPAL POWERS NOT REPEALED.

Section 3650, General Code, giving municipalities the power to provide for the regulation of steam boilers and steam boiler plants for the purpose of abating smoke nuisances, is not affected in any way by House Bill No. 248, providing for state inspection of steam boilers, for the reason that the powers conferred on municipalities are in no wise inconsistent therewith.

April 12, 1911.

HON. M. D. FRAZIER, *Senate Chamber, Columbus, Ohio.*

DEAR SIR:—I have your favor inclosing copy of Senate Bill No. 32 and House Bill No. 248. House Bill No. 248 provides for the inspection of steam boilers and creates a department to be known as the board of boiler rules. Without quoting the bill in full, on account of its great length, it provides for such inspection and regulation on behalf of the state as to insure safety in operating steam boilers. Senate Bill No. 32 is to amend section 3650 of the General Code and gives municipalities power to provide by resolution:

> "To cause any nuisance to be abated, to prosecute in any court of competent jurisdiction any person or persons who shall create, continue, contribute, to or suffer such nuisance to exist; to regulate and prevent the emission of dense smoke, to prohibit the careless or negligent emission of dense smoke from locomotive engines; to declare each of the foregoing acts a nuisance, and to prescribe and enforce regulations for the prevention thereof; to prevent injury and annoyance from the same, to regulate and prohibit the use of steam whistles, *and to provide for the regulation of the installation and inspection of steam boilers and steam boiler plants.*"

Your question is in brief whether if the municipality provided by ordinance for the proper inspection and regulation of steam boiler and steam boiler plants located within the municipality for the purpose of determining whether a smoke nuisance was being committed and to abate the same, and for the proper inspection of boilers that are about to be installed in such municipality for the purpose of determining whether such boilers will or will not create a smoke nuisance, and consequently to forbid the installation of such boilers in case it would create a smoke nuisance, would be void on account of the provisions of section 25 of House Bill No. 248, which provides that:

> "All acts and parts of acts in conflict or inconsistent with this act or its purposes are hereby repealed."

As before stated, the primary and practically sole purpose of House Bill No. 248 is to provide in an efficient manner for the insurance and safety in the operation of steam boilers, and there is nothing in said act that is in conflict with the power of the municipality to inspect and regulate steam boilers for the purpose of regulating and preventing the ignition of dense smoke, such inspection and regulation would be in addition to and independent of the purposes expressed by said House Bill No. 248, and so long as such ordinance was

intended for and provided solely for the inspection and regulation of steam boilers so as to prevent what is commonly known as smoke nuisance, it would not be void as being in conflict with the provisions and purpose of House Bill No. 248.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

220.

STATE LIABILITY BOARD OF AWARDS ACT — CONSTITUTIONALITY — POLICE POWER — CLASS LEGISLATION — "TRIAL BY JURY" — OPEN COURTS — "OUSTING OF COURTS" — "DUE PROCESS OF LAW" — "EMPLOYERS OF LABOR"—PENALTY—CLASSIFICATION OF EMPLOYES AND EMPLOYERS.

The validity of an act is to be determined, not upon principles of abstract justice but upon the construction of constitutional provisions.

As it is well settled that parties may waive right of trial by jury and as the bill in question permits the parties to elect whether or not they will accept its terms and thereby impliedly waive such right, there is no conflict with the Ohio constitutional provision providing for the inviolability of such right.

With reference to the Ohio constitutional provision that "all courts shall be open" and that all persons shall have remedy by "due course of law" it is well settled that parties may refer a dispute as to rights or liabilities to a board or tribunal but may not stipulate that such determination shall be final and thereby oust the courts from power to review. As the effect of the bill, therefore, is to make the board in the first place the ultimate judge of certain preliminary questions (e. g.) First, is the applicant an employe for whom a premium has been paid? Second, did the injury take place in the course of employment? Third, Was the injury self-inflicted? It is suggested that bill be remedied so as to provide for a review of such facts upon appeal to the courts.

The constitutional requirements providing for "the guarantee to citizens of each state of all privileges and immunities of citizens in the several states," the prohibition of abridgement of privileges and immunities of citizens of the United States" or the denial of "the equal protection of the laws" are all directed against "special or class legislation." It is well settled in this connection that their limitations extend only to unreasonable and arbitrary classification and that the legislature is given a wide discretion in establishing, under the police power, restrictions and regulations which affect equally the members of a special class or category, whose individual conditions make such regulations uniformly justifiable.

Under this principle, the classification of the bill in question of employers into paying and non-paying, giving them the right of election in this connection, is not objectionable. As the same privilege of election is extended to employes, although their only alternative is to seek work elsewhere, the classification of employes is also not objectionable.

Difficulty is presented by reason of the fact that employers are generally classified as "employers of labor" while employes are not classified as "labor employes." It is therefore suggested that the words "of labor" be either omitted in connection with employers or applied equally to employes.

With respect to the fourteenth amendment of the constitution of the United States prohibiting a deprivation of property without due process of law, the fact

that the bill permits the employer to pay into the fund in behalf of all employes, and permits the employes to enter into the contract only as a mass and subject to the first choice of the employer, does not in view of the privileges of elections conferred, present difficulty worthy of serious consideration. Under the same constitutional provision the taking away of the common law defense, of assumption of risk, fellow servant rule, and contributory negligence, is within the scope of a proper exercise of the police power, and it seems that such exercise may be based upon any substantial public use or benefit, held in view.

The fact that the bill does not expressly declare within its terms, the fact that it is an exercise of the police power is not objectionable.

The fact that the bill in the alternatives presented seems to provide a penalty for those who do not accept its provisions is also not derogatory.

COLUMBUS, OHIO, April 12, 1911.

HON. RAYMOND RATLIFF, *House of Representatives, Columbus, Ohio.*

DEAR SIR:— The special committee of the house of representatives to which was referred Senate Bill No. 127, entitled, "A bill to create a state insurance fund for the benefit of injured and the dependents of killed employes and to provide for the administration of such fund by a state liability board of awards," has, through you, requested my opinion as to the validity of the bill in question, if enacted into a law by the general assembly, with certain amendments thereto. My consideration of the entire bill is not invited, but my attention is particularly directed to the provisions of certain sections thereof. In order, however, to present my views in orderly fashion, it is necessary for me to set forth herein the general scheme of the bill as well as to quote from the particular provisions in question.

The bill creates a liability board of awards and a state insurance fund to be administered and disbursed by said board. Said insurance fund is to be derived from premiums paid thereto by "employers of labor" and their employes, and is to be disbursed in accordance with the rules to be adopted by the board to injured employes of employers who have paid the premium and to the dependents of such employes in case of accidental death.

The bill is aptly described as "a workman's compensation bill," but as a part of the scheme of legislation embodied in it, sweeping changes are made in the existing laws with respect to the liability of such employers. The sections which it is proposed to insert in the bill are in part as follows:

> "Any employer of labor who shall pay into the state insurance fund the premiums provided by this act shall not be liable to respond in damages at common law or by statute save as hereinafter provided, for injuries or death of any such employe during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premium provided by this act; the continuation in the service of such employer with such notice shall be deemed a waiver by the employe of his right of action as aforesaid. * * *
>
> "For the purpose of creating the state insurance fund * * * each employer and his employes shall pay on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risks in the class of employment as may be determined and published by the liability board of awards. * * * The said employers for themselves and their employes shall make said payments to the state treasurer of Ohio

* * * in the following proportions, to-wit: ninety per cent. of the premium shall be paid by the employer and ten per cent. of the premium by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of said premium for any premium period and to apportion the same in proportion to the pay roll of each employe.

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

"The receipt of benefits or compensation from the fund shall operate to bar such injured employe or his legal representatives from all right of recovery against or from the employer of such injured employe.

"All employers of labor who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injury sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes, and also to the personal representatives of such employe if death results from such injuries, and in such action the defendant shall not avail himself of the following common law defenses:

"The defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

"But where a personal injury is suffered by an employe or when death results to an employe from a personal injury while in the employ of an employer in the course of employment and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the malicious or wilful act of such employer or from the failure of such employer or any of such employer's officers or agents to comply wtih any municipal ordinance or lawful order of any duly authorized officer, or any statute regulating the health, comfort, life or safety of employes, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employe or his legal representatives, in case death results from the injury may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employe except as provided in this section. In case of an election to sue as provided in this section, the defendant shall be entitled to all defenses under the law without regard to the provisions of this act."

Analyzing the foregoing, it appears that the scheme of the bill, in brief, is as follows:

A plan of insurance is provided as a substitute for the enforcement of personal injury claims by actions at law. Such plan, however, is not a complete substitute, but may be adopted or rejected—it is not compulsory. The election to adopt the plan is that of the employer in the first instance; he must choose whether or not he will pay into the state insurance fund and thus escape common law and statutory liability in a large number of cases, and thereupon must notify his employes. They are given the choice of permitting him to deduct from their wages for their portion of the premiums or leaving his employment; they cannot, while remaining in his employment, in any way object to his adop-

tion of the scheme. But if they do remain, they not only must permit him to withhold from their wages the amount of the premium chargeable to them but they are also deemed thereby to waive certain rights of action.

Should the employer choose not to subscribe to the plan, he thereby forfeits, in a sense, his right to interpose in an action for personal injury or wrongful death of any of his employes certain defenses. It would seem that the operation of the bill in this respect might aptly be termed a forfeiture, inasmuch as the bill does not repeal other statutes providing for such defenses, nor does it affect the common law in these respects, except as to the persons directly affected.

It seems also that the bill does not in terms constitute a complete revision of the common and statutory law pertaining to employers' liability. The natural inference from its provisions is, that it is intended that a certain class of employers and employes shall be affected by its provisions, and that as to all other persons bearing this relation to each other, the rules pertaining to the existence and enforcement of rights of action for personal injuries and wrongful death shall be preserved intact. If this were not the intention of the bill there would be no reason for the repeated reference therein to "the rights of action and defenses existing at common law and under statutes."

The validity of this proposed legislation must be measured by the following constitutional provisions:

> "Article I, section 10, constitution of the United States. No state shall * * * pass any * * * law impairing the obligation of contracts. * * *
>
> "Article IV, section 2, constitution of the United States. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.
>
> "Fourteenth amendment to the constitution of the United States. Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "Article I, section 2, constitution of Ohio. All political power is inherent in the people. Government is instituted for their equal protection and benefit, * * * and no special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the general assembly.
>
> "Article I, section 5, constitution of Ohio. The right of trial by jury shall be inviolate.
>
> "Article I, section 16, constitution of Ohio. All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay.
>
> "Article II, section 28, constitution of Ohio. The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts;" * * *

I have included in the foregoing catalogue of constitutional provisions, those relating to the impairment of contractual obligations, merely because I anticipated that some question as to the effect of the bill might be raised upon this ground. The rule is, of course, that laws of this sort are never construed so as

to affect subsisting contractual obligations. They are deemed prospective in their operation and will not be permitted to be enforced in such a manner as to interfere with contractual rights that have already accrued. The validity of the bill as a whole is not to be challenged upon such grounds, but it could not be made operative to authorize an employer, for instance, to deduct from the wages or salary of an employe, employed under a written or other express contract, in force at the time of the first premium paying period. I have called attention to this matter merely to point out the exact operation of these constitutional provisions.

The list of constitutional provisions which I have quoted is, I am satisfied, a complete one. Unless the bill in question, if passed by the general assembly, will infringe on them it must be regarded as valid and constitutional. The principle is too well settled to require citations of authorities in support of it, that laws are not to be declared invalid because of their conflict with supposed natural right or justice, or with the public policy which the common law has enforced.

As was said by Burket, J., in Probasco vs. Raine, 50 O. S. 378-390, "The validity of an act passed by the legislature must be tested alone by the constitution; and the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy." It is obvious that some of the provisions above quoted, if applicable at all, tend to condemn the fundamental scheme of the bill. That is to say, the bill provides that upon a certain choice being made by an employer and his employes, the latter are deprived of recourse to the courts for the redress of certain injuries except in certain cases. If this is a violation of the constitutional provision that "All courts shall be open," then, of course, this basic feature of the plan—the waiver of the right to sue—could not be sustained. Again, the redress of injuries of the sort contemplated by the bill was at common law effected through the intervention of a jury which either party had a right to demand. Undoubtedly the right to trial by jury in cases of this sort is one of the rights preserved by this section of the constitution. Unless this right may be waived in the manner provided in the bill, the latter must be regarded as unconstitutional.

Because these possible objections go to the fundamental principle of the bill, I deem it proper to consider first, the sections of the constitution upon which they are based. In so doing, I shall consider that portion of the bill merely which deals with the effect of an election on the part of the employer to avail himself of the insurance features of the insurance plan, and shall, for the time, disregard the alternative provision of the bill which prescribes the effect of failure so to elect.

Legislation precisely like that contemplated by the bill in question, is novel in the United States, and so far as I have been able to ascertain, the constitutionality of such legislation has not been passed upon under provisions like those now under consideration. The only decision even remotely bearing upon the precise question at hand is the recent one of the supreme court of appeals of the state of New York in the case of Ives vs. The South Buffalo Railway Company, decided March 24, 1911. I have carefully examined the opinion of the court in this case and find that the decision relates to a statute of the state of New York imposing absolute liability for injury in certain extraordinarily hazardous employments upon the employer, regardless of his election or choice in the matter, and without the intervention of any state insurance fund. (See Laws of New York, 1910, Chapter 674.) This portion of the New York law is to be distinguished from that passed at the same session of the legislature of that state. (Laws of New York, 1910, Chapter 352, commencing with section 205 thereof, page 646, Birdsaye, Cumming & Guilbert's Consolidated Laws of New

York, Supplement 1910.) This and the related sections of the New York law provide an elective insurance scheme similar to that of the bill now under consideration, and this portion of the New York law was not under review in the Ives case.

The law above described and involved in the decision in the case above cited was therein held unconstitutional. The description of this law which I have given is not complete, but it is sufficient for the present purpose. There are some significant passages in the opinion, however, which I deem it worth while to quote in connection with the inquiry as to the validity of that section of the bill in question which relates to the effect of the payment of a premium. Among others is the following:

> "Another objection urged against the statute is that it violates section 2 of article I of our state constitution which provides that 'the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.' This objection is aimed at the provisions * * * of the statute, which relate to the 'scale of compensation' and 'settlement of disputes,' and has no reference to the fundamental question whether the attempt to impose upon the employer a liability when he is not at fault, constitutes a taking of property without due process of law. In other words, the objection which we are now considering bears solely upon the question whether the two last mentioned sections of the statute deprive the employer of the right to have a jury fix the amount which he shall pay when his liability to pay has been determined against him. If these provisions relating to compensation are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common law jury. In all cases where there is a right to trial by jury there are two elements which necessarily enter into a verdict for the plaintiff: 1, the right to recover; 2, the amount of the recovery. It is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body. (East Kingston vs. Towle, 48 N. H., 57; Wadsworth vs. Union Pacific Ry. Co., 18 Col., 600; Fairchild vs. Rich, 68 Vt., 202.) This part of the statute, in its present form, has given rise to conflicting views among the members of the court, and, since the disposition of the questions which it suggests is not necessary to the decision of the case, we do not decide it."

It is to be noted that the court reserved decision only on the point as to whether or not the portion of the law under consideration permitted the intervention of a jury for the purpose of determining the measure of the liability of the employer. It is clearly to be inferred that if the court had been satisfied that the right to have a jury was denied by the law it would have held the law unconstitutional.

The court in the New York case seems to have regarded the law from the standpoint of the employer exclusively. It is to be remarked of course that the employer's right to a jury trial is no more fundamental or extensive than that of the employe.

This portion of the decision in the New York case is, for reasons above suggested, scarcely applicable to the bill under consideration. The question in

that case was, as to whether or not the legislature could, by providing a compulsory scale of compensation to be paid directly by the employer, deprive both the employer and the employe to the right of trial by jury. The question presented by the bill is, as above suggested, whether or not the general assembly may provide that by the commission of certain acts certain persons shall be deemed to have waived the right of trial by jury in advance of the accrual of any cause of action.

As above suggested, the scheme of the bill is such that both of two possible adversary parties in an anticipated controversy arising out of a possible personal injury, shall by appropriate acts constructively waive the right of trial by jury. It is well settled that parties may in open court, by word or deed, and regardless of statute waive the right. (Benewitz vs. Benewitz, 50 O. S., 373; Culver vs. Rodgers, 33 O. S., 537; Whitworth vs. Steers, 4 C. D., 556.) It is equally well settled that the parties to a contract may, previous to litigation thereon, or default thereunder, waive the right of trial by jury and authorize the confession of judgment. A typical case of such contracts is the familiar one known as "the cognovit note." The precise question, however, as to whether parties may by contract entered into prior to the accrual of any cause of action, mutually waive the right of trial by jury, with respect to any possible future cause of action in tort which may arise between them has, so far as I am able to find, never been judicially determined. Because of the absence of any decision to the effect that the constitutional right cannot be thus waived, and because this feature seems so essential in the scheme of the bill I cannot but reach the conclusion that the same does not violate the constitution in this respect. Indeed, it would seem that if parties can contract away the right of trial by jury with respect to an anticipated cause of action ex contractu they may do the same with respect to a future cause of action ex delicto.

The only question remaining in this connection is as to whether the bill provides an effectual waiver. The bill does not in terms state that the action of the employer in paying a six months premium shall constitute a waiver of his right to trial by jury, as to all causes of action arising out of personal injury during the period covered by the premium. But this inference is fairly raised by all of the provisions of the bill. The bill does expressly provide in the first of the proposed amendatory sections above quoted that "the continuation in the service of such employe with such employer (on the part of the employe) shall be deemed a waiver by the employe of his right of action." While this language does not expressly refer to the right of trial by jury the procedure outlined for the government of the state liability board of awards by other sections of the bill discloses that its effect is the same as it would be if express reference were made to the right of trial by jury. The question in the mind of the New York court with respect to the act under consideration in the case of Ives vs. The South Buffalo Railway Company is therefore not presented by the bill under consideration, as it is clear that the intention is to constitute the continuation of the employe in the service of his employer after the receipt of notice a waiver of the right to trial by jury.

The bill may, I think, be fairly construed as creating an implied contract between the employe and the employer whereby both, under certain conditions, are deemed to agree to waive the right of trial by jury.

A more serious question is presented with respect to the application of the above quoted provision of section 16 of article I of the constitution that "all courts shall be open, and every person, for an injury done him in his * * * person * * * shall have remedy by due course of law; and justice administered without denial or delay." As above stated, the implied contract which,

under the bill if enacted into a law, would enter into and become a part of every contract of employment entered into after its passage, is not only that the parties shall waive the right of trial by jury, by the commission of certain acts, but also that the employe shall waive *his right of action* in certain cases. It has become well settled in this state that at least in the absence of any statute, a contract which stipulates against recourse to the courts in case of dispute or injury is void. This rule is sometimes said to be based upon considerations of public policy. If this were the case no difficulty would be encountered in sustaining the validity of a statute embodying a contrary rule of policy. The legislature in cases not covered by the constitution undoubtedly has power to determine what shall be the rules of public policy, and if a statute is enacted which does violence to the common law in this respect its validity nevertheless cannot be called in question. (Probasco vs. Raine, Supra.)

In this state, however, the rule that parties may not by contract agree to waive rights of action and ultimate recourse to the courts does not seem to be based solely upon common law rules of public policy. In B. & O. Railroad Company vs. Stankard, 56 O. S., 224, the supreme court of this state held invalid a contract between the railroad company and one of its employes whereby the latter agreed that in consideration of membership in the relief department of the railroad company and certain rights accruing under such membership, to himself and to his personal representatives in case of death, he, and the beneficiaries under the contract should be bound absolutely by the determination of the officers of the relief department as to the amount and validity of any claim. In commenting upon this contract, which was embodied in what was known as rule 11 of the relief department of the railroad company, Burket, C. J., uses the following language:

> "But in the case at bar the equivalent of an appeal was had, and the advisory committee acted upon and rejected the claim, and then the parents were compelled to either abandon the claim, or resort to an action at law.
>
> "Does rule eleven bar such action? We think not. A long line of decisions held that parties cannot by contract take away the jurisdiction of the courts in such cases, and that the attempt to do so is void.
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> "Supreme Council of the Order of Chosen Friends vs. Forsinger, 125 Ind., 52; Whitney vs. National Masonic Accident Association, 52 Minn., 378; Insurance Company vs. Morse, 20 Wallace, 445; Stephenson vs. Insurance Company, 54 Maine, 55; Mentz vs. Insurance Co., 78 Pa. St., 475; Read vs. Insurance Co., 136 Mass., 572.
>
> "While courts usually base their decisions upon the ground that parties cannot by contract, in advance oust the courts of their jurisdiction of actions, a more satisfactory ground is, that under our constitution all courts are open, and every person, for an injury done him in his land, goods, person or reputation shall have remedy by due course of law. Article I, section 16.
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> 'Courts are created by virtue of the constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for anyone by contract or otherwise, to deprive himself of their protection. The right to appeal to the courts for the redress of wrongs is one of those rights which is in its nature under our constitution (in)alienable, and cannot be thrown off, or bargained away."

This significant language at once raises the question as to whether or not the general assembly may pass a law which, while in itself depriving the courts of no jurisdiction and not abolishing any causes of action, nevertheless permits parties by implied contract, which the law itself creates, to bind themselves not to resort to the courts for the enforcement of possible rights of action. Let it be noted that the bill in question not only provides for a waiver of causes of action, but in affording an alternative it seems to confer upon the state liability board of awards authority finally to determine all questions of fact involved in making its awards. Section 36 of the bill provides that "The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final." The "jurisdiction" of the board is not exactly defined, but it is provided by section 21 that it shall "disburse the state insurance fund to such employes of employers as have paid into said fund the premiums * * * that have been injured in the course of their employment and which have not been purposely self-inflicted." Thus, the board must have the power in the first instance to determine the following facts: 1. Is an applicant for relief, or was his decedent, an employe for whom a premium has been paid? 2. Did the injury take place in the course of the employment? 3. Was the injury self-inflicted? It would seem then, that the plain meaning of section 36 is that the decision of the board as to these questions shall be final. In this connection the following language from the opinion in the Stankard case is significant:

> "Such contracts are in their nature only applicable to cases wherein it becomes necessary to fix some facts, leaving the question of law to be settled by the courts upon proper proceedings. The ultimate question to be determined—the liability or non-liability of the parties—must be left to the courts. The construction of a written contract is a question of law for the court, and a provision in the contract that the construction of such contract, or the meaning of rules or regulations, shall be finally determined by some designated person, is void, because the court cannot be robbed of its jurisdiction to finally determine such questions. In insurance and other like cases, where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract, but the ultimate question as to whether the money shall be paid or not, may be litigated in the courts, and a stipulation to the contrary is void. The fixing of the particular fact by the person or persons named in the contract, and in the manner therein provided, is usually a condition precedent to the bringing of an action on the contract, and the performance of such condition should be averred in the petition, or some good excuse given for its nonperformance. Viney vs. Bignold, 27 Central Law Journal, 40."

It seems to me perfectly apparent from this language that the gist of the decision in the Stankard case is, that under the constitutional provision which we are now considering courts may not be deprived of their ultimate jurisdiction. That is, to say, while it is competent for parties to agree or for the general assembly to enact that they may agree that a certain question of fact be submitted for determination to a board or tribunal other than a court, it is not competent for the legislature to provide that the finding of such a board of tribunal as to the existence of any liability at all in the matter shall be conclusive. I fear, therefore, that in its present form the bill is in this respect un-

constitutional. It should in my judgment be amended so as to provide that the decision of the board of awards on any of the three points above referred to might be reviewed at least as a question of law by a court of competent jurisdiction at the instance of any interested party.

Aside from this point I am satisfied, though by no means certain, that the decision in the case of Railroad Company vs. Stankard, supra., does not operate to render unconstitutional the provision of the bill for a waiver of unaccrued causes of action. But the alternative right that the bill does give must be subject to enforcement by judicial process and this is denied by the bill in its present form.

All but one of the remaining constitutional provisions above quoted may, for the sake of convenience, be considered together, with respect to their application to the bill. The guarantee to the citizens of each state of all privileges and immunities of citizens in the several states, the prohibition upon the states as to the making and enforcement of laws which shall abridge the privileges or immunities of citizens of the United States or deny to persons within their jurisdiction the equal protection of the laws, the declarations of our bill of rights, that government is instituted for the equal protection and benefit of all the people, and the prohibition against special privileges and immunities not subject to alteration or repeal, all may be said in a sense, to be directed against a single evil, namely, the enactment of special or class legislation. Thus, if a class is arbitrarily created and deprived of rights enjoyed by other members of society in the same situation, the members of such a class are denied the equal protection of the laws. If, however, the members of a special class are the recipients of specially created rights, then they are the grantees of special privileges or immunities, and the equality of the protection of the law is denied to those not members of the class. The two propositions are correlative.

None of the foregoing constitutional provisions forbids classification of the subjects of legislation. The legislature has the right, often assailed, but always sustained, especially to legislate concerning classes of subjects of legislation as to which the necessity for such special legislation exists. The constitutional provisions above quoted operate simply to forbid arbitrary and unreasonable classification of the subjects of legislation. A few of the leading cases will suffice to illustrate the nature and extent of the rule.

In Barbier vs. Connelly, 113 U. S., 27, the supreme court sustained the constitutionality of an ordinance of the city and county of San Francisco, prohibiting the carrying on of public laundries and wash houses within certain prescribed limits of the city and county from ten o'clock at night until six o'clock in the morning. Mr. Justice Feld in delivering the opinion of the court employed the following language:

> "There is no invidious discrimination against anyone within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against anyone. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.
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> "The fourteenth amendment, in declaring that no state 'shall de-

prive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconveniences as possible, the general good. Though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the circumstances and conditions. Class legislation discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

It is here to be remarked that a statute of the state of Ohio applicable only in a certain locality, would have to be held unconstitutional under that provision of article II, section 26, that "all laws of a general nature shall have a uniform operation throughout the state." The principle enunciated by Mr. Justice Field, however, is just as applicable to this constitutional provision of our own state as it is to the provision of the fourteenth amendment, to which his remarks relate. That is to say, the test of uniformity of operation is territorial rather than personal; a law may operate only upon a certain class, such as an act prescribing the duties of physicians in making and returning birth and death certificates; or an act prescribing the rules of neglect applicable to trial of causes arising out of injuries received in the service of a railroad company. If they would all operate alike in all sections of the state upon all persons and subjects of the legislation within the same category, they would not infringe upon either provision.

In Missouri Pacific Railway Co. vs. Mackey, 188 U. S., 205, the supreme

court of the United States, for the first time, had under consideration one of the now familiar state statutes relating to the liability of railroad companies to employes, and which are sometimes termed "the fellow servant statutes." It was contended that inasmuch as the statute of Kansas, which was directly involved in the case, related solely to railroad companies as employers, and as to such companies prescribed a rule of liability different from that relating to other employers it thereby deprived such companies of the equal protection of the laws. Mr. Justice Field in delivering the opinion of the court makes use of the following language (page 209):

> "The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. (That it amounted to a taking of property without due process.) It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. * * * Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. * * * But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for the object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities.. As said by the court below, it is simply a question of legislative discretion, whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

Missouri Pac. R. R. Co. vs. Humes, 115 U. S. 512-523.
Barbier vs. Connelly, 113 U. S. 27.
Soon King vs. Crowley, Id. 703.

A similar statute of Ohio, 87 O. L. 149, was held constitutional by the circuit court of appeals of the United States in the case of Lane vs. Erie Railroad

Company, 67 C. C. A. 653, 68 L. R. A. 788. Richards, J., in delivering the opinion of the court uses the following language:

> "The contention is that the act violates the second section of the bill of rights of the constitution of Ohio, which provides that 'all political power is inherent in the people; government is instituted for their equal protection and benefit;' and which, as held in the case of The State ex rel. Schwartz vs. Ferris, 53 Ohio State 314, is not less broad than that clause of the fourteenth amendment which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the law.' It is strongly urged that the statute, by conferring upon some employes a right to recover which is denied others, unjustly discriminates among those engaged in the same occupation, creating a favored class, and denying to those outside of it the equal protection of the law.
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> "The doctrine is well settled that the general assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made. Wagoner vs. Loomis, 37 O. S. 571; Adler vs. Whitbeck, 44 O. S. 539; State ex rel. vs. Jones, 51 O. S. 492; State vs. Nelson, 52 O. S. 88; Cincinnati vs. Steinkamp, 54 O. S. 285; Hagerty vs. State, 55 O. S. 613; France vs. State, 57 O. S. 1; State vs. Gardner, 58 O. S. 599; State ex rel. Taylor vs. Guilbert, 70 O. S. 229; * * * Mo. Pac. R. Co. vs. Mackey, 127 U. S. 205; Minn. & St. L. R. R. Co. vs. Herrick, 127 U. S. 210; Minneapolis & St. L. R. R. Co. vs. Beckwith, 129 U. S. 26 (and citing numerous other cases on the same point).
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> "Of the above cases, Missouri P. R. Co. vs. Mackey, 127 U. S. 205; Minneapolis & St. L. Railroad Co. vs. Herrick, 127 U. S. 210; Chicago M. & W. R. Co. vs. Pontius, 157 U. S. 209, and Tullus vs. Lake Erie & W. R. Co., 175 U. S. 348, sustain the validity of laws either abrogating or modifying the common law rule of fellow servants as applied to railroad employes.
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> "The sole question in the case, therefore, is whether the exercise of authority in the service affords a reasonable ground for the classification of railroad employes. A valid classification for legislative purposes 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150; Billings vs. Illinois, 188 U. S. 97, 102. It must be grounded upon a 'reason of a public nature,' and 'the act must affect all who are within the reason for its enactment. Judge Shauck in Miller vs. Crawford, 70 Ohio St., 217, 214."

The foregoing decisions which, as is apparent from the citations quoted from the last of them, are merely illustrative of the large number of decisions embodying the same rule, suggest both the extent and the limits of the rule defining the classification which is permissible under constitutional provisions prohibiting class legislation. The limits of the rule, however, are perhaps better illustrated by cases wherein similar laws have been held unconstitutional. An extremely well considered case of this kind is that of Ballard vs. Mississippi

Cotton Oil Company, 21 Miss. 507, 62 L. R. A. 407. In this case, a statute of Mississippi making all corporations liable for injuries to employes through defective machinery, notwithstanding the employes had knowledge of the defect, when the same liability was not placed on private individuals, was held unconstitutional, the court holding that there was no distinctive difference between a corporation and a private individual as an employer, under favor of which, the legislature could impose a rule of liability upon the former different from that imposed upon the latter. The opinion in the case is very lengthy and cites many authorities, but the reasoning of the court is sufficiently disclosed in the above statement of its decision. While the court in this case reached the conclusion that the statute under consideration was unconstitutional, it bases its decision entirely upon the line of decisions above cited, and is in no respect at variance with them.

In Lochner vs. New York, 198 U. S. 45, the supreme court of the United States held unconstitutional, an act of New York, prescribing the hours of labor of persons employed in bakeries. Mr. Justice Peckham in delivering the opinion of the court, after citing and commenting upon the decisions of the court respecting the extent of the police power of the states, uses the following language:

> "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other parties of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground."

From all the foregoing authorities, it is apparent that that is not class legislation, depriving any citizen of privileges and immunities afforded to other citizens or denying to citizens the equal protection of the law, which upon a reasonable and logical basis classifies the subjects of legislation and operates equally upon all within the same category; while that is class legislation resulting in an infraction of the various constitutional provisions now under consideration, which, without reason or logic and regardless of the economic necessities of the case, creates an arbitrary class, affording to such class privileges and immunities or denying to that class protection which the law affords to others in the same category.

Still considering, for the purpose of this opinion, the main or fundamental features of the bill—those defining the scheme known as the state insurance fund, and the effect of the election of the employer to pay into the fund, as

well as the consequences in general, but not in particular of his failure to pay into the fund—it remains to test the same by the rule above defined. The first question which naturally arises is as to whether or not a class is created by the bill. In particular, does the two-fold aspect of the bill in its operation upon employers who elect to pay into the insurance fund and those who elect not to do so create a class within the subjects of the legislation upon which the bill acts; that is to say, are the paying employers and the non-paying employers separate classes? Does the fact that different acts of rights and remedies are afforded respectively to the members of these two classes and to the corresponding classes of employes, render the bill unconstitutional, as affording special privileges and immunities, or as denying the equal protection of the laws to the persons thereby affected?

This question is not without difficulty. As to the employers themselves I find it not difficult to reach the conclusion that there is no real classification. Each employer has the right to choose the class to which he shall belong; that is to say, the boundaries of these so-called classes are not fixed but depend upon the voluntary act of those who may constitute their membership. All the employers in any way affected by the act have the same rights. True, if they act in one way the consequences to them are different from what they would be if they had acted otherwise; but, as I have pointed out, the change in the legal rights of such an employer results through an implied contract, the right to make which, by appropriate acts he has at each recurring premium period. It would indeed be folly to hold that a law did not operate uniformly which failed to impose upon a citizen the privileges and liabilities which he might have had if he had entered into a contract into which the law permitted him to enter.

The case of the employe, under the bill, however, is slightly different from that of the employer. His election is between acceding to his employer's wishes and leaving his employment. Technically speaking, as above indicated, his right in the insurance fund depends upon an implied contract and his waiver of his future rights of action results from such a contract. I am not sure, however, that it is a contract into which he enters as a free agent. My doubt in this respect relates more appropriately to the application of the constitutional provision which prohibits a state from depriving persons of property without due process of law. In this connection, however, let it be noted that the employe whose employer has elected to pay into the fund, and the employe whose employer has elected not to pay into the fund constitute two separate classes of persons, the rights of which are not created by the same rule of law. These classes are not created by the voluntary act of the persons creating them, except insofar as the failure to leave an employment may be regarded as a voluntary act. That is to say, the employe whose employer does not desire to pay into the state insurance fund, but who himself desires to obtain the benefits of such a fund cannot secure the same without leaving his employment and seeking that of another employer who will subscribe to the scheme. Upon close analysis this point will, I think, be found to be superficial. As I have above suggested, the theory of the bill is that of implied contract. It is obvious that every contract must depend upon a meeting of the minds—the mutual assent of two adverse parties to the same proposition. If then, an employe is dissatisfied with the choice of his employer he is at a disadvantage no greater than he would be if he were dissatisfied with the wages which his employer chose to pay him. It is not essential to the validity of the scheme that the bill should provide against seeming hardships like this.

Although, therefore, the case of the employe is somewhat harder than that of the employer under the scheme of the bill I do not find that the classes into

which the bill apparently divides employes are any more real than those into which it divides employers.

On the whole then, I conclude that insofar as the two sections prescribing the consequences respectively of election to pay into the insurance fund and of election not to pay into said fund are considered, said sections do not create two distinct classes either of employers or of employes, and that, therefore, the question as to whether such a classification would be reasonable is not even raised. As between those who are entitled to the benefits and subject to the liabilities conferred and imposed by a choice to pay into the fund, and those of the other so-called class there is no discrimination whatever.

A question more serious in theory, though perhaps of trifling importance in practice, is suggested by the use of the words "of labor" in connection with the word "employers" wherever it occurs in the bill. The mere qualification of the word "employers" by the phrase in question implies that it is not all employers that are to be affected by the act, but merely "employers of labor." I do not know what this phrase means. The words "labor" and "laborer" are of very indefinite meaning. Primarily, as will be found by consulting the lexicons, a "laborer" is one who works at any employment not requiring skill or technical training of any sort, but this meaning has long since departed in usage; now, we speak of "skilled" and of "unskilled" labor, while originally only the latter class were properly termed "laborers."

I deem it unnecessary to quote the numerous and confusing decisions as to what constitutes a "laborer." It is quite apparent that the intention of the bill is to make the phrase "employers of labor" refer to a class less extensive than the word "employers" would refer to if used without any modifying clause. The presence in the bill of this phrase creates at once a classification as between "employers of labor" and employers whose employes are not "laborers." Bearing in mind then, the rule that every such classification must depend for its constitutional justification upon some inherent difference in the classes thus created I fear that under the decisions above quoted the constitutionality of the bill might be seriously questioned.

Furthermore, while it is only an employer of labor who may pay into the insurance fund, and while it is only an "employer of labor" who, failing to pay into the insurance fund, is subject to suit without being permitted to avail himself of certain defenses, it is not clear with respect to the first of these classes as to what *employes of such an employer* become, upon the payment by such employer of a premium into the state insurance fund, subject to deduction from their pay roll on account of such premium, and entitled to a right of compensation from said fund in case of injury. That is to say, the law classifies all employers into two classes, employers of labor and other employers, but it does not expressly classify the employes of such employer into those who are laborers and those who are not laborers; that is, it might happen that an employer might have in his employ as his servant, a person who was clearly not a "laborer"—if indeed the word is capable of exact definition; another employer might have in his employ a person sustaining exactly the same relation to him, together with other persons, who would be "laborers" within the meaning of the bill. Both are employes engaged in similar pursuits, but by reason of the provisions of the bill, if enacted into law, the rights and liabilities of the one would be substantially different from those of the other. As to the first, all the existing rules of law applicable to the relation of master and servant would exist as they now are; as to the other the rules would be modified, as they are proposed to be modified by this bill. Clearly, this would be a case of arbitrary classification between persons within the same category, and

would amount to a denial to such persons of equal protection of the law, and of the privileges and immunities granted to others in like circumstances.

The use of the word "such" in connection with "employe" where the latter first occurs perhaps obviates this objection, and this matter is perhaps trifling, but I feel obliged to suggest in the interest of the proposed bill that the classification suggested by the words "of labor" be eliminated or else clearly applied to employes as well as to employers.

So far in this opinion I have not considered the application to the proposed bill of that provision of the fourteenth amendment to the constitution of the United States which prohibits any state from making or enforcing any law which shall deprive any person of property without due process of law. Two features of the bill have attracted my attention in this connection, one of them inherent in the scheme of the bill itself and the other incidental thereto. In the first place it is provided in the bill that any employer who may choose to pay into the fund shall do so for and on behalf of himself and all of his employes. He is denied the privilege of paying into the fund for and on behalf of a part of his employes. His employes on the other hand, are denied the privilege of stipulating as individuals for relief under the provisions of the bill. As above pointed out, the only election which the individual employe has, is to leave the service or to abide by the arbitrary judgment of his employer. Again, it is provided by the bill that premiums shall be payable every six months. If then, an employer chooses to pay into the fund at the beginning of a half-yearly period and then changes his mind at the next premium paying period, his employe, that he might still reap the benefits of the insurance fund, must leave and seek employment elsewhere. But if the employe has an annual contract with his employer, made upon condition that the employer shall subscribe to the insurance fund, then it might be said that the effect of the bill, if enacted into law, upon such a contract, would be to impair its obligations by affording to the employer the right to terminate it by refusing to pay into the fund. This objection, however, is not weighty inasmuch as an employe would then have a right of action for breach of his contract of employment. On the whole I am satisfied that so far as the fundamental objection to the bill on this ground is concerned, the same is not well taken. It is to be borne in mind, however, that a long line of decisions of this and other states supports the rule that the right to contract respecting the terms of employment is a right which cannot be arbitrarily taken away or in any way abridged. The New York law above referred to (not the one passed upon in the Ives case, supra), provides for separate agreements between an employer and each of his employes as to entering the compensation plan prescribed by the law. And this statute appeals to me as avoiding the constitutional question which might be raised as to the bill under consideration, which provides for an implied contract which may be entered into only by the employer on the one side and all of his employes on the other. Indeed, it might seriously be questioned that because the employer may enter into an implied contract as an individual while his employes may only enter into the contract in the mass, so to speak, there is here a classification which is repugnant to the constitutional provision requiring that all persons shall be afforded the equal protection of the law. On all of these questions, however, I have been unable to find any authority, and I do not feel that I would be justified in advising your committee that the bill is to be regarded as unconstitutional on any of these grounds.

In the second place, the alternative feature of the bill, not yet discussed, presents a seeming difficulty. One of the proposed amendatory sections provides that:

"All employers of labor who shall not pay into the state insurance fund * * * shall be liable to their employes for damages suffered by reason of personal injury sustained in the course of employment, *caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes*, and also to the personal representatives of such employes where death results * * * and in such action the defendant shall not avail himself of the following common law defenses:

" 'The defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence.' "

Now, it is perfectly apparent that if an employer chooses to subscribe to the fund and to pay premiums thereto, he also forfeits thereby his right to these defenses, or rather he is not subject to suit at all, and therefore has no need of making these defenses. It is of course provided that an employed electing to pay into the fund shall nevertheless be liable to suit in case an injury or death is caused by his willful act or by the failure of himself or his agents to comply with the rules of law or ordinance, or the orders of officers duly authorized in the premises, and that in such actions he shall be allowed to avail himself of all defenses which he might have under the law as it existed before this bill shall have been passed. The effect of the whole bill, however, is virtually to take away the three defenses above referred to, except in the class of actions last above described. In the case of Ives vs. South Buffalo Railway Company, supra, the decision of the court was based expressly upon the application of the assumption of risk rule. The statute in question in that case sought, like the particular section now under consideration, to abolish the fellow servant rule, the contributory negligence doctrine, and the law relating to the employe's assumption of risks. The court uses the following language in the opinion:

"The new statute, as we have observed, is totally at variance with the common law theory of the employer's liability. Fault on his part is no longer an element of the employe's right of action. This change necessarily and logically carries with it the abrogation of the 'fellow servant' doctrine, the 'contributory negligence' rule, and the law relating to the employe's assumption of risks. *There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power; and that as to the third, this power is limited to some extent by constitutional provisions.*

"The 'fellow servant' rule is one of judicial origin engrafted upon the common law for the protection of the master against the consequences of negligence in which he has no part. In its early application to simple industrial conditions it had the support of both reason and justice. By degrees it was extended until it became evident that under the enormous expansion and infinite complexity of our modern industrial conditions the rule gave opportunity, in many instances, for harsh and technical defenses. In recent years it has been much restricted in its application to large corporate and industrial enterprises, and still more recently it has been modified and, to some extent abolished, by the labor law and the employers' liability act (of New York).

"The law of contributory negligence has the support of reason in any system of jurisprudence in which the fault of one is the basis of liability for injury to another. * * * In many of the states con-

tributory negligence is a defense which must be pleaded and proved by the defendant, and in some states it has been entirely abrogated by statute. In our own state the plaintiff's freedom from contributory negligence is an essential part of his cause of action which must be affirmatively established by him, except in cases brought by employes under the labor law, by virtue of which the contributory negligence of an employe is now made a defense which must be pleaded and proved by the employer; and under the employers' liability act which provides that the employe's continuance in his employment after he has knowledge of dangerous conditions from which injury may ensue, shall not, as matter of law, constitute contributory negligence.

"Under the common law the employe was also held to have assumed the ordinary and obvious risks incident to the employment, as well as the special risks arising out of dangerous conditions which were known and appreciated by him. This doctrine, too, has been modified by statute so that under the labor law and the employers' liability act the employe is presumed to have assented to the necessary risks of the occupation or employment and no others; and these necessary risks are defined as those only which are inherent in the nature of the business and exist after the employer has exercised due care in providing for the safety of his employes, and has complied with the laws affecting or regulating the business or occupation for the greater safety of employes.

"We have said enough to show that the statutory modifications of the 'fellow servant' rule and the law of 'contributory negligence' are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employe. In the labor law and the employers' liability act, which define the risks assumed by the employe, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our constitutions, and there of course we must stop. * * * * * * * * * * * * * * * *

"This legislation is challenged as void under the fourteenth amendment to the federal constitution * * * which guarantees all persons against deprivations of life, liberty or property without due process of law. * * * The several industries and occupations enumerated in the statute before us are neededly lawful within any of the numerous definitions which might be referred to, and have always been so. They are, therefore, under the constitutional protection. One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employes for personal injury by accident to any workmen arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment of one inherent in the nature thereof, except that there shall be no liability in any case where the injury is

caused in whole or in part by the serious and wilful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law *and we think it plainly constitutes a deprivation of liberty and property under the federal and state constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head.* In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that under our present system, the loss falls immediately upon the employe who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employe which it is to the interests of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts. The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. * * * The argument that the risk to an employe should be borne by the employer, because it is inherent in the employment may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employe, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B, and that cannot be done under our constitutions. * * * There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute for the theory is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea."

The court then cites Parrot vs. Wells Fargo & Co., 15 Wall. 534; Ohio & Miss. Ry. Co. vs. Lackey, 78 Ills. 55; Jonsen vs. Union Pacific Ry. Co. 6 Utah, 253; Ziegler vs. South & North Ala. Ry. Co., 58 Ala., 594; Birmingham Ry. Co. vs. Parsons, 100 Ala., 662; Biclingbery vs. Montana Union Ry. Co., 7 Montana, 271; Schenk vs. Union Pac. Ry. Co., 5 Wyoming 430; Gottrell vs. Union Pac. Ry. Co., 2 Wyoming, 540.

Continuing, the court say:

> "We conclude, therefore, that in its basic and vital features the right given to the employe by this statute does not preserve to the employer the 'due process' of law guaranteed by the constitutions, for it authorizes the taking of the employer's property without his consent and without his fault. So far as the statute merely creates a new remedy in addition to those which existed before it is not invalid. The state has complete control over the remedies which it offers to suiters in its courts even to the point of making them applicable to rights or equities already in existence. * * * We repeat, however, that this power must be exercised within the constitutional limitations which prescribe the law of the land." * * *

Proceeding further the court acknowledges that if the statute were a police regulation necessary for the protection of the lives, health or the safety of the public generally it might be upheld. Analyzing the law the court concludes that the statute is not a police regulation.

The feature of the New York law which was condemned by the supreme court of appeals of that state, as is clear from the foregoing quotation, was the deprivation of the employer's right to defend on the ground that the employe had assumed the risks inherent in the employment. Whether or not the reasoning and conclusion of the court in this respect are correct, they do not apply to the bill which you have presented to me. The section now under consideration and last above quoted discloses that the employer who does not enter the insurance scheme provided by the whole bill shall be subject to suit —not for *any* injury sustained in the course of employment by his employes but for such injuries as may have been "caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employes," and that in such an action he shall not have the defense of assumed risk. It seems to me to be perfectly plain that the only assumed risks upon which the employer is thus prohibited from defending are the risks of defective machinery known to the employe, and of incompetent fellow servants, etc. This language does not take away the right to defend on the ground of assumed risks inherent in the employment, or, as the New York court more properly puts it, it does not confer upon the employe the right to sue regardless of the delict of the employer, thereby making the employer absolutely liable for all injuries sustained by his servant. Thus, the reasons which led the supreme court of appeals of New York to hold the New York law under consideration, unconstitutional, are not presented by the bill under consideration. The court in that case concedes that the assumed risks which are taken away by the bill are such as may be taken away by the legislation without depriving anyone of property at all. Therefore, the questions as to what taking of private property is permissible under the police power and as to what degree of public interest in the subject of legislation will justify in the exercise of police power are not raised.

The New York court would seem to hold that the police power of the states is limited to the preservation and protection of the lives, health and safety of the members of the body politic, and that it does not extend to legislation for the general economic welfare of the people aside from the considerations of security, health, morals and the like. If this is the holding of the New York court it is clearly opposed to the weight of authority, although the authorities to be sure, are not uniform. In the New York case are cited cases like Barthoff vs. O'Reilly, 74 N. Y., 509; Mullen vs. Peck, 49 O. S., 447; Marvin vs. Trout, 199 U. S. 212, affirming Trout vs. Marvin, 62 O. S. 132. All of these cases sustain

the constitutionality of police measures of statutes creating rights of action where no wrong had been committed.

The cases of Noble State Bank vs. Baskell, 219 U. S. 104, Shallenberger, et al., vs. The First State Bank, etc., 172 Fed. 999, and Assaria State Bank vs. Dolley, 219 U. S. 121, referred to in the opinion of the court of appeals of New York, are cases arising under the so-called "bank depositors guarantee acts" of Oklahoma, Nebraska and Kansas respectively. In these cases the supreme court of the United States sustains the validity of each of these acts, not on the ground alone that all business of banking is a privilege which may be made subject to franchise and license, but on the further ground that legislation of this sort constitutes a valid exercise of the police power of the states. In the opinion of Mr. Justice Holmes in the first of the above cited cases appears the following:

> "In the first it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark vs. Nash, 198 U. S. 361; Strickly vs. Highland Boy Mining Co., 200 U. S. 527, 531; Offield vs. New York, New Haven & Hartford R. R. Co., 203 U. S. 372; Bacon vs. Walker, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases besides the every day one of taxation, in which the share of each party in the benefits of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Company vs. Indiana, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.
>
> "It may be said in a general way that the police power in a general way extends to all the great public needs. Camfield vs. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions of the present time is the possibility of payments by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it." * * *

In the third of these cases the same justice says:

> "The case of Noble State Bank vs. Haskell, just decided, cuts the root of the plaintiff's case, except so far as the Kansas law shows certain minor differences from that of Oklahoma. The most important of these is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the circuit judge, that the law could not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate step." * * *

It therefore appears that there is weighty authority for holding that private property may be taken where there is any public use or benefit to be subserved by the taking. Perhaps the theory of the decisions is aptly phrased in our own constitution, article I, section 19—the only provision corresponding with that of the fourteenth amendment of the federal constitution which I have been discussing. Said section 19 provides that "private property shall ever be held inviolate but subservient to the public welfare."

Does then, the public welfare seem to justify the enactment of the bill under consideration? The general assembly is itself the first and almost the final judge of what constitutes the public welfare? Courts will only disturb its judgment when as in the Lochner case, supra, no ground whatever can be advanced for the enactment of the law in question.

It has been decided then, that in the exercise of the police power private property may be taken; that this taking may be by way of creating a right of action where no wrong has been suffered—by making those who profit by the carrying on of a business or by the fruits of the labors of others absolutely liable for injuries resulting from such business or in the course of such employment; that in ascertaining whether the public welfare is subserved by a measure which does take private property, or does interfere with the liberty of persons, the courts will investigate and take notice of economic conditions and physical facts underlying the law which is called in question. Mueller vs. Oregon, 238 U. S. 412, in which Mr. Justice Brewer says:

> "When a question of fact is debated and debatable, and the extent to which special constitutional limitation goes is affected by the truth in respect to that fact, widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

(This is the case involving the Oregon law limiting hours of labor for women.)

All of these priciples having been established, and the economic soundness of the scheme of the bill being conceded, it seems to me reasonably certain that no feature of it constitutes such a deprivation of property or liberty as is inhibited by article XIV, section 1 of the constitution of the United States, or by article I, section 19, of that of this state.

The difficulty of the question arises from the fact that no court, excepting the New York court of appeals, has ever passed upon a statute precisely like the bill proposed.

Another difficulty arises from the fact that the bill in question does not explicitly or by *necessary* inference purport to be a police measure. Such a meaning, however, may be read into a statute, or rather the court will look to all parts of the statute, to ascertain its true intent.

Still another difficulty arises from the fact that the provision depriving the employer of the right to defend on the ground of assumed risk is inserted seemingly as a penalty or forfeiture which is to be visited upon him for not doing a thing which it is not made his duty to do. True, the case of Assaria State Bank vs. Dolley, supra, would seem to hold that it is competent for a state legislature in the exercise of police power to provide that persons who are subject to the legislation *may* do certain things and then to provide that if they do not do them, certain burdens shall be imposed upon them. If this decision is to be regarded as going to the length of holding that a person may be in a sense punished for not doing that which he has a right not to do, then it is decisive of

the whole question. At any rate, in view of the importance of the bill which has been submitted to me and in view of its undoubted beneficence of purpose I am constrained on the authority of the case last above cited to hold, if the bill is a police measure, designed for the protection of the public interests, this manner of enforcing its prime object does not render it unconstitutional.

For the same reason and in spite of the decision in the Ives case, supra, I am inclined to the view that by the analogy of cases representing the decided weight of authority the bill in question must be regarded as a police measure.

In conclusion, I may say that I am very reluctant to pass upon the constitutionality of any bill as I feel that that function is one which should be left to the courts. I am more reluctant to reach an adverse conclusion as to the constitutionality of any of the features of this bill, the general object and aim of which is so humane and just. I have given to the consideration of the various questions involved in a study of this bill from a constitutional standpoint, as great care as the time at my disposal has afforded. I have in every instance resolved all doubts in favor of the constitutionality of the bill, and because of this presumption I have not held unconstitutional a few of its provisions concerning the validity of which I still have some doubt. As to these particular provisions, all of which are mentioned in the foregoing opinion I might perhaps be able to satisfy myself more fully by devoting more time to their study.

In spite of my reluctance to pass upon the constitutionality of the bill at all, and in spite of the presumption of constitutionality which I have afforded to all of the provisions of the bill called in question by your inquiry I have felt obliged to hold one feature of the proposed bill unconstitutional and to question seriously the constitutionality of the two other features. I trust that my advice in the matter will be useful to the committee and to both houses of the general assembly, and that changes can be conveniently made in the bill with a view to obviating the defects above referred to without sacrificing to any degree any of the basic principles thereof.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 222.

APPROPRIATION BY STATE TO ASSIST CITY IN BUILDING CULVERT—FORM—"SUNDRY BILL."

COLUMBUS, OHIO, April 14, 1911.

Finance Committee, House of Representatives, Columbus, Ohio.

GENTLEMEN:—You have asked me to advise you as to the form in which an appropriation should be made for the following purpose:

> "The city is about to install a drain or culvert for a purpose which will relieve the state of the necessity of doing the same thing, and it is deemed proper and just that the state shall appropriate money in aid of the enterprise."

In my judgment it would be most proper to place said appropriation in a separate bill by itself, so that the conditions upon which the appropriation is

made may be fully set forth. I know of no reason, however, why it should not be placed in any of the bills that are customarily made up and designated as "appropriation bills," although the item would seem to be such as should more properly be included in what is known as the "sundry bill."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

233.

EMPLOYERS' LIABILITY LAW—CONSTITUTIONALITY—CLASSIFICATION OF "EMPLOYERS OF FIVE OR MORE MEN."

In the exercise of the police power, the legislature may establish classifications and impose special regulations upon each class when the classes are reasonably and logically distinct.

In the act under consideration however, the fact that all employes may avail themselves of its provisions but that only employers "of five or more workmen" are subject to the alternative contingencies presented where payment is not made into the fund, presents a possible imposition of an arbitrary and unreasonable classification which will impair the constitutionality of the bill.

COLUMBUS, OHIO, April 29, 1911.

HON. WM. GREEN, *President, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 28th, requesting my opinion as to the constitutionality of sections 21-1 of Senate Bill No. 127, as amended and passed by the house of representatives. Said Senate Bill No. 127 is the same bill which I recently considered in an opinion addressed to Hon. Raymond Ratliff, chairman of the special committee of the house of representatives. I enclose a copy of that opinion.

You will note that I state therein that the established rule in all the courts upon the subject of class legislation is that the legislature may divide the subjects of legislation into such classes as can be reasonably and logically distinguished from each other, and may enact laws pertaining to one of such classes to the exclusion of the others. There must be, however, a real and substantial difference justifying such classification.

The enclosed opinion also states my conclusion as to the manifest object of the bill, which is to apportion between employers and employes the burden of insuring a community against the pauperism and suffering which are the inevitable result of industrial accidents. Whether or not the classifications made in the bill—and there are several of them—are reasonable depends upon whether or not they are in furtherance of this object. That is, the bill might be made applicable to certain employments only, on the theory that the risk to the public in certain other employments was so small on account of the number of accidents occurring therein as to make special legislation of this sort unnecessary in regard to such employments. Such a classification would probably be held reasonable. But the classification made by section 21-1 of the bill is not this classification. All employments, whatever their nature, are, in their application to individuals, divided into those in which five or more men are engaged under a single employer and those in which fewer than that number are so employed. Applying the above stated principle to this classification it is at

once seen that it cannot be upheld unless it can be established that industrial accidents are less likely to occur in an employment where fewer than five men are engaged than where more than that number are engaged. It is not that more accidents are likely to occur where the body of employes is larger; that follows as a matter of course, for the number of accidents is always in proportion to the number of men employed—at least roughly so. The real question is as to whether an employe, engaged in a common enterprise with three others, is less likely to suffer injury than if he is engaged with five others.

As a matter of fact, of course, such an individual is more likely to be injured if he has more fellow servants because of the principle that the presence of each additional fellow servant introduces an element of risk on account of the possible negligence of such fellow servant.

It would seem, therefore, that it might properly be said that there is some basis for the classification which the bill makes in this particular, but no reason appears to me for the selection of the number five; it seems purely arbitrary. Unless it can be established that there is some logical classification between the employments in which five or more men are engaged and those in which fewer than that number are employed I fear that on this broad ground the classification would not be upheld, and that a court would hold that its effect was to deny to all parties in the same situation with respect to the main purpose of the bill, the equal protection of the law.

There is another ground, however, for criticising this classification—or rather the same fundamental reason, of the denial of the equal protection of the laws, operates in another way. Another section of the bill provides that all employers may pay into an insurance fund on behalf of themselves and their employes. As I understand, the operation of that section is not confined to employers employing five or more men and an employer employing fewer than five men may avail himself of its advantages. The object of section 21-1 is to induce by indirect methods employers to subscribe to the state insurance fund. In its present form, however, its persuasive force is exerted on a part only of those who may comply with the preceding section. In other words, we have two sections, one of which offers a course of conduct open to all of a given class, while the other threatens certain consequences if a part only of that class do not elect to follow such course of conduct. It seems to me that the preceding sections clearly indicate that the general assembly intends that the general object of the bill shall apply to *all* employers. If that is the case then the indirect penalty must also be made applicable to *all* or we shall have a classification within a classification which, by the very terms of the bill itself, is unreasonable as measured by the decisions quoted in my former opinion.

For both of the foregoing reasons I am of the opinion that the words "who employ five or more workmen or operatives in the same business or in or about the same establishment" if allowed to remain in Senate Bill No. 127 will seriously impair its constitutionality.

For a fuller discussion of the decisions establishing the principles which I have endeavored to apply to this question I refer you to the enclosed opinion.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

248.

TOWNSHIP TRUSTEES—POWER TO RESURFACE MACADAM ROAD WITH BRICK WITHOUT VOTE OF ELECTORS—PROCEDURE.

Provided they adopt the proper procedure and keep within the taxation limitations, the trustees of a township may improve an existing highway now surfaced with macadam by resurfacing the same with brick, under section 3939, General Code, subhead 22, without submitting the proposition to a vote of the electors.

May 9, 1911.

HON. E. N. BOGGS, *Representative of Belmont County, care House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have requested an opinion from me as to whether the trustees of a township can, without submitting the same to a vote of the electors, improve a certain piece of road which was originally paved with macadam by resurfacing the same with brick.

Section 3295 reads as follows:

> "The trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., in such manner as is provided by law for the sale of bonds by such township, for any of the purposes authorized by law for the sale of bonds by a municipal corporation for specific purposes, when not less than two of such trustees, by an affirmative vote, by resolution deem it necessary, and the provisions of law applicable to municipal corporations in the issue and sale of bonds for specific purposes, the limitations thereon, and for the submission thereof to the voters, shall extend and apply to the trustees of townships."

Section 3939 states as one of the specific purposes for which bonds may issue:

> "22. For resurfacing, repairing or improving any existing street or streets as well as other public highways."

Section 3940 provides:

> "Such bonds may be issued for any or all of such purposes, but the total bonded indebtedness created in any one fiscal year under the authority of the preceding section, by a municipal corporation, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation, except as hereafter provided in this chapter."

Section 3941 provides:

> "When such council, by resolution or ordinance passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, deems it necessary in any one fiscal year to issue

bonds for all or any of the purposes so authorized in an amount greater than one per cent. of the total value of all the property in such municipal corporation as listed and assessed for taxation, it shall submit the question of issuing bonds in excess of such one per cent. to a vote of the qualified electors of the municipal corporation at a general or special election in the manner hereafter provided in this chapter."

Section 3942 (as amended February 22, 1911, 102 Ohio Laws —) provides:

"The net indebtedness incurred by any township or municipal corporation for the purposes mentioned in sections 3295 and 3939 of the General Code, shall never exceed four per cent. of the total value of all the property in such corporation or township, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the township or corporation in the manner hereinafter provided."

Century dictionary—Surface: "To put a surface (of a particular kind) on, or give a (certain) surface to; specifically to give a fine or even surface to; make plain or smooth."

Webster—Surface: "To give a surface to; especially to cause to have a smooth or plain surface; to make smooth or plain."

The words "repair" and "improvement" are of such common use that it is not necessary for me to give a definition of such words.

It is my opinion, therefore, that under subhead 22 of section 3939, supra, the trustees of a township may improve an existing highway now surfaced with macadam by resurfacing the same with brick, and may issue bonds therefor without submitting the same to a vote of the electors, provided the total bonded indebtedness for any and all purposes created in any one fiscal year shall not exceed one per cent. as provided in section 3940, supra, and provided, further, that the provisions of sections 3942 and 3943 are not violated.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 251.

BILL CREATING A CHIEF INSPECTOR OF PUBLIC OFFICES AND STATE INSTITUTIONS CONSTITUTIONAL — FINDING OF INSPECTOR NOT BINDING UPON COURTS.

COLUMBUS, OHIO, May 12, 1911.

HON. GEORGE K. CETONE, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—I have carefully examined Senate Bill No. 158, of which you are the author, being "A bill to create a chief inspector of public offices and state institutions and to repeal certain sections of the General Code."

I know of no reason for regarding this bill as unconstitutional or defective in any respect. My attention having been especially directed to section 6, I beg to state that said section does not seem to confer upon the chief inspector of public offices the power to pass upon the validity or legality of a claim except-

ing in an advisory capacity. This section and the other sections of the act do not make the findings of the chief inspector binding upon the courts or upon the taxing districts or upon the state; such findings are merely for the guidance of officers and taxpayers interested in the disbursements of public moneys. This being the case, I find no constitutional objection to this particular section.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

261.

HEADING FOR APPROPRIATION FOR APPRAISERS OF STATE PROPERTY.

COLUMBUS, OHIO, May 31, 1911.

Finance Committee, House of Representatives, Columbus, Ohio.

GENTLEMEN:—You have asked me to advise you under what heading the appropriation to carry out the purposes of House Bill No. 378 should be placed.

In my judgment it would be most proper to place said appropriation under a separate heading, as follows: "Appraisers of state property. Per diem and expenses of members, $....."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 295.

COMPENSATION OF CLERKS OF HOUSE AND SENATE—$5.00 PER DIEM FOR DAYS ACTUALLY EMPLOYED.

Under section 53, General Code, clerks of the senate and house of representatives are entitled to $5.00 per diem for only those days upon which they are actually employed in the work provided for in said section.

COLUMBUS, OHIO, July 14, 1911.

HON. W. V. GOSHORN, *Clerk of the Senate, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of a letter signed by Hon. Charles W. Kempel, clerk of the house of representatives, and yourself, jointly submitting for my opinion thereon the following question:

> "Please render us an opinion as to the compensation to which the clerks of the senate and house are entitled under the provisions of section 53 of the General Code."

Said section 53, General Code, is in part as follows:

> "The clerks of the senate and house of representatives shall be paid five dollars per day, each, for the time employed after the adjournment of the general assembly in making indexes to the recorded and printed journals, and reading the proof sheets of the printed journals. The bills therefor must be approved by the commissioners of public printing or a majority of them." * * *

The primary meaning of this provision is very clear. The compensation therein provided is five dollars per day for the time employed in certain work. Manifestly, no intention is apparent to compensate the clerks for days in which no services have been rendered. Broadly speaking, the compensation provided for by this section is in the nature of a per diem fee without any unusual features. It is the essential nature of compensation so measured that its amount at a given time is determined, not by the lapse of time alone but by the number of days on which official services have been rendered. (Cobrecht vs. Cincinnati, 51 O. S. 68.)

The intent of the statute in this particular is rendered absolutely clear by the provision that "the clerks shall render bills subject to the approval of the commissioners of public printing." Were it intended to make the compensation payable under the section in the nature of a salary, the amount of which would be dependent solely upon the lapse of time, such a method of ascertainment would have been unnecessary.

I am therefore of the opinion that the clerks of the senate and house of representatives are each entitled, under section 53, to the sum of five dollars for each day on which he is employed after the adjournment of the general assembly in making indexes to the journals and reading the proof sheets of the printed journals, but that neither clerk is entitled to any compensation for any day during the time when he is generally employed in such work on which he actually performs no services.

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

C 301.

CANDIDATES FOR CONSTITUTIONAL CONVENTION—NOMINATION BY PETITION NOT BY PRIMARIES—REGULATIONS.

It is not necessary for candidates for the constitutional convention to present their petitions to the board of elections prior to the date of filing petitions for county offices or on the date of their filing.

As many qualified electors as file nominating petitions may be candidates for members of the constitutional convention.

Candidates may not be nominated at the primaries but by nominating petitions only.

COLUMBUS, OHIO, July 20, 1911.

HON. ADAM FRICK, *Member House of Representatives, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the 14th inst., in which communication you inquire as follows:

> "In your opinion is it necessary under Senate Bill No. 15 to have the candidates for the constitutional convention present their petitions to the board of elections prior to the date of filing petitions for county offices, or on the date of their filing?
>
> Also, if a candidate should file his petition in accordance with the law relative to filing petitions for county offices, would the fact that a candidate has been selected at such primaries prevent any other person from entering the contest and presenting his petition to the board of

elections not earlier than sixty days, or later than thirty days prior to the general election at which such candidates are elected?

"Would a candidate selected in the coming primaries bar any other person from later becoming a candidate?

In answer to your inquiry section 6 of Senate Bill No. 15 provides that:

"Candidates for members of the constitutional convention shall be nominated by nominating petitions only."

Section 7 of Senate Bill No. 15 provides as follows:

"In any county, any qualified elector of said county may be nominated as a candidate for members of the constitutional convention for said county upon a petition in writing addressed to the county board of deputy state supervisors of elections, signed by not less than two per cent. of the qualified electors of said county, or by such as will be legally qualified electors at the election to be held on the first Tuesday after the first Monday in November, 1911. And the said percentage of two per cent. shall be based on the number of those who voted at the last preceding general election. In no case shall the number of signers to a petition be less than three hundred."

Section 12 of Senate Bill No. 15 provides as follows:

"Nominating petitions shall be filed with the board of deputy state supervisors of elections of each county not less than thirty nor more than sixty days prior to the day of election."

I can find no provision in said bill which requires that candidates for the constitutional convention shall present their petitions to the board of elections prior to the date of filing petitions for county offices or on the date of filing such petitions. However, by virtue of the provisions of the above cited sections 6 and 12 of said Senate Bill No. 15, I am of the opinion that any qualified elector of his respective county may be nominated as a candidate for member of the constitutional convention upon a petition in writing, addressed to the county board of deputy state supervisors of elections, provided said petition is signed by not less than two per cent. of the qualified electors of said county, or by such electors as will be legally qualified to vote at the election to be held on the first Tuesday after the first Monday in November, 1911, and in no case shall the number of signers to the petition be less than three hundred.

So that, therefore, in conclusion, it is my opinion, in answer to your first question, that it is not necessary that candidates for the constitutional convention should present their petitions to the board of elections prior to the date of filing petitions for county offices or on the date of such filing.

By the provisions of section 6 of said bill, and which is cited above, candidates for members of the constitutional convention *shall be nominated by nominating petitions only*, and by the provision contained in section 12 of said senate bill such nominating petition shall be filed with the deputy state supervisors of elections of each county not less than thirty days or more than sixty days prior to the date of election.

Therefore, it is my opinion that as many qualified electors as file petitions in accordance with the above provisions can be candidates for members of the

constitutional convention, and that furthermore, there is no provision for nominating candidates for the constitutional convention by or at the regular primaries, and that said bill provides that candidates for said constitutional convention can be nominated only by petition as above stated.

I believe my answers to your first two questions also answers your third question in this to-wit, that a candidate for the constitutional convention cannot be selected by primary, and that no qualified elector of his respective county can be barred from being a candidate provided he has filed the required petition with the deputy state supervisors of elections not less than thirty nor more than sixty days prior to the date of election.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

360.

OFFICES INCOMPATIBLE—MEMBER GENERAL ASSEMBLY AND DELEGATE TO CONSTITUTIONAL CONVENTION—"PUBLIC OFFICE."

A member of the legislature may be elected delegate to the constitutional convention.

A member of the constitutional convention holds a lucrative public office, however, in that he acts in a public capacity and exercises duties delegated as a part of the sovereignty of the state, and therefore under article II, section 4 of the constitution, cannot retain at the same time his seat in the general assembly.

COLUMBUS, OHIO, September 15, 1911.

HON. HARRY W. CRIST, *Member, House of Representatives, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 31st, and would say that I have not until now rendered an opinion upon the question which you submit. You state:

> "I understand sometime ago that an opinion had been rendered by you that a member of the present general assembly is eligible to membership in the coming constitutional convention. I would be greatly obliged if you would inform me as to whether you had given this matter attention and had rendered any opinion concerning it. The law itself would seem to make any elector eligible, and the constitutional provision forbidding senators and representatives to hold an office which they have created or as to which they have increased the salary, for one year after the expiration of their terms, would appear to apply only to appointive positions, in case it had any application to the matter in hand.
>
> "In case a member is eligible to membership in the constitutional convention, would it be necessary to resign as a member of the present general assembly?"

Article XVI, section 2 of the constitution provides as follows:

> "Whenever two-thirds of the members elected to each branch of the general assembly shall think it necessary to call a convention, to revise, amend, or change this constitution, they shall recommend to the

electors to vote, at the next election for members to the general assembly, for or against a convention; and if a majority of all the electors, voting at said election, shall have voted for a convention, the general assembly shall, at their next session, provide, by law, for calling the same. The convention shall consist of as many members as the house of representatives, who shall be chosen in the same manner, and shall meet within three months after their election, for the purpose, aforesaid."

Article XVI, section 3 of the constitution provides as follows:

"At the general election, to be held in the year one thousand eight hundred and seventy-one, and in each twentieth year thereafter, the question 'Shall there be a convention to revise, alter or amend the constitution' shall be submitted to the electors of the state; and, in case a majority of all the electors, voting at such election, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon."

These sections afford the scheme for the calling, membership, compensation, etc., of members, and the times for holding constitutional conventions. Nowhere in the constitution will be found provisions for the qualifications of delegates to such constitutional conventions.

The legislature having duly recommended an election for the purpose of holding a constitutional convention, and the election having resulted in favor of said convention, the last general assembly passed an act to provide for the election to and assembling of a convention to revise, alter or amend the constitution of the state. (102 O. L. 298-303.)

Section 1 of this act provides for the election and the number of delegates, and that said delegates should possess "the qualifications of an elector."

Section 7 of the act (102 O. L. 299) provides:

"In any county any qualified elector of said county may be nominated as a candidate for member of the constitutional convention for said county" * * *

Section 20 (page 303) provides as follows:

"Any elector of the state shall be eligible to membership in such convention and any disqualification now imposed by law upon persons holding any other office under the laws of this state is hereby removed, insofar as the right to be a delegate to such convention is concerned. The delegates of the convention shall be entitled to the same compensation and mileage for their services as is allowed by law to members of the general assembly for one year." * * *

It is manifest from a consideration of the above act, providing for the convention, that any qualified elector is eligible to a seat in the constitutional con-

vention, and any statutory provision providing a disqualification is specifically removed.

As suggested in your letter article II, section 19 of the constitution provides that:

> "No senator or representative 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."

I agree with your opinion that this provision of the constitution applies only to "appointive" offices. As originally introduced in the convention wherein it was adopted, the section read "elected or appointed to," but after some discussion the word "elected" was stricken out and the section was meant to apply only to appointive offices. (2 Debates, 1851, 562-832). I conclude that so far as your eligibility to membership in the coming constitutional convention is concerned, the fact that you are a member of the general assembly now and was at the time of the enactment of the law fixing the time of the holding of said convention, as well as the compensation of members, etc., would not interfere, and that you might be elected to membership in said constitutional convention.

A more serious situation is presented in your last inquiry, where you ask whether or not a member of the constitutional convention is eligible to a seat in the general assembly.

Section 4 of article II of the constitution provides that:

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

The general inhibition applies to a person holding office under the authority of the United States or a lucrative office under the authority of this state. The express exceptions are township officers, justices of the peace, notaries public or officers of the militia. I am inclined to believe that the well known maxim "*Expressio unius exclusio alterius est*" would apply in this instance, and that the only offices excepted under the general prohibition are such as are specifically set forth in the above section, and that a person holding any other office than those excepted would be ineligible to and could not have a seat in the general assembly.

It necessarily follows, then, that the sole question to be determined is whether or not a delegate to the constitutional convention holds a "lucrative office" under the authority of this state. Since the act of the general assembly provides that the compensation shall be the same, including mileage, as is allowed by law to members of the general assembly for one year, it would be lucrative, and I need only consider as to whether or not such delegate is an *officer* under authority of this state.

The delegate is elected by and represents his constituents in a convention held for the purpose of altering, amending or revising the state constitution. His is a duty of the highest type, that of revising, or amending and altering the fundamental law of the state. True, his term of office is not definitely fixed

other than to the time necessary to faithfully do and perform the particular things for which he was elected, but, as stated in People vs. Bledsoe, 68 N. C. 257:

> "Duration and salaries are not of the essence of public office. The duty of acting for and on behalf of the state constitutes an office."

The delegate takes an oath of office—at least such has been the custom of previous conventions, doing this, I suppose, by virtue of section 7 of article V of the constitution.

Judge Spear says (49 O. S. 37):

> "An office, speaking in general terms, is the right and duty to exercise an employment. It is defined by the Century dictionary as 'a post, the possession of which imposes certain duties upon the possessor and confers authority for their performance;' by Cochran, in his Law Lexicon, as 'a position or appointment entailing certain rights and duties,' and Bouvier as 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.' And in Bradford vs. Justices, 33 Ga., 332, 'Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer.'" * * *

Mason vs. State, 58 O. S. 30, holds:

> "A public office is a public trust held for the benefit of the public." * * *

In the leading case of State vs. Jennings, 57 O. S. 415-424, Judge Minshall says:

> "Many efforts have been made to define a public office; and it is only the incumbent of such an office whose rights can be challenged in a proceeding in *quo warranto*. But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state."

In the case of Clark vs. Stanley, 66 N. C. 59-62, the court says:

> "A public officer is one whose duties are in their nature public, thus involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance citizens, irrespective of party, are interested, either as members of the entire body politic or of some duly established division thereof."

From these definitions and expressions of the different courts it is clear to

me that the position created by the act in question is an office and that the incumbent elected in the manner prescribed by law is an officer. The delegate to the constitutional convention is truly an agent of the state. He represents his constituency in suggesting changes in the organic law; his responsibility is the very highest; his obligation the greatest; he, in a way that is fast becoming popular, legislates—a legislation with a referendum, for the proposed new constitution must go before the public for acceptance or rejection.

The present legislature, while it adjourned *sine die*, is subject to call from the governor to assemble in extraordinary session; and although no one knows whether or not the governor will find it necessary, for any purpose, to convene the present general assembly in extraordinary session, it is at least possible that it may become necessary so to do. It would certainly not be held that in the event the general assembly reconvenes in extraordinary session in January next, and the constitutional convention should meet at that time, the same person could hold his right to sit in both meetings. Neither do I think that this person, holding both offices, would have the option of attending the one and resigning from the other at his own sweet will and pleasure. It would be possible in the event that a number of the present members of the general assembly were elected in their respective counties to the constitutional convention, to seriously inconvenience and delay the meeting of the convention if an extraordinary session of the general assembly became necessary. There would then be an incompatibility of time as well as duties of a person holding an office in the convention and in the general assembly at the same time.

I am, therefore, of the opinion that while a member of the general assembly is eligible to be elected a delegate to the constitutional convention, public policy would demand that such member resign as a member of the general assembly before accepting the office of delegate, as he would be in no event, were the general assembly reconvened in extraordinary session, entitled to have a seat in the general assembly, since his office of delegate to such constitutional convention is a lucrative office under the state, and so forbidden under our constitution herein cited.

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

378.

MAYOR—POWER TO DESIGNATE JUSTICE OF THE PEACE—TO PERFORM JUDICIAL POWERS WHILE ABSENT—POWERS OF PRESIDENT OF COUNCIL EXECUTIVE ONLY.

The mayor of a city has the power to designate a justice of the peace to exercise his judicial functions during his absence.

The president of the council during the absence of the mayor succeeds only to the executive functions of the latter and not to his judicial functions.

COLUMBUS, OHIO, September 19, 1911.

HON. S. S. DEATON, *Member, Ohio Senate, Urbana, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 13th in which you call my attention to the seeming conflicting provisions of section 4273 and section 4549 of the General Code, and to the additional fact that the former of these two sections was originally enacted at a later date than the

latter; and in which you request my opinion as to whether, in the light of these two sections, the mayor of a city has power to designate a justice of the peace to exercise his judicial functions during the absence or disability of the mayor, or whether such functions during such absence or disability devolve upon the president of the council.

This question was submitted to this department during the incumbency of my predecessor, who held that the mayor now has the power as formerly, to designate a justice of the peace for the purpose aforesaid. The conclusion is based upon the decision of the circuit court, State vs. Hance, 26 C. C. 273, which is to the effect that the president of council during the absence of the mayor succeeds under the section above cited, only to the executive functions of the mayor, as distinguished from his judicial functions.

I concur in this opinion and therefore advise that in the case described by you, the mayor had the power to designate the justice of the peace to exercise his judicial functions during his absence. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 390.

LEGISLATIVE ACT NOT WITHIN INITIATIVE AND REFERENDUM ACT.

COLUMBUS, OHIO, September 23, 1911.

HON. CHARLES KUHL, *Member Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Under date of September 13th you address me as follows:

> "Please give me your opinion on the following: There was an act passed in April, 1904, providing for the purification of the strongly polluted Mill creek running through Hamilton county and the city of Cincinnati. The county commissioners were held by that act to construct a trunk sewer for that purpose, but nothing was done by them so far. The state board of health declared the condition of the creek a menace to health, also did the city board of health lately and ordered the county commissioners to act according to the law. But now comes the commissioners and say we are not able to undertake this big problem which may take four or five years for its completion. As we are only elected for two years and overloaded with work now we demand that the next legislature give us the power to appoint a commission of experts to take hold and carry the problem through from beginning to end. To avoid any more delay in this urgent case, cannot the law be changed or amended to that effect by a popular vote on the strength of the initiative and referendum act?"

If you will refer to the initiative and referendum act as passed by the last legislature, and as found in 102 O. L., page 521, etc., you will note that section 4227-1 and section 4227-2 of said act applies only to resolutions, ordinances and measures of municipal corporations and does not refer at all to the acts of the legislature. Therefore, I would say that the act passed in April, 1904, by the Ohio legislature was not within the purview of the initiative and referendum act. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

402.

OFFICES INCOMPATIBLE—MEMBER OF GENERAL ASSEMBLY AND MEMBER OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS—"PUBLIC OFFICE."

As the position of the board of trustees of public affairs of a village is a lucrative office under the authority of the state, within the comprehension of article II, section 4 of the state constitution, such position may not be held by a member of the general assembly.

COLUMBUS, OHIO, September 30, 1911.

HON. M. J. JENKINS, *Member of the House of Representatives, Plain City, Ohio.*

DEAR SIR:—I herewith beg to acknowledge receipt of your inquiry under date of August 11th, 1911, in which you say:

> "I am the Madison county member of the seventy-ninth general assembly and I would like an official opinion from your department as to my eligibility to serve as a member of the board of trustees of public affairs of the village in which I reside.
>
> "I requested an opinion upon this question from your predecessor inasmuch as I was a member of such board when elected representative, but the information never reached me.
>
> "I have been certified to the board of elections as a candidate for the same office at the forthcoming primaries and if I am ineligible I wish to so notify the board before the ballots are printed."

In reply to your inquiries, I wish to say that section 4357 of the General Code provides as follows:

> "In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4358 of the General Code provides as follows:

> "When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint the members thereof, subject to the confirmation of the council. Such appointees shall hold their offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such village."

Article 2, section 4 of the constitution provides as follows:

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

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

I take it that the office of member of the board of trustees of public affairs of the village of Plain City is a lucrative office under the authority of the state, and, therefore, comes within the prohibition of article 2, section 4 of the state constitution; and inasmuch as said office is not within any of the exceptions of the aforesaid sections of the constitution, I am of the opinion that so long as you are a member of the board of trustees of public affairs of your village, you are neither eligible to, nor entitled to have a seat in the general assembly. If you desire to retain your position in the general assembly you should resign from the board of trustees of public affairs at once, as you may not legally hold the office of member of the general assembly, nor draw any pay therefor while you hold the other office, but if you resign as member of the board of trustees of public affairs of your village at once, I apprehend no question will be raised about your membership in the general asembly.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Secretary of State)

2

CLEVELAND HUNGARIAN AID SOCIETIES DEATH BENEFIT ASSOCIATION—MUTUAL CORPORATION NOT FOR PROFIT—DOING INSURANCE BUSINESS—FEE FOR FILING ARTICLES OF INCORPORATION.

A corporation not for profit whose business substantially amounts to insurance, must pay a fee of $25.00 *for filing its articles and must in every way become subject to the insurance laws of the state and particularly to sections* 9427 *et seq., General Code.*

COLUMBUS, OHIO, January 4, 1910

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

DEAR SIR:—I beg to acknowledge receipt of your letter of December 30th, enclosing proposed articles of incorporation of the Cleveland Hungarian Aid Societies Death Benefit Federation, and requesting my opinion as to the fee chargeable for these articles.

The corporation is not for profit. The purpose for which it is formed is "aiding the families of its members in the event of death." It is further provided in the articles that "its proceedings and business shall be conducted agreeable to its constitutions and by-laws, and such amendments and alterations as it may from time to time adopt for its government." The association has no capital stock.

These articles of incorporation indicate that the federation mentioned therein is in one of two possible classes mentioned in section 176 of the General Code, viz:

"1. A mutual life insurance corporation having no capital stock.

"2. A corporation not organized for profit and not mutual in its character."

In my opinion the business which this company proposes to do substantially amounts to insurance and it must not only pay a fee of twenty-five ($25.00) dollars for filing its articles, but it must become subject in every respect to the insurance laws of the state and particularly to sections 9427 et seq. of the General Code. See section 665 of the General Code.

The articles in question are regular in form and may be filed upon the payment of the proper fee.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

4.

CORPORATIONS—LEGALITY OF PURPOSE CLAUSE OF WESTERN SECURITIES COMPANY—POWER OF CORPORATION TO OWN STOCK IN COMPETING COMPANIES.

A purpose clause of articles of incorporation conferring the power to hold stocks and securities of other competing and non-kindred corporations as owner thereof is a violation of public policy and statutes of the state of Ohio.

COLUMBUS, OHIO, January 6, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 3d, submitting for my opinion as to the legality of the purpose clause thereof the proposed articles of incorporation of the Western Reserve Securities Company, which said clause is as follows:

> "Said corporation is formed for the purpose of taking charge of, caring for and managing real estate for owners, negotiating loans, acquiring, owning, holding and disposing of stocks, bonds, notes, bills of exchange, mortgages, leases, leasehold interests, or other securities either as owner, agent or broker, and to promote, finance, develop or otherwise further the lawful enterprises of others, and to do any and all other incidental acts and things."

The power to "acquire, own, hold and dispose of stocks, bonds, notes, bills of exchange, mortgages, * * * or other securities, either as owner, agent or broker; and to promote, finance, develop or otherwise further the lawful enterprises of others," is not only separate and distinct from the power "to take charge of, care for and manage real estate for owners," and thus objectionable under the rule laid down in State ex rel. v. Taylor, 55 O. S. 67, but the power as above referred to is one which may not lawfully be conferred upon any corporation in Ohio. The power of an Ohio corporation to hold stocks and securities of other corporations *as owner* is limited to the acquisition of stocks of kindred but not competing corporations. Under the powers attempted to be conferred upon this corporation it could commit acts directly violative of the established public policy of this state and of statute law relating to trusts and combinations. For a more complete discussion of the principles involved I beg to refer you to my opinion of December 21, 1910, respecting the admission of the U. S. Investment Securities Company to do business in Ohio.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

19.

January 13, 1911.

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

MY DEAR SIR:—I beg to acknowledge receipt of your letter of January 11th, inclosing certified copy of the articles of incorporation of the U. S. Investment and Securities Company, a corporation organized under the laws of South Dakota, and seeking admission to do business in this state under the provisions of sec-

tions 178 and 183 of the General Code, formerly sections 1485 and 1486, respectively, Revised Statutes. The application is referred to me as to whether the business, or object of the corporation, as set forth in said articles, is such as may be legally carried out by a corporation organized under the laws of this state. I beg to refer you in this connection to the opinion of Hon. U. G. Denman, Attorney General, rendered to your department under date of December 21, 1910. I indorse the conclusion and opinion of that date of the attorney general as expressed in that opinion, that the object of the incorporation of the U. S. Investment and Securities Company are all contrary to the settled public policy of the state of Ohio. I therefore advise you that you may not lawfully issue a certificate authorizing the U. S. Investment and Securities Company to do business in the state of Ohio.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

7.

ARTICLES OF INCORPORATION OF B. F. FINK COMPANY—LEGALITY—POWER OF CORPORATION TO ENGAGE IN SEVERAL UNRELATED FORMS OF BUSINESS—REAL ESTATE CORPORATIONS—TWENTY-FIVE YEAR LIMITATION.

The word "purpose" in section 8623, General Code, is intentionally used in the singular and except in certain cases, expressly stipulated in the statutes, corporations may not lawfully be formed in Ohio for more than one purpose.

A corporation to engage in real estate business will expire in twenty-five years and the articles of incorporation should so state.

COLUMBUS, OHIO, January 11, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 10th, enclosing articles of incorporation of the B. F. Fink Company and requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of engaging in and conducting a general wholesale and retail business in all kinds of merchandise; also for conducting an undertaking business including the wholesale and retail and manufacturing of articles and goods used in the undertaking business and general merchandising business; also for the purpose of buying and selling and exchanging and owning real estate and improving and developing same."

I am unable to ascertain from this purpose clause just what is the real principal purpose of this company. If it is a general merchandise business, the first phrase of the clause ending with the semi-colon, while objectionable because of its vagueness and generality, is probably legal. With this principal business—assuming it to be such—however, the incorporators have sought to join the following unrelated purposes:

1. That of engaging in the undertaking business. 2. That of dealing at wholesale and retail in articles and goods used in the undertaking business. 3. That of manufacturing articles and goods used in the undertaking business. 4. That of dealing generally in real estate.

In the leading case of State ex rel. vs. Taylor, 55 O. S. 67, the supreme court of this state established the rule that the word "purpose" in former section 3235, Revised Statutes, now section 8623, General Code, was designedly used in the singular number, and that excepting in certain cases expressly provided for by statute, corporations may not lawfully be formed in Ohio for more than one purpose. The application of this rule would require the incorporators of the B. F. Fink Company to elect among the various unrelated purposes stated in the articles of incorporation presented to me, the one purpose for which they desire to incorporate.

In the same connection I beg to advise that if the incorporators desire that the company shall engage in the real estate business the corporation thus formed will expire by limitation in twenty-five years from the date on which its articles of incorporation are issued by you, and in my judgment the articles of incorporation themselves should so state. See section 8648, General Code.

For the foregoing reasons I advise that until the articles of incorporation are amended as above suggested, you do not file or record the same.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

27.

ARTICLES OF INCORPORATION OF THE DEAL-KERNS AGENCY COMPANY—GENERAL INSURANCE AGENCY BUSINESS — PURPOSE CLAUSE—"UNDERWRITERS."

A corporation formed for the purpose of engaging in a general insurance agency business, cannot, in the purpose clause of its articles, express such purpose as a "business of general insurance underwriters."

COLUMBUS, OHIO, January 16, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 14th, enclosing proposed articles of incorporation of the Deal-Kerns Agency Company and requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of engaging in the business of general insurance underwriters."

The incorporators of these articles have used unfortunate language. It is apparent from the name of the corporation that they have employed the word "underwriters" in its derivative or popular sense, as being synonymous with "agents." Such, however, is not its original and technical meaning. The term "underwriter" is defined in Bouvier's law dictionary as follows:

> "The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer."

The Standard dictionary gives a similar definition.

I take as above suggested, that this company was not intended to be organized for the purpose of doing an insurance business, but rather for the

purpose of doing an insurance agency business. Defining the powers of an insurance company, the articles of incorporation are for obvious reasons insufficient; as attempting to create an agency company, the language employed is for the above reasons inaccurate.

I therefore advise, until the articles of incorporation are amended as above suggested, that you do not file the same. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

28.

CORPORATIONS — HOLDING COMPANIES — OWNERSHIP OF STOCKS — LEGALITY OF ARTICLES OF INCORPORATION OF OHIO SECURITIES COMPANY, WESTERN RESERVE SECURITIES COMPANY AND THE AMERICAN BRIDGE COMPANY.

It is against the statutes and the settled policy of the state of Ohio to permit a corporation or association of natural persons to exercise rights of general ownership of corporate stocks.

The statute is against the common law and should be construed strictly, and articles of incorporation governed thereby must express only what is clearly legal.

2. *Corporations may, however, be formed for the purpose of dealing in stocks and securities of other corporations as agents.*

COLUMBUS, OHIO, January 16, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 11th, enclosing proposed articles of incorporation of the Ohio Securities Company with check of L. D. Weadock attached thereto; also your letter of January 14th, enclosing amended application for articles of incorporation of the Western Reserve Securities Company with letter of T. A. McCaslin and check attached thereto; also your letter of January 14th, enclosing amended certificate of incorporation of the American Bridge Company. All of these letters present the same general question, viz:

> "Can a corporation be legally incorporated under the laws of this state for the purpose of owning the stocks of other corporations?"

This department has repeatedly held that this may not be done: it is against the settled policy of this state to permit a corporation or association of natural persons to exercise the rights of general ownership of corporate stocks; the exercise of such a right would tend to monopoly.

It is true that certain statutes authorize corporations to acquire stock of other corporations under certain circumstances, and that section 8683 authorizes all private corporations to

> "purchase or otherwise acquire and hold shares of stock in other kindred but not competing plant and corporations, domestic or foreign."

All such provisions, however, are to be strictly construed. All of them to define powers which are purely incidental and which may not be recited in the

statement of the purpose for which the corporation is formed. In other words, it is not lawful in this state for a corporation to be engaged in the business of owning stocks; the power which all corporations have in this respect is purely incidental and may not be extended beyond the strict terms of the statute. This is because the statutes themselves are in derogation of the common law rule.

Bank v. Bank, 36 O. S., 354.
Ry. Co. v. Iron Co., 46 O. S., 44.
Peoples v. Trust Co., 130 Ill., 268.
State ex rel. v. Standard Oil Co., 49 O. S., 137.

In Mr. McCaslin's letter the point is made that inasmuch as the company has the right to own stocks of similar but not competing corporations, the ———— in its articles that the company is formed for the purpose of "acquiring, owning, holding and disposing of stock," etc., will be construed as if limited to the acquisition of stocks of kindred but not competing corporations. This, however, does not follow. The articles of incorporation of the Western Reserve Securities Company attempt to authorize that company to acquire the stocks of *any* corporation whether such corporations be kindred or not and whether or not they be competing corporations. They would authorize the company to acquire and to exercise the rights of ownership with respect to the stock of a number of unrelated manufacturing companies; in other words, they authorize the formation of what is familiarly known as "a holding company."

Mr. McCaslin in his letter states that the acts of the company are presumed to be legal. This is immaterial. Let the articles of incorporation recite what is clearly legal and there will be no objections to them.

It is, of course, to be understood that corporations may be formed for the purpose of dealing in stocks and securities of other corporations as agents.

For the foregoing reasons I beg to advise you that the articles of incorporation of the Ohio Securities Company of the Western Reserve Securities Company as drafted may not be filed by you, and that the American Bridge Company may not be admitted to do business in Ohio so long as it retains in its certificate of incorporation the power to "purchase, hold * * * or * * * dispose of the shares of the capital stock * * * of any other corporation or corporations * * * and * * * while owner of any such stock * * * to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

35.

ARTICLES OF INCORPORATION OF CONTRACTOR'S INVESTMENT COMPANY—BUILDING COMPANIES.

Section 10210 *of the General Code does not authorize building companies to engage in a general rental business.*

Corporations may be formed for a single purpose only, unless express authority to pursue more than one object has been conferred by law.

COLUMBUS, OHIO, January 18, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 17th, re-

questing my opinion as to the legality of the purpose clause of the proposed articles of incorporation of the Contractor's Investment Company, which said clause is as follows:

> "managing and renting office buildings and other buildings designed for business and other purposes, and of acquiring, erecting and holding office buildings and other buildings designed for business and other purposes, and of acquiring, selling, holding and otherwise disposing of leasehold estates or other interests in land which may be necessary or proper in connection therewith, and of doing a general contracting business."

The incorporation and powers of building companies are especially provided for by section 10210, General Code, which provides in part as follows:

> "A corporation organized for the purpose of constructing and maintaining buildings to be used for hotel, store rooms, offices, warehouses and factories, may acquire by purchase or lease, and hold upon mortgage and lease all such real estate or personal property as is necessary, for such purpose. But no such corporation shall acquire or mortgage any real or leasehold estate, or lease it for a period exceeding * * * the term of five years, without the consent of the holders of two-thirds of the stock * * * Nothing herein shall authorize corporations to buy and sell, or to deal in real estate for profit."

The above quoted articles recite the following purposes:

1. Managing and renting buildings.
2. Acquiring, erecting and holding buildings.
3. Doing a general contracting business.

The purpose of acquiring and disposing of interests in land is also set forth in the articles, but this purpose, while probably superfluous, is clearly stated to be incidental to the other purposes of the company and therefore is not, strictly speaking, objectionable. The purpose of renting office buildings is not one of the purposes which may be independently pursued by a corporation organized under section 10210. The managing and renting of a building may properly be said to be an incident to its maintenance. However, it is obvious that the business of managing and renting office buildings may be carried on by a person or corporation without maintaining the building thus managed and rented. Section 10210 does not authorize corporations formed thereunder to engage in the rental agency business.

"General contracting" business is clearly an enterprise separate and distinct from that of constructing and maintaining buildings.

The rule in this state being that laid down in State ex rel. v. Taylor, 65 O. S. 67, that corporations may be formed for a single purpose only, excepting where express authority to pursue more than one object is conferred by law, I am of the opinion that until the phrase "of doing a general contracting business" is eliminated from the articles of incorporation of the Contractor's Investment Company, and until the purpose of managing and renting offices and other buildings is stated therein as clearly subordinate and incidental to the principal purpose of acquiring, erecting and holding such buildings, the said articles of incorporation of that company should not be filed by you.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

41.

ARTICLES OF INCORPORATION OF THE MOBERLY PAVING BRICK COMPANY—LEGALITY OF PURPOSE CLAUSE—COMBINATION OF CERTAIN PURPOSES ILLEGAL.

The articles of incorporation of the Moberly Paving Brick Company are somewhat superfluous in that they set out incidental powers which would accrue without their statement in the articles.

The articles are generally legal however, except that they combine certain purposes which may not be so united under the statutes.

COLUMBUS, OHIO, January 20, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 18th, in which you request my opinion as to the legality of the purpose clause of the proposed articles of incorporation of the Moberly Paving Brick Company, application for which, together with voucher check for three hundred dollars, was enclosed with your letter.

The clause in question is as follows:

> "Said corporation is formed for the purpose of acquiring, owning, constructing, selling, maintaining and operating quarries, mines, plants, works and factories for the making, manufacturing, and producing paving bricks, paving blocks, curbing blocks, building bricks, building blocks and any and all other kinds and varieties of bricks and blocks, tiling of all kinds, terra cotta products of all kinds, and clay, shale and cement products and manufactures of all kinds and descriptions; to buy, sell, own, trade and deal in all classes and kinds of clay, shale and concrete products, both natural and manufactured, and to mine and quarry all kinds of clays and shales; to engage in the contracting or construction business, or both, for any kind of construction or building work involving in whole or in part the use of any variety or form of clay, shale or concrete products, including the contracting for, and building of, streets, avenues, alleys and roadways and sidewalks; to buy, sell, construct, own, maintain and operate all classes of real estate and personal property necessary to the conduct of such business, and to own, maintain, improve, operate, and sell any such property, real or personal, as shall be received or acquired in the course of such business; to buy, sell, construct, maintain and operate tramways, dummy-lines and cable-lines and all necessary means of transportation for the proper handling and management of said business, not however, to include the business of a common carrier in any case; also to own, acquire, develop, maintain, operate and sell building stone of all kinds and stone quarries, and to manufacture, buy and sell, and deal in, crushed stone and all other varieties of commercial stone."

Much of the foregoing clause is merely superfluous, being the recital of incidental powers, which would vest in the corporation without such express mention. As to so much of the clause as may be so characterized I beg to advise that, while it is out of place in the articles of incorporation, it is not,

strictly speaking, illegal, and if the incorporators insist upon retaining it therein, I know of no objection to such a course.

The company has joined several purposes, most of which are authorized to be so joined, by virtue of sections 10137 et seq. of the General Code, which authorize companies to be incorporated for the purposes of mining and manufacturing. These sections, however, do not authorize such companies to be formed for purposes such as that described in the clause:

> "to engage in the contracting or construction business, or both, for any kind of construction or building work involving in whole or part the use of any variety or form of clay, shale or concrete products, including the contracting for, and building of, streets, avenues, alleys and roadways and sidewalks;"

This purpose not being included within the purposes which may, under the statutes above referred to, be joined together, must be eliminated from the articles of incorporation, under the rule laid down in State ex rel. vs. Taylor, 55 O. S. 67.

For this reason, you should not in my opinion, file the articles of incorporation of the Moberly Paving Brick Company, until they are amended so as to obviate the above criticism.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General.

43.

ARTICLES OF INCORPORATION OF THE "BIG NIGHT TONIGHT SOCIAL CLUB"—LEGALITY OF PURPOSE CLAUSE—MUTUAL PROTECTION AND RELIEF.

A corporation organized for purely social purposes is incorrect in using in its purpose clause the terms "for mutual protection and relief" for the reason that such terms are applied to insurance companies in the statutes.

COLUMBUS, OHIO, January 20, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 11th, enclosing application for *articles of incorporation* of the *Big Night Tonight Social Club*, together with two dollars in currency.

You request my opinion as to the legality of the purpose clause of said articles of incorporation, which is as follows:

> "Said corporation is formed for the purpose of holding meetings, for social purposes by its members and their families, and for mutual protection and relief of the members thereof, and their families exclusively, and not with a view of profit. All expenses incurred is to be voluntarily contributed by its members."

While the objects of the proposed company, as stated in the above quoted clause, are in no sense illegal, they are not stated with sufficient definiteness, in my judgment, to permit you to file them. The language, "mutual protection

and relief of the members thereof" has come to have a peculiar significance in our statutes. In section 9427, for example, it is used to describe the business of insurance to be conducted by what are known as mutual protective associations. If the incorporators of the club desire to conduct an insurance business they must more particularly describe the nature of that business in the articles of incorporation, and they must pay a fee of twenty-five dollars for filing the same. If, however, the object is purely social as indicated by the first portion of the clause in question, the phrase "mutual protection and relief" should be eliminated.

For the foregoing reasons, I beg to advise, that, in my opinion, you should not file the proposed articles of incorporation of the Big Night Tonight Social Club in their present form.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General.

72.

CORPORATIONS—INCREASE OF STOCK—CERTIFICATES OF SUBSCRIPTION.

When a corporation increases its capital stock, a certificate of the action provided for in section 8698, General Code, must be filed with the secretary of state.

Certificate of subscription to the increased stock need not be filed.

COLUMBUS, OHIO, January 26, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 20th, enclosing a letter addressed to you by Howard A. Couse, attorney-at-law, and requesting an opinion upon the question raised in said letter which is as follows:

> "When a corporation increases its capital stock must a certificate of subscription to the increased stock be filed with the secretary of state?"

The following provisions of the General Code of Ohio relates to this question:

> "*Section 8633.* When ten per cent. of the capital stock is subscribed, *the subscribers to the articles of incorporation*, or a majority of them at once shall so certify in writing to the secretary of state.
>
> "*Section 8634.* The incorporators shall be liable to any person affected thereby, in the amount of any deficiency in the actual payment of ten per cent. on the stock subscribed for at the time of so certifying to the secretary of state.
>
> "*Section 8635. As soon as such certificate is made, the signers* thereto, shall give notice to the stockholders * * * to meet * * * for the purpose of choosing * * * directors * * *
>
> "*Section 8698.* After its original capital stock is *fully subscribed for*, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation * * * may increase its capital stock

* * * by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock * * * Or, the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy, * * * and also agree in writing to such increase, naming the amount thereof to which they agree. *A certificate of such action* shall be filed with the secretary of state."

There are no other provisions of the General Code directly or indirectly applicable to the question at hand.

Section 8633, 8634 and 8635 above quoted, not only provide for what is known as a certificate of subscription, but also clearly indicate the purposes of such a provision, which are to fix the liability of the incorporators, and to make it possible for the incorporators to complete the organization of the company. The filing of the certificate of subscription is a necessary step in the formation of the corporation. Once the corporation is formed and directors are elected, the necessity for such a certificate is satisfied.

Section 8698 above quoted confers the right to increase capital stock upon such corporations only whose original capital stock is fully subscribed for. It provides for the filing with the secretary of state of but one certificate and that is a certificate of increase of capital stock.

In view of the absence of a specific provision requiring a certificate of subscription to the increased stock to be filed with the secretary of state, and in view also of the object and purpose of the requirement that such a certificate shall be filed as a step in the original organization of the corporation, I am of the opinion that the secretary of state may not require or file a certificate of subscription to stock acquired by a corporation by increase of its capital stock under section 8698 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

73.

ARTICLES OF INCORPORATION OF GUARANTEED MORTGAGE AND BOND COMPANIES—GENERAL BROKERAGE BUSINESS.

A corporation may be formed for the purpose of carrying on a general brokerage business.

January 26, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 18th, inclosing articles of incorporation of the Guaranteed Mortgage and Bond Company with check for $50 attached thereto. You request my opinion as to the legality of the purpose clause of said corporation, which is as follows:

"Said corporation is formed for the purpose of buying and selling notes, bills of exchange and evidences of indebtedness, loaning money, leasing property, buying and selling securities, negotiating loans, en-

dorsing and guaranteeing notes, bonds and other securities and doing whatever else that may be necessary to carry on a general brokerage business in securities."

While this clause is somewhat awkwardly framed it is all in my judgment to be construed in the light of the last few words thereof: "whatever else that may be necessary to carry on a general brokerage business." This purpose is lawful and all the enumerated acts which precede this language are to be construed as subsidiary thereto.

I therefore advise that the purpose of the Guaranteed Mortgage and Bond Company is lawful and that the articles of incorporation, now presented to you, may be filed.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

COLUMBUS, OHIO, February 1, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 26th, enclosing proposed articles of incorporation of the Huron Realty Company, with letter and check attached thereto.

You request my opinion as to the legality of the purpose clause thereof, which is as follows:

"Said corporation is formed for the purpose of acquiring or constructing and maintaining buildings to be used for hotels, store rooms, offices, warehouses or factories, and, for such purpose, acquiring, by purchase or lease, and holding, using, mortgaging and leasing all such real estate or personal property as may be necessary therefor; and of doing all other things necessary, proper or incidental to the transaction of said business; this corporation being organized under section 10210 of the General Code of the state of Ohio."

This clause is a substantial transcription in words of the provisions of section 10210, General Code. I therefore advise that the articles of incorporation in question are legal and may be filed by you.

I note that the letter attached to the articles states that the company is to succeed a company of the same name now existing as a real estate corporation. The new company may not succeed such real estate company in every sense of the word as is disclosed by the last sentence of section 10210 of the General Code, which is as follows:

"Nothing herein shall authorize corporations to buy and sell, or to deal in real estate for profit."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

74.

CERTIFICATE OF AGREEMENT FOR CONSOLIDATION OF THE BENEVOLENT ASSOCIATIONS THE FINNISH TURVA TEMPERANCE SOCIETY AND THE FINNISH KUNTO TEMPERANCE SOCIETY OF ASHTABULA, OHIO, INTO THE FINNISH SOVINTO TEMPERANCE SOCIETY.

The provisions of section 10039-10041, *General Code, having been complied with, the certificate under consideration may be filed by the secretary of state.*

January 26, 1911.

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

DEAR SIR:—You have submitted to me for my opinion thereon a certificate to the secretary of state of an agreement for the consolidation of the benevolent associations, the Finnish Turva Temperance Society, and the Finnish Kunto Temperance Society, both of Ashtabula, Ohio, under the new name and style of the Finnish Sovinto Temperance Society.

Section 10038 of the General Code provides that:

> "When two or more charitable or benevolent associations, societies or organizations formed or incorporated by or under any law of this state for charitable or benevolent purposes, desire to be consolidated or united as a single corporation, the trustees * * * of such associations * * * may enter into an agreement for such a consolidation and prescribe its terms and conditions; also, a corporate name for such united associations, * * * the time and place for the first meeting of the new corporation, the number of members of one or more or of each separate branch or organization to be chosen as directors, trustees, or other officers of the new corporation." * * *

Section 10039 of the General Code in part provides:

> "That no agreement so made shall be valid until it has been submitted to a separate meeting of the members, of which due and full notice has been given, according to the form and usage for calling meetings of each of such associations * * * and ratified by a two-thirds vote of all the members present at the meeting, in person or by proxy, entitled to vote." * * *

Section 10040 of the General Code provides in part:

> "When such agreement has been ratified by each association * * * the clerk or secretary of each meeting shall certify the record of the proceedings thereof, and deliver it to the clerk or secretary of the first meeting of the united associations."

Section 10041 of the General Code in part provides:

> "At the first meeting of the united associations * * *. If at the meeting the proceedings and acts of the several associations * * * are submitted to and approved by it, and a board of trustees * * * are chosen in accordance with the terms of the agreement, the clerk,

or secretary of the meeting shall certify the approved agreement or terms of union agreement and file it in the office of the secretary of state, whereupon the several associations * * * shall be one corporation under the name by it adopted."

I have carefully examined the certificate submitted to me and find that it complies in every respect with the provisions above quoted. I presume that the question concerning which you desire my opinion is as to whether or not the two associations which have attempted thus to be consolidated are "charitable or benevolent associations" or "organizations incorporated for charitable or benevolent purposes" within the meaning of section 10038 above quoted.

The papers submitted to me do not disclose the nature and extent of the corporate power of either of the constituent societies. Yet, however, as indicated by the names thereof their objects are to further the cause of temperance generally among their members or among a certain defined class of persons; then in my judgment such societies are "societies incorporated for charitable purposes" within the meaning of said section.

See Harrington vs. Pier, 105 Wis. 465.
Saltonstall vs. Sanders, 11 Allen 466.

If, therefore, these societies are formed for purposes such as above described you should file and record the certificate which has been transmitted to you for that purpose as provided in section 10043 of the General Code, upon receipt of the fees chargeable therefor, which would seem to be provided for by paragraph twelve (12) of section 176 of the General Code.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

78.

ARTICLES OF INCORPORATION OF THE PLASTERING CONTRACTORS ASSOCIATION COMPANY—PURPOSE CLAUSE.

The use in the purpose clause of the words "promoting the business welfare of its stockholders and members" is too broad and too vague and until it has been satisfactorily amplified and explained, the articles of incorporation should not be filed.

January 27, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 21st, requesting my opinion of the purpose clause of the inclosed articles of incorporation of the Plastering Contractors Association Company, which said clause is as follows:

"Said corporation is formed for the purpose of promoting the business welfare of its stockholders and members; to inculcate just and equitable principles: to adjust, so far as practicable, all difficulties arising between its stockholders and members and their employes; to

acquire, purchase, possess, lease and sell such real estate and personal property, and to do all other things necessary or incident to the carrying out of the purpose for which said corporation is formed."

The clause of "promoting the business welfare of its stockholders and members" should in my judgment be amplified or explained. This statement is not sufficiently definite. It is so broad as to seem to cover the fostering of agreements in restraint of trade and competition in violation of the statute law and public policy of this state, and especially when taken in connection with the name of the company which indicates that the stockholders of the corporation are intended to be persons who would otherwise be competing agents. If the principal business of the company as indicated by the language "to adjust, so far as practicable, all difficulties arising between its stockholders and members and their employes" is to deal in behalf of a certain class of employers with the employes of its stockholders or customers such a purpose would be lawful. If the purpose is intended to be broader than this, however, it must nevertheless be definitely stated.

I advise that until the clause in question is so amended as to obviate the above criticism you do not file the articles of incorporation of the Plastering Contractors Association Company.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

89.

ARTICLES OF INCORPORATION OF WOODROW-PARKER COMPANY—NECESSITY OF CLAUSE DEFINING TWENTY-FIVE YEAR LIMITATION OF REAL ESTATE CORPORATIONS.

It is to be recommended that articles of incorporation of companies formed for the purpose of dealing in real estate be made to include the specific statutory twenty-five year limitation, but such clause is not legally necessary.

COLUMBUS, OHIO, February 1, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 26th, enclosing proposed articles of incorporation of the Woodrow-Parker Company, with check and letter attached thereto.

You request my opinion as to whether the purpose clause thereof is legal, as defining a single purpose, or whether it attempts to set forth a plurality of purposes. You also ask to be advised as to whether the clause in question should contain an express provision, that the powers to be conferred upon the corporation thereby, shall expire by limitation in twenty-five years.

I have carefully examined the purpose clause in question, which is very lengthy. The principal object or purpose of the corporation as therein defined, is the conduct of the real estate business. Without quoting the clause, suffice it to say, that I am satisfied that none of the objects set forth therein, are foreign to such business; many of them define powers which would be incidental to the real estate business, and, strictly speaking, their recital is merely superfluous and subject to criticism on that ground. However, such a statement of powers, clearly intended and stated to be incidental, while unnecessary, is not illegal,

and does not invalidate the articles of incorporation. I therefore advise with respect to your first question, that the articles of incorporation of the Woodrow-Parker Company define but a single purpose, and are, in that respect, legal.

With respect to your second question I beg to state that section 8648 of the General Code provides that:

> "A corporation formed to buy or sell real estate shall expire by limitation in twenty-five years from the date on which its articles of incorporation were issued by the secretary of state."

It is clear from this section that the articles in question will expire by limitation in twenty-five years from the date on which they may be issued by you, whether or not the purpose clause thereof so states.

I have several times recommended to you that articles of incorporation of companies formed for the purpose of dealing in real estate include this specific provision, but as a strict matter of law, there is no such requirement. If, then, the incorporators of this company prefer not to include such a statement in the purpose clause of their articles of incorporation, you may not, on that ground, refuse to file or record the same.

It is my opinion, therefore, that the articles of incorporation of the Woodrow-Parker Company are legal in form and may be filed by you.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

91.

ARTICLES OF INCORPORATION OF THE OHIO MUTUAL TEMPERING COMPANY—PATENT AND INVENTION CORPORATIONS—MANUFACTURING CORPORATIONS.

A corporation formed for the purpose of developing certain inventions and patents may not include in its articles of incorporation the purpose of manufacturing and selling the articles to which the patent processes are applicable.

On the other hand, however, a corporation formed for the purpose of manufacturing and selling certain articles may have as incidental thereto, the right of purchasing and selling patent rights.

COLUMBUS, OHIO, February 1, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 18th, enclosing articles of incorporation of the Ohio Metal Tempering Company, with letter and check attached thereto.

You request my opinion as to the legality of the purpose clause of the said articles of incorporation, which is as follows:

> "Said corporation is formed for the purpose of purchasing, leasing, obtaining license or contract for, or otherwise acquiring, the title to, and right to the use of, by itself, or others to whom it may grant rights in the same, any and all inventions, patents, applications for patents, or other rights or privileges, in and to any and all processes for improving the physical properties of copper, iron, steel and other metals, especially

such as relate to the tempering of such metals, and including what is known as the 'Lamon process of improving the physical properties of metals.' Also of purchasing, using and assigning, as above, any and all patents, or applications therefor, improvements, or additions thereto, or extensions thereof, including inventions or other rights or claims connected with and germane to such processes, and including not only such as may now, but such as may hereafter, be made, or arise, and be material to the successful operation of any such processes. Also of engaging in the business of manufacturing and selling any and all articles to which said processes are applicable. Also of engaging in the business of developing and disposing of the right to use said processes by others engaged in such manufacture. Also of acquiring, owning, operating and disposing of such real and personal property, including experimental and demonstrating laboratories, chemicals, machinery, scientific instruments, and all other appliances used, or relating to, any such processes, and necessary to accomplish the above purposes; also generally of doing all other acts and things necessary to carry out the purposes above mentioned."

The principal purpose of the corporation seems to be that of developing certain inventions and patents. This purpose is lawful, but it may not be extended as is attempted to be, to that of manufacturing and selling the articles to which the patented processes are applicable. If the incorporators desire to engage in the business of manufacturing, a corporation formed by them for this purpose would have the incidental right to purchase and dispose of patent rights; but it does not follow that a corporation formed for the purpose of developing patent rights may, as incidental to such purpose, engage in the business of manufacturing. It thus appears that the incorporators must elect as to whether the company will be organized for the purpose of manufacturing, or for the purpose of the development of inventions. Until this election is made and the articles are amended in compliance therewith, I advise you not to file or record the same.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

91a.

ARTICLES OF INCORPORATION OF THE WORTH McK. COMPANY—PROFESSIONAL BUSINESS.

A corporation may not be formed in Ohio for the purpose of carrying on a professional business.

A corporation formed for the purpose of acting as agent or broker in making of contracts when the actual object of the corporation requires that its business must be transacted by agents who must be publicly qualified and licensed is to be deemed professional and within the prohibition of the statute.

If, however, the scheme of the corporation was, for a compensation, to be paid to it by individuals, to arrange a contract between such individual and a professional, leaving the designation of the latter to the individual and the

amount of compensation to be agreed upon between the individual and the member of the profession, such would be a brokerage or agency business and a lawful purpose for a corporation.

COLUMBUS, OHIO, February 2, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 25th, enclosing proposed articles of incorporation of the Worth McK. Company, as redrafted, with check for ten dollars thereto attached.

You request my opinion as to the legality of the purpose clause thereof, which is as follows:

"Said corporation is formed for the purpose of acting as agent or broker in the making of contracts and especially in the following manner, to-wit:

"Said corporation will procure contracts from groups of individuals, partnerships or corporations, each group consisting possibly of one or more hospitals, physician, surgeon, optician, dentist and attorney, by the terms of which contract the members of said group shall grant, give and furnish to the members of another group, which last named group hereinafter referred to as certificate holders, certain concessions, inducements and advantages, as for example, certain free consultations and services and the contract which said corporation will procure from said first named group shall be expressly for the use and benefit of said group known as certificate holders of said corporation. A sample of said contract is in words and figures as follows, to-wit:

" 'Cleveland, O., ...

" 'It is hereby agreed by and between the Worth McK. Company, a corporation, acting as agent for its certificate holders, holding certificates numbering from 1 to ...., and for their sole and exclusive use and benefit, party of the first part and (Richard Roe, Optician, etc.) party of the second part.

" 'In consideration of the covenants and agreements hereinafter set forth and of the payments to be hereinafter made by the party of the first part, second party hereby agrees,

" '1. To give to each of the aforesaid certificate holders of first party during the twelve months following the date of this contract, five (5) free office consultations and other services at the following prices, to-wit:

" 'First party shall on the first day of each and every calendar month during the continuance of this contract, pay the second party ..... cents for each and every certificate issued and in full force between the numbers aforesaid.

" 'In witness whereof, the parties have hereunto affixed their signatures in duplicate this ..... day of ....., A. D. 1911.'

"Said corporation will issue to its certificate holders for a sum to be paid by them in regular installments a certificate entitling the holder thereof to the benefit of all the contracts made by said corporation for the benefit of its certificate holders a sample of said certificate in substance is as follows:

CERTIFICATE OF MEMBERSHIP
of
THE WORTH McK. COMPANY, a Corp.
Incorporated under the laws of Ohio.

" 'The Worth McK. Company, a corporation, hereby certifies that John Doe is entitled to all the benefits, privileges and emoluments of certificate holders of said the Worth McK. Company and of all the contracts made by said the Worth McK. Company for the benefit of its certificate holders. Said certificate holder is entitled upon presentation of this certificate, for one year from and after the date of this certificate, to the following benefits, to-wit: Five (5) free consultations with a physician, five (5) free consultations with an attorney, free cleaning of the teeth twice, free consultation with an optician, in case of accident first aid to the injured free, not exceeding three (3) days free care and attention at a hospital within the city of Cleveland and care and attention thereafter while necessarily confined to said hospital at not to exceed $7.00 per week, including necessary medical attention and nurse.' "

Section 8623 of the General Code provides as follows:

"Except for carrying on *professional business*, a corporation may be formed for any *purpose* for which natural persons *lawfully* may associate themselves."

It is apparent upon examination of this section that three questions must always arise in the consideration of the legality of any particular articles of incorporation, viz:

1. Do they seek to authorize the carrying on of professional business?
2. Do they seek to authorize the pursuit of more than one purpose?
3. Is the purpose for which the corporation is formed one for which natural persons, lawfully, may associate themselves?

The above quoted clause, in my opinion, defines a single purpose, and the second of the above questions is not, therefore, raised by it.

The term "professional business" is not defined in the General Code, and the authorities construing the same are meager. It was held, however, in State ex rel. the Physicians' Defense Company v. Laylin, 73 O. S. 90, that a corporate charter which authorized a company to be formed for the purpose of aiding and protecting the medical profession "by the defense of physicians and surgeons against civil prosecutions for malpractice" defined professional business. The relator in this case proposed to conduct its business as stated in its charter, as follows:

"The association shall issue to physicians and surgeons * * * contracts by which *it* will undertake and agree to defend the holder of the contract at its own expense against any action brought against him for damages for alleged malpractice * * * But the association shall not, in any defense of contract issued by it, assume * * * or pay any judgment for damages * * * rendered against the holder of such contract."

The court, on page 99, employs the following language:

"* * * Is the business in which the Physicians' Defense Company proposes to engage * * * a professional business? This, we

think, must be answered in the affirmative. * * * The business * * * proposed is that of defending physicians and surgeons against suits at law that may be brought against them for alleged malpractice. * * * The services necessary to be rendered by the company in the carrying out and performance of its said contract, being such, as in this state, may only be performed by a member of the legal profession * * * who shall be first duly authorized and licensed to perform the same, are professional services, and a business which in its conduct or transaction requires and permits only that character of services is essentially and certainly a professional business. But it is said by counsel * * * that the Physician's Defense Company, being a corporation, an impersonal entity, cannot and does not itself engage in the practice of law, or the management and conduct of defense in suits at law, but in what it does or obligates itself to do, it undertakes only to act as agent of the contract holder in retaining legal counsel and in managing and maintaining the defense of the suits. How else, we may ask, could the corporation, being an impersonal entity, discharge its contractual obligations other than by the employment of natural persons as its authorized agents to carry out and perform its said contract?

"The agents to be employed are and must be attorneys at law, and by the express terms of its contract they are to be employed and paid by the corporation. While, therefore, the services rendered by the persons thus employed are rendered to and in defense of the contract holder, they nevertheless are rendered for and in legal contemplation are performed by the corporation itself. If this be not the engaging in or carrying on of such professional business, then it would be difficult to conceive how professional business could be engaged in or carried on by a corporation. We are of opinion that the business proposed is professional business * * * This conclusion renders it unnecessary to consider the further question suggested by counsel * * * viz: That the contract issued * * * is a contract, the making of which is against public policy * * *

The following principles may be deducted from the decision above quoted, although not explicitly set forth therein:

1. A profession is a calling or occupation requiring public authority or license as a condition precedent to its lawful pursuit.

2. When the principal purpose or object of a corporation requires that its business be transacted by agents, who must be so qualified and licensed, such business must be deemed professional and within the prohibition of the statute.

In connection with the decision of the Supreme Court, it is worthy to note that the Physicians' Defense Company, the relator therein, again sought admission to Ohio under an amended form of contract and articles of incorporation. Such altered plan of business as quoted in the report of the attorney general for 1906, page 51, was as follows:

"The business or objects of the corporation which it is engaged in carrying on or which it proposes to engage in or carry on in the state of Ohio, is to aid the medical profession in the practice of medicine and surgery by *compensating attorneys* and other persons *employed* by and rendering services to physicians and surgeons in the defense of civil prosecutions for malpractice."

The amended application having been submitted by the secretary of state

to the attorney general for his opinion thereon, the attorney general made the following observations with respect to the same:

> "The counsel for the company claim that because the attorneys are not to be employed by the association, but that the employment thereof is to be left to the physician or surgeon holding a contract with the company, hence such provision has removed the criticism made by the court. The corporate articles provide that 'it,' the company, will undertake and agree to defend the holder of the contract, and the purposes as recited in the objects of the corporation contain provision that the company shall pay the attorney so employed.
>
> "The supreme court * * * has severely criticised the payment by the corporation after the employment. In other words, the scheme of the business of assuming to defend malpractice cases and to be responsible for the compensation of the attorneys engaged, is condemned by the court as being professional business * * *
>
> "I am of the opinion that the objections by the supreme court to this scheme have not been removed by the proposed change of plan now presented by this company, and that the scheme is still obnoxious to the criticisms then made * * *"

Referring now to the above quoted articles of incorporation of the Worth McK. Company, it appears that the company seeks authority to do business as *agent or broker* in the making of contracts. The contracts proposed to be made are contracts for the services of physicians, surgeons, dentists and attorneys, among others; all such persons are of course members of "professions" as impliedly defined in the above quoted decision of the supreme court. If, then, the statement in the first sentence of the articles of incorporation to the effect that the contracts are to be by the company "acting as agent or broker" is borne out by the remainder of the clause, it would seem that the decision above quoted and applied by the attorney general, as herein indicated, would not be applicable; that is to say, if the scheme of business of the company is simply to arrange for a compensation to be paid to it by individuals, contracts for certain kinds of professional services, leaving the payment of the member of the profession and his designation to the individual in each case, such business would be in the fullest sense of the word an agency or brokerage business, and not a professional business.

It is difficult for me, however, to reach the conclusion that the first paragraph of the purpose clause of the articles of incorporation of the Worth McK. Company does accurately describe the relation of the company to those with whom it deals, in pursuance of the scheme of doing business as fully set forth in the succeeding paragraphs of said clause. Two forms of contract are set forth. One purports to be a contract between the corporation and a member of a profession whereby the corporation agrees to pay to the other party a certain salary based upon the number of outstanding certificates issued by the company, and the professional man agrees to render services in consideration thereof to the holders of such certificates.

The certificates thus referred to seem to be contracts between the company and an individual, agreeing to furnish to the individual for a consideration, not named, services of a professional nature.

It appears that under this plan of operation the selection of the member of the profession who shall perform the services which constitute the subject matter of the contract or contracts, is made by the corporation, and that the com-

pensation to be paid for such services is paid by the corporation. It matters not, in my judgment, that the contract entered into between the company and the professional man recites that the corporation shall "act as agent for its certificate holders." This cannot be accurate; it is as accurate to say that under the contract denominated "certificate of membership" the corporation is the principal of the professional man and that they are its agents.

It might be said that the first form of contract set forth in the articles of incorporation constitutes the professional man an independent contractor as distinguished from an agent of the company. However, all these refinements of logic are, in the face of the decision above quoted, beside the mark. Whether the attorneys, physicians, surgeons and dentists whose services are to be contracted for by the company are to be deemed agents or independent contractors, the fact remains that they are to be employed and paid by the company, and that the language of the supreme court in the above quoted case applies exactly to the contract in question.

I therefore conclude that the business proposed to be carried on by the Worth McK. Company is a professional business and that you may not, therefore, file its articles of incorporation.

This conclusion renders it unnecessary to consider the other question above suggested as to whether or not this business is one for which natural persons, lawfully, may associate themselves. I may state, however, that the specific question in my mind in this connection is sufficiently answered by the decision of the supreme court in Railway Company v. Volkert, 58 O. S. 362, and that there is no objection to the articles of incorporation on this ground.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

92.

ARTICLES OF INCORPORATION OF THE AMERICAN BRIDGE COMPANY—OWNERSHIP BY CORPORATION OF STOCK OF OTHER CORPORATIONS.

If, through error, or inadvertency, articles of incorporation have been filed which give the right to own stock of other corporations generally, it would be vain to institute proceedings in the absence of evidence of some user of the illegal franchise.

The secretary of state should not file the articles of incorporation of companies formed under the general corporation laws of New Jersey, Pennsylvania, Delaware, North Carolina, Nevada or any other state whose laws confer upon its corporation the incidental power of ownership of stock or other corporations generally, unless such corporation expressly renounces this right.

COLUMBUS, OHIO, February 2, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of January 27th, enclosing a letter addressed to you by the Corporation Trust Company, in the matter of the proposed amendment of the certificate of incorporation of the American Bridge Company, a foreign corporation, heretofore admitted to do business in the state of Ohio.

The amended certificate of incorporation in question has already been submitted to this department for an opinion thereon as to the legality of that por-

tion thereof which authorizes the corporation to exercise all rights of ownership of shares of capital stock of other corporations generally. I advised at that time that this portion of the amended certificate of incorporation is contrary to the settled public policy of the state, and that a corporation could not be admitted to this state for the purpose of exercising this franchise therein.

It now appears from the letter of the Corporation Trust Company that the objectionable clause has always been in the certificate of incorporation of the American Bridge Company during the entire period within which it has been admitted to do business in Ohio. You suggest that possibly the company is actually exercising in Ohio the powers which it has under this clause of its charter, and that if this is the case, it is violating the law of this state.

I have no means of knowing whether or not this possibility is a fact. The company may have the power to own stocks of other corporations, but may not be exercising it in Ohio, or elsewhere. While the company ought never to have been admitted to do business in Ohio, with this provision in its certificate of incorporation, yet it would be a vain thing to oust it from exercising a franchise which it is not in point of fact exercising; nor would it be worth while to institute proceedings without some proof that the franchise was actually being exercised. If, however, the company is actually exercising this franchise in Ohio, it must cease to do so, and if it refuses it will be my duty, upon a showing that it is exercising this franchise, to institute proceedings in quo warranto against it.

The letter of the Corporation Trust Company further discloses that under section 51 of the general corporation law of New Jersey, quoted in its letter, any corporation formed under the laws of that state may exercise the rights of ownership of the capital stock of any other corporation. The authorities quoted in the letter of the Corporation Trust Company establish the rule that this power inheres in every corporation formed under the laws of New Jersey as an incidental power, and it would seem, regardless of whether or not it is recited in the certificate of incorporation, that is to say, every corporation formed under the general corporation law of the state of New Jersey has the incidental power to own stocks of any other corporation, just as corporations formed under the general corporation laws of the state of Ohio have the incidental power to own shares of capital stock of *kindred but not competing corporations*. The letter of the Corporation Trust Company also states that provisions similar to those of the New Jersey law are to be found in the corporation laws of Pennsylvania, Delaware, North Carolina and Nevada, and that many corporations of these several states have been admitted to Ohio.

I am not informed as to what has been the practice in the office of the secretary of state, but it is my opinion that in the future, at least, you should not admit a corporation formed under the general corporation laws of New Jersey, Pennsylvania, Delaware, North Carolina, Nevada or any other state whose laws confer upon its corporations the incidental power of ownership of stocks of other corporations generally, without express disclaimer of this power and right on the part of the corporation so applying. My reasons for recommending this course of action to you are set forth, I think, in the former opinion respecting the matter of the American Bridge Company.

With respect to the amended certificate of incorporation of the American Bridge Company I advise that you do not file the same until a disclaimer, such as that above referred to, is filed by said company.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

96.

INSURANCE COMPANIES—ELECTION OF DIRECTORS AND OFFICERS—SPECIAL LEGISLATION—REDUCTION OF CAPITAL STOCK OF A LEGAL RESERVE LIFE INSURANCE COMPANY.

The directors and officers of a legal reserve life insurance company cannot be lawfully elected until the entire authorized capital stock is paid in.

Insurance companies are the subject of special legislation and, except when the intention is unmistakable, a general statute referring to ordinary corporations cannot be applied to an insurance company.

A legal reserve life insurance company may not reduce its authorized capital stock.

The fact that among the special insurance statutory regulations provision is made for increase of stock whilst nothing is provided for decrease of stock, supports the construction of the legislative intent to prohibit the reduction of the capital stock.

COLUMBUS, OHIO, February 4, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of February 3d, enclosing what purports to be a certificate of reduction of the capital stock of the Great Northern Life Insurance Company, a certificate of subscription of the Great Northern Life Insurance Company, seven dollars in currency, a brief on the reduction of the capital stock of the Great Northern Life Insurance Company and a certificate of reduction of the capital stock of the Western Reserve Insurance Company.

You request my opinion as to whether you may lawfully receive and file the certificates of reduction and the certificate of subscription above referred to, which, you state, are submitted to your office for filing. The certificate of reduction of capital stock of the Great Northern Life Insurance Company is upon a printed form of your department, prepared for the convenience of general corporations desiring to reduce their capital stock; it certifies that, at a meeting of the *directors* of the Great Northern Life Insurance Company, the written consent of the persons in whose names a majority of the shares of capital stock of said company stood on the *books of the company* having first been obtained, the capital stock of the company was reduced from five hundred thousand dollars ($500,000.00) to one hundred thousand nine hundred and fifty dollars ($100,950.00). The certificate of reduction of the Western Reserve Insurance Company is similar in form excepting that the resolution of the directors of the company is set forth in full therein. Said resolution is in part as follows:

> "Be it resolved, that said capital stock of the Western Reserve Insurance Company be reduced from three hundred thousand dollars ($300,000.00) to two hundred thousand dollars ($200,000.00), and that the shares of stock be of the par value of twenty ($20.00) instead of one hundred dollars ($100.00), and that the stock be issued in accordance with said reduction of capital and said reduction as to the par value of shares, and that fifty thousand dollars ($50,000.00) of the capital stock heretofore subscribed and paid in be used to increase the surplus of the company."

The certificate of subscription of the Great Northern Life Insurance Company is signed by some fourteen incorporators of said company, and certifies

that after legal publication of the opening of books of subscriptions to the capital stock had been made as required by law, said books were opened by the incorporators and were kept open "as required by law" until ten thousand and ninety-five (10,095) shares of the capital stock of the company, of the par value of ten dollars each, and of the amount of one hundred thousand nine hundred and fifty dollars ($100,950.00) was subscribed, and until all said capital stock *was fully paid for*, and that thereupon the incorporators proceeded to organize the company.

In the brief of counsel representing the Great Northern Life Insurance Company it is pointed out that there is no provision of law specifically authorizing legal reserve life insurance companies to reduce their capital stock, and it is contended that section 8700 of the General Code, which is in the chapter relating to the organization and general powers of ordinary corporations, applies to insurance companies and authorizes the reduction of the capital stock of such companies, in accordance with its provisions. Said section 8700 of the General Code provides as follows:

> "With the written consent of the persons in whose names a majority of the shares of the capital stock thereof, stands on its books, the board of directors of such a corporation (referring evidently to the enumeration in section 8698, General Code, which includes a corporation for profit, or a corporation not for profit, having a capital stock) may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby, and a certificate of such action shall be filed with the secretary of state."

Section 8698 of the General Code, which is in *pari materia* with section 8700, General Code, provides a method for the increase of the capital stock of a corporation for profit or a corporation not for profit. Section 9345, General Code, a section of the chapter relating to the organization and powers of legal reserve life insurance companies, provides a method for the increase of the capital stock of such companies; but, as above stated, there is no corresponding provision relating to the reduction of the capital stock of such companies. The question is thus presented as to whether the absence of such a section, co-ordinate with section 9345, General Code, and corresponding to section 8700, General Code, with reference to the reduction of the capital stock of legal reserve life insurance companies, is to be construed as evidence of a legislative intent to deny to legal reserve life insurance companies the power to reduce capital stock; or, on the other hand as evidence of an intent that the general provisions of section 8700 which, on their face, could be appropriately applied to such companies, govern the same, and authorize the reduction of capital stock by them. In connection with this general question, counsel cite section 8737 of the General Code, a part of the general corporation chapter, in pari materia with section 8700 supra, and which provides:

> "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern, unless it clearly appears that the provision is cumulative."

This section, however, is not decisive in the case, because the question still remains as to whether or not special provision is made for the increase and reduction of the capital stock of legal reserve life insurance companies in the chapter relating to such companies; for it can, with much force, be urged that

the increase of capital stock and the reduction of capital stock are matters so related that a special provision with respect to one of them, without a corresponding provision as to the other, would lead to the conclusion that the general assembly intended that the power not enumerated should not be conferred upon the class of corporations especially provided for.

With respect at least to the Great Northern Life Insurance Company, however, an answer to this question is, in my opinion, unnecessary; that is to say, I have chosen first, to ascertain in my own mind, whether or not the Great Northern Life Insurance Company has complied with section 8700, General Code; until it clearly appears that such compliance has been effected, it is manifest that the question as to whether or not section 8700, General Code, applies to the company cannot become material.

Referring now to section 8700 above quoted, it will be observed that the corporation which may, thereunder, reduce its capital stock must be such a corporation as may have directors and stockholders; that is to say, the organization of the company must have proceeded to the point at which the company is legally organized. This is the clearer upon consideration of section 8698, General Code, which provides one method of increase of capital stock, prior to organization, and another after organization. It is clearly the intention therefore of section 8700 that the capital stock of a general corporation may not be reduced prior to the organization of the corporation.

Is the Great Northern Life Insurance Company legally organized? The papers transmitted to me disclose that the authorized capital stock of the Great Northern Life Insurance Company—that is, the amount of capital set forth in its charter, comprised in its articles of incorporation—is five hundred thousand dollars, and that one hundred thousand nine hundred and fifty dollars of said authorized capital stock have been subscribed and paid in.

Section 9342 of the General Code sets forth in great detail the manner in which legal reserve life insurance companies shall be organized. It is as follows:

> "When the signers of such articles (of incorporation) receive from the secretary of state a certified copy thereof, and desire to organize such company, they shall publish their intention in a paper published and having general circulation in the county * * * After the publication has been made for six weeks, they may open books to receive subscriptions to the capital stock, keep them open until the amount *required by this chapter* is subscribed, distribute the stock among the subscribers, *if more than the necessary amount is subscribed, collect the capital and complete the organization of the company.*"

The certificate of subscription discloses that publication was made in accordance with this section for six weeks, that books for subscription were opened, but that they were closed after $100,950.00 of the capital stock of the corporation was subscribed.

Section 9343 of the General Code provides that:

> "No joint stock company shall be organized under this chapter with less than one hundred thousand dollars capital. Before proceeding to business the whole capital shall be paid in and invested * * *

There are a number of questions involved in the question now under consideration, and arising out of the language of the last two related sections. In order that they may be satisfactorily answered an analysis of these sections is necessary.

It is clear that all the acts contemplated by section 9343 above quoted, are acts of the signers of the articles of incorporation, who may be called, for convenience, the incorporators of the company. These incorporators are required to keep books open until the amount required by the chapter is subscribed. What is the amount required by the chapter?

In a superficial view of the case, it would seem reasonable to suppose that the amount of one hundred thousand dollars, prescribed by the first sentence of section 9343, above quoted, and which is the only amount mentioned in the chapter, is meant by the provision "the amount required by this chapter" in section 9342. This view, however, must be abandoned upon a close analysis of the sections. In the first place, it is to be noticed that the amount of one hundred thousand dollars pertains to and modifies the word "capital" in section 9343. This word is used frequently throughout the chapter. The first occurs in section 9340, in the following connection:

> "* * * The charter shall set forth the name of the company * * * the place where it is to be located, the kind of business to be undertaken, the manner in which its corporate powers are to be exercised, the number of directors * * *, the manner of electing them and other officers, * * * the time of such election, the manner of filling vacancies, *the amount of capital to be employed*, and such other particulars as are necessary to explain * * * the objects * * * of the company, and the manner in which it is to be conducted.

It is clear that the word "capital" in the context last above quoted, means what is ordinarily and more exactly referred to as authorized capital stock, that is, the aggregate par value of the shares of stock, the right to have which the company acquired by filing its articles of incorporation. It is fair to presume that, unless a contrary intention appears in a succeeding specific section of the chapter, that meaning should be given to the word "capital" as manifestly attaches to it in section 9340. I cannot reach the conclusion that any meaning, other than that suggested, attaches to the word "capital" in section 9343. The primary meaning of the first sentence of section 9343 depends in part upon the word "organized" as used therein. In my opinion, this word does not alone refer to the organization of the company as effected and completed by the election of directors and other officers; it refers to every step required to be taken to put into being a legal reserve life insurance company. As paraphrased then, the sentence would, in my opinion, mean "no joint stock company shall be incorporated under this chapter with less than one hundred thousand dollars authorized capital stock."

But regardless of what may be the meaning of the first sentence of section 9343, General Code, a close examination of the second sentence of section 9342, General Code, will disclose that the phrase "the amount required by this chapter" cannot refer to the sum of one hundred thousand dollars. This whole sentence requires careful analysis, and all of its provisions must be read together. It is to be noted that the books are to be kept open until the required amount is subscribed, and *if more than the necessary amount is subscribed* the incorporators are to distribute the stock among the subscribers. The plain meaning of this last provision is that if the stock is over subscribed the incorporators shall have the power, and it shall be their duty to distribute the stock as they may deem best among the subscribers; thus, if "A" subscribes for ten shares, and the total stock is over subscribed, it will be necessary, in order that all subscribers may have the benefit of their subscriptions, for the incorporators to

allot, say, nine shares to "A." This is what is meant by a distribution of the stock among the subscribers; in fact, it is the only thing that could be meant by this phrase.

It is manifest that if a company has an authorized capital stock of five hundred thousand dollars, such capital stock cannot be over subscribed unless the subscriptions in the aggregate exceed five hundred thousand dollars. It certainly cannot be the intention of section 9342 to authorize the incorporators ratably to distribute the capital stock among the subscribers if the aggregate subscriptions exceed one hundred thousand dollars, unless that sum also represents the total authorized capital stock.

From all the foregoing then, it follows that the incorporators of a legal reserve life insurance company must retain control of the organization of the company until the whole authorized capital stock of the company is subscribed.

This conclusion, however, is supported by other facts apparent upon the fact of sections 9342 and 9343 above quoted. By the former section it is made the duty of the incorporators to "collect the capital;" by the latter section it is provided that "before proceeding to business, the whole capital shall be paid." The word "capital" in this last sentence undoubtedly refers to the authorized capital stock, not only for the reasons above stated, but because the manifest object of this provision is to prevent fraud, through the advertisement by a legal reserve company of a large capital stock, when, in point of fact, it has but a portion of the same paid up. If, therefore, the whole capital must be paid in before the company proceeds to business, and if it is the duty of the signers of the articles of incorporation to collect the capital, then, manifestly, the incorporators must continue to manage the organization of the company until the entire authorized capital stock is paid in. Therefore, directors cannot be elected, certificates of stock cannot be issued, and officers cannot be chosen until the incorporators have collected the entire amount of the authorized capital stock of the company in money.

No construction other than that above indicated will harmonize all the provisions of sections 9342 and 9343 of the General Code. By adopting this construction all such provisions are completely harmonized; thus, it is provided in the last clause of section 9342 that the signers of the articles "shall collect the capital and complete the organization of the company." The entire section (9342) provides a scheme for the organization of legal reserve life insurance companies, and sets forth the steps which are necessary to be taken before the organization can be completed. It is entirely apparent to me that these steps are intended to be sequential, and that the completion of the organization of the company cannot be effected until the capital is collected, which, as above stated, must be the entire authorized capital.

It is equally clear to me that sections 9342 and 9343 of the General Code are special provisions, and that, under section 8737, above quoted, they must be held to supplant entirely, as to legal reserve life insurance companies, the provisions of sections 8630, 8631, 8632, 8633 and 8635 of the General Code. It follows, of course, that not only may not a legal reserve life insurance company organize by the election of directors, when ten per cent. of the capital stock is subscribed and one-tenth of each subscription paid in, as is the case with respect to general corporations, but that there is no provision thereof for the filing by such a company, with the secretary of state, of any such certificate of subscription as is now offered to you for filing by the Great Northern Life Insurance Company.

From all the foregoing it follows that the Great Northern Life Insurance Company has not been legally organized; that it has no stockholders, and no directors or officers legally elected; that the enterprise in the contemplation of

the law remains in the hands of the signers of the articles of incorporation; and that, whether or not section 8700 of the General Code applies, its capital stock may not be reduced. I therefore advise as to the certificate of reduction of the capital stock of the Great Northern Life Insurance Company, and the certificate of subscription to the capital stock of the same company, that you do not file these papers.

It does not clearly appear to me from the certificate of reduction of the capital stock of the Western Reserve Insurance Company, whether the entire authorized capital of this company has been paid up or not. It is possible that the organization of this company has been legally completed, and that the sole question with respect to its certificate of reduction is as to whether section 8700 of the General Code applies to legal reserve life insurance companies. If that is the case, the question, suggested in the brief of counsel representing the Great Northern Life Insurance Company, but which, for reasons above stated is not raised by the facts in that case, must be answered. That question, as above stated, is as to whether within the meaning of section 8737 of the General Code a provision for the increase of capital stock of legal reserve life insurance companies is a complete special provision as to changes in the capital stock, or, whether, in the absence of a provision for the reduction of the capital stock of legal reserve life insurance companies, the general provisions of section 8700 apply to such companies.

This question is by no means easy of solution. Excellent reasons can be marshalled in support of either of the two possible conclusions; thus, was urged in the brief of counsel representing the Great Northern Life Insurance Company in view of the fact that the general policy of the state is to confer the right to reduce the authorized capital stock upon all corporations, and this right is not expressly denied to legal reserve life insurance companies, such companies would in the absence of a special provision respecting the reduction of their capital stock, be entitled to proceed under the general corporation law.

The whole matter, however, is one of construction. The intent of the general assembly must be ascertained from an examination of all the provisions relating to legal reserve life insurance companies. Upon such an examination it at once appears that the capital stock of such a company has a different status from that of the capital stock of the ordinary company. The general assembly has seen fit to prescribe what shall be done with the capital stock of a legal reserve life insurance company, whereas it has made no such requirement with respect to the capital stock of a general corporation. It is a familiar fact that the capital stock of a general corporation need never be paid in in cash, and that, so long as the company remains solvent and the rights of creditors do not intervene, subscribers need not be compelled to pay up the amount of their subscriptions. As to legal reserve life insurance companies, however, the situation is entirely different. As is apparent from the above discussion a legal reserve life insurance company may not be organized until the money representing its entire authorized capital stock is in the hands of its incorporators. By section 9343, above quoted, immediately upon organization and before proceeding to any other business, the directors and officers of the company are required to invest the capital in certain ways. The whole authorized capital when paid in, must be invested in "treasury" notes, in stocks or bonds of the United States or state of Ohio, or any municipality or county thereof, or in mortgages on unincumbered real estate, within this state, worth double the amount loaned thereon. Furthermore, one hundred thousand dollars of such securities must, under the provisions of section 9346, General Code, be deposited with the superintendent of insurance, and under section 9307, General Code, the superintendent

holds such securities "as securities for policy holders in the company." It is clear from all these facts that the entire subject of the capital stock of legal reserve life insurance companies is one specially provided for by the various related provisions of the chapter relating to such companies. The omission, then, from such chapter of a section or provision authorizing the reduction of the authorized capital stock of such companies cannot be said to permit such companies to reduce their authorized capital stock, under the general provisions of section 8700, General Code. In other words, because of the interrelation of all the sections of the chapter pertaining to the organization of legal reserve life insurance companies, and relating to the capital stock of such companies, the scheme of such sections must be deemed complete in the chapter; and the entire subject is taken, both by implication and by the express provisions of section 8737 out of the scope of the sections relating to changes in the capital stock of general corporations.

In addition to this principle of statutory construction, there would seem to be equities against the contention of the Western Reserve Life Insurance Company, assuming it to be a going concern. It has secured policies and incurred debts upon the faith of an authorized and paid up capital stock of three hundred thousand dollars; it now seeks to transform one hundred thousand dollars of that capital stock into surplus, which may be dissipated by the stockholders and directors of the company at will. The reason, therefore, for the failure of the chapter, relating to organizations of legal reserve life insurance companies, to contain any provision authorizing the reduction of their capital stock, becomes apparent. The whole chapter is designed to secure and preserve what the legislature has deemed the rights of policy holders and creditors; and it is clear in my mind that the omission of such a provision was neither accidental, nor indicative, of an intent to preserve the same power to insurance companies as is conferred upon general corporations by section 8700 of the General Code. The maxim "Expression of one thing is the exclusion of all others" must be applied.

While the foregoing conclusions are manifest, in my opinion, upon the face of the statutes as they are at present phrased, however, I think there can be no dispute that at most the question as to the power of a legal reserve life insurance company to reduce its capital stock is open to doubt. Such doubt warrants an examination of the legislative history of these statutes to the end that the intent of the general assembly may be ascertained.

Both section 8700 and section 8690 of the General Code have been in substantially the form in which they appear in the General Code, since the adoption of the revision in 1880; in that revision the former was section 3264, Revised Statutes, and the latter was section 3592, Revised Statutes; in like manner section 8737, General Code, was section 3269, Revised Statutes. Said section 3264, Revised Statutes, at present section 8700, General Code, was a revision and codification of section 1 of the act of April 3, 1868, entitled "An act to authorize building associations and other companies and associations to reduce their capital stock." Said section 1 provided in part as follows:

> "Any building association, and any other association or company *excepting insurance companies* now existing or hereafter organized under any law of the state of Ohio, may reduce its capital stock in the manner hereafter mentioned * * *" 65 O. L. 51.

So far as that act was concerned then, the intention to prohibit insurance companies from reducing their capital stock was clearly manifest.

The only other section authorizing the reduction of capital stock, and in

effect at the time of the adoption of the Code of 1880, was section 74 of an act of May 1, 1852, 50 O. L. 275-295, providing for the incorporation of various companies not including insurance companies. This section provided in part that:

> "The board of directors or trustees of any company * * * which may hereafter be formed under any law of this state, with the written consent of the persons in whose names a majority of the shares of the capital stock thereof shall stand on the books of said company, reduce the amount of said capital stock * * *"

At the time of the enactment of the act last mentioned, however, there was no general law in force authorizing the incorporation of insurance companies. The insurance code of this state, or rather the chapter pertaining to the incorporation of legal reserve life insurance companies, was first enacted on April 27, 1872, 69 O. L. 140. The various sections of chapter two of this act have remained in substantially their original form ever since their first enactment. No provision is found therein authorizing insurance companies to reduce their capital stock; and no provision of law was in force prior to the adoption of the Code of 1880, from which such authority might be inferred, unless it be section 74 of the act of 1852, above quoted, which section was passed twenty years before the insurance code was passed. It seems, therefore, very clear to me that, prior to the adoption of the Code of 1880, a domestic life insurance company had no right to reduce its capital stock.

The revision and codification of 1880 did not change the law. It is a fundamental principle of statutory construction that an act passed for the purpose of revising and codifying all or a part of the statute laws of the state is not presumed to change the law; and in case of doubt arising under any provision of such a code, the prior law will be looked to for the purpose of resolving such doubt. When, therefore, the general assembly of 1880 adopted the plan evidenced by sections 3264 and 3269, Revised Statutes, being sections 8700 and 8737, General Code, it must be presumed that it did not intend to confer thereby, upon life insurance companies, a power which they had not theretofore had.

To obviate all doubt I have examined the report of the codifying commission of 1880 to the general assembly, and find that these two sections were adopted by the general assembly as reported by the commission, and that no amendment thereto was adopted by the general assembly in enacting the revision.

I therefore advise that you do not file the certificate of reduction of the capital stock of the Western Reserve Insurance Company. My conclusions of law may be summed up as follows:

1. The directors and officers of a legal reserve life insurance company cannot be lawfully elected until the entire authorized capital stock of the company is paid in.

2. A legal reserve life insurance company may not reduce its authorized capital stock.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

109.

ARTICLES OF INCORPORATION OF THE GREEN TOWNSHIP MUTUAL AID SOCIETY COMPANY—MUTUAL LIFE INSURANCE COMPANIES—FEE FOR FILING.

A corporation formed for the purpose of giving aid to its members in case of sickness and death is to be regarded, under 9427, General Code, as a mutual life insurance corporation having no capital stock and must pay a fee of twenty-five dollars.

(See Section 176, General Code.)

COLUMBUS, OHIO, February 10, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of February 8th, enclosing proposed articles of incorporation of the Green Township Mutual Aid Society Company, a corporation not for profit, the purpose clause of which is as follows:

> "Said corporation is formed for the purpose of giving aid to its members in case of sickness or death."

This purpose clause does not disclose the manner in which the business of the company is to be conducted. It conforms substantially to section 9427 of the General Code, which authorizes the organization of mutual protection associations. Under these articles, therefore, a business substantially amounting to an insurance business could be conducted, and inasmuch as the articles specifically provide for the payment of death benefits, the company is in my opinion to be regarded as a "mutual life insurance corporation having no capital stock." As such the fee for filing the articles is twenty-five dollars. (Section 176, General Code.)

I enclose the two dollars in currency, attached to the articles of incorporation, and advise you not to file the articles or accept said fee as the proper filing fee.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

113.

ARTICLES OF INCORPORATION OF THE PLASTERING CONTRACTORS' ASSOCIATION COMPANY — BY-LAWS — CORPORATION FOR PROFIT MAY NOT DETERMINE QUALIFICATIONS OF MEMBERS.

An Ohio corporation may not make rules for the disposition and sale of its capital stock.

A corporation not for profit is not authorized to make rules for the expulsion, suspension and government of its stockholders nor to collect fines and dues from them nor to dispose of the shares of stock of deceased members.

COLUMBUS, OHIO, February 11, 1911.

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

DEAR SIR:—You have handed to me the proposed articles of incorporation

of the Plastering Contractors' Association Company, as amended, and request my opinion as to the validity of the fourth section or clause of said articles of incorporation, which is as follows:

> "Said corporation shall have the power to make and adopt a constitution, by-laws, rules and regulations for the admission, suspension and expulsion of its stockholders or members and for their government, for the collection of fines and dues, for the disposition and control of the capital stock of its members and those who may cease to be members by death or otherwise, and for the doing of all other lawful acts incident to its corporate existence, and from time to time, to alter, amend and repeal such constitution, by-laws, rules and regulations."

This section was not considered by me when the articles were first presented to me by you. I confess that my failure to consider this clause was occasioned, not only by the fact that my attention was not specifically directed to it, but by the fact that companies of this kind have generally sought to exercise powers like those attempted to be conferred by said fourth clause, and so far as I am informed have done so without question. Upon careful consideration of the question now presented by you, however, I am of the opinion that the fourth article, insofar as it attempts to enlarge the powers of the corporation with regard to the adoption of by-laws and regulations, is not lawful. Section 8704 of the General Code provides as follows:

> "When no other provision is specially made *in this title*, a corporation by its regulations may provide:
>
> "1. The time, place and manner of calling and conducting its meetings.
>
> "2. The number of stockholders or members constituting a quorum.
>
> "3. The time of the annual election for trustees or directors, and the manner of giving notice thereof.
>
> "4. The duties and compensation of officers.
>
> "5. The manner of election, or appointment, and the tenure of office, of all officers other than the trustees or directors.
>
> "6. The qualifications of members *when the corporation is not for profit.*

I have sought carefully for any other special provision in the title providing for the organization and powers of corporations generally, and can find no such special provision under favor of which, a corporation for profit, may determine the qualifications of its stockholders. The word "members" as used in the articles of incorporation of the Plastering Contractors' Association Company is meaningless. A corporation for profit cannot have *members;* this word as used in section 8704 pertains to corporations not for profit.

It is a mooted question as to whether or not corporations for profit may, by by-laws or regulations, lawfully provide the manner in which shares of its stock may be sold by its stockholders; this question has not been adjudicated in this state, but, in the face of the plain provisions of section 8704, General Code, which enumerates the only things which the *regulations of a corporation* may provide for, and those of section 8702, General Code, which restrict the *by-laws* to matters "consistent with the regulations," I doubt very seriously the power of an Ohio corporation to impose such restriction in the sale of stock of its members. By section 8682 of the General Code the shares of stock in a corporation

are made personal property, and it would seem that to authorize a corporation, without the assent of all stockholders, to prescribe rules for the shares of its stock, such authority must be explicitly stated in the laws pertaining to the organization of such corporations.

In any view of the case, however, it seems clear to me that there is no authority for containing in the articles of incorporation a provision that the corporation shall have power to expel, suspend and govern stockholders, or to collect fines and dues from them, or to dispose of the shares of stock of deceased members. These powers, as suggested by you in your letter, might appropriately be conferred upon and exercised by a corporation not for profit, but not a corporation for profit. Accordingly, I return herewith the proposed articles of incorporation of the Plastering Contractors' Association Company, with check for ten dollars attached thereto, and advise you not to file the same.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

132.

ARTICLES OF INCORPORATION OF GERMAN GARDENERS' UNION AND BENEFICIAL ASSOCIATION—MUTUAL PROTECTIVE ASSOCIATION.

The attorney general need not endorse his approval upon articles of incorporation of mutual protective associations in the same manner that he is required by other sections of the insurers' statutes to endorse articles of incorporation.

Fee for filing articles of incorporation of mutual protective association is $25.00.

COLUMBUS, OHIO, February 24, 1911.

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

DEAR SIR:—I return herewith the articles of incorporation of the German Gardeners' Union and Beneficial Association, the purpose clause of which is as follows:

> "Said corporation is formed for the purpose of providing benefits to sick members, and death benefits to the families of deceased members, and promoting the welfare and happiness of its members generally."

This purpose is lawful. It constitutes the company a "mutual protective association" within the intendment of section 9427, General Code. This section and related sections do not provide that the attorney general shall endorse his approval upon articles of incorporation in the same manner that he is required by other sections of the insurance law to endorse articles of incorporation. I have, therefore, not endorsed my approval on these articles.

You state in your letter that the correct filing fee of $2.00 has been paid to your office. Permit me to point out that this is not the correct filing fee. Section 176, General Code, paragraph 5, provides that the fee for filing articles of incorporation of "corporations not organized for profit and not mutual in their character" shall be $2.00; while paragraph 4 of the same section provides that the fee for filing articles of incorporation of a "mutual life insurance corporation having no capital stock" shall be $25.00. The kind of business in which this company proposes to engage is in part life insurance; it is, as above indi-

cated, a "mutual company." I am, therefore, of the opinion that said paragraph 4 governs, and that the proper filing fee for these articles of incorporation is $25.00.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

166.

STATE BOARD OF AGRICULTURE—FEE FOR COMMISSION OF MEMBERS.

Members of State Board of Agriculture receive a compensation as members of the State Board of Live Stock Commission and therefore, under section 139, General Code, are compelled to pay a fee of five dollars for their commission.

COLUMBUS, OHIO. March 8, 1911.

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

DEAR SIR:—You inquire whether members of the State Board of Agriculture are required to pay a fee to the secretary of state for the making, recording and forwarding their commissions, etc., as provided by sections 138 and 139 of the General Code.

Section 138 of the General Code provides:

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

Section 139 of the General Code provides:

> "Except militia officers, each of the officers designated in the preceding section who, for the discharge of his official duty receives any fee, compensation or salary, shall pay a fee to the secretary of state for the making, recording and forwarding his commission before being entitled to receive it. The fee to be paid by each justice of the peace shall be two dollars, and the fee of all such officers, five dollars."

Section 1079, General Code, provides for the appointment of the State Board of Agriculture.

Section 1081 of the General Code provides for the expenses of the members of the Board of Agriculture and expressly provides that they shall receive no compensation for their services as such members of such board. It would seem that they would not come under the provisions of sections 138 and 139 above quoted. However, section 1091 provides that the Ohio State Board of Agriculture shall constitute the State Board of Live Stock Commission, and section 1093, General Code, fixes the compensation of the State Board of Live Stock Commission at $3.00 per day for each and every day they are actually engaged in the investigation and eradication of diseases of domestic animals by direction of the board, etc.

Under the provisions of section 139 above quoted, each officer designated in section 138, General Code, who receives any fee, compensation or salary for the

discharge of his official duty must pay a fee to the secretary of state as required by said section.

I am of opinion that because of the compensation provided in section 1093 of the General Code that members of the State Board of Agriculture receive compensation for the discharge of their official duties, and, therefore, are required to pay the fee provided in said section 139.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

196.

ARTICLES OF INCORPORATION OF THE HOLGATE MUTUAL HORSE INSURANCE COMPANY—INSURERS OF HORSES.

The articles of incorporation of the Holgate Mutual Horse Insurance Company do not comply with sections 9510, 9608 *and* 6609 *of the General Code, and therefore cannot be filed.*

COLUMBUS, OHIO, March 23, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21st, enclosing proposed articles of incorporation of the Holgate Mutual Horse Insurance Company for such action in the premises as may be proper.

The articles of incorporation in question are in form those of a corporation not for profit and having no capital stock, to be formed for the following purpose:

> "To insure owners of horses against loss from disease, accident, fire, lightning or any cause of death of the horse or horses."

I find myself unable to approve these articles of incorporation as required by section 9512, General Code, for the following reasons. The statutes of this state contemplate the formation of two kinds of companies for the doing of this sort of insurance business, as follows:

1. Those organized under section 9510, the general section authorizing the organization of insurance companies other than life, the third paragraph of which provides as follows:

> "A company may be organized or admitted under this chapter to make insurance on the lives of horses, cattle or other live stock against loss by death caused by accident, disease, fire or lightning, and against loss by theft and damage by accident. But such companies shall have a capital stock of one hundred thousand dollars with at least twenty-five per cent. of the capital stock paid up."

2. Mutual live stock insurance companies formed under sections 9608 et seq., of the General Code, the pertinent provisions of which are as follows:

> "Sec. 9608. Any number of persons of lawful age, residents of this state, not less than five, may associate themselves together for the purpose of becoming a body corporate, and insure themselves, and any person becoming a member of such corporation, in accordance with the

rules and regulations thereof, against loss from death of domestic animals, and assess upon and collect from each other, such sums of money, from time to time, as are necessary to pay losses which occur from the death of such animals, to any member of the corporation, and incidental expenses * * *

"Sec. 9609. Such person shall make and subscribe a certificate setting forth therein:

"1. The name by which the corporation is to be known.

"2. The place which is chosen as its principal office.

"3. The object of the corporation, which shall only be to enable its members to insure each other against loss from death of domestic animals, and to enforce any contract by them entered into, whereby they specifically agree to be assessed for the payment of losses and incidental expenses."

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

The articles submitted to me do not comply with either of the above quoted provisions. I therefore return them to you advising you not to file or record them.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

211a.

THE OHIO NEWS BUREAU—PAYMENT FOR NEWSPAPER CLIPPINGS OUT OF CONTINGENT FUNDS.

Paying for newspaper clippings out of contingent funds is not an act within the prohibition of the general appropriation act of 1910 against the payment for newspapers out of appropriations for contingent expenses.

COLUMBUS, OHIO, April 4, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of March 18th, submitting for my opinion thereon the following question:

"I understand that it is the practice of the different departments to pay the Ohio News Bureau an amount monthly for newspaper clipings of items referring to the departments.

"I have examined the different appropriation bills and I find that the appropriation for contingent expenses of the executive department is the only one including newspapers, and that such bills specifically state that no bills for newspapers shall be paid out of the appropriations for contingent expenses.

"Is there any authority for paying the Ohio News Bureau for these clippings?"

It is true as you state that various appropriations made from time to time have contained provisions of which the following, quoted from the so-called "General appropriation act" of 1910, 101 O. L. 177-190, is typical:

"No bills for clerk hire, for furniture or carpets or for newspapers shall be paid out of appropriations for contingent expenses."

I am, however, of the opinion that clipping service, such as that furnished by the Ohio News Bureau, is not within the intendment of such provision. Whatever may be the object of the law, there is a wide distinction between subscribing and paying for a newspaper and subscribing and paying for news clipping service. The construction which I am placing upon the law in complying with your request for an opinion is that which has been followed in this department for a number of years.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

212.

CERTIFICATES OF BIRTH—PAYMENT BY STATE OF POSTAGE EXPENSE INCURRED BY PHYSICIANS AND MIDWIVES.

No moneys may be withdrawn from the public treasury except in pursuance of specific statutory authority nor expended for any purpose not authorized by law.

No statute or law of this state authorizes the state to furnish postage to physicians and midwives for filing certificates of birth.

COLUMBUS, OHIO, April 4, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of March 18th, submitting the following question for my opinion:

"Is the secretary of state or the registrar of vital statistics authorized to furnish postage at state's expense, to physicians and midwives, for filing certificates of birth?"

Section 218, General Code, provides in effect that, within ten days after a birth, the attending physician or midwife, shall file with the local registrar of the district in which the birth occurred the certificate of birth described in the succeeding section.

Section 12704 makes it a misdemeanor for such physician or midwife or other person charged by law with the responsibility of reporting births to neglect or refuse to file the certificate. I have examined the related sections and find therein no provision authorizing the furnishing of postage to the persons charged with the duty of filing birth certificates. It would be lawful for the state or local registrar to mail blanks to physicians, midwives and others requiring or requesting him, but in the absence of any specific provision I am clearly of the opinion that the expense of filing such blanks properly filled out may not be paid for by the state. It is elementary that money may not be withdrawn from the public treasury except in pursuance of specific statutory authority, nor expended for any purpose not authorized by law. In the case at hand not only do the statutes fail to authorize such an expenditure but, placing as

they do the duty of filing birth certificates upon the physicians and others concerned, it must necessarily follow that their intent is that such physicians and other persons shall bear any expense incident to the discharge of such duty.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

A 212.

ARTICLES OF INCORPORATION OF THE L. C. I. MACHINE FABRIC AND RUBBER COMPANY—PURPOSE CLAUSE—"OBJECTS WHICH MAY BE COMBINED"—INCIDENTAL POWERS—"PREFERENCE OF PREFERRED STOCK."

The purpose clause of the articles in question while somewhat verbose in expressing powers which are clearly incidental to its main purpose, nevertheless does not combine objects not permitted and is legal.

The stipulations for premiums on preferred stock over and above 8% are legal as they do not establish a "preference" of more than 8% over other stockholders, within the comprehension of the statute.

The limitation as to preference in the statute is not violated so long as the difference between the dividend paid on preferred stock and that paid on other stock does not exceed 8%.

COLUMBUS, OHIO, April 5, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of March 23d, enclosing tentative articles of incorporation of the L. C. I. Machine, Fabric & Rubber Company, and requesting my opinion as to the legality of the purpose clause and of the provisions which specify the dividend to which holders of preferred stock shall be entitled. The following clauses of the articles of incorporation are called in question by your inquiry:

> "Third. Said corporation is formed for the purpose of acquiring, developing, manufacturing, using, buying and selling specially designed machinery and fabrics constructed therefrom, wherein fibrous material, rubber or other cohesive compositions form the component parts thereof, from which all kinds of articles, substances and things relative thereto can be constructed or manufactured therefrom; and of buying, using, selling and dealing in the same, and of producing, manufacturing, using, buying, selling and dealing in all articles, substances and things which may be required and used in the development thereof, wherein all such products are made therefrom or therewith; and also of buying, using and disposing of all patented inventions and improvements thereon necessary and essential in the production, manufacture, use and sale of all such specially designed machinery, processes and devices, wherein fabrics can be produced therefrom and various articles made thereof; and of acquiring, holding and disposing of all such real estate as may be necessary or convenient to carry on the business herein contemplated and to convey, mortgage, lease, sell or otherwise dispose of the same, and as incidental thereto, of purchasing and otherwise acquiring and holding, shares of the capital stock in any other kindred but non-competing private corporations, whether domestic or foreign.

which may be deemed essential in the carrying out of the aforesaid objects and purposes; and of doing all and everything necessary, suitable, convenient, or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated or incident to the powers herein named, or which shall at any time appear conducive or expedient for the protection, advancement or benefit of said corporation.

"Fourth. * * * The holders of the preferred stock shall be entitled to a dividend of six per cent (6%) per annum, payable semi-annually out of the net surplus profits of the company, the same being in conformity with the laws of Ohio.

"Fifth. The holders of the preferred stock shall also be entitled to further participate in the net surplus earnings of the company after the six per cent. (6%) dividend has been paid on said preferred stock as set forth in the articles of incorporation, fourth paragraph, it being mutually understood and agreed by the holders of the preferred and common stock that such net surplus earnings of the company thereafter shall be divided, apportioned, and paid to the holders of the preferred and common stock on the following basis, to wit:

"A. The preferred stock shall be entitled to further participate in the net surplus earnings of the company and receive an additional dividend of one per cent. (1%) or a total of seven per cent. (7%) after the common stock has been paid four per cent. (4%) and the same is earning equal to five per cent. (5%) per annum.

"B. The preferred stock shall be entitled to further participate in the net surplus earnings of the company and receive an additional dividend of two per cent. (2%) or a total of eight per cent. (8%) after the common stock has been paid five per cent. (5%) and the same is earning equal to six per cent. (6%) per annum.

"C. It is provided that when, in any one year, dividends not exceeding eight per cent. (8%) have been paid the preferred stock and dividends of eight per cent. (8%) have been paid upon the common stock in said year, any net surplus earnings additional thereto of the company for such year shall be divided, apportioned and paid in the following ratio, to wit: One-half (½) of one per cent. (1%) to the preferred capital stock, and one-half (½) of one per cent. (1%) to the common capital stock out of such net additional surplus earnings of the company in that year, and in no other manner shall the preferred stock participate in the net surplus earnings of the company thereafter."

I assume that there is no question as to the propriety of clauses six, seven, eight and nine. Upon careful consideration of the purpose clause of this corporation I am satisfied that while the same is very verbose, it does not state more than a single purpose, that of manufacturing and dealing in machinery, and fabrics constructed therefrom, wherein fibrous material, rubber or other cohesive compositions form the component parts thereof. The other enumerated objects are all expressly made incidental to the principal purpose, and while entirely superfluous cannot be regarded as illegal.

As to the provisions relating to the preferred stock I beg to state that they are essentially similar to those passed upon by Hon. Wade H. Ellis, attorney general, in an opinion to Hon. Carmi A. Thompson, secretary of state, under date of October 29, 1907. (See Annual Report of the Attorney General for that year, page 113.) The principle which my predecessor announced in that opinion is

that, under the statutes then in force, any dividend might be paid upon preferred stock, provided that a preference of more than eight per cent. in favor of the preferred stock and against the common stock, should not thereby be created. The material part of this opinion is as follows:

> "The statute, while not expressly authorizing the preferred stock to pro rate with the common stock after the payment of not to exceed eight per cent. on the preferred stock, says only, that *preference of more than eight per cent.* shall not be created, and notwithstanding the opinion in an early Ohio case (Ryan vs. Little Miami R. R. Co., 6 O. D. Reprint 1071) it has been considered allowable to permit a further distribution of profits to preferred stockholders, limiting, however, the difference between dividends paid to common stockholders and those to preferred to a sum not to exceed 8%." * * *

The statute on which this opinion is based was section 3235a R. S., which provided in part as follows:

> "* * * it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to dividends not exceeding 8% per annum, payable quarterly, half yearly, or yearly, out of the surplus profits of the company each year *in preference to all other stockholders*, and such dividends may be made cumulative."

This provision is identical with that of the first sentence of section 8668, General Code. So that the question which you raise is exactly that upon which my predecessor has passed.

I have very carefully considered the provisions of the statute and the opinion to which I have referred, and upon such consideration I concur heartily in the finding thereof. The case cited in the opinion, Ryan vs. Railroad Company, does not, however, in my judgment, militate against the conclusion which Mr. Ellis reached in the matter. The question at issue in that case was not such as to render the remarks of the court directed to this point necessary in the decision thereof.

I may be permitted to add to Mr. Ellis's opinion my own construction of the statute, which is, that the phrase "in preference to all other stockholders" seems, because of the use therein of the word "stockholders" to be out of place. This phrase should follow the word "entitled" which it clearly modifies. The idea of the section is that it may be provided that holders of preferred stock shall be entitled in preference to all other stockholders to dividends not exceeding eight per cent. I do not understand that the statute means that it shall not be recited in the articles of incorporation that holders of preferred stock shall be entitled to other dividends not in preference to all other stockholders. In fact—though it is not necessary in this connection to decide this—I know of no reason why holders of preferred stock should not be considered as stockholders for every purpose whatever, having the additional right to receive preferred dividends up to the amount fixed in the articles of incorporation.

The articles of the L. C. I. Machine, Fabric & Rubber Company do not provide, as above indicated, a preference of more than eight per cent. True, they provide a preference of six per cent., a deferred preference of one per cent., a further deferred preference of two per cent, and a further right to pro rate with the common stock, which is not a preference at all. This matter

however, of providing for the preferred stock is in my opinion clearly authorized by section 8669, General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

216.

ARTICLES OF INCORPORATION OF THE TEUTONIA FIRE INSURANCE COMPANY, OF DAYTON, OHIO—POWER TO AMEND.

A fire insurance company which has complied with the General Code laws under 8719 *is authorized by this section to amend its articles of incorporation for the purpose of "diminishing" the objects or purposes for which the company was found. And the fact that the special provision mentioned in* 8737, *General Code, has not been made, does not argue against such right, as it does in the case of legal reserve life insurance companies.*

COLUMBUS, OHIO, April 10, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of April 7th, enclosing letter addressed to you by the secretary of the Teutonia Fire Insurance Company, of Dayton, Ohio, in which it is stated that the company desires to amend its articles of incorporation so as to eliminate therefrom a power originally granted to it, to insure a certain class of marine risks and to lend money on bottomry or respondentia. You request my opinion as to whether or not the amendment may lawfully be filed and recorded by you.

The power to amend its articles of incorporation is not expressly conferred upon a company organized under section 9510, General Code, and described in the title as a company for insurance upon property against certain contingencies. However, there is no provision whatever in the chapter in which the section in question is found relating in any way to the amendment of articles of incorporation. The case is therefore different from that of a legal reserve life insurance company, concerning which I recently addressed an opinion to you, and I am of the opinion that section 8737 of the General Code which provides that

> "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern, unless it clearly appears that the provision is cumulative."

applies to and governs the matter of the amendment of the articles of incorporation of an insurance company of this class. It follows, therefore, that an insurance company having complied with the general corporation laws of the state embodied in section 8719 et seq., may amend its articles of incorporation.

The amendment under consideration is for the purpose of "diminishing the objects or purposes for which the company was formed" within the meaning of paragraph 3, of said section 8719, and I am of the opinion that it may lawfully be filed and recorded by you.

It is interesting in this connection to note that a part of the objects and purposes sought to be stricken from the articles of incorporation in question are not authorized by section 9510 and section 9511 of the General Code in their

present form. That is to say, under section 9511 a company formed for the purpose of insuring houses, buildings and other kinds of property against loss or damage by fire, and making insurance on goods, merchandise and other property in the course of transportation on land, water, or on a vessel, boat or whatever it may be, may not lawfully be authorized to lend money on bottomry or respondentia, etc. There would seem to be some question, therefore, as to whether or not the corporation in question was ever legally authorized to transact the kind of business, authority to transact which, it now seeks to part with.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

221a.

CORPORATIONS — CERTIFICATE OF INCREASE OF STOCK OF THE RIDGELY DECORATIVE COMPANY — POWERS OF AMENDMENT — POWERS TO INCREASE AND DECREASE CAPITAL STOCK, PAR VALUE, AND NUMBER OF SHARES.

A corporation cannot increase or decrease its capital stock by amendment to its articles of incorporation.

Section 8698, however, provides for an increase of the capital stock or of the number of shares. Section 8700 provides for a reduction of the capital stock, and the value of shares, or for the reduction of par value without a corresponding decrease of the capital stock. Neither of the above sections provides for the increase of par value or for a decrease in the number of shares of stock, and as there are no other provisions providing for the same these powers are not conferred.

COLUMBUS, OHIO, April 14, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of March 18th, enclosing a document which purports to be a certificate of increase of the capital stock of the Ridgely Decorative Company. Said certificate provides for the increase of the authorized capital stock of the corporation, and for an increase in the par value of the shares thereof. You assume that the change in the par value of the shares amounts to an amendment of the articles of incorporation as distinguished from an increase of the capital stock. You point out that the certificate evidences full compliance with the legal formalities necessary to be observed by the directors and stockholders of a corporation in order to effect the increase of its capital stock, and the amendment of its articles of incorporation; and upon this assumption and these facts you submit for my opinion the following questions:

> "1. Can a corporation increase its capital stock and amend its articles of incorporation by the filing of one certificate, which certificate shows that the law authorizing both the increase of capital stock and amendment of its articles of incorporation, have been complied with, or should two certificates be filed, one showing a compliance with the law authorizing the increase of the capital stock, and the other showing a compliance with the law authorizing the amendment of its articles of incorporation?
>
> "2. If the filing of one such a certificate showing the compliance with the law providing for both the increase of its capital stock and the

amendment of its articles of incorporation is sufficient, should this department exact both the fee for filing a certificate of increase of capital stock, and the fee for filing an amendment to articles of incorporation, as provided by paragraphs 2 and 9 respectively of section 176 of the General Code; if not, what fee should be required to be paid?"

Upon examination of the statutes relating to the subject, I find myself unable to agree with you in the assumption that the change in the par value of the shares of stock of the corporation amounts to an amendment of its articles of incorporation. Section 8719 provides what may be accomplished by an amendment of the articles of incorporation, and is as follows:

"A corporation organized under the general corporation laws of the state may amend its articles of incorporation as follows:

"1. So as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public.

"2. So as to change the place where it is to be located, or its principal business transacted.

"3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.

"4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

I have carefully considered this section and I do not find in it any authority to change the nominal or par value of the shares of stock of a corporation.

Section 8698 on the other hand provides for the increase of capital stock. It contains inter alia, the following provisions:

"After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, *prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock* * * * *Or the stock may be increased at a meeting of the stockholders* * * * A certificate of such action shall be filed with the secretary of state."

This section expressly contemplates a change in the par value of shares of capital stock of a corporation. It is quite apparent, it seems to me, that the number of shares into which the authorized capital stock of a corporation is divided, cannot be changed, the authorized capital stock remaining the same, without changing the par value of the shares.

Section 8700 provides that:

"With the written consent of the persons in whose names a majority of the shares of capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, * * * and a certificate of such action shall be filed with the secretary of state."

Curiously enough the provisions of section 8700 and of section 8698, insofar as they authorize a corporation to change the nominal value of its shares of stock are exactly the same in effect, although opposite terms are used. The one authorizes an increase in the number of shares without a corresponding increase in the capital stock; the other authorizes a decrease in the par value of shares without a corresponding decrease in the capital stock. Both of them in effect authorize the same thing.

The foregoing analysis of sections 8698 and 8700 has been made for the purpose of disclosing the fact that neither one of them authorizes an increase in the par value of the shares, or a decrease in the number of shares of stock of a corporation. The assumption of your letter is, that such an increase of par value or decrease of the number of shares may be made, but that it must be made by amendment. I have already stated that I found in the section authorizing amendment no authority for making changes in capital stock, either in the amount thereof, or in the par value of shares, and the number thereof. That such a change cannot be made by amendment seems to me the more certain upon consideration of sections 8698 and 8700. These two sections constitute a scheme whereby corporations may make changes in their capital stocks. It seems to me that the intention is to provide for every change which may be made, and that when a possible change is found to be omitted from these sections, such omission must be deemed to withhold from the corporation the power to make the change in any manner, by amendment or otherwise.

Whatever may be the policy of these statutes in these respects, and whether or not they are founded upon considerations of public policy, I do not think it can be held that the omission was by accident. I am firmly of the opinion that no corporation has the power to increase the par value of its shares or decrease the number of shares into which its capital stock is divided.

To summarize them, my conclusions of law are that if a corporation desires to increase its total authorized capital stock it must at the same time increase the number of shares into which such stock is divided; if such an increase of the number of shares occurs as an incident to an increase in the capital stock itself, one certificate—that provided for by section 8698—is sufficient, and that is the certificate provided for by paragraph 2 of section 176 of the General Code. If a corporation desires to reduce its capital stock, it may at the same time reduce the par value of the shares; and here again one certificate—that provided by paragraph 7 of section 176—is sufficient. If a corporation desires to increase the number of shares without changing the total capital stock, this may be done both under section 8698 and section 8700, but the certificate filed in either case is that, the fee for which, is prescribed by paragraph 12 of section 176. No corporation may lawfully increase the par value of its shares of stock as an incident to an increase in the total authorized capital stock. In fact, no corporation has any power whatever to increase the par value of its shares. As to whether or not a corporation, in reducing its capital stock, may decrease the number of shares into which it is divided, I make no holding.

For the foregoing reasons I advise that you do not accept the certificate of the Ridgely Decorative Company, because of the fact that it attempts to increase the par value of the shares of stock of said company.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

223.

CORPORATIONS—CERTIFICATE OF INCREASE OF PREFERRED STOCK OF THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

A certificate of increase of preferred stock as provided for in section 5699, *General Code, must show upon its face that its original capital stock is fully subscribed and an installment of ten per cent. on each share has been paid in as laid down in section* 8698, *General Code.*

COLUMBUS, OHIO, April 18, 1911.

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

DEAR SIR:—Your letter of April 14th received. You state:

> "Section 8698 of the General Code, 1910, provides, in part, that
>
> " 'After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, * * * may increase its capital stock,' etc.
>
> "Section 8699 of the General Code, 1910, provides that:
>
> " 'Upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock, it may issue and dispose of preferred stock in the manner by law provided therefor,' etc.
>
> "The accompanying certificate of increase of capital stock of the Northern Ohio Traction and Light Company, upon a comparison with the said section 8699 of the General Code, will be found to contain all that is contained in said section, and in addition thereto, conforms, in part, to some of the conditions contained in said section 8698 of the General Code."

And inquire:

> "Please advise this department in writing, whether said certificate of increase of capital stock is regular in the form presented, or whether it should contain, in addition, another part of section 8698, namely, that the original capital stock was fully subscribed for and an installment of ten per cent. on each share of stock had been paid thereon, as is provided for at the beginning of section 8698, quote above?"

The gist of your inquiry is, whether or not section 8699 is to be interpreted standing alone, or whether you are to look to section 8698 as a guide to its meaning?

I am of the opinion that section 8699 must be read in the light of section 8698, and that before there may be an increase by preferred stock, all of the original capital stock must be subscribed for and an installment of ten per cent. on each share of stock fully paid. The language "upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock," unquestionably means three-fourths in per cent. of its capital stock upon the basis of one hundred per cent. The order in which the statutes occur sustains this theory. Moreover, it is not reasonable that there might be an increase by preferred stock by conforming to fewer requirements than that required for an increase of capital stock.

I therefore hold that the certificate of increase of capital stock of the

Northern Ohio Traction and Light Company is irregular in the form presented, and in order to make it regular it should contain a statement that the original capital stock was fully subscribed and an installment of ten per cent. on each share of stock had been paid thereon as is provided for in section 8698 of the General Code.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 280.

ARTICLES OF INCORPORATION OF THE TOLEDO GLASS INSURANCE ASSOCIATION—MUTUAL PROTECTIVE ASSOCIATIONS OTHER THAN LIFE—LIMITATIONS—MUTUAL PROTECTIVE STOCK COMPANIES.

Mutual protective associations may be formed for the purpose of insuring against only such risks as are enumerated in section 9593.

Stock companies governed by a board of directors may however insure against loss to property from causes other than fire or lightning.

COLUMBUS, OHIO, June 27, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23d enclosing for my consideration the proposed articles of incorporation of the Toledo Glass Insurance Association, which said proposed articles of incorporation are in part as follows:

> "These articles of incorporation of the Toledo Glass Insurance Association witnesseth, that we, the undersigned, all of whom are citizens of the state of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said state, do hereby certify:
>
> "First. The name of said corporation shall be the Toledo Glass Insurance Association.
>
> "Second. Said corporation is to be located at Toledo, in Lucas county, Ohio, and its principal business there transacted.
>
> "Third. Said corporation is formed for the purpose of enabling its members to insure each other against loss by accidental breakage to glass wherever located, and to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to members."

An analysis of the foregoing articles discloses that it is evidently intended to form what is designated in the General Code of this state as a "mutual protective association other than life." The business is to be conducted not for profit and the members are required to enter into contracts, agreeing to be assessed specifically for incidental purposes and for the payment of losses. The validity of the articles, therefore, are to be measured by section 9593 General Code, the first sentence of which is as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state, and owning insurable property in this state, may associate themselves together for the purpose

of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any member of such association."

* * *

Section 9593 has been twice amended since its original enactment as a section of the General Code, but neither of these enactments in any material respect changes the above quoted language.

It is to be observed that while any property or class of property may be insured by a mutual protective association it is not every risk or class of risks that may be insured against but only loss by fire, lightning, cyclone, tornadoes, wind storms, hail storms and explosions from gas.

The articles of incorporation of the Toledo Glass Association on the other hand seek to authorize the association to insure against any loss by accidental breakage to glass.

In my opinion, therefore, the articles of incorporation measured by section 9593 are invalid. That is to say, a mutual protective association may not be organized under the laws of Ohio for the purpose of insuring the members mutually against any loss which may occur with respect to a specific class of property but only against loss by the causes specified in section 9593.

Section 9510 authorizes the formation of companies for the purpose of making insurance against loss or damage resulting from loss to property from causes other than fire or lightning. Such companies, however, must be stock companies, governed by a board of directors, as is apparent from a consideration of section 9512, etc., in *pari materia* with section 9510.

Furthermore such stock companies may not insure against any accidental loss of property but only against accidental loss arising from causes other than fire or lightning. This follows because of the provisions of section 9511 General Code.

Because, therefore, the articles of incorporation under consideration do not witness the formation of a stock company, and because further they do not except loss from fire or lightning from the accidents proposed to be insured against by the company, I am of the opinion that the articles of incorporation cannot be filed under section 9512 General Code.

For all of the foregoing reasons I am of the opinion that you may not file or record the proposed articles of incorporation of the Toledo Glass Insurance Association.

I herewith return said proposed articles.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

B 301.

CONSTITUTIONAL CONVENTION ELECTION—GENERAL ELECTION—CONSTITUTIONAL LAW.

The question of a constitutional convention should not be submitted at any election held in the year 1911.

The correct and essential grammatical intendment of Article XVI, section 3, *of the constitution of* 1851 *is that the question of a constitutional convention*

shall be submitted at the general election of every twentieth year after such election of 1871; *i. e., the election at which state officers and members of the general assembly are determined.*

Mere dates and periods are "subsidiary" to the general framework, and the requirement that the above question shall be submitted at a general election is controlling as against the direction that such question shall be presented at strict intervals of twenty years.

Article XVII, passed in 1905, *and known as the "Biennial Election Amendment," causing general elections to be held in the odd instead of the even years, works a repeal of former constitutional provisions which are inconsistent therewith.*

COLUMBUS, OHIO, July 20, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of July 17th, in which you request my advice as follows:

> "Please advise this department if at the election to be held in November, in the year 1911, the question 'Shall there be a convention to revise, alter or amend the constitution' shall be submitted to the electors of the state, as provided in section 3, Article XVI, of the constitution of Ohio?
>
> "Also please advise this department if the manner of electing the members of the constitutional convention, as provided in Senate Bill No. 15, is contrary to the provisions of section 2 of Article XVI of the constitution of Ohio, wherein it is provided that such members 'shall be chosen in the same manner' as members of the house of representatives."

Section 3 of Article XVI of the constitution of Ohio to which you refer in your first question provides in part as follows:

> "*At the general election*, to be held in the year one thousand eight hundred and seventy-one, and *in* each twentieth year thereafter, the question 'Shall there be a convention to revise, alter or amend the constitution,' shall be submitted to the electors of the state; * * *

Your question is of practical importance because in the event of the foregoing provision being held to require a submission of the question therein set forth to the electors of the state on the first Tuesday after the first Monday in November, 1911, an anomalous situation will be presented to-wit: The electors will be called upon to vote at the same election for delegates to a constitutional convention already called under section 2, Article XVI of the constitution, and at the same time "to vote upon the question upholding another convention for the same purpose."

This peculiar situation would seem almost to justify a holding that the submission of the question under section 3 of Article XVI of the constitution would be entirely superfluous and that the intention of the adopters of the constitution of 1851 could not have been that said question should be submitted under section 3, as all events regardless of a prior determination of the electors under section 2 of Article XVI to hold a convention for the purpose of revising, altering or amending the constitution at a time practically co-incident to a time when a convention as ordered under section 3 would have to be held.

It is a dangerous thing to decide a question of such importance on the grounds of expediency. Fortunately in the case presented there is no necessity for resting a conclusion in the matter upon such an unstable foundation.

It will be observed that the mandate of the above quoted provision of section 3 is that, the question therein set forth shall be submitted "at the general election to be held in the year one thousand eight hundred and seventy-one, and in each twentieth year thereafter." The primary grammatical construction of this phrase is that which requires the phrase "in each twentieth year thereafter" to be regarded as co-ordinate with the phrase "in the year one thousand eight hundred and seventy-one," and accordingly as modifying the same phrase, viz: "to be held." The phrase "to be held" in turn modifies the word "election" so that the grammatical analysis of the clause in question leads to the following as a complete paraphrase thereof: "At the general election to be held in the year one thousand eight hundred and seventy-one and *at the general election to be held in each twentieth year thereafter*, the question: 'Shall there be a convention * * *' shall be submitted to the electors of the state."

Nor is this manifest correction of the grammatical construction inconsistent with the obvious intent of the adopters of the constitution of 1851 as indicated thereby. Weight must be given to every word found in the context of a constitutional provision. None are deemed superfluous or unimportant. Now it was evidently the intention of the electors of 1851 that the first periodical resubmission of the question as to the policy of holding a convention to revise the constitution shall be at a particular election, viz: the *general* election to be held in the year 1871. The choice of the electors of 1851 fell upon the general election of 1871 to the conclusion of any other election which might be held in that year. This follows by necessary inference; that is to say, it expressly respects the first resubmission to be at the general election of 1871. The electors of 1851 clearly indicate that they did not intend that the first resubmission should be held at a *special* election to be held in the year 1871, or at any local election, though simultaneous throughout the state, which might be held in that year unless the phrase "the general election to be held in the year one thousand eight hundred and seventy-one" was without a definite meaning at that time. If this phrase did have an ascertained meaning, in the light of the remaining provisions of the constitution of 1851, that meaning must be given to it in this clause.

Now the phrase "the general election to be held in the year one thousand eight hundred and seventy-one" did have a definite meaning at the time of the adoption of the constitution. Sections 2, 3 and 4 of the schedule of the constitution of 1851 required the first election for members of the general assembly, the executive officers of the state and the judicial officers of the state and the districts thereof to be held "on the second Tuesday of October, 1851." Each of these several officers were given terms, an even number of years, to commence in January next after the election. (Art. 2, Sec. 2; Art. 3, Sec. 2, except as to common pleas judges; Art. 4, Sec. 12.)

In 1895 the date of the fall election for state officers was changed to the first Tuesday after the first Monday of November. (82 O. L., 446.)

It is apparent, therefore, that the adopters of the constitution of 1851 contemplated the election which should be the *general* election throughout the state, and which would have been held in the year 1871—not some special election throughout the state, nor any series of local elections which might be held at the same time throughout the state in that year. It is not difficult to find the motive for fixing upon the general election. It is a notorious fact that because of the added interest in such elections many more votes would likely be cast thereat than at a special or local election although held throughout the state at the same time.

It is, therefore, very clear that by the phrase "at the general election to be held in the year one thousand eight hundred and seventy-one" the adopters of the constitution of 1851 contemplated the fall election (then held in October) for state officers and members of the general assembly, and that this intention precluded the submission of such a question at any special or local election.

There would be no reason whatever for holding that the submission of 1871 did not extend to the resubmission of the same question at succeeding intervals of twenty years; that is to say, that it would be unreasonable to suppose that the adopters of the constitution of 1851 intended particularly to require that the question be submitted in 1871 at the election for state officers and at the same time state that the submission in the year 1891 might be made at a special election or at that election (then held in the spring) for local officers. It would be most reasonable to presume that the electors of 1851 cherished the same intention with respect to all resubmissions. Thus the primary grammatical construction of the first phrase of section 3 of Article XVI of the constitution as above analyzed becomes the only construction consistent with reason.

From all the foregoing, then, it follows that the requirements that the mandatory periodical resubmission of the question of holding a convention to revise the constitution be at the election at which state officers and members of the general assembly are determined is the *essential* requirement of the said section.

In 1905 the electors adopted what is known as Article XVII of the constitution and which has been frequently referred to as the "biennial election amendment." Without quoting all of the provisions of this article, which consists of three sections, suffice it to say that it changes the year in which the general election for state officers and members of the general assembly shall be held from the odd numbered years to the even numbered years. Accordingly, it is obvious there will be no such "general election" in the year 1911 as was contemplated by the adopters of the constitution of 1851 and referred by them in the first phrase of section 3 of Article XVI.

What, then, was the effect of the adoption of Article XVII upon section 3 of Article XVI? In State ex rel. v. Creamer, 83 O. S., the supreme court of this state held in effect that Article XVII is capable of working a repeal by implication of such sections of the original constitution of 1851 as might be inconsistent or inharmonious with its requirements.

In like manner, the effect of the article in question upon a given section of the constitution might be more properly defined in a given case as that of implied amendment.

The same case—State ex rel. v. Creamer—is authority for the contention that in the constitution of 1851, mere dates or periods, at which governmental acts are required by the original constitution to be performed, are subsidiary to the general frame work of the government erected by the whole instrument and where a change is effected in the latter by means of a constitutional amendment, the former, being regarded as non-essential, is to yield. In the Creamer case the specific holding was that the provision "that all regular sessions of the general assembly shall commence on the first Monday of January. The first session under this constitution shall commence on the first Monday of January, 1852." Insofar as it might be construed to create a biennial sequence of the regular sessions to be held in even numbered years it was amended or repealed by implication by the adoption of Article XVI requiring state officers and members of the general assembly to be elected in even numbered years for terms to begin in January of odd numbered years.

The courts found the interrelation of the constitutions to be such that the real intent of its framers and adopters was to make the commencement of the

regular session of the general assembly dependent upon the commencement of the terms of the executive officers of the state, and that the express requirement as to holding the regular sessions biennially beginning with the year 1852 ought to yield to such controlling intent.

So, in the case you submitted, the *controlling intent* is that the submission of the question shall be at an election for the state officers and the members of the general assembly; the subsidiary intent is that such submission shall be at periods of twenty years, and the other essential provision is that such twenty-year periods begin with the year 1871.

It follows then that upon a careful consideration of the intent of section 3 of Article XVI and of the effect thereon of Article XVII as established by analogy from the decision of State ex rel. v. Creamer, the question "Shall there be a convention to revise, alter or amend the constitution" ought not to be submitted to the electors at any election held this year. Whether or not such question should be submitted to the electors at the general election to held in the year 1912 is a matter upon which my opinion is not solicited and as to which no opinion is expressed.

As to your second question, I beg to state that the same was submitted to me by the author of the act to which you refer therein, and an opinion was rendered to him thereon on February 10, 1911. I enclose you a copy of this opinion which fully answers the question asked by you.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

323.

PRIMARY ELECTIONS — QUALIFICATIONS OF VOTER — AFFILIATION WITH PARTY.

The fact that a voter has not previously affiliated himself with the party whose ticket he desires to vote shall be cause for challenge at a primary election.

Under section 4982, General Code, the judges at the election in question have a wide discretion and are sole masters of the question whether or not said voter has affiliated with his party at the last general election.

Their judgment shall be determined when the individuals vote at said election. It should at least be shown that said elector cast his vote for his party's candidate for congress, for state senator and representatives, and for a majority of the state ticket.

COLUMBUS, OHIO, August 12, 1911.

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

DEAR SIR:—In your communication to me of August 11th you state:

> "According to the provisions of section 4980 et seq., it is provided, in substance, that a voter at the primary election shall have previously affiliated with the party whose ticket he now desires to vote and that affiliation shall be determined by the vote of the elector making application to vote at the last general election held in even numbered years."

And you ask for my opinion:

> "As to what extent the voter shall have previously voted the party ticket that he may be held to have affiliated with such party."

Section 4980 of the General Code which provides who may vote at primary elections, is as follows:

> "At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, and it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legality of any vote that may be offered, to interpose a challenge. The cause of a challenge shall be: That the person challenged has received or been promised some valuable reward or consideration for his vote; that he has not previously affiliated with the party whose ticket he now desires to vote. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years."

Section 4982 of the General Code specifies when the vote of a person desiring to vote at such primaries shall be rejected, and is as follows:

> "If a person challenged refuses to be sworn, or being sworn, refuses to answer any questions, or if his answers show that he lacks any of the qualifications herein required to make him a legal voter at such primary election, his vote shall be rejected. The judges, or either of them, shall have the power to make further investigations, and he or they may call and examine witnesses as to the qualifications of the person challenged, and, if the judges of the party to which the person asking the ticket claims affiliation are not satisfied that he is a legal voter under this chapter, they shall reject his vote."

I wish to call your special attention to the last paragraph of said section 4982, especially the last clause of said paragraph:

> "If the judges *of the party* to which the person asking the ticket claims affiliation are not satisfied that he is a legal voter under this chapter, they shall reject his vote."

From this language of section 4982 it seems clear that if the judges of the party to which the voter claims affiliation are not satisfied that the voter has complied with all the essentials necessary to entitle him to vote as provided in section 4980, they have full power to reject his vote. In other words, they have a wide discretion in the matter, their decision is final, and it is necessary for the person desiring to vote to satisfy them that he possesses the necessary qualifications provided by section 4980, and, therefore, he must satisfy said judges that he has in fact previously affiliated with the party whose ticket he desires to vote.

It seems to me, therefore, that the only restriction upon the judges in satisfying themselves whether or not the person desiring to vote has affiliated with the party whose ticket he proposes to vote, is that they shall determine said fact, as provided in section 4980, from the vote of said person at the last general election held in the even numbered years.

Further than specifying that they must so determine this fact from the vote of the elector at said last general election the statute is silent, and, therefore, it must necessarily be held that said judges have the final authority to deter-

mine from the manner in which the applicant voted whether he thereby affiliated himself with the party whose ticket he now desires to vote. This matter being left solely to the discretion of the judges, I take it that no ruling by yourself or by me as to the extent to which the voter shall have previously voted the party ticket to entitle him to be classed as affiliated with the party, would be binding upon said judges. Whatever ruling might be made would simply have the force of a suggestion which the judges should follow in determining this question; and as it is almost universal that the vote of each man is influenced by circumstances and conditions applying to him individually, and which properly would not apply in toto to any other particular voter, it follows that the question as to the affiliation of each man desiring to vote must be determined by the judges from the peculiar facts relating to his individual vote. As a general rule to apply to all cases, and which in view of what I have stated above, would not and could not be an inflexible rule, I would say that a person could only be held to be affiliated with a party when his vote showed that he thereby endorsed and advocated the principles of the party with which he claims to be affiliated. That is, his vote must show that he has an individual interest in the success of that party at the polls and in the enactment of its principles. This I think would be shown by the vote of the individual for the majority of the state ticket of a party and for the candidate of said party for congress, and for state senator and representative; anything less than this would be insufficient to indicate that a man had affiliated with a party. I think that in determining this question the vote of the individual for the county ticket, except for state representative and state senator could possibly be disregarded, but that he must at least vote for the candidate of said party for congress, state representative and senator and a majority of the state ticket.

I further think that the applicant should have an opportunity to explain his vote, and finally as above stated his vote must clearly indicate that it was cast from principle and conviction, and was not influenced by local issues, enmity for candidates, personal friendship or spite.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

335.

ILLEGALITY OF CERTIFICATE OF REDUCTION OF CAPITAL STOCK OF THE WESTERN RESERVE INSURANCE COMPANY—FIRE INSURANCE.

The provisions of the General Code in reference to domestic fire insurance companies are similar to those respecting legal reserve life insurance companies.

Such companies are subject to special provisions and cannot be permitted to reduce their capital stock under the general incorporation statutes.

COLUMBUS, OHIO, September 2, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of August 24th, submitting for my opinion, as to the duty of the secretary of state in the premises, a certificate of reduction of the capital stock of the Western Reserve Insurance Company, a domestic fire insurance company, sent to you for the purpose of

filing the same. You also ask as to the proper fee to be charged in case it is the duty of the secretary of state to file the proposed certificate of reduction.

The certificate in question shows on its face, compliance with section 8700 of the General Code, which said section authorizes corporations, formed under the general corporation laws of the state, to reduce the amount of their capital stock and the nominal value of all the shares thereof, by proceeding in a certain manner. If this section applies to domestic fire insurance companies the question is an easy one.

If this section does not apply to such companies, a question of some difficulty is presented, inasmuch as in the chapter relating to the powers of such company is found a section expressly authorizing an increase of capital stock, but not authorizing such companies to decrease their capital stock. (Section 9531, General Code.)

There is, of course, a general provision (section 8737, General Code), which discloses that the legislative policy of the state with regard to the powers of corporations is that the general laws shall apply unless it is apparent that a special provision relating to a certain class of corporations is intended to apply.

In this connection I have carefully read the brief courteously furnished to me with regard to the matter, by counsel for the company, in which it is urged that the general law applies.

Upon careful consideration of the points enumerated by counsel, however, I am of the opinion that section 8700 of the General Code does not cover the Western Reserve Insurance Company, and that the certificate offered you for filing may not lawfully be filed by you.

Let me recall the fact that on February 4, 1911, I addressed to you an opinion upon your duty as to the filing of this very certificate of reduction, in which I held that you should reject the same. At the time I was under the impression that the Western Reserve Insurance Company was a legal reserve life insurance company, and the observations of the opinion are based upon this assumption. Having carefully examined the General Code, however, I find that its provisions with regard to the powers of domestic fire insurance companies are in all essential respects similar to those respecting legal reserve life insurance companies; and that the history of legislation with respect to the two classes is practically the same. The reasons, therefore, stated in my former opinion, apply as well to the case of a fire insurance company as to that of a legal reserve life insurance company.

To recapitulate, these reasons are as follows:

1. The provision as to the increase of capital stock, found in section 9531, General Code, is to be regarded as a complete exhaustion of the legislative intent, so to speak, regarding changes in the capital stock of fire insurance companies. The case is one, therefore, where there is a special provision which controls to the exclusion of the general provision of section 8700.

2. All provisions respecting the capital stock of fire insurance companies are essentially dissimilar from parallel provisions respecting the capital stock of general corporations. The former is required to be paid in and invested in a certain manner before the company may begin business; the latter need not be paid in, in full, nor is there any requirement as to investment before proceeding to business. This distinction makes it clear that the legislature intended to deal separately with the whole subject of the capital stock of fire insurance companies.

3. There are stronger equities against holding that a fire insurance company may not reduce its capital stock than there are in favor of such a holding, and than there would be in case of a reduction of the capital stock of an ordinary corporation. In this connection I am informed by counsel that the

stockholders have agreed among themselves that the amount of paid up capital stock proposed to be surrendered by them shall go into the surplus of the corporation, subject to the claims of creditors and policy holders. This agreement, however, is entirely *extra legal*, so far as the relation of the corporation to the state is concerned. If an insurance company might act at all under section 8700 it would have the power simply to present to its stockholders a part of their paid up capital, so long only as actual creditors were not prejudiced. The intent of the insurance law on the other hand is, not only that creditors having actual claims, shall be secured, but that policy holders, the claims of whom are merely contingent, shall also be secured.

4. The legislative history of section 8700 clearly discloses that when it was first passed it was not intended to apply to any kind of an insurance company (65 O. L. 51). Since the passage of this act the section has not been amended except in process of codification, insofar as any such amendment affects the question at hand. The principle of statutory construction is that verbal changes made in process of codification are not deemed to have been made with intent to change the meaning of a statute. Therefore, section 8700 is to be construed now in the light of the express language used at the time of its original enactment, which was in part as follows:

> "Any * * * company, *excepting insurance companies*, now existing or hereafter organized under any law of the state of Ohio, may reduce its capital stock in the manner hereafter mentioned." * * *

This last consideration alone is sufficient upon which to base an opinion that a domestic fire insurance company has no right to reduce its capital stock.

I herewith return the certificate of reduction in question.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

347.

FRATERNAL ASSOCIATION—COMPLIANCE WITH MUTUAL BENEFIT INSURANCE PROVISIONS—EXCEPTIONS THERETO.

A fraternal order having power to render aid or assistance to its members but lacking the power to issue insurance certificates, is within the exception provided for in section 29 of the act of June 19, 1911 (102 O. L. 533), and such company need not be incorporated by the filing of articles of incorporation with the superintendent of insurance.

The averment that a society is organized for the benefit of its members by aiding them in sickness, distress and death is an absurdity which should be amended.

COLUMBUS, OHIO, September 7, 1911.

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

DEAR SIR:—Your letter of September 1st, enclosing proposed articles of incorporation of the Independent Order of Rangers, and requesting my opinion as to your duty to file such articles in the form in which they are presented to you, and as to the proper fee for filing the same, if they should be filed at all, is received.

The articles seek to form a corporation, not for profit, for the following purpose:

"Conducting and operating a voluntary fraternal association, not for profit, having a representative form of government, to be organized and conducted solely for the mutual benefit of its members, and having a supreme governing or legislative body and subordinate lodges into which members are elected and initiated or admitted in accordance with its constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges must meet in regular session at least once during each month, with power and authority to render aid and assistance to its members in distress, sickness and death; provided, however, that neither the supreme governing body nor any subordinate lodge shall issue an insurance certificate."

The act of June 19, 1911 (102 O. L. 533), applies to and governs the organization of fraternal benefit societies, so-called, and probably repeals by implication sections 9462 to 9509, General Code, which said sections formerly applied to and governed the subject-matter.

Section 1 of said act provides in effect that any corporation without capital stock, organized for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work, and which shall make provisions for the payment of benefits in accordance with section 5 of the same act, shall be deemed to be a fraternal benefit society.

Sections 2 and 3 of said act define the phrase "lodge system" and "representative form of government" as used throughout the act and in section 1.

Section 4 provides that:

"Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, * * *"

Section 5 of the act provides that:

"Every society transacting business under this act shall provide for the payment of death benefits."

And prescribes in detail the manner of exercising this power.

Section 6 prescribes who shall be the beneficiary, and by inference provides that each member shall have issued to him a certificate entitling such beneficiary to such benefits.

Section 8 further provides for the form of such certificate.

Sections 9, 10 and 11 govern the fiscal management of fraternal benefit societies.

Section 12, which is particularly to be considered in connection with your question, provides for the organization of fraternal benefit societies in the following language:

"Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this act, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

"1st. The proposed corporate name of the society. * * *

"2d. The purpose for which it is formed * * * and the mode in which its corporate powers are to be exercised.

3d. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year. * * *

"Such articles of incorporation * * * shall be filed with the *superintendent of insurance*" * * *

Section 29 of the act provides in part as follows:

"Nothing contained in this act shall be construed to effect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias * * * and the Junior Order of United American Mechanics * * * or the National Council Daughters of America Benefit Department, or societies which limit their membership to any one hazardous occupation, *nor to similar societies which do not issue insurance certificates*" * * *

Section 8623, General Code, provides that:

"Except for carrying on professional business a corporation may be formed for any purpose for which natural persons may lawfully associate themselves."

The corporation proposed to be formed through the filing of the articles proffered to you is not given the power to issue insurance certificates. It or its subordinate lodges are given power to render aid or assistance to its members. Lacking the power to issue certificates and being a fraternal order, the association, in my opinion, is a "similar society which does not issue insurance certificates" within the meaning of section 89 of the act above quoted. That being the case the remaining provisions of the act, some of which are also quoted in this opinion, do not apply to this proposed order, and therefore it need not be incorporated by the filing of the articles of incorporation with the superintendent of insurance.

Said section 29 implicitly recognizes the lawful existence of fraternal orders other than fraternal benefit societies within the meaning of the act, I know of no reason why the formation of such fraternal order should be deemed other than a purpose for which persons lawfully may associate themselves, within the meaning of section 8623, General Code. That is to say, I believe that a fraternal order other than a fraternal benefit society may lawfully be incorporated under the general laws of the state as a corporation not for profit by filing articles of incorporation with the secretary of state. In general then, the procedure adopted by the incorporators of this proposed fraternal order is legal. I doubt, however, whether you ought to file the particular articles offered to you for that purpose unless the word "death" is eliminated therefrom or the last phrase in which it is found is amplified and is less ambiguous than in its present form. The purpose clause of the corporation provides that the association or its subordinate lodges (it is not exactly clear as to which is meant) shall have the power and authority to render aid and assistance to its members in distress, sickness and death. It is also provided that the association shall be a "voluntary fraternal association * * * to be organized and conducted solely for the mutual benefit of *its members*." These two phrases read together lead to an absurdity. Strictly speaking they mean that the association is organized for the benefit of its members and may render them aid and assistance in death.

The draftsman of the articles probably intended that the association should have the power to render financial or other assistance to the families of the members after the death of the member. I have been unable to imagine any aid or assistance which an association of this sort might render to an individual member after his death. The purpose clause is therefore ambiguous and uncertain in its present form and should be amended. If it is amplified by including language authorizing the rendition of aid and assistance to the members of families of members it must not be filed in your department unless the language chosen clearly negatives the idea of fraternal insurance as defined in the act above quoted. Whatever business the association does it must not be authorized to enter into a contract with its members substantially amounting to insurance, as this would violate the fraternal benefit act; that is to say, if the proposed articles authorize the writing of insurance contracts then the order must be incorporated in the manner prescribed in the fraternal benefit society act.

Assuming that the articles of incorporation will be corrected in the manner suggested and again offered to you for filing, I beg to advise, in answer to your second question, that in my opinion the sum of $25.00 is the proper fee for filing such articles as these. Section 176, General Code, paragraph 4, provides that:

> "For the filing of articles of incorporation of a mutual life insurance corporation having no capital stock, or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock the secretary of state shall charge and collect a fee of $25.00, "except as hereinafter provided."

The exception refers to certain societies and associations enumerated in paragraph 5 of the section, and being societies and associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, and for the filing of which articles of incorporation the secretary of state is to charge and collect a fee of $2.00. The proposed corporation is clearly a mutual corporation. Furthermore, it is clearly not organized strictly for benevolent or charitable purposes; on the contrary it is formed exclusively for the mutual benefit of its members. It is not such a corporation as is described in the last part of paragraph 5 of section 176. Therefore, the matter of the fee for filing such articles of incorporation is governed by paragraph 4 of section 176, and said fee is $25.00.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 359.

CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION OF THE AMERICAN MULTIGRAPH COMPANY—PREFERRED STOCK.

The certificate of amendment to the articles of incorporation of the American Multigraph Company are legal and should be filed.

Under section 8668 the holders of preferred stock may be given the right to receive dividends of more than eight per cent. in the aggregate, provided that

not more than eight per cent. of such dividends shall be in preference to all other stockholders. They may, therefore, be entitled to aggregate dividends of eleven per cent., seven per cent. of which shall be preferred.

COLUMBUS, OHIO, September 14, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of August 29th, enclosing proposed amendment to the articles of incorporation of the American Multigraph Company, and requesting my opinion as to the legality of the same.

The certificate of amendment is in form a substitution of an entirely new fourth article for the corresponding article of the original articles of incorporation, which said article stated the amount of the authorized capital stock of the corporation and the number of shares into which it was divided, and the par value thereof. The question was at once raised in my mind as to the propriety of the procedure adopted by the corporation in view of that provision of section 8719, General Code, which is as follows:

> "The capital stock of a corporation shall not be increased or diminished * * * by amendment."

However, by examination of the original articles of incorporation of the company together with several increases and reductions of capital stock filed in your office by the corporation, I have ascertained that the amount of the authorized capital stock, the portion thereof which is preferred stock, the par value of the shares and their number are all the same in the amended articles as what the corporation was entitled to have under such certificate of reduction filed by it, being the last change in its capital stock. (Certificate of reduction filed May 20, 1910.)

The only change then that has been made in the articles of incorporation of the company consists of the minutely detailed provisions of amended article fourth concerning the dividends payable to the holders of preferred stock, the right of the company to redeem such stock, the obligation of the company to maintain a surplus for the payment of dividends upon preferred stock and the voting powers of holders of preferred stock, etc. These provisions are too lengthy to be quoted herein. I have examined them carefully and find ample authority for each specific provision thereof in the following sections of the General Code:

Section 8668:

> "When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent., payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative."

Section 8669:

> "A corporation issuing both common and preferred stock may create designations, preferences and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, pre-

ferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof."

Section 8670:

"Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been exhausted, and then only for such amount as remains unpaid. Such liability in no event shall exceed that fixed by law for the common stock of such corporation."

Section 8671:

"On the insolvency or dissolution of the corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities, the full payment of its par value, before anything is paid to the common stock."

I may add that the question as to whether under section 8668 the holders of preferred stock may be given the right to receive dividends of more than eight per cent. in the aggregate, provided that not more than eight per cent. of such dividends shall be in preference to all other stockholders has been before this department on more than one occasion. The ruling of the department has been that such a provision is lawful, and I have concurred in that ruling.

I am of the opinion, therefore, that the provision of the certificate of amendment to the general effect that the holders of preferred stock shall be entitled to aggregate dividends of eleven per cent., seven per cent. of which shall be preferred, is legal under section 8668.

The remaining provisions of the certificate of amendment are all justifiable in my opinion as "designations, preferences, voting powers, restrictions and qualifications" within the meaning of section 8669, and in particular the provision as to the retirement of preferred stock is proper under the latter portion of that section. Inasmuch as no increase or diminution of capital stock of the corporation has been made, and inasmuch as in my opinion the remainder of article fourth constitutes matter "which lawfully might have been provided for originally in such articles" in the meaning of section 8719, and inasmuch also as the certificate evidences full compliance with sections 8720 and 8721, General Code, which provides proceedings by which amendments may be effected, I am of the opinion that it is your duty to file and record the certificate of amendment of the American Multigraph Company which I return herewith.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

362.

USURPING EXECUTIVE COMMITTEE—APPOINTMENTS TO FILL VACANCY RECOMMENDED BY TWO COMMITTEES, EACH CLAIMING TO BE THE DULY AUTHORIZED COMMITTEE—DUTY OF STATE CENTRAL COMMITTEE AND OF SECRETARY OF STATE.

Where two presumptive executive committees each claiming to be the duly authorized committee of their party, recommend a candidate for appointment to a vacancy in the board of deputy state supervisors of elections, the question as to which committee is to be recognized must be left to the state central committee.

COLUMBUS, OHIO, September 15, 1911.

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

DEAR SIR:—You have requested my opinion as to the proper solution of a problem which has arisen in your department with reference to the appointment of a Republican member of the board of deputy state supervisors of elections for a certain county, caused by the rival recommendations of two committees, each purporting to be the rightful Republican executive committee for that county.

An abridged statement of facts, so far as pertinent to the question, are these:

> "On May 21, 1910, the Republican central committee of Jackson county elected an executive committee for that county, which committee was officially recognized by the Republican state central committee.
>
> "On July 8, 1911, the Republican central committee of Jackson county passed a resolution purporting to dissolve the existing executive committee of Jackson county and elected a new executive committee in its stead.
>
> "Executive committee No. 1, elected May 21, 1910, and executive committee No. 2, elected July 8, 1911, have each recommended a candidate for appointment to the vacancy in the board of deputy state supervisors of elections for Jackson county, and the question arises as to which recommendation is to be followed, if either, by the secretary of state in making the appointment, or if neither is to be followed, then, as to what is the proper procedure under the existing circumstances."

Section 4807 of the General Code provides as follows:

> "If, within five days after such vacancy occurs in the membership of a board of deputy state supervisors, the executive committee of the party entitled to the appointment to fill such vacancy recommends a qualified person to the state supervisor, he shall appoint such person to fill such vacancy for the unexpired term. If no such recommendation is made, the state supervisor shall make the appointment as provided in this chapter."

Under this section, if a qualified person is recommended for the appointment to the board of deputy state supervisors of elections within the proper time, by the proper committee, then the secretary of state must appoint that person. He has no discretion. In the present instance there is no question

raised as to the qualification of the person or persons, or as to the time; the doubtful proposition is as to which is *the* executive committee. And how is this to be determined? Is the matter of the determination to devolve upon the secretary of state, or must we look for statutory direction in this contingency?

Section 4808 of the General Code provides the answer. Such section reads:

> "When recommendations are made to the state supervisor for appointment to new terms or to fill vacancies in the office of deputy state supervisor by more than one committee, each claiming to be the rightful executive committee of a political party entitled to recommend qualified persons for appointment on such board, such state supervisor, before making any such appointment, shall notify the chairman of the state central committee of the political party entitled to such appointment, and he shall recognize that committee as the rightful executive committee which such state central committee shall certify to be the rightful committee of such party. If such committee fails to make such certification for ten days from the giving of such notice, the state supervisor shall determine which of such disputing bodies or committees is the rightful committee of such party and shall make the appointment as provided in this chapter."

The statute states specifically and unequivocally,

> "When recommendations are made by more than one committee, each claiming to be the rightful executive committee * * * such state supervisor before making any such appointment, shall notify the chairman of the state central committee of the political party entitled to such appointment, and he shall recognize that committee as the rightful executive committee which such state central committee shall certify to be the rightful committee of such party."

The statute is mandatory. No discretion is left to the secretary of state. The moment the condition specified in the statute exists, he must do one thing, and only one; he must notify the chairman of the state central committee of the party and abide by the decision of that committee, as to which is the rightful executive committee entitled to make the recommendation. As to the foundation upon which the respective committees base their claims, or as to the sufficiency or propriety of these claims, he has no concern.

The objection that as there can be only one rightful executive committee, therefore, one proper recommendation, and, therefore, no necessity for a reference to the state central committee for the purpose of deciding between the conflicting claims of the self-styled executive committees, has no force, for two reasons: First, because the wording of the statute is, not "the rightful committee," but "committee claiming to be the rightful executive committee;" and second, because there is no way provided by which the merits of the respective claims of the respective executive committee can be tested.

To hold otherwise would be to place the power of arbitrary declaration in the hands of the secretary of state.

Other apparent objections might be urged, such as the one that the primary election enactments are rendered nugatory so far as is held operative, but upon examination none of these objections will be found to stand the test of proper legal interpretation or sound logical analysis, while on the other hand the conclusion, irresistibly forced upon us by a reading of the statute, finds support and confirmation in the unvarying policy of the legislature and courts of

this state in leaving to the respective political parties the settlement of their own disputes and the control and management of their own internal affairs.

Therefore, my ruling is that the situation here presented is one in which the secretary of state should leave the determination as to which is the rightful Republican executive committee of Jackson county to the state central committee of that party.

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

371.

NOTICES OF ASSESSMENT AGAINST THE STATE FOR SEWER IMPROVEMENTS—SECRETARY OF STATE NOT REQUIRED TO ACKNOWLEDGE SAME.

As there is no manner provided by law for the service of summons in civil cases except as provided in enabling acts, the secretary of state is not required to acknowledge service of notice of a proposed sewer assessment.

COLUMBUS, OHIO, September 16, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your communication of the 17th inst., wherein you ask whether it would be proper to comply with letter of R. Y. McCray, city clerk of Cleveland, Ohio, requesting you to "sign acknowledgment on back of second notice inclosed."

Said notice being directed to "the state of Ohio" and giving notice of a proposed sewer improvement and assessment to the "owner of each parcel of property to be assessed for said sewer as shown by names appearing upon the tax duplicate, who are residents of the county of Cuyahoga."

Under the statutes such notices are to be served "in the manner provided by law for the service of summons in civil cases." (Section 3818, G. C.)

Since generally the state cannot be sued without an enabling act which usually provides upon whom service is to be made, and since section 194 of the General Code permitting certain suits for fees paid to the secretary of state under protest, provides for service of process upon the attorney general who shall represent the state, and as there does not seem to be any statutory provision rquiring service of summons on the secretary of state in matters wherein the state of Ohio is a party defendant, I am of opinion, therefore, that you are not called upon to sign an acknowledgment of service of the notice concerning which you make inquiry.

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

381.

NOMINATION AND ELECTION—CANDIDATES—MUNICIPAL COURT OF CLEVELAND, OHIO.

Where there is an act which is general in its terms and applicable to a multitude of subjects and another act is passed with regard to one of the particular subjects and making special and different provisions therefor, the latter act should be construed as an exception to the general act unless its terms provide otherwise.

Under this rule of construction, the act relating to the election of candidates to the municipal court of Cleveland is exclusive and its terms provide the only possible means of nomination and election of its officials provided for therein.

COLUMBUS, OHIO, September 20, 1911.

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

DEAR SIR:—Your verbal inquiry as to whether or not section 5 of the act passed May 10, 1911 (102 O. L., page 155), is exclusive, has received the most careful consideration of this department. Said section 5 of the act aforesaid is as follows:

> "The judges of the municipal court including the chief justice shall be nominated by direct vote, unless the city controlling committee of any party shall, by a majority vote, at least forty days before the time fixed by law for a primary, direct its candidates for said positions to be nominated by delegate conventions, the delegates to which shall be elected at the primary, in which case they shall be nominated. And they shall be elected by the electors of the city of Cleveland. The first election of said judges shall be held at the regular municipal election of 1911, at which time three judges shall be elected for two years and three judges and the chief justice for four years. At the regular municipal election next preceding the expiration of the term of office of each judge a successor shall be elected for a term of four years. The term of office of each judge shall commence on the first day of January next after his election and he shall hold office until his successor is elected and qualified."

My answer to your inquiry is in the affirmative. It is argued by some in Cleveland, I am informed, that section 5 of the act aforesaid is not exclusive with reference to the nomination of judges of the municipal court of Cleveland, but that the nominations for said judges may be made by petition under favor of section 4996 of the General Code.

I have at hand the brief of Hon. Newton D. Baker, city solicitor of Cleveland, a very able and distinguished lawyer, addressed to E. W. Horn, clerk of the board of deputy state supervisors and inspectors of elections, wherein the view is advanced that an alternative method of nomination is provided because section 4996 of the General Code has not been repealed. It is urged by Mr. Baker that the language of the sections of the General Code, to-wit, 4996 et seq., is universal and that the principle of construction applying is that the language should be given full effect, unless there is some unnecessary inconsistency between it and some other statute.

Mr. Baker further advances the idea that no such inconsistency seems to exist, and he is, therefore, of the opinion that independent candidates securing

the requisite number of signatures to their petitions and otherwise complying with the requirements of the statutes regulating nominations by petition are entitled to have their names on the ballot.

I subscribe entirely to the principle of construction that he announces, but I am not able to concur in his conclusion that no inconsistency exists between section 4996 of the General Code and section 5 of the act under consideration.

I might first revert to sections 4949 et seq., of the General Code, which provides how candidates for public office are to be nominated. These sections recognize what might be called "the primary method of making nominations."

Section 4950 of the General Code provides as follows:

> "Nothing in this chapter shall repeal the provisions of law 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 herein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary."

Section 4996 of the General Code provides:

> "Nominations of candidates for any county, township, municipal or ward office may be made by nomination papers, signed in the aggregate for each candidate by not less than three hundred qualified electors of the county or fifty electors of the city or twenty-five electors of the township, ward or village, respectively. In counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for each fifty persons who voted at the next preceding general election in such county."

The sections which I have just quoted are to be found in Chapter 6, Title 14, Part I.

Section 4992 of the General Code, found under Chapter 7, of the said title, provides as follows:

> "Except as provided by the preceding chapter of this title, nominations of candidates for public office may be made as herein provided by a convention, caucus, meeting of qualified electors, primary election by such electors or central or executive committee representing a political party, which at the next preceding November election for state officers polled at least one per cent. of the entire vote cast in the state. One nomination may be made for each office to be filled at the following election, and when not invalidated or withdrawn, the names of the candidates so nominated shall be printed on the ballot. The nominations so made to be valid must be filed as hereinafter provided."

From the foregoing it will appear that there are three different methods of making nominations under the general statutes for municipal officers.

Summarizing from the statutes before quoted, these three methods are:

1. *Compulsory primary*, where the party polled at least one per cent. of the entire vote cast therein in the municipality.
2. *Nominations by petition.*

3. *Nomination of candidate by convention, caucus, etc.*, which is a privilege accorded to a party polling more than one per cent. of the total vote cast in the state at the last election and less than ten per cent. of that cast in the municipality.

Now, the question to be considered is whether section 5 of the act under consideration may be harmonized with either of the statutes quoted, or the methods therein provided for, or with the scheme denoted by either of the three methods.

To start with, section 4950 of the General Code has no effect or control over section 5 of the act aforesaid, because section 5 of the act aforesaid is not embraced in Chapter 6 and has no place thereunder, it being a special statute in relation to the city of Cleveland.

Now, the sections that I have quoted provide for, as aforesaid, three methods of nomination: (a) direct primary, (b) nomination by petition, (c) nomination by convention, caucus, etc., where the party at the next preceding November election for state officers polled at least one per cent. of the entire vote cast in the state.

It will be noted that the last does not provide for nomination by petition.

Now, then, section 5 of the act aforesaid provides that judges shall be nominated by direct vote, unless the city controlling committee of any party shall, by a majority vote, at least forty days before the time fixed by law *for a primary*, direct its candidates for said positions to be nominated by delegate conventions. It will be seen that two methods are provided in section 5: (a) direct vote, (b) nomination by delegate conventions. It will appear clear that section 5, insofar as it provides for nomination by a delegate convention, is clearly in conflict with each of the foregoing, and said section 5, so far as it provides for a delegate convention, provides a method entirely different from each of the three sections aforesaid.

The intent of the legislature in the act of May 10, 1911 (102 O. L. 158), is further shown by section 29 thereof, providing for the election of a clerk. Said section 29 is in part as follows:

> "At the municipal election of 1911 and every four years thereafter, there shall be nominated and elected a clerk of the municipal court in the same manner as other municipal officers are nominated and elected." * * *

It will be noted that it is provided therein that the clerk of the municipal court shall be nominated and elected in the same manner as other municipal officers are nominated and elected. It, therefore, appears that the *clerk may be nominated by* that *one of the three general methods* above described which is appropriate in a particular case, and *cannot be nominated in the manner provided in section* 5.

This appears as one of the first reasons why section 5 is exclusive, but there is another reason that we think is controlling, and that is the inconsistency of section 5 with either of the other three methods hereinbefore pointed out. Lewis Sutherland on "Statutory Construction," section 346, lays down this doctrine: (I shall quote the entire section.)

> "Sec. 346. PARTIAL CONFLICT RESOLVED INTO AN EXCEPTION. The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. But, in the nature of things, contradictions cannot stand together. Where there is an act or provision which is general, and ap-

plicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act. That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate. In adjusting the general provisions in a general act to the particular provisions of a special act, considerations of reason and justice, and the universal analogy of such provisions in similar acts, are proper to be borne in mind, and ought to have much weight and force. *A local act provided that the auditor of a particular county should receive an annual salary of* $700 *in full for his official services. On the following day a general act was passed imposing additional duties on auditors; and it provided a compensation by a percentage on certain funds. It was held that these were to be construed as one act, and that the first act exclusively controlled as to the particular county.* A general act made the term of revenue commissioners four years; by another act, passed the same day, the charter of a particular city was amended so as to make the official term of its revenue commissioners two years; it was held that this amendment made a special exception to the general rule. If an act in one session authorizes a corporation to sell a particular piece of land, and in another prohibits it from selling any land, the first section is not repealed, but will be treated as creating an exception. An absolute direction in one section to set off for a widow and children the decedent's homestead, free from all his debts, though absolute in terms, was held qualified by a subsequent section, which in terms embraced such homestead, subjecting it to debts contracted prior to the passage of the act."

The principles enunciated in the foregoing not only clearly apply, but the examples given fit the case under consideration exactly. The following from "Black on Interpretation of Laws" is, we think, to use a popular but expressive phrase, "on all fours" with the present consideration. At page 117 he says:

> "A local statute, enacted for a particular municipality, for reasons satisfactory to the legislature, is intended to be exceptional and for the benefit of such municipality." * * *

It might be observed in a general way that the act found in 102 O. L., page 155, is an amendment to an act providing for and establishing a municipal court in the city of Cleveland, passed May 10, 1910. The act not only provided for the method of nomination of a court, but the same act provided for the creation of the very court itself. It specified in considerable detail all the provisions in relation to the creation, jurisdiction, nominations and election of a court and all of its officers. It is well known that for the past few years there has been before the legislature almost constantly proposed laws in reference to the primaries, delegate conventions, nominations by petition, nominations by convention, caucus and otherwise, and in the face of all of the proposed laws, to-

gether with a great many acts that were passed on this subject, it is hard to conceive how any other meaning was intended by the legislature than that expressly stated in section 5, so that, aside from the rules of construction which are controlling, there is no reason to believe in a given case that the legislature had in mind any exception to what is contained in said section 5. Further, a review of all the election statutes will disclose, I think without exception, that the legislature in reference to the method of nomination and election has taken pains in each instance to make an expression as to whether an exception was intended, or otherwise.

For the foregoing reasons, while desirous of honoring the widest interpretation to the statutes in reference to nominations of candidates, I am constrained to hold that section 5 is exclusive and provides the only method for nominating candidates for the municipal court of Cleveland.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

COLUMBUS, OHIO, September 22, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of September 20th, enclosing a letter from T. L. Gifford, attorney-at-law, and proposed substitute purpose clause of the articles of incorporation of the Independent Order of Rangers, as to the original of which I recently rendered you an opinion.

The proposed substitute purpose clause is as follows:

> "For the purpose of conducting and operating a voluntary fraternal secret society, not for profit, having a representative form of government, and having a supreme governing, or legislative body, and subordinate lodges into which members shall be elected and initiated, or admitted, and which shall be conducted in accordance with the constitution, laws, rules, regulations and prescribed ritualistic ceremonies adopted by the supreme governing, or legislative body; provided, however, that neither the supreme governing body nor any subordinate lodge shall have any right or authority to issue any insurance certificate or enter into any insurance contract with any of its members."

Upon consideration thereof I am of the opinion that the same is in all respects legal and that a corporation formed for this purpose would be a "secret society" within the meaning of paragraph 5 of section 176 of the General Code, and in no sense a "mutual corporation" within the meaning of paragraph 4 of that section.

With respect to other matters referred to in my former opinion I beg to advise that the proposed substitute is similar to the original draft.

I therefore advise that you may lawfully receive and file articles of incorporation of the association referred to when presented to you, embodying the purpose clause aforesaid, and that the fee chargeable for filing the same would be two dollars.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

459.

CERTIFICATE OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE REPUBLIC ACCIDENT INSURANCE COMPANY—INCREASE OF PAR VALUE OF SHARES.

A corporation cannot increase the par value of its shares by amendment to its articles of incorporation.

COLUMBUS, OHIO, November 10, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of November 3d, transmitting the proposed certificate of amendment to the articles of incorporation of the Republic Accident Insurance Company, and requesting my opinion as to the right of the company to amend its articles of incorporation in the manner therein set forth. The copy of the amendment set forth in the certificate is as follows:

> "*Resolved*, That the articles of incorporation of the Republic Accident Insurance Company be and the same are hereby amended, so as to change the corporate name from the Republic Accident Insurance Company to the Republic Casualty Company, and so as to change the capital stock from one hundred thousand dollars ($100,000.00) divided into one thousand (1,000) shares of one hundred ($100.00) dollars each, to one hundred thousand dollars ($100,000.00) divided into ten thousand ($10,000) shares of ten dollars ($10.00) each."

Insurance companies are not given express power to amend their articles of incorporation but may exercise this power, of course, under the general law, section 8719. This section of the General Code provides as follows:

> "A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> 1. So as to change its corporate name, but not to one already appropriated, or to one likely to mislead the public.
>
> 2. So as to change the place where it is to be located, or its principal business transacted.
>
> 3. So as to modify, enlarge or diminish the objects or purpose for which it was formed.
>
> 4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

While this section does not expressly prohibit a change in the capital stock by amendment, yet the effect is the same, because section 8719, standing by itself, could not have been intended to apply to changes in the capital stock. Such section is a grant of power and is, therefore, subject to the application of the rule that the expression of one thing is the exclusion of all others; furthermore, all changes in capital stock which may be made by a general corporation must be made in the manner provided by sections 8698 to 8700, inclusive, General Code. The changes therein provided for include changes in the par value of the shares as well as in the total authorized capital stock.

I may add that for the reasons heretofore stated, in other opinions to you, I am of the opinion that all possible changes in the capital stock of an insurance company other than life are provided for by section 9531.

For all of the foregoing reasons I am of the opinion that a corporation formed for the purpose of insuring against accident may not change the par value of the shares of its stock by amendment to the articles of incorporation.

I may add that the change of names sought to be made by the amendment is within the power of the corporation and may be accomplished in this way.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

497.

CORPORATIONS--ARTICLES OF INCORPORATION—PURPOSE CLAUSE—RIGHT TO USE NAME WHICH IS MISLEADING.

It is illegal in this state for persons to form an association in the guise of a corporation "not for profit" when the real object as disclosed by the articles of incorporation is the promotion of the pecuniary benefit of its members.

2. It is in the discretion of the secretary of state to determine whether or not a corporation name is misleading.

COLUMBUS, OHIO, December 20, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of December 15th, requesting my opinion as to the legality of the purpose clause of the articles of incorporation of the John Robert Crouse Savings & Trust Association submitted to me therewith, and also as to the right of such corporation to use the name selected.

In my opinion you may not lawfully file and record the articles of incorporation submitted to you for the reason that the purpose clause of the association as set forth therein, whether in itself lawful or unlawful, and whether single or multifarious, measured by the rule in State ex rel. vs. Taylor, 55 O. S. 67, is clearly for the pecuniary profit of the members thereof. It is not lawful in this state for persons to form an association in the guise of a corporation "not for profit" when the real object of the incorporators, as disclosed by the articles of incorporation, is the promotion of the welfare of its members by any form of business enterprise or management which will reap a pecuniary profit for them. The clause in question expressly states that the welfare of the members of the association is to be promoted in part by the investment of money and the disbursement of interest, profits and avails thereof, and by disposing of the same in part to its members or their legal representatives.

Again, I do not feel that the secretary of state should permit a corporation of this kind to use the name "Savings and Trust Association."

The question is scarcely one of law inasmuch as under section 8628, General Code, it is incumbent upon the secretary of state in the exercise of discretionary power to determine in the first instance whether or not the corporate name chosen by the signers of articles of incorporation "is likely to mislead the public as to the nature or purpose of the business its charter authorizes." The name "Savings and Trust Association" is one which has a definite significance in our statute law as referring to a certain class of banking corporations. It

would seem, therefore, that the use of a name containing the sequence of words "Savings and Trust Association" by a corporation other than a savings and trust company would have a tendency to mislead the public as to the nature of the business authorized by the charter of such corporation.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

131.

(To the State Registrar of Automobiles)

OFFICES INCOMPATIBLE—STATE REGISTRAR OF AUTOMOBILES AND CLERK OF COURTS—TEMPORARY AND PERMANENT ABSENCE DISTINGUISHED.

A holder of the office of clerk of courts of Ashland county who accepts the position of state registrar of automobiles cannot retain the former office. The second position necessitates a permanent absence from the office of the former and as it furthermore demands substantially all of the time and attention of its incumbent, the occupancy of such position would make impossible the demand of the law that the clerk of courts be found at all office hours in his office.

COLUMBUS, OHIO, February 24, 1911.

HON. JOSEPH A. SHEARER, *State Registrar Automobiles, Office Secretary of State, Columbus, Ohio.*

DEAR SIR:—You inquired of me verbally yesterday as to your right to continue to hold the office of clerk of the court of Ashland county, Ohio, which position you have held for some time. You further informed me that your term as clerk will expire in August, 1911, and further that you have been appointed to the position of state registrar of automobiles in the office of the secretary of state, which said latter office is in Columbus, Ohio. I assume that the duties of your position as state registrar of automobiles which you are now occupying requires all of your time, and requires that you should remain at Columbus.

I am of opinion that your acceptance of the position of state registrar of automobiles, and your being in this city to discharge the duties thereof, and it being necessary that you remain here for that purpose, works an abandonment, in contemplation of law, of your office as clerk of court of Ashland county. The presumption of law is that one elected to an office, such as clerk of court, may ordinarily be found at the office. True, there are exceptions to the rule, growing out of temporary absence, sickness or other matters that customs justify, but it is not the intention of the law that one may accept another office requiring his presence elsewhere and retain an office in his home county to be filled by deputies. From what you stated, I take it that you do not expect to return to Ashland during the term of office for which you were elected. This is not an instance of temporary absence from Ashland county or inability for the time being to perform the duties of the office of clerk of court, but one wherein you have accepted a permanent appointment in Columbus, the duties of which will require your whole time and attention, and such a situation is entirely inconsistent with the proper performance by you of the duties of clerk of the court of Ashland county.

Assuming that you desire to retain your present position this department advises that you tender your resignation as clerk of the court of Ashland county.

This opinion is in harmony with one rendered by my predecessor on April 21, 1910, to Hon. E. B. Keck, acting mayor of the village of McArthur, Ohio.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

P. S. This case is to be distinguished from the Mayor Anderson case at Fostoria in this, that Mayor Anderson's absence was held by the court to be but temporary.

A 390.

REGISTRATION OF AUTOMOBILE DEALERS—CERTIFICATES—CHANGE OF FIRM MEMBERSHIP OR FIRM NAME.

As the object of the registration statutes is to afford a means of identification of dealers in motor vehicles, a certificate of registration issued to a firm no longer applies to the remaining members where one member withdraws his connections with the firm.

The same rule applies when a firm remains the same but changes the firm name.

COLUMBUS, OHIO, September 23, 1911.

HON. J. A. SHEARER, *Registrar of Automobiles, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your request for an opinion upon the following questions:

> "Early in the year we issued to the firm of King-Dillow & Sons, certificate of registration as dealers, and assigned to them a distinctive number. Since that time Mr. King has withdrawn from the firm, and the firm as it is now constituted is known as C. C. Dillow and Son. Now the question arises can the firm as now constituted retains the registration which was issued to King-Dillow & Sons? Would we be authorized to issue to this firm certified copies of the original registration number issued to King-Dillow & Sons?
>
> "We also desire your opinion upon the following question:
>
> "A firm which has registered as dealers in * * * had assigned to them a distinctive number, changes their firm name, but retains all of the original members of the firm, can they, under the law, operate under the registration issued in the name of the original firm, and are we authorized to issue to the firm as now constituted certified copies of their original registration number?"

Answering your first question I desire to cite section 6301 of the General Code, which is as follows:

> "A manufacturer or dealer in motor vehicles shall make application for the registration, in a like manner, as hereinbefore provided, of each gasoline, steam, electric or other make of motor vehicle, so manufactured or dealt in, and pay a registration fee of ten dollars for each

make of motor vehicle named therein, to be determined by the motive power of such vehicles. Thereupon the secretary of state shall assign to each make of motor vehicle therein described a distinctive number which must be carried and displayed by each motor vehicle of such make in like manner as provided in this chapter while it is operated on the public highway until it is sold or let for hire. Such manufacturer or dealer, so registering a make of motor vehicle, may procure certified copies of such registration certificate upon the payment of a fee of two dollars for each such copy. With each of such certified copies the secretary of state shall furnish two placards with the same numbering provided in the original registration certificate."

It is apparent from a reading of the above section that it is intended primarily to afford a means of identification of dealers in motor vehicles; and anything which tends to make identification difficult or uncertain is contrary to the plain purpose of this statute. It is a familiar principal of law that the withdrawal of a member of a firm *ipso facto* dissolves the firm, and accordingly upon the retirement of Mr. King, the firm of King-Dillow & Son ceased to have a legal existence. The firm of Dillow and Son is a new entity—entirely distinct from King-Dillow & Son, and a transfer to the above named firm of the certificates issued in the name of King-Dillow & Son would be misleading to the public and contrary to the statute. I am, therefore, of the opinion that the certificate issued to King-Dillow & Son cannot be transferred to the firm of Dillow and Son.

In answer to your second question I beg to say that a change of a firm name without a change of membership would render identification difficult, if not impossible. Identification being the principal object of the statute, as heretofore stated, the transfer of the certificate issued in one firm name to a firm of a different name, although composed of the same persons as the former, would be unwarranted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Board of Deputy State Supervisors and Inspectors of Elections)

B 280.

TELEPHONE IN PRIVATE RESIDENCE OF CLERK AND DEPUTY CLERK OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—ALLOWANCE OF EXPENSE—COUNTY COMMISSIONERS.

As the expense of installing a telephone in the private residence of the clerk and deputy clerk of the board of deputy state supervisors of elections is not an expense whose amount is fixed by law or which is authorized to be paid out of the county treasury upon voucher of the board, a claim for such expense may not be allowed except upon approval of the county commissioners under sections 4821 *and* 2460, *General Code.*

June 27, 1911.

HON. W. B. GONGWER, *Deputy Clerk, Board of Deputy State Supervisors and Inspectors of Elections, Cleveland, Ohio.*

DEAR SIR:—Under date of May 13th you submitted for my consideration the following:

"Acting under authority of section 4821 of the General Code, some six months ago the board of deputy state supervisors and inspectors for Cuyahoga county by resolution duly passed at a regular meeting of said board, authorized the installation in the homes of the clerk and deputy clerk of this board and payment therefor by the board of main line telephones. The board took this action with a view to increasing the efficiency of the office for the reason that the board felt the business of the office was of such importance as to preclude the use of party line telephones.

"Several weeks ago when bills for said services were presented by the telephone companies, vouchers were forwarded to the county commissioners for the payment of the same. The legal adviser of the county commissioners acting as he said under authority of section 4821 declared the payments to be illegal.

"Will you kindly give us at your early convenience your opinion of the authority of our board in this matter, and whether or not the bills in question constitute a legitimate expenditure, and if so, whether the county commissioners must pay the same?"

Section 4821 of the General Code provides:

"*All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor.* In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

Section 4822 of the General Code provides:

"Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. *Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it.*"

Section 4942 of the General Code provides:

"*In addition to the compensation provided* in section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall

receive for his services the sum of five dollars for each election precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk under this section shall in no case be less than one hundred and twenty-five dollars each year. *The additional compensation provided by this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board.*"

Section 4944 of the General Code as amended 101 O. L. 344, provides as follows:

"The registrars of each election precinct in such cities shall be allowed and paid for their services as registrars four dollars per day and no more for not more than six days at any one election. In registration cities having a population of three hundred thousand or more by the last preceding federal census, the judges of election, including the registrars as judges and the clerks of election, shall each be allowed and paid ten dollars for each general election and five dollars for each special election, at which they serve and no more, either from the city or county. In all other registration cities, the judges of election, including the registrars as judges and clerks of election, shall each be allowed and paid five dollars for each election at which they serve and no more, either from the city or county. *No registrar, judge or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors made at a joint session, certifying that each has duly performed his duty according to law as such, and stating the number of days' service actually performed by each. Such allowance and order shall be certified by the chief deputy and clerk of the board to the city or county auditor.*"

Section 4945 of the General Code provides:

"For November elections held in even-numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. *Such allowance and order of the board for such expenses and compensation to such judges and clerks of elections shall be certified by the chief deputy and clerk to the auditor of such county, who shall issue his warrants upon the county treasury for the amounts so certified.*"

Section 4946 of the General Code provides:

"*The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified,* the lawful compensation of the deputy clerk and his assistants and all

registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, *and the cost of the rent, furnishing and supplies for rooms, hired by the board for its offices, and* as places for registration of electors and the holding of elections in such city, shall be paid by such city from its general fund. *Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor.* Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

Section 4991 of the General Code provides:

"All expenses of primary elections, including cost of supplies for election precincts and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, *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 them."

Section 5052 of the General Code provides:

"All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

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

Section 2460 of the General Code provides in part:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county *auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim."*

It is my opinion that in view of the provisions of section 2460 supra that the county commissioners have the right to exercise supervision over all expenses incurred by the board of deputy state supervisors and inspectors of elections, except those the amount of which is fixed by law or authorized to be paid out of the county treasury or city treasury upon voucher of the board of deputy state supervisors and certified by the chief deputy and clerk of such board as specially set forth in the various sections of the General Code relating to board of deputy state supervisors as above enumerated.

Therefore, the expenditure incurred by the board of deputy state supervisors and inspectors of elections for Cuyahoga county in authorizing the installation of telephones in the homes of the clerk and deputy clerk of the

said board, not being covered by any of the above sections specifically, the board of county commissioners have the authority by virtue of section 4821 supra and section 2460 supra to supervise such expenditure. There being no provision of law authorizing the installation of telephones in the homes of the clerk and deputy clerk, I am of the opinion, that the act of the board in authorizing telephones to be so installed is without authority of law, and the payment therefor would be illegal.

In my interpretation of the statutes I am always inclined to liberality for the purpose of accomplishing the necessities of the public. On the other hand the public have no right to impose upon the privacy of homes. The imposition is two-fold: The imposition of the individual upon the public in the way of graft and dereliction of duty, is treasonable, while the imposition of the public upon the privacy of the home is unpardonable. A public official that honestly and conscientiously, and during recognized and reasonable hours, gives his entire service to the public, owes it to his wife and family to have the privacy of the home after hours; the obligations are mutual: Those of the public to the official, and of the official to the public. Recognizing the principle that the public has no right to break into the privacy of one's home, I cannot bring myself to the conclusion that the public have a right to order a public telephone in any man's private home, and therefore, payment for any such telephone bill is unauthorized.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

139.

(To the Auditor of State)

DOW-AIKEN TAX—SOCIAL CLUBS—LIABILITY TO PAY.

A social club or any other club, giving a ball or dance, and selling intoxicating liquors and retaining the receipts, even though they sell the liquors in a building where a saloonkeeper is properly listed, is amenable under the Dow-Aiken tax.

COLUMBUS, OHIO, February 27, 1911.

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

DEAR SIR:—I am in receipt of your letter of February 16th, together with letter addressed to you by F. S. Krug of Cincinnati, Ohio.

You inquire:

> "Is a social club or any other club, giving a ball or dance, and selling intoxicating liquors, and retaining the receipts, in a building where a saloonkeeper is properly listed, amenable under the Dow-Aiken tax?"

Mr. Krug states in his letter that under a recent ruling of the United States revenue office, social clubs giving balls where intoxicating liquors are sold must take out a revenue license, notwithstanding the fact that a saloonkeeper in the same building is properly listed in the revenue office and in the county auditor's office. He also states that the county auditor notified a certain social club in the city of Cincinnati, Ohio, that their Dow tax was due, and that they refused to pay the same upon theory that the saloonkeeper renting them the hall, having a saloon in the same building, and being properly listed in the county, they were permitted thereby, under his Dow-Aiken tax, to sell liquors.

Section 6071 of the General Code, providing for tax on the liquor business, reads as follows:

> "Upon the business of trafficking in spiritous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation, or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or co-partnership, the sum of one thousand dollars."

According to the state of facts presented by Mr. Krug, in his letter, it seems to be admitted that the social club mentioned, *sells* liquor, but they claim to have the right to sell it under the license of the owner of the building, who has paid his Dow-Aiken tax.

The circuit court of Hamilton county, in the case of the University Club vs. Frank Ratterman, treasurer, and Fred Raines, auditor, of Hamilton county, under the following state of facts:

> "A *bona fide* social club, incorporated under the laws of this state, 'for the promotion' of higher education, and of social and friendly relations between its members,' and not for profit, leased a building in which were reading, dining, sitting and other rooms, and a library, which was open to the members of said club at all reasonable hours; and with the funds of said corporation it purchased food, wines, liquors, and cigars, which during the years 1886 and 1887 were furnished at such club house, to such members as desired the same, and which were there used and paid for by the persons receiving the same, at a price

fixed by the management, so as simply to pay the cost of procuring and serving them. No dividends or profits can be received by any member, nor does any officer receive a salary, and the club is not engaged in any business with a view to profit. During such period by the rules and regulations of the club, a member was authorized to introduce strangers having certain qualifications, who thereupon, for a limited period, became entitled to the privileges of such club house, and to be furnished with food, wines, liquors, etc., at the price so fixed as aforesaid—the member introducing such guest being liable for all supplies furnished him, if not paid for by such guest. During these years this privilege was occasionally exercised by the members of the club, and persons so introduced were furnished by the club with wines, liquors and other supplies, which were paid for by them or the persons introducing them.

"*Held*, That, the furnishing of such wines and liquors so purchased by said club to its members in this manner was a 'trafficking in intoxicating liquors,' within the meaning of Sec. 8, of 'An act providing against the evils resulting from the traffic in intoxicating liquors,' passed May 14, 1886 (82 Ohio L. 157), the same being a sale by said club to its members, and rendered it liable to assessment under the terms of said statute, as did also the furnishing of such liquors to the guests of such club in the manner stated."

In the case just quoted, of a bona fide social club which bought liquors for the use of the club, it was held, under that state of facts that they must pay their liquor tax.

In the case of Leonard vs. Bowland, treasurer, 4 N. P. (n. s.), page 577, it was held that the sale of four bottles of beer which were obtained from the saloon at fifteen cents per bottle, and sold for one dollar a bottle at the same place where the seller formerly carried on the business, was "a traffic in intoxicating liquors and would be liable to be assessed under the Aiken law."

I am therefore of the opinion, that a social club or any other club, giving a ball or dance, and *selling* intoxicating liquors and retaining the receipts even though they sell the liquors in a building where a saloonkeeper is properly listed, is amenable under the Dow-Aiken tax.

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

143.

STATE'S LIABILITY FOR RENTAL OF AUTOMOBILE EMPLOYED IN COLUMBUS STRIKE—FEDERAL OWNERSHIP OF SAID MACHINE.

The state would be justified in paying a reasonable amount to the trustee thereof for the rent of an automobile used in the Columbus street car strike, and rightly belonging to the federal government.

COLUMBUS, OHIO, March 2, 1911.

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

DEAR SIR:—Sometime ago you submitted to this department a specific inquiry relating to the bill submitted by Edward T. Miller, trustee, for rent of automobile during the Columbus street car strike. You desired advice as to whether or not this automobile is owned by the state, and if in any case the state should pay the bill for rental of the machine.

At the time the question was submitted there was no evidence in this department bearing upon the question, which is, in the last analysis, a question of mixed fact and law. Recently, however, Col. Miller, to whose order as trustee the voucher is made out, has presented to this department an affidavit setting forth the facts relating to the car in question, a copy of which affidavit is attached hereto. It appears therefrom that the fund out of which the automobile was purchased was derived from the use of a fund appropriated by the Congress of the United States, and disbursed by the assistant quartermaster general of Ohio, not in his capacity as such, but as United States disbursing officer and agent of the federal war department. It would seem that the machine belongs primarily to the federal government. It further appears from the affidavit that the funds appropriated by the United States government are to be applied by the disbursing officer in connection with the rifle range at Camp Perry. It further appears that the purchase of the automobile has been approved by the federal authorities as an incident to the "promotion of small arms practice" at the rifle range at Camp Perry. It appears that the automobile so owned and used was brought into service by the direction of the adjutant general and presumably with the consent of the federal authorities in the city of Columbus in the summer of 1910.

On all the foregoing facts it appears to me that the adjutant general in securing the use of this automobile acted precisely as if he had rented a similar machine from a citizen of Columbus. The automobile is not the property of the state of Ohio. It belongs to the federal government and is, so to speak, an appurtenance of Camp Perry as an agency in the promotion of rifle practice thereat.

The state of Ohio would be justified in paying a reasonable sum to the trustee having charge of this automobile for the use of the fund by him to be disbursed under the direction of the federal government. I do not, of course, pass upon the reasonableness of the amount of the voucher, nor upon any facts other than those apparent upon the face of the affidavit.

Yours very truly,

TIMOTHY S. HOGAN.
Attorney General.

187.

REQUISITION FOR FUGITIVE FROM JUSTICE—COST BILL—AUTHORITY OF OFFICIAL TO ALLOW OR DISALLOW COSTS.

The question of the reasonableness of the expenses of pursuing and bringing back a fugitive is vested in the county commissioners and their determination in this respect is conclusive.

The commissioners may or may not, as their discretion dictates, allow the expenses of a hired assistant to the agent as a necessary expense, although the hiring of such assistant is not expressly authorized by law.

The auditor of state may disallow items of cost of extradition which are unauthorized by law. Under this rule, while it would be more reasonable to allow compensation to the agent himself, nevertheless as the law does not authorize any such compensation to the agent himself, the auditor of state is vested with the authority to disallow such compensation.

COLUMBUS, OHIO, March 21, 1911.

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

MY DEAR SIR:—I beg to acknowledge receipt of your letter of March 16th, submitting cost bill in the case of State vs. Gardner, certified to you from

Shelby county for payment under the provisions of the General Code. You request my opinion as to the legality of the following items charged therein:

Per diem of agent and assistant.....$20 each
Expenses of assistant.....$27.11
Jury fee $6.00

The following provisions of the General Code are applicable to the various questions suggested by these items:

Section 2491: "When any person charged with a felony has fled to another state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, *the commissioners may pay from the county treasury* to the agent designated in such requisition or request * * * all necessary expenses of pursuing and returning such person so charged * * *."

Section 13722: "Upon sentence of a person for a 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 the seal of the court, a complete bill of costs made in such prosecution, *including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor*, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

Section 13724: "If the convict is sentenced to imprisonment in the penitentiary or to death, and no property has been levied upon, the sheriff shall deliver such certified cost-bill, having accredited thereon the amount paid on costs, with the convict, to the warden of the penitentiary."

Section 13726: "When the clerk certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff 'No goods, chattels, lands or tenements, found whereon to levy,' the warden of the penitentiary shall allow so much of the cost-bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

Section 13727: "Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of the costs of conviction, and no additional property is found whereon to levy, the clerk shall so certify to the auditor of state, under his seal, with a statement of the total amount of costs, the amount made and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

Carefully examining the above quoted sections and construing them together, I have reached the conclusion that the auditor of state may reject such items as are found by him to be incorrect in the sense that they are not authorized by law. Where a specific item is one the amount of which is not fixed by law but depends upon extraneous facts, such as the actual incurring of expenses and the reasonableness of the amount thereof, the auditor's authority, under the last of the quoted sections, must be determined by ascertaining

whether or not the power to pass upon and approve the amount of such charges is vested in any other officers or board.

With respect to the expense of returning a felon upon requisition, the authority to pass upon the necessity and reasonableness of items of such expense is clearly vested in the county commissioners. The auditor of state, then, is without authority to set aside or in any way modify the allowance of the county commissioners excepting in particulars in which they have clearly acted beyond the scope of their jurisdiction. In all other cases the action of the county commissioners is binding upon the state.

The two items concerning which you speak in this connection are aptly illustrative of the principle of action embodied in the related statutes. Section 2491 authorizes the commissioners to pay "*all necessary expenses of pursuing and returning*" the person charged with a felony, and by necessary inference the commissioners are given the authority to pass upon the necessity of a given item of expense, provided the money expended was actually and legally paid out in pursuance of the purpose authorized. In the case at hand the agent designated by the governor has paid out $20.00 as compensation of an assistant employed by him, and the sum of $27.11 as the expenses of such assistant.

It is true that no authority is found in the statute, or in this section for the employment of an assistant. If an agent, then, employs an assistant, he clearly does so at his own risk and he is not entitled, as a matter of rights, to be reimbursed for any outlay he may have made actually or constructively by way of compensation and expenses of such assistant. When, however, he presents his itemized statement to the county commissioners and it shows that an assistant was actually employed, and actually did participate in the return of a felon, the necessity of such employment must be determined and conclusively determined by the county commissioners. If, in their judgment, the necessity existed and the rate of compensation paid or agreed to be paid by the agent to the assistant is reasonable and the expenses incurred on his account were actually paid out, the commissioners clearly have the authority, in my opinion, to allow such compensation and expenses as "*expenses of pursuing and returning*" person so charged. It is not that the commissioners are allowing compensation and expenses directly to the assistant, the theory of the proceeding is that they are allowing these items of *expense of the agent*, and their discretion in this particular cannot be disturbed.

Under section 13722 the sum paid by the county commissioners must be included in the cost-bill which is to be paid under certain circumstances by the auditor state. It thus clearly appears that the finding and judgment of the commissioners in the matter of such items as above discussed are conclusive.

It is otherwise, however, with regard to per diem of agents. Section 2491 above quoted authorizes payment of expenses of agents and there is no provision so far as I have been able to ascertain which authorizes such an agent to receive any compensation whatever. I am told that it has been the practice to allow certain compensation to such agents. It is certainly more reasonable to allow compensation to the agent than it is to disallow such compensation, and allow like compensation to his assistant. We are dealing, however, with the statutes as we find them, and not as they ought to be, and I am clearly of the opinion that the county commissioners are without any authority whatever to allow any pay to the agent designated in the requisition any compensation for himself. In this particular, then, the auditor of state is clearly vested with authority to set aside the finding of the county commissioners and disallow the item.

The foregoing questions have been passed upon by former attorneys general. I should be inclined to follow the rulings of my predecessors if they had agreed

among themselves. However, I find that Hon. James Lawrence, former attorney general, advised the then auditor of state on June 15, 1885, in his opinion the county commissioners had authority to allow the agent designated in the requisition a reasonable compensation for his time and services; while Hon. Wade H. Ellis, attorney general, advised the prosecuting attorney of Lucas county, February 12, 1908, that the commissioners were without authority to allow any per diem compensation to the agent. As above indicated, I prefer the latter holding.

With respect to the third item mentioned in your question, I beg to refer you to the opinion of this department under date of December 14, 1910, in which it was held that a jury fee of $6.00 may be taxed as costs in a felony case and recovered from the defendant, but that such fee may not be included in the bill of costs which the auditor of state may be obliged to pay. I concur in the holding of this opinion.

I herewith return the certified cost-bill submitted to me.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

247.

INSPECTORS OF BUILDING AND LOAN ASSOCIATIONS—OFFICIAL RESIDENCE—TRAVELING EXPENSES.

As the salaries of inspectors of building and loan associations are not fixed by law, the appropriation items confer ample authority upon the chief inspector to reimburse his examiners for traveling expenses incurred by them in the performance of their duties.

As there is no provision requiring examiners to maintain a permanent office in any particular portion of the state, the chief inspector may assign one as the official residence of his examiners.

Street car fare to and from the office or residence of an examiner, and the office of the building and loan association of a designated place of work outside the examiners' regular place of work, or extra expense may be properly classed as traveling expenses. So also are any extra expenses incurred while absent from his home city on official business.

COLUMBUS, OHIO, May 8, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of May 5, requesting my opinion upon the following questions:

> "Should inspectors of building and loan associations be allowed expenses for street car fare, hotel and meals while making inspections in the city where they reside?
>
> "Providing an inspector whose residence is in another city be assigned to inspect an association in Columbus, should he be entitled to living expenses while engaged in that work?
>
> "What should be considered as an inspector's official residence?"

I have carefully examined the provisions of the General Code relating to the Bureau of Building and Loan Associations, sections 674 to 695, inclusive,

and find therein nothing relating in any way to the official residence, or the right to reimbursement of the examiners of that bureau. The right to appoint examiners is conferred by section 676.

I find, by examining the appropriation laws passed by the recent sessions of the general assembly, that it is customary to provide an appropriation for traveling expenses of these examiners, as well as to provide for their salaries. Inasmuch as the salaries of these examiners are not fixed by permanent law, I am of the opinion that such appropriation items confer ample authority upon the chief inspector to reimburse his examiners for "traveling expenses" incurred by them in the performance of their duties.

The exact duties of the examiners are not prescribed by law except in so far as section 684 may be regarded as prescribing them. This section provides that:

> "At least once each year the inspector of building and loan association shall make an examination into the affairs of each such association, or cause it to be made by a person appointed by him for that purpose."

While therefore, the general duty of the examiners is to examine building and loan associations, the particular duties are such as may be prescribed by the chief inspector of building and loan associations.

It follows, therefore, that the orders of the chief inspector of building and loan associations are sufficient to authorize an examiner in his department to incur an item of "traveling" expenses. It follows also that inasmuch as there is no provision requiring examiners to maintain a permanent office in a particular portion of the state, the orders of the inspector in this respect are also conclusive, that is to say, should the inspector assign one of his examiners, say to the city of Cincinnati and direct him to maintain permanent headquarters there, that city would become the official residence of such examiner, otherwise the examiner's official residence would be the same as his domicile.

Regarding your first two questions, I may be permitted to observe they are rather questions of fact than of law. An inspector who is making an examination in the city in which he resides, is not "traveling" when so doing, except in going to and from the office of the building and loan association of which he is examiner. It is not necessary for him to procure his meals at a hotel nor secure lodging other than that provided in his own residence. Such items are not properly payable as "traveling expenses." On the hand, street car fare necessarily expended in visiting the office of such building and loan association might properly, in my opinion, be regarded as such "traveling expenses." I do not mean it to be understood that any officers having a regular office is entitled to his street car fare from his home to his office, but outside of this any extra expense to which he is put in the discharge of his duties in the way of traveling, whether on the street cars or railroad, are properly expenses that the public should pay.

When an inspector is assigned to inspect an association in a city other than that of his residence, whether that city be the capital of the state or not, all expenses incurred by him while absent from his home are, in my opinion, "traveling expenses." The fact that the principal office of the bureau is in Columbus does not, in my opinion, make it the residence of all the members of the department.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

A 247.

BUILDING AND LOAN EXAMINERS—COMPENSATION— OFFICIAL RESIDENCE—ALLOWANCE OF TRAVELING EXPENSES—CONTROL OF CHIEF INSPECTOR.

The appropriation items made by the general assembly for the reimbursement of examiners of building and loan associations, confer ample authority upon the chief inspector to allow traveling expenses.

The official residence of the examiners is a matter within the control of the chief inspector.

The question of traveling expenses is one of fact, and they might be justified in the home city of the examiner under circumstances when they are incurred outside of the ordinary expenses of his living routine when incurred as an incident to his official duties.

COLUMBUS, OHIO, May 8, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of May 5th, requesting my opinion upon the following questions:

> "Should inspectors of building and loan associations be allowed expenses for street car fare, hotel and meals while making inspections in the city where they reside?
>
> "Providing an inspector whose residence is in another city be assigned to inspect an association in Columbus, should he be entitled to living expenses while engaged in that work?
>
> "What should be considered as an inspector's official residence?"

I have carefully examined the provisions of the General Code relating to the bureau of building and loan associations, sections 674 to 695, inclusive, and find therein nothing relating in any way to the official residence or the right to reimbursement of the examiners of that bureau. The right to appoint examiners is conferred by section 676.

I find, by examining the appropriation laws passed by the recent sessions of the general assembly, that it is customary to provide for their salaries. Inasmuch as the salaries of these examiners are not fixed by permanent law, I am of the opinion that such appropriation items confer ample authority upon the chief inspector to reimburse his examiners for "traveling expenses" incurred by them in the performance of their duties.

The exact duties of the examiners are not prescribed by law except in so far as section 684 may be regarded as prescribing them. This section provides that:

> "At least once each year the inspector of building and loan associations shall make an examination into the affairs of each such association, or cause it to be made by a person appointed by him for that purpose."

While, therefore, the general duty of the examiners is to examine building and loan associations, the particular duties are such as may be prescribed by the chief inspector of building and loan associations.

It follows, therefore, that the orders of the chief inspector of building and loan associations are sufficient to authorize an examiner in his department

to incur an item of "traveling" expenses. It follows also that inasmuch as there is no provision requiring examiners to maintain a permanent office in a particular portion of the state, the orders of the inspector in this respect are also conclusive, that is to say, should the inspector assign one of his examiners, say to the city of Cincinnati and direct him to maintain permanent headquarters there, that city would become the official residence of such examiner, otherwise the examiner's official residence would be the same as his domicile.

Regarding your first two questions, I may be permitted to observe they are rather questions of fact than of law. An inspector who is making an examination in the city in which he resides, is not "traveling" when so doing, except in going to and from the office of the building and loan association of which he is examiner. It is not necessary for him to procure his meals at a hotel nor secure lodging other than that provided in his own residence. Such items are not properly payable as "traveling expenses." On the other hand, street car fare necessarily expended in visiting the office of such building and loan association might properly, in my opinion, be regarded as such "traveling expenses." I do not mean it to be understood that any officer having a regular office is entitled to his street car fare from his home to his office, but outside of this any extra expenses to which he is put in the discharge of his duties in the way of traveling, whether on the street cars or railroad, are properly expenses that the public should pay.

When an inspector is assigned to inspect an association in a city other than that of his residence, whether that city be the capital of the state or not, all expenses incurred by him while absent from his home are, in my opinion, "traveling expenses." The fact that the principal office of the bureau is in Columbus does not, in my opinion, make it the residence of all the members of the department.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

263.

CONSTITUTIONALITY OF SENATE BILL NO. 40 PROVIDING FOR THE PAYMENT OF MILEAGE TO EMPLOYES OF THE GENERAL ASSEMBLY —NECESSITY FOR APPROPRIATION FUND—POWERS OF SINGLE BRANCH OF THE GENERAL ASSEMBLY—PRE-EXISTING LAW.

As there is no appropriation fund providing for the payment of railroad fare to officers of the Senate, a resolution passed by that body authorizing such payment is in conflict with article 2, section 22, of the constitution of Ohio.

Even if such a fund existed a single branch of the assembly could not provide for such compensation out of the same, unless the services were provided for by a pre-existing law, or unless a provision making the allowance be ratified by two-thirds of the members elected to each branch of the general assembly.

COLUMBUS, OHIO, June 2, 1911.

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

DEAR SIR:—You request my opinion as to whether or not, you, as auditor of state, can legally issue warrants upon the state treasurer in favor of the officers and employes of the state senate of Ohio for the aggregate amount of railroad fare to and from their respective homes and the capitol, on the basis

of two trips per month, from January 2, 1911, to date of sine die adjournment of the 79th general assembly, as provided in senate resolution No. 40, a copy of which was submitted to me with your request for my opinion. Said senate resolution No. 40 provided as follows:

> "WHEREAS, the General Code does not provide for the allowance of railroad fare to officers and employes of the general assembly, and
>
> "WHEREAS, it is but just and right that an allowance for same be made;
>
> "Therefore, be it resolved:
>
> "Section 1. That officers and employes of the senate be paid the amounts hereinafter stated, the same to represent the aggregate amount of railroad fare to and from their homes and the capitol, on the basis of two trips per month, from January 2, 1911, to date of sine die adjournment of the general assembly, and that the auditor of state be, and is hereby directed to draw his warrant on the state treasurer for the amounts hereinafter set out, and in the name of each officer and employe or their authorized agent, the said amounts to be paid out of the legislative fund."
>
> (Followed by the names of the respective officers and employes of the senate, and the amount to be paid to each.)

The only legislative fund in existence is that which was created by house bill No. 105, entitled "An act to make sundry appropriations." Said act provided as follows:

> "Be it enacted by the general assembly of the state of Ohio;
>
> "Section 1. That there be and is hereby appropriated from any moneys in the state treasury to the credit of the general revenue fund, and not otherwise appropriated, the sum of $250,000 for salaries and mileage of members, per diem of clerks, sergeants at arms, and other officers and employes of the general assembly; $5,000 for contingent expenses of the house."

This bill was passed January 26, 1911, and approved by the governor on February 6, 1911. The said act specifically provided and appropriated said sums therein stated, for specific purposes, as follows:

1. Salaries and mileage of members.
2. Per diem of clerks.
3. Sergeants at arms.
4. Other officers of the general assembly.
5. $5,000 for contingent expenses of the house.

Section 22 of article II of the constitution of Ohio provides that,

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

The appropriation act, House Bill No. 105, above referred to, does not appropriate or provide any specific fund for the payment of mileage or railroad fare for the officers and employes of the senate, and makes no provision for a contingent fund for the state senate.

The supreme court of Ohio, in the case of State ex. rel., George L. Riley, vs. John F. Oglevee, Auditor of State, 36 O. S. at page 324 held that,

> "Neither branch of the general assembly can alone appropriate money from the treasury; but where a fund is provided by law for the contingent expenses of *either branch*, the disbursement of the fund for such purposes is subject to the control of such branch."

The said Senate Resolution No. 40, above referred to, having provided that said amounts be paid out of the legislative fund, is not specific enough or sufficient to meet the requirements of the law as to moneys being paid from the treasury, as provided by said section 22 of article II of the constitution.

The supreme court of our state in the case of State of Ohio, ex. rel. Field, et al, vs. Williams, Auditor of State, 34 O. S. 218, held that,

> "A single branch of the general assembly cannot, by resolution, allow compensation for extra services performed by its sergeants at arms, such compensation being inhibited by section 29, article II, of the constitution, unless the services were provided for by pre-existing law, or the allowance be ratified by two-thirds of the members elected to each branch of the general assembly."

The railroad fare or mileage sought to be paid to the officers and employes of the senate by said Senate Resolution No. 40, aforesaid, was not provided for by pre-existing law, and said resolution having been passed by the senate only, even were there a specific fund known as the "legislative fund" as set forth in said resolution, from which to pay said mileage aforesaid, unless ratified by two-thirds of the members elected to each branch of the general assembly, would under said decision of the supreme court nevertheless be illegal and you would be unauthorized to issue a warrant upon the treasurer for the payment of the same.

In view of the decisions of the supreme court, above quoted, and of section 22 of article II of the constitution, I am of the opinion that you are without legal authority to issue warrants to said officers and employes of the state senate, as provided by said Senate Resolution No. 40.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 275.

INVENTORY OF STATE LIBRARY BY AUDITOR OF STATE—NO NECESSITY TO LIST EACH BOOK SEPARATELY.

The provisions of section 273-1 with reference to taking of inventories of departments upon the retirement of their respective heads is satisfied in the case of the state library inventory by such an examination as will substantially show that all volumes are on hand.. It is not necessarily required that every book be listed separately.

COLUMBUS, OHIO, June 24, 1911.

Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of June 19th you state:

> "In making the inventory of the state library provided under this act, is it necessary to list each book separately, indicating the name,

> subject, etc., or is it in compliance with the law to count or otherwise determine the number of volumes on file in the library, and depend upon the record of the librarian for the number of volumes in circulation? We are informed that there are, approximately 145,000 volumes in this library, a great number of which are always in circulation, thereby rendering it impossible to at any time find all the volumes in place in the library. You can readily see the enormity of this undertaking, if, under the provision of this law, it is necessary for our examiners to handle and list 145,000 volumes."

and you call my attention to section 273-1 of the General Code found in 101 O. L. 213.

Section 273-1 provides as follows:

> "The auditor of state, not more than twenty days nor less than ten days prior to the expiration of the term of office of any state official, who is the head of a department, shall send an accountant to the office of such retiring official for the purpose of making an inventory of all properties, supplies, furniture, credits and moneys, and any other thing belonging to the state, which it shall be the duty of such retiring official to turn over to his successor in office, or pay into the state treasury, and when such inventory has been made, such said accountant shall prepare a schedule thereof, and sign the same as such state accountant; one copy of which shall be delivered to such retiring state official, one copy thereof, to his successors in office, and one copy thereof to be filed with the governor, one copy thereof to be filed with the auditor of state, and one copy thereof to be filed with the attorney general."

It is my opinion that the meaning of the above section is that the auditor of state shall make such inventory of the property belonging to the office of the retiring state officials as will satisfy him that the property belonging to that department is to be found there, and that he should make such a list thereof as will show that to be a fact.

I do not believe that it is necessary to make a complete catalogue of the state library providing he can be satisfied without going to the time and expense of so doing that the number of volumes are on file in the library.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

297.

DOW-AIKEN TAX—INTOXICATING LIQUORS—THE EFFECT OF REMOVAL OF BUSINESS UPON AIKEN TAX.

A person engaged in the traffic of intoxicating liquors who discontinues business in one place, and opens in another will be taxed $1,000.00 *under section* 6071, *General Code, upon each place of business, unless under section* 6074 *he be allowed a refunding order from the county auditor upon discontinuance of business in place No.* 1.

COLUMBUS, OHIO, July 17, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of May 5, 1911, in which you ask this department for a written opinion upon the following question:

> "Can a person engage in the traffic of intoxicating liquors, who has paid the tax imposed by title II, 'Police Regulations,' chapter XV, 'Intoxicating Liquors,' General Code, commonly known as the Aiken law, during the fiscal year change the location of his business and continue the traffic without again paying said tax?"

In consideration of this question in the light of section 6071, General Code, I will not stop to consider or discuss the legislation and judicial decisions treating upon the question as to whether the assessment of $1,000 upon the business of trafficking in spiritous, vinous, malt or other intoxicating liquors is a tax or a license.

Section 6071 of the General Code provides as follows:

> "Upon the business of trafficking in spiritous, vinous, malt or other intoxicating liquor, there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

Section 6081 of the General Code provides that an accurate description of the premises where the liquor business is conducted, and the name of the owner of the premises in which the business is carried on, must be furnished the county auditor.

Section 6080 of the General Code provides that in case of failure to collect the amount due under section 6071, the county auditor shall place the amount due and unpaid upon the tax duplicate against the real estate in which such traffic is carried on, and it shall be collected as other taxes and assessments.

By the terms of sections 6071, 6080 and 6081 General Code, it was plainly the intent of the legislature to make an assessment of $1,000 on *each place* where the *business* is carried on by any person, corporation or co-partnership, and the assessment is made a lien upon the particular place where the business is conducted, whether owned by the party carrying on the business or not.

Section 6074 General Code provides as follows:

> "When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afteward discontinues such business, the county

auditor. upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained shall not be less than two hundred dollars unless such discontinuance of business has been caused by an election under a local option law or a lawful finding of a mayor or judge on a petition filed in a residence district as provided in this chapter, in which case the proportionate amount of such tax shall be refunded in full."

This section provides a method whereby any person, corporation or co-partnership that desire to change their place of business or discontinue it in such place, may secure a refunder of the assessment paid under section 6071 General Code.

Since the statute makes an assessment against the *business* of trafficking in intoxicating liquors for *each place* where such business is carried on and provides for a refunder in case any person, corporation or co-partnership desires to make a change in the location of its business or quit the business, I am of the opinion that the assessment having been paid by a particular person, corporation or co-partnership upon the business of trafficking in spiritous, vinous or other intoxicating liquors, for a particular place, there can be no change in location of the business except by taking out a refunding order as provided by section 6074, and payment of a new assessment under section 6071.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

314.

TAX COMMISSION—CONSTITUTIONALITY OF SECTION 128 OF THE HOLLINGER BILL—APPROPRIATION LAW MUST BE SPECIFIC—REPAYMENT OF EXCESS TAXES.

That part of section 128 *of the Hollinger bill which provides for an appropriation for an amount equal to such tax as the tax commission shall find to have been overpaid is in conflict with article* 2, *section* 22 *of the constitution of Ohio, because it is not specific and not limited to two years.*

COLUMBUS, OHIO, August 4, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of July 27th, submitting for my opinion thereon the following question:

"Pursuant to the provisions of section 128 of House Bill No. 491, passed May 31, 1911,the tax commission of Ohio has made a finding in favor of the above company of an amount of corporation tax that appears to have been overpaid, due the state, and have directed the auditor of state to draw his warrant on the treasurer of state in favor of said company for the amount of such taxes so erroneously paid.

"There is no question in my mind as to the authority of the tax commission to make such review and correction, and to direct me, as auditor of state, to draw warrant on the treasury. There is some question in my mind as to whether the appropriation made in section 128 is sufficiently specific to comply with the requirements of article

II, section 22, of the constitution. The last paragraph of section 128 of the act referred to reads as follows:

"'The county treasurer or the treasurer of state, as the case may be, shall pay such warrant, and there is hereby appropriated from the general revenue fund of any such county and from the general revenue fund of the state not otherwise appropriated such amount as may be necessary to pay such warrant.'

"Heretofore, in similar instances, the attorney genral has held that an appropriation, to be available, must be for a specific amount. I have no desire to withhold the payment of this tax, which has been erroneously paid by the claimants, and to which they are evidently entitled, but in view of former decisions on such matters, I desire your opinion as to whether the appropriation provided for in section 128 is sufficient for the treasurer to honor the warrant of the auditor of state."

Section 128 of the Hollinger bill, so called, being the act passed May 31, 1911, provides in part as follows:

"In case any such bank, public utility or corporation has paid the tax or fee assessed against it under mistake, and such mistake is corrected by the commission * * * so that the amount due from such bank, public utility or corporation * * * is less than the amount paid, the * * * auditor of state * * * shall upon certificate of such correction * * * draw his warrant on the treasurer in favor of the bank, public utility or corporation for the amount so erroneously paid by it. * * * the treasurer of state * * * shall pay such warrant; and there is hereby appropriated from the general revenue fund of the state, not otherwise appropriated, such amount as may be necessary to pay such warrants."

Are these provisions constitutional? This section is permanent in its effect; that is to say, will remain the law until it is amended or repealed, unless it conflicts with the constitution. The amount sought to be appropriated is undetermined.

The constitution of the state, section 22 or article II, provides:

"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."

The appropriation attempted to be made by section 128 as above quoted, is not specific. Furthermore, it is attempted to be made for a longer period than two years. For both of these reasons, section 128 of the Hollinger bill insofar as it seeks to authorize the auditor of state and the treasurer of state by their joint action to draw money from the treasury of the state is in my judgment unconstitutional.

I deem it proper to state that the infirmity of the section in this particular does not, in my opinion, affect the remaining provisions of the section itself, or of the act in general. I may also state the only relief which can be constitutionally accorded to a public utility or corporation which has erroneously paid an excessive sum of money into the state treasury, is through the legislature by means of a specific appropriation for that purpose.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

319.

DOW-AIKEN TAX—ASSESSMENT IN DRY TERRITORY—DISCRETION OF AUDITOR IN ALLOWING REFUNDER.

Section 6074, General Code, providing a tax of $1,000.00 upon the business of trafficking in intoxicating liquors applies as well to dry as to wet territory.

Under section 6089 such assessment in dry territory must carry with it a penalty of twenty per cent., and not until all of this has been paid in, can the auditor consider a refunding order.

The allowance of the refunding order is entirely at the discretion of the auditor, and he may take into consideration all surrounding facts and circumstances.

It is not for the court to restrain the treasurer from collecting such taxes nor has the court anything to do with the discretion of the county auditor in allowing a refunder.

COLUMBUS, OHIO, August 9, 1911.

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

DEAR SIR:—I am in receipt of your favor of August 7th, wherein you state:

> "I hereby request your written opinion as to the provision of section 6074, General Code, so far as the same relates to the duties of county auditors in the matter of refunding liquor tax assessments.
>
> "Does this apply to assessments in what is known as 'dry' as well 'wet' counties?"

Section 6074 of the General Code provides:

> "When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership, a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained, shall not be less than two hundred dollars unless such discontinuance of business has been caused by an election under a local option law or a lawful finding of a mayor or judge on a petition filed in a residence district as provided in this chapter, in which case the proportionate amount of such tax shall be refunded in full."

This section is one of the sections relating to the taxation upon the business of the liquor traffic in this state, which law is included between sections 6071 and 6096 inclusive, and is familiarly known as the "Aiken tax."

The supreme court of Ohio in the recent cases familiarly known as the Newark liquor tax cases, has declared that the Aiken law tax operates uniformly throughout the state, that is, in what is known as "dry" as well as in "wet" territory, and that insofar as the assessments under such law are made, the law does not take cognizance of whether the party against whom the assessment is levied is within prohibited territory or not. Such being the rulings of the supreme court, it seems to me that insofar as the question of taxation of liquor business is concerned, the question of the legality or illegality of such business is not to be considered.

I am, therefore, of the opinion that the entire Aiken law tax and all the provisions thereof operate within "dry" territory as well as "wet" territory, and that it is no concern of the state in assessing such business whether it is assessed in "wet" or "dry" territory.

Such being my view, I am of the opinion that section 6074 applies to assessments in "dry" counties as well as in "wet." To hold otherwise, would be to hold that although the Aiken law tax operates in each and every part of the state, and consequently, the state does not take into consideration whether or not the business of trafficking in liquor is prohibited, yet that certain sections of such statutes do not so operate. As far as the Aiken law tax is concerned, I can see no distinction in the matter of allowing refunders between the failure of a party engaged in the liquor business in the territory in which it is not prohibited to make due returns under the law and the failure to make returns by a party who is carrying on such business in territory wherein the traffic is prohibited.

Replying further to your inqury as to the duties of the county auditor in the matter of refunding liquor tax assessments, I invite your attention again to section 6074, quoted in the first part of this opinion, and its requirements in brief are:

> "When a person * * * engaged in such business *has been assessed* and has paid the *full amount of such assessment*, and afterwards discontinues such business, the county auditor, upon *being satisfied thereof* shall issue * * * a refunding order * * * for a proportionate amount of such assessments so paid, but the amount of such assessment so retained, shall not be less than two hundred dollars * * *."

This is all of said section that need be considered in answering your inquiry. From these provisions, it is plain that before a refunding order can be issued in any case, the full amount of the assessments must be paid into the treasury, and the auditor, nor anyone else could make a refunder or issue a refunding order until the entire assessment has been paid. Where the assessment, which in "dry territory under section 6089 must carry with it a penalty of twenty per cent. has been paid into the treasury by the person assessed, and not until then, the auditor may consider an application for a refunding order; it will be observed, under the provisions of section 6074, the matter as to whether or not a refunding order shall be issued is left entirely to the discretion of the auditor. The person applying for such refunding order *must* satisfy the auditor that he has discontinued such business, and it seems to me that under this section the auditor in satisfying himself whether the applicant has actually discontinued such business, may take into consideration such facts as in his judgment may enlighten him on this question. To consider the character of the applicant, his previous reputation, whether or not he has before violated the liquor laws, the circumstances surrounding the premises which he occupies and upon which said business has been carried on, unless all the paraphernalia usually found about a saloon or about a place where intoxicating liquors are sold lawfully or unlawfully, is removed or disposed of or destroyed, it might well be doubted if the applicant were making the application in good faith.

It seems to me further, that there are so many facts and circumstances which an auditor in satifying himself upon this question, might take into consideration that it would be impossible to enumerate or call attention to all of them, and that, therefore, as the decision of the matter is within the discretion

of the auditor the means by which he may reach his decision must necessarily be held to be within his discretion also, and it may well be said that in satisfying himself upon such question, he may not act as judges frequently do, when called upon to pass sentence on a person convicted of crime. That is, make such outside investigation personally or otherwise as may tend to throw light upon the matter under consideration.

I wish further to call your attention to the fact that section 6090 of the General Code provides that ten per cent. of the penalty imposed by section 6089 upon pesons certified to the auditor of state as trafficking in intoxicating liquors by the dairy and food commissioner under section 6087 et seq., shall be set apart and paid into the state treasury, and that the remainder shall be distributed as provided in section 6093.

It will be kept in mind that the Aiken law and the Rose law *are not* the same. The one recognizes the right to sell liquor in any part of the state upon paying tax upon the liquor business; the other recognizes the right of the people to vote the liquor business out of existence in a given county. The former, under the decision of the supreme court, provides for the enforcement of the collection of taxes without reference as to whether the territory is wet or dry; it provides that upon the business of trafficking in spiritous, vinous, malt or other intoxicating liquor, there shall be assessed *yearly* and paid into the county treasury as provided in sections subsequent to section 6071 by each person, corporation or co-partnership, engaged therein and in each place where such business is carried on by such person, corporation or co-partnership, the sum of $1,000.00.

Section 6074 provides that:

> "When a person, company, corporation or co-partnership engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, company, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid."

I see no reason for reading into the statutes the idea of voluntary payment. The court, in my judgment, has nothing whatever to do with the whole controversy except in so far as its aid is necessary to enforce the collection of the assessment.

I have no hesitancy in saying that the action of Judge Nicholas in refusing a restraining order upon the treasurer of Coshocton county is correct. It is not for the court to restrain the treasurer from collecting such taxes, and that distinguished jurist is undoubtedly right upon the question. On the other hand, the court has nothing to do with the discretion of the county auditor in allowing a refunder.

Suppose a man sold one drink of whiskey, and as a consequence was compelled to pay the Aiken-Dow tax; that within a month after such payment he was killed; that all of this occurred within three months, could it be claimed for a moment that the state of Ohio is not to refund to his estate for the nine months that he is out of business? I cannot conceive of an interpretation that would forbid this refunder. The object of the refunder is perfectly apparent. The state of Ohio does not desire to collect taxes on a traffic not in existence. The penalties provided are ample to meet all of the trouble arising from having to go to court to enforce collection. To my mind, the letter of the law, the spirit of the law and common honesty suggest the giving of the county auditor

discretion to make a refunder. On the other hand, the auditor should be quite sure that no refunder should be issued to one except a person who has beyond doubt discontinued business. The latter is sufficient protection to the public—the former is common honesty to be practiced by the state.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

324.

APPROPRIATIONS—PERRY CENTENNIAL AND PERRY MEMORIAL BUILDING—LEGISLATIVE INTENT.

The Perry Centennial appropriation bills of 1911 *and* 1912 *express clear and specific intents of their own and therefore are free and independent of, and not to be governed or restricted by the Perry Centennial appropriation bills passed May* 9, 1910.

COLUMBUS, OHIO, August 15, 1911.

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

DEAR SIR:—The answer to your communication of July 28th, in regard to the appropriations for the Perry Victory Centennial Commission of Ohio has been unavoidably delayed until this time. Your letter in regard to this matter is as follows:

> "There was appropriated in the general appropriation bill for 1911, $25,000 for 'expenses Perry memorial and centennial celebration.' The question arises as to whether any part of this appropriation can be used by the Perry's Victory Centennial Commission for the expenses of the members of the commission and any other necessary expenditures that they may have made in carrying out the provisions of the act of May 9, 1910, page 176, vol. 101, O. L. There would be no question in my mind but that this appropriation could be used for such expenses were it not for the preamble to the act referred to, which clearly indicates the intention of the general assembly that a total sum of $75,000 should be apppropriated in the aid of the erection of a permanent memorial building. Twenty-five thousand dollars of this amount was appropriated (page 176, 101 O. L.) in 1910, 'solely toward the erection of the said memorial building on Put-in-Bay island.' In addition, on the same page, is appropriated the sum of $5,000 for the use of the commission for its actual and necessary expenses. The general appropriation bill of 1911 carried an item for the commission of $25,000 for 'expenses Perry memorial and centennial celebration.' The appropriation bill of 1912 carried an item of $20,000 for the same purpose.
>
> 'I would be pleased to have your written opinion as to whether it was the intention of the legislature that these two columns, namely, $25,000 in 1911 and $20,000 in 1912, should be used solely for the purpose of the erection of a memorial building on Put-in-Bay Island, as was the $25,000 appropriated in 1910, or if any part of the appropriations of 1911 and 1912 can be used by the Perry's Victory Memorial Commission for the expenses of the members, and salaries of secretary or other employes of the commission."

The act of April 26, 1910, making the first appropriation for this centennial

and memorial is found in 101 O. L., page 175. The preamble to this act is quite lengthy, but it seems necessary, in order to arrive at the intention of the legislature, to set it out in full. The act is entitled:

> "An act making an appropriation in behalf of a Perry's victory centennial celebration and the erection of a permanent memorial on Put-in-Bay Island during the year 1913 in commemoration of the 100th anniversary of the battle of Lake Erie and of General William Henry Harrison's northwestern campaign in the War of 1812."

and the preamble is as follows:

> "WHEREAS, The state of Ohio by joint resolution of the general assembly, passed February 28, 1908, authorized its governor to appoint, and in pursuance thereof he did appoint, five commissioners to prepare and carry out plans for a Perry's victory centennial to be held during the year 1913 on Put-in-Bay Island, Lake Erie, state of Ohio, in commemoration of the 100th anniversary of the battle of Lake Erie, fought and won off that island in Lake Erie, September 10, 1813, the primary objects of the celebration to be the erection of a permanent memorial to Commodore Oliver Hazard Perry and the observance of the centenary of his naval victory and of the military campaign of General William Henry Harrison the same year, and of the peace of 1814; also to take the form of an educational, military, naval and historical exposition; and
>
> "WHEREAS, By like resolution of the general assembly adopted in 1909, the governor of Ohio was authorized to and did appoint four additional members of said commission for the like purpose; and,
>
> "WHEREAS, The governors of the states of Pennsylvania, Michigan, Illinois, Wisconsin, New York, Rhode Island and Kentucky by the unanimous votes of their respective legislatures have each since appointed five commissioners to likewise co-operate the same ends, and with said Ohio commissioners in such Perry victory centennial so to be held; and,
>
> "WHEREAS, The states of Indiana and Minnesota will be invited and are expected to also appoint commissioners for the same purpose; and
>
> "WHEREAS, Said states have taken and are expected to take further action to aid in securing said centennial and exposition; and
>
> "WHEREAS, Said commissioners of Ohio and of the other states herein named, have organized with the name 'Perry's Victory Centennial Commission,' and the Ohio commissioners have submitted to the governor and general assembly an exhaustive report embodying appropriate and practical plans for the proper celebration of said centennial anniversary; and,
>
> "WHEREAS, It is a part of the said plans to erect on said island, with the aid of the national government and the states participating in the said centennial celebration, a permanent 'Perry memorial,' combining the objects of a monument and lighthouse, wireless telegraph, meteorological and life-saving stations and aquarium, to be of perpetual usefulness for such and other purposes; and,
>
> "WHEREAS, House Bill No. 16368, introduced by Congressman J. Warren Keifer, of Ohio, as representing the Ohio delegation and appro-

priating the sum of two hundred and fifty thousand dollars in aid of the erection of said memorial in conjunction with the said centennial celebration, is now pending in congress with every prospect of favorable consideration; and,

"WHEREAS, The commission appointed by the governor of Ohio, as aforesaid, in said report to the governor recommends a suitable appropriation to carry out the plans and purposes therein outlined; and,

"WHEREAS, It is the sense of the general assembly that there shall be appropriated the sum of seventy-five thousand dollars in aid of the erection of a permanent memorial building, and an appropriation of five thousand dollars for the use of the commission for its actual and necessary expenses; therefore * * *."

From this it is clear that it was the intention of the legislature to make an appropriation or appropriations not only to erect a permanent memorial, but also in behalf of the Perry's victory centennial celebration, and the first purpose as contemplated in the appointment of commissioners was to prepare and carry out plans for a Perry's victory centennial to be held during the year 1913.

Afterwards, as further appears from the said preamble, other states and the United States were invited to participate in the said celebration, and the legislatures of the several states expressed their intention to co-operate in the said celebration; and when the Ohio commissioners submitted their preliminary report to the governor, in addition to plans for the proper celebration of the said centennial, said report included plans for the erection of a permanent Perry memorial as set forth in the said preamble. Therefore, the plan as it now exists and as it existed at the time of the passage of the said act was two-fold; first, a centennial celebration to be held in 1913 on Put-in-Bay Island; second, the erection of a permanent memorial on said island.

The last clause of the preamble would seem to indicate that it was the intention of the legislature, that is of the 78th general assembly of Ohio, to make an appropriation of $75,000 "in aid of the erection of a permanent memorial building and an appropriation of $5,000 for the use of the commission for its actual and necessary expenses," but when we come to the enacting clause, section 1, we find that the legislature did not at this time appropriate $75,000, and the only sum it appropriated was $25,000, which was specifically appropriated to be used "solely toward the erection of the said memorial building on Put-in-Bay Island." There was also an appropriation of $5,000 for the use of the commission for actual necessary expenses.

This ends the matter so far as this particular act and specific appropriation are to be considered. The said $25,000 can only be used towards the erection of the memorial building.

The 79th general assembly by the act of May 31, 1911, House Bill 566, being an act to make the general appropriations for the year 1911, made the following appropriations, "Expenses Perry memorial and centennial celebration at Put-in-Bay to be disbursed by Perry's Victory Centennial Commission of Ohio—$25,000." Taking the language of this act, "Expenses of Perry *memorial and centennial celebration*" and the title to the act previously referred to, namely, 101 O. L. 175, "Making an appropriation in behalf of a *Perry's victory centennial celebration and the erection of a permanent memorial* on Put-in-Bay Island * * " it seems to be clear that it was the intention of the last legislature (i. e., the 79th general assembly of Ohio) to appropriate $25,000 for the expenses of the *Perry memorial and centennial celebration.* This language is explicit, brief and clear and corresponds with the purposes heretofore expressed

by the legislature. It seems to me that it would be doing violence to the wording of the act as used to say that it is to be construed as modified and limited by the language used in the last clause of the preamble to the act of 1910, that appropriation, as heretofore pointed out, was to be used "solely toward the erection of the said memorial building." It may have been the intention of that legislature that subsequent legislatures should appropriate $50,000 additional to be used *solely toward the erection of the memorial building*, but the subsequent legislature (in this case the 79th general assembly) was not bound by the mere intent expressed by the 78th general assembly. If it wished to carry out said intent, all that would have been needed would have been to put in the present appropriation bill "Expenses Perry memorial" and omit the words, "and centennial celebration," but it did not do this, and this act stands by itself without any reference to former acts, and as its terms are too clear to admit of any other construction, I must necessarily hold that the act is to be construed as it reads, that is, an appropriation is made of $25,000 for the expenses of the *Perry memorial and centennial celebration*, which is to be disbursed by the Perry's Victory Centennial Commission of Ohio. This also applies to the appropriation bill for 1912 carrying a similar item of $20,000.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

329.

STATE BOARD OF ADMINISTRATION—MERGER OF APPROPRIATIONS—DUTIES OF BOARD, STATE AUDITOR AND THE STATE TREASURER.

The state board of administration under act of May 7, 1911 (102 O. L., 211) is empowered to merge appropriations into the three heads of "Maintenance," "Ordinary Repairs and Improvements," and "Specific Purposes," so as to conform to said act.

The state auditor and the state treasurer are fully authorized to open a new set of accounts so far as the appropriations are concerned, agreeably to the act aforesaid.

It would be well, however, to adopt a system which would apprise the state treasurer and state auditor of the fact that the voucher drawn for a certain purpose under the three general heads does not exceed in amount the specific sum appropriated by the legislature for any specific purpose.

COLUMBUS, OHIO, August 31, 1911.

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

DEAR SIR:—Your favor of the 29th inst. just received, wherein you inquire:

> "Can the treasurer of state and auditor of state legally merge the appropriations made by the last general assembly for the use of each institution for the year ending February 15, 1912, except specific purposes, under maintenance and ordinary repairs and improvements?
>
> "Can the auditor of state legally issue his warrant on the treasurer of state in payment of vouchers authorized by the Ohio board of administration, and draw on the funds when so merged?"

Section 7 of the act approved May 17, 1911, found in year book 102, at page 211, provides as follows:

"The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

Section 31 of the said act provides as follows:

"Each managing officer shall before each session of the general assembly present to said fiscal supervisor an itemized list of appropriations desired for maintenance, repairs and improvements and special purposes, as he considers necessary for the period of time to be covered by appropriations. The fiscal supervisor shall tabulate such statements and present them to the board of administration with his recommendations. It shall then be the duty of the board to present the needs of the institutions to the general assembly. For this purpose a per capita allowance for the inmates, patients and pupils of each of the institutions shall be arrived at and a total allowance for maintenance asked for on the basis of actual number and estimated increase. The fiscal supervisor and the board shall furnish to the governor and to the general assembly such information as may be required regarding appropriations requested. It is the intent and meaning of this section that all requests for appropriations for said institutions shall be placed under sole control of the board, and that appropriations for the maintenance and for ordinary repairs and improvements thereof shall be made to the board in single sums to be used for the several institutions according to their varying needs.

"Hereafter the appropriations for said institutions shall be of three classes:

"(1) Maintenance.

"(2) Ordinary repairs and improvements.

"(3) Specific purposes.

"Appropriations for specific purposes shall cover all items for construction, extraordinary repairs and purchase of land and shall be used only for the institutions and purposes specified therein."

Section 30 of the said act provides as follows:

"The state treasurer shall have charge of all funds under the jurisdiction of the board and shall pay out the same only in accordance with the provisions of this act; provided, that the moneys designated and approved by the board and the state auditor as salary and contingent funds in the monthly estimates shall be placed, not later than the first day of each month, in the hands of the managing officer of each institution, who shall act as treasurer thereof. Moneys in the hands of the officials of the several institutions at the organization of the board shall be transferred forthwith to the state treasurer. Moneys collected from various sources such as the sale of goods, farm products and all miscellaneous articles, shall be transmitted on or before Monday of each week to the state treasurer and a detailed statement of such collections made to the fiscal supervisor by each managing officer; but the receipts from manufacturing industries shall be used and accounted for as provided in section 32 hereof."

Section 29 of the said act provides as follows:

"For the purpose of proper regulation, recording and auditing the various expenditures of said institutions the managing officers thereof shall prepare and present to the fiscal supervisor in triplicate, not less than fifteen days before the first day of each month, and on forms furnished by the board, a detailed estimate of all supplies, materials, improvements and money needed during each month. The fiscal supervisor shall renew such estimates, and in writing advise changes, if any, giving his reasons therefor, and present them to the board. The officer making the estimate may appeal to the board on any change so advised, due notice of which shall be given him. Estimates for periods longer than one month may be made in the same manner by the managing officer for staple articles designated by the board or for other supplies. Each estimate may include a contingent fund of not to exceed three per cent. of the total amount for maintenance for the period of the estimate, for which no detailed account need be given in the estimate, but such fund shall be drawn upon only in due form as herein provided and under the rules of the board. The fiscal supervisor shall return to the managing officer one copy of every estimate with the board's approval or alterations in writing, furnish one copy to the state auditor, and file the third in the office of the board. The state auditor shall ascertain that the estimates so received do not exceed the respective appropriations, and shall draw warrants on the state treasurer monthly for the salary and contingent funds for each institution, which shall be placed in the hands of the managing officer thereof. Itemized payrolls or vouchers for all payments shall be drawn in triplicate. One copy shall be kept on file by the managing officer, one be given to the fiscal supervisor, and one to the state auditor, who shall issue a warrant on the state treasurer thereon. Each voucher shall contain a statement of the managing officer, or of some other bonded officer designated by him, certifying that the supplies and materials purchased conform to the contract and samples, and that the improvements or repairs made or special services rendered were fully satisfactory; that the approving officer was in no way financially interested in the transaction to which the same relates, and that he has full knowledge of the value of the purchase or work or services in question; such statement to be made according to forms provided by the board; provided, that payrolls for temporary employments in cases of emergency may be made at any time after the services are performed, but all such payrolls shall be certified by the managing officer in the same manner as other vouchers, who shall also certify that each person named in the payroll actually rendered the services for the time and at the rate charged therein."

In connection with your inquiry I have one from the Ohio board of administrations, a copy of which is as follows:

"Section 31, paragraph 2, of an act 'to create a board of administration for the institutions of the state * * * passed May 17, 1911, reads as follows:

" 'Hereafter the appropriations for said instiutions shall be of three classes:

(1) Maintenance.

(2) Ordinary repairs and improvements.

(3) Specific purposes.'

"It is the desire of this department to merge the several appropriations made by the legislature to the institutions into the funds above named. For example:

Boys' Industrial School	Partial	General	Total
Current expenses	$50,000 00	$65,000 00	$115,000 00
Salaries of officers, teachers and trustees' expenses	20,000 00	23,000 00	43,000 00
Ordinary repairs and improvements including gas wells		7,000 00	7,000 00
Rewards		700 00	700 00
Necessary additions and improvements in power plant		2,500 00	2,500 00
	$70,000 00	$98,200 00	$168,200 00

"The board desires to merge the above appropriations as follows:

MAINTENANCE

Current expenses	$115,000 00
Salaries of officers, teachers and trustees' expenses	43,000 00
	$158,000 00

ORDINARY REPAIRS AND IMPROVEMENTS

Ordinary repairs and improvements	$ 7,000 00
	$ 7,000 00

SPECIFIC PURPOSES

Rewards	$ 700 00
Necessary additions and improvements in the power plant	2,500 00
	$ 3,200 00
Total	$168,200 00

"You will observe that the above merger is no diversion of funds, but is simply a change in the manner of bookkeeping. The appropriations made by the legislature for the institutions for the year ending February 15, 1913, is made in the same manner as outlined in the above statement, and it is the intention of this department, providing the auditor and treasurer are satisfied that this matter of merging the funds is no violation of the law, to request them to classify their several appropriations as they now carry them and merge them in this way.

"I attach hereto a full statement showing the manner in which it is desired that these funds should be merged for the several institutions, and you will note, for instance, the appropriations for the salaries of managers at the penitentiary; inasmuch as these officers no longer exist, such appropriations should be turned back into the general revenue fund.

"I trust you will take this matter under immediate consideration, and advise the state auditor and state treasurer and, also, this department, of your opinion as to the legality of the merger outlined above."

From the foregoing you will observe that by the provisions of section 7 of the act, the board is given all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions.

You will observe that section 30 aforesaid, provides that the state treasurer shall have charge of all funds under the jurisdiction of the board and shall pay out the same only in accordance with the provisions of the act referred to before, to-wit: the act of May 17, 1911.

You will further observe that by provision of section 31, it is provided hereafter the appropriations for the said institutions shall be of three classes: 1. Maintenance. 2. Ordinary repairs and improvements. 3. Specific purposes.

Section 12 of the aforesaid act provides as follows:

> "The board shall cause to be kept in its office a proper and complete set of books and accounts with each institution, which shall clearly show the nature and amount of every expenditure authorized and made thereat, and contain an account of all appropriations made by the general assembly and of all other funds, with the disposition thereof. It shall prescribe the form of vouchers, records and methods of keeping accounts at each of the institutions which shall be as nearly uniform as possible. The board or any member or officer thereof shall have the power to examine the records of each institution at any time. It shall also have the power to authorize its bookkeeper, accountant, or any other employe to examine and check the records, accounts and vouchers or to take an inventory of the property of any institution, or to do whatever may be deemed necessary, and to pay the actual and reasonable expenses incurred in such service upon an itemized account thereof being filed and approved."

You will further observe that the appropriation act providing money available to pay liabilities incurred on and after February 16, 1912, so far as relates to the Ohio board of administration, is to be found in year book 102, page 407, and the same is divided under the heads of *Maintenance, Ordinary repairs and improvements, and Specific purposes*, so that as to any period after February 16, 1912, there can be no question, and the only matter of concern is as to the power of the state board of administration to merge the appropriations made for the year prior to February 16, 1912, and group them under the three heads of Maintenance, Ordinary repairs and improvements, and specific purposes.

Without going into detail in this opinion, it is sufficient to say that the act establishing the state board of administration for state institutions sets forth in the beginning its intents and purposes as follows, to-wit:

> "Section 1. The intent and purpose of this act are to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state;
>
> "To provide for the delinquent such wise conditions of modern education and training as will restore the largest possible portion of them to useful citizenship:
>
> "To promote the study of the causes of dependency and delinquency, and of mental, moral and physical defects, with a view to cure and ultimate prevention;
>
> "To secure by uniform and systematic management, the highest

attainable degree of economy in the administration of the state institutions consistent with the objects in view;

"This act shall be liberally construed to these ends."

Section 8 of the said act provides:

"The board on its organization shall succeed to and be vested with the title and all rights of the present boards of trustees, boards of managers, and commissions of and for said several institutions in and to land, money or other property, real and personal, held for the benefit of their respective institutions, or for other public use, without further process of law, but in trust for the state of Ohio. Said several boards of trustees, boards of managers, and commissions now charged with duties respecting the institutions above named shall on and after August 15, 1911, have no further legal existence and the board is hereby authorized and directed to assume and continue, as successor thereof, the construction, control and management of said institutions, subject to the provisions of this act."

From the foregoing it is perfectly apparent that the object of the act is that the board of administration shall succeed to and be vested with the title and all the rights of the present boards of trustees, boards of managers and commissions of the aforesaid several institutions in and to the lands, moneys, and other property, real and personal, held for the benefit of the respective institutions or for any other public use.

You will also notice that the said "several boards of trustees, boards of managers and commissions" now chargeable with the duties respecting the institutions above named, *shall on and after August 15, 1911, have no further legal existence*, and the board by the said act is authorized and directed to assume and continue as successor thereof in the construction, control and management of the said institutions.

In short, it is unreasonable to assume that the legislature would provide for an entirely new method of managing state institutions and abolish the old method of management and relieve the former managers and trustees, and at the same time deprive the new board of all the fiscal necessities and advantages of the old.

The appropriations for the year ending February 12, 1912, were made agreeably to the old order of things, but the board of administration, together with the state treasurer, are required under the statutes to conform to the new order of things. It is not reasonable to assume that the new board is to institute two systems of bookkeeping. On the other hand, it is only fair to believe that the new board will start out with its new system of bookkeeping as a permanent one in conformity with the new order of things as made by the act aforesaid, and not in respect to any other.

I wish to state that the board of administration has a perfect right to merge the funds appropriated by the legislature so as to conform to the act of May 17, 1911. By so doing the said board is not making any appropriation—it is simply merging the funds already appropriated so as an account of same may be kept in accordance with the act aforesaid.

My holding is, therefore, that the state board of administration is empowered to merge the said funds and certify its action to the state auditor and to the state treasurer, and the state auditor and the state treasurer are fully authorized to open a new set of accounts, so far as the appropriations are concerned, agreeably to the order of the board of administration, and the act of May 17, 1911, aforesaid.

In order to avoid the possibility of exceeding the amount appropriated for specific purposes after the funds have been merged in accordance with the act creating the state board of administration, it would be well to adopt some system which would apprise the state treasurer and the state auditor of the fact that the voucher drawn for a certain purpose under the three general heads does not exceed in amount the specific amount appropriated by the legislature for any specific purpose.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

338.

DEPUTY COUNTY AUDITOR AND DEPUTY SEALER OF WEIGHTS AND MEASURES—OFFICES ARE COMPATIBLE.

County auditor in his capacity as sealer of weights and measures may appoint his deputy auditor to serve in the capacity of deptuy sealer of weights and measures.

COLUMBUS, OHIO, September 5, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of July 19th, requesting an opinion on the question submitted by J. M. Fischer, auditor of Clinton county, to-wit:

> "Is it permissible for a county auditor as sealer of weights and measures to appoint a person who is serving in his office as deputy auditor, to the position of deputy sealer or weights and measures? That is, can a person fill the positions of deputy auditor and deputy sealer of weights and measures and legally draw pay for service in each capacity?"

Section 2622 of the General Code, as amended May 31, 1911 (102 O. L. 426), provides as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deptuy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

The sole question is whether the respective positions of deputy auditor and deputy sealer of weights and measures are compatible. As Lord Mansfield (Rex vs. Guyer, 1st Burt 226) long ago said, each case must be judged by its own peculiar circumstances. There is no constitutional or statutory prohibition against the person holding the two offices mentioned, and in the event that the

taking on of the added duties did not so interfere with the duties of the office he already held, I can see no reason why the same person could not hold the two offices and legally draw pay for services in each capacity.

I am therefore of the opinion that the inquiry should be answered in the affirmative.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

343.

COUNTY COMMSISIONERS—RIGHT TO PAY EXPENSES OF DEPUTY SEALER OF WEIGHTS AND MEASURES.

COLUMBUS, OHIO, September 5, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your communication of July 19th, enclosing a letter from H. A. Buerhaus, auditor of Muskingum county, requesting an opinion upon the following question:

> "Can the county commissioners pay the expenses of the deputy sealer of weights and measures in going over the county listing measures, etc.? I can find nothing in the code one way or the other, and we must know before we fix his salary?"

On June 28th, this department answered this question in an opinion to the state sealer of weights and measures, as follows:

> "* * * if by 'necessary traveling expenses' is meant any of the personal expenses of the officer, then the law is well settled that no such allowance can be made. But if in the performance of his duties as a county official it became necessary to incur any expense, which expense would be for the county rather than for himself, personally I am inclined to the belief that the county commissioners could reimburse him for such expense. It is difficult to lay down a rule which would be applicable to all cases; every particular case would have to be considered individually, and while there is no provision of law fixing the exact expense for which reimbursement may be made, the ancient custom, which has become the law, allows reimbursement for what is really the expense of the political division.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

357.

TAX COMMISSION—NOTIFICATION TO STATE AUDITOR AND STATE TREASURER OF CORRECTED FINDINGS.

The auditor of state within the meaning of section 128 *of the Hollinger bill is the proper officer to whom the tax commission should certify any correction made by it of its findings.*

The proper procedure for the tax commission would be also to authorize the treasurer of state of such corrected findings.

COLUMBUS, OHIO, September 13, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 27th, submitting for my opinion thereon the following question:

> "Section 128 of the Hollinger law says that 'the tax commission upon application may make such correction in its determination, finding or order, as it may deem proper and its decision in the matter shall be final. Such correction shall be *certified to the proper official* who shall correct his records and duplicate in accordance therewith.'
>
> "The tax commission has been notifying the auditor of state as *the proper official*, and this department gets no certification or official authority to change its records in accordance with the findings of the tax commission, although the treasurer of state has the original duplicate.
>
> "I would therefore ask your opinion as to who is the *proper official* mentioned in section 128 of the Hollinger law and how the treasurer of state should receive official notice to change the duplicate in accordance with the findings of the tax commission."

Said section 128, which is sufficiently quoted in your letter, is to be read in connection with section 99 of the Hollinger law, which provides that,

> "After determining the amount of taxes or fees payable to the state * * * the auditor of state shall thereupon prepare proper duplicates and reports, and certify them to the treasurer of state for collection * * *."

and with section 100 of said act, which provides that,

> "The treasurer of state shall * * * render a daily itemized statement to the auditor of state of the amount of taxes or fees collected and the name of the company from whom collected, under all provisions of this act."

The question which you present is perhaps as much a question of administrative management as of law, but inasmuch as three separate departments are concerned, and inasmuch as no one department has authority to prescribe rules for the government of others, I have no hesitancy in submitting to you my views as to the proper procedure.

Under the above cited and quoted sections it is my opinion that the auditor

of state is the "proper officer" within the meaning of section 128 to whom the tax commission should certify any correction made by it of its findings. This is true because the auditor of state must in all cases compute the tax due. Again, the auditor of state is himself required to keep a record of the sums charged for collection as well as a record of payments thereon. On the other hand, the treasurer of state, who is the custodian of the duplicates, must have some authority to make a change therein. This authority ought properly to emanate from the auditor.

In my judgment, therefore, when the tax commission has reviewed and corrected its findings in a given particular, it should notify the auditor of state, who should correct his own records in accordance therewith and thereupon by letter or upon such blank forms as may be prepared, notify the treasurer of state of the amount due under such corrected finding from the company affected thereby. Thereupon, the treasurer would be authorized to correct all his own records and duplicates in the matter.

By following the above suggested procedure and by formulating blanks if necessary, in accordance therewith, it seems to me that any difficulty which may now be present in the administration of the law in question would be obviated.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

367.

RESOLUTION OF COUNTY COMMISSIONERS PROVIDING FOR COMPENSATION AND EXPENSES OF COUNTY AND ASSISTANT SURVEYORS AND ENGINEERS—STATUTORY AUTHORIZATIONS AND INHIBITIONS.

A resolution of the county commissioners passed Oct. 4, 1904, providing for compensation and expenses for county surveyors and assistants is invalid, for the reason that the same is provided for by statute.

A similar resolution providing for compensation of engineers and assistants is valid by virtue of sections 2403-2413 G. C.

2. *The term "mileage" includes general expenses of travel on official business.*

COLUMBUS, OHIO, September 16, 1911.

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

DEAR SIR:—Your favor of July 1, 1911, is received, in which you ask an opinion of this department upon the legality of mileage paid by virtue of the following resolutions:

> "Under a resolution of the commissioners of Franklin county, page 286 of the journal in use October 4, 1904, Walter Braun was appointed deputy engineer from September 1, 1904, to September 1, 1905; seven assistant engineers were provided for. Per diem for both engineer and first four assistant engineers was fixed at $4.00 per day for bridge and $5.00 per day for road work. The three additional assistants were to receive $4.00, $3.00 and $2.00 per day respectively. In addition, the engineer and all the assistants and deputies were to be allowed 5 cents per mile.
>
> "July 31, 1905, Commissioner's Journal No. 12, page 520, another resolution was adopted reciting that the extra amount of work in the

county surveyor's office required the appointment of an engineer and assistants and that, under the act of 97 O. L. 304, certain assistants named therein were appointed and their compensation fixed at a flat rate per month.

"We understand that the prosecuting attorney's department of Franklin county has rendered written opinion that mileage could be legally charged and collected from the county at least under the first, if not under the second of the above resolutions.

"Kindly advise this department whether or not findings should be made against such surveyor and deputies for the mileage so charged."

The county surveyor is often known as county engineer, and I take it that the resolution of October 4, 1904, appointed Walter Braun as county surveyor to fill a vacancy in that office, and that the assistants were deputy county surveyors.

The compensation of a county surveyor is fixed by statute.

Section 282 of the General Code provides as follows:

"When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses. When not so employed he shall be entitled to receive the following fees:" (Here follows schedule of fees.)

In 1904 the compensation was $4.00 per day.

The compensation of a county surveyor and his deputies is fixed by statute and the commissioners had, at that time, no authority to fix the same. The statute does not provide for any mileage, and therefore mileage could not be collected by a county surveyor or his deputy.

However, if Mr. Braun was appointed as engineer by virtue of 97 O. L., page 304, a different statute governs the compensation. This act is now known as sections 2408 to 2413, inclusive, of the General Code. Section 2411 authorizes the county commissioners to make appointments of engineers and assistants upon request of the county surveyor. I might add that the commissioners had no authority to appoint deputy county surveyors.

The method of fixing the compensation of engineers appointed under this act is provided in section 2413 of the General Code, which is as follows:

"The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board. No provisions of law requiring a certificate that the money therefor is in the treasury, shall apply to the appointment or employment of such persons."

The compensation is left to the discretion of the county commissioners. Under the resolution of October 4, 1904, they have fixed the compensation at so much per day and five cents per mile. The mileage allowed is part of the compensation. This method of paying officials was used by the legislature in fixing the compensation of county commissioners.

In the case of Richardson vs. State, 66 O. S. 108, Williams, C. J., in the opinion of the court on page 111, says:

"It must be conceded that the three dollars per day allowed the commissioners is the limit of his compensation for his day's work, in

whatever way it may be performed in the discharge of his official duties. He cannot lawfully claim that the county is also bound to pay his board or other personal expenses. And, the 'mileage allowed him is intended to compensate him for expenses of his travel on official business.' That is the legal meaning and import of the term."

Section 2413 of the General Code delegates to the commissioners the power of fixing the compensation of the engineer and his assistants. The commissioners exercised that power under resolution of October 4, 1904, and the per diem and mileage so fixed is legal.

Under the resolution of July 31, 1905, the compensation was fixed at so much per month, and as no mileage was provided for in the resolution, none could be collected.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

Addendum:

While we hold that mileage cannot legally be charged and collected from the county under the second of the above resolutions, and that there should be a finding under this second head against those that unlawfully collected it, yet when the matter of settlement comes up it may be found that these officers did not collect their reasonable expenses to which they are entitled under the act found in 97 O. L. 304. Under that act they are entitled to their expenses, and it may be that they did not receive them, must mistakenly took mileage instead.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

396.

OHIO NATIONAL GUARD CORRESPONDENCE SCHOOL—PAYMENT FOR COST OF POSTAGE CANNOT BE PAID FROM THE "MAINTENANCE OHIO NATIONAL GUARD FUND."

By reason of article 2, section 22, providing for specific appropriation for all moneys to be drawn from the treasury, the cost of postage connected with a correspondence school for officers of the Ohio National Guard cannot be paid out of the fund for "Maintenance of Ohio National Guard."

COLUMBUS, OHIO, September 28, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of September 14th, requesting an official opinion upon the question submitted in the letter of General C. C. Weybrecht, which is as follows.

"In conjunction with the officers of the regular army, who have been detailed to the state of Ohio by the war department, this department proposes to inaugurate a correspondence school for officers of the Ohio National Guard, commencing November 1st.

"A ruling has been made by the attorney general of the United States that government penalty envelopes carrying free postage cannot

be used for this work, and it would be up to us to pay postage on all this correspondence.

"It has been estimated that it will cost at least $600 to cover the postage, over and above what this department uses annually. Our fund for 'contingent expenses' is barely large enough to carry on the regular work of this department, and it cannot stand this extra draft. Inasmuch as this work is for the benefit, use and maintenance of the Ohio National Guard, would it not be possible to pay this postage out of the fund for 'Maintenance Ohio National Guard?' "

As I take it, the matter of the correspondence school for officers of the Ohio National Guard is a new proposition and novel venture, and I conclude that no suggestion of this matter ever entered the legislative mind when appropriations were made for the various matters pertaining to the adjutant general's department and the Ohio National Guard by the last general assembly.

Section 5265 of the General Code provides:

"The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose."

Section 5266 of the General Code provides:

"The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio National guard fund.' "

Section 5267 of the General Code provides:

"From the 'maintenance Ohio National Guard fund,' the adjutant general shall pay the per diem, transportation, subsistence and incidental expenses of militia companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage of horses, and medical supplies."

Section 5268 of the General Code provides:

"From the 'state armory fund,' the board shall provide armories by leasing, purchasing or constructing as provided in this chapter."

General Weybrecht asks if the cost of the correspondence school can be paid out of the fund for "maintenance Ohio National Guard." Inasmuch as article II, section 22, of the constitution provides:

"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."

and since section 5267 of the General Code specifically states what can be paid

out of the maintenance fund, I am of the opinion that the cost of the correspondence school referred to cannot be paid out of the "maintenance fund, Ohio National Guard." Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 396.

INTOXICATING LIQUORS—DOW-AIKEN TAX—STOREHOUSE—TRAFFICKING.

The maintenance of a storehouse for intoxicating liquors is subject to the Aiken tax where in actual fact orders are taken at or sale made from such place.

COLUMBUS, OHIO, September 28, 1911.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of some time ago, wherein you request an opinion upon a question submitted in a letter addressed to you by the Bruckman Brewing Company, of Cincinnati, Ohio, which reads as follows:

> "In reply to your letter of April 20th, will say that we were thinking of starting a bottle beer route through this county, and in doing so we must establish a depot as a storage room for the bottle beer, also for horses and wagons, which would be central and more convenient to make deliveries from, instead of making daily deliveries from our plant. Would you kindly let us know if we must procure Aiken license for the same?"

As I understand the inquiry it is desired to have a depot or storage place for supplies, to-wit: bottled beer, at some point in the county other than the manufactory, and from this depot make deliveries by wagon, of bottled beer.

In order to determine the question whether such a manner of conducting such a business would be liable to the payment of the Aiken tax, it is necessary to determine whether the sales of said beer, in law, would take place at the manufactory or elsewhere, for if the sales are at the manufactory they come within the exception of the law and no Aiken tax is assessable, while, if the sales are made anywhere else the tax necessarily attaches. You do not state specifically how or where the orders for the beer are to be taken. I take it, as you say you are "thinking of starting a bottle beer route through the county" that the drivers or the wagons, or the custodian of the depot, or some other agent, is to solicit or receive orders which are filled from the storage place, and under such state of facts, I am inclined to the opinion that this would constitute sales other than at the manufactory, and therefore would entail a liability for the payment of the Aiken tax.

In Reyman Brewing Company vs. Brister, 92 Federal Report 28, (an Ohio case) the United States Court of the Southern District of Ohio held:

> "A manufacturer of beer who leases a room in a cold storage warehouse at a certain railroad, in which to store beer shipped to that station, which has not been ordered in advance, and from which it is sometimes sold directly, is 'traffic subject to taxation.'"

In the Village of Bellefontaine vs. Vassaux, 55 O. S., 323, the court held: (in the syllabus)

> "The general rule is that title to goods intended to be transported passes from the vendor to the purchaser upon delivery by the former to a common carrier consigned to the purchaser whether paid for or not. But if the vender consigns the goods nominally to the purchaser, but actually in care of his own storekeeper, who is to retain them in control and give possession to the purchaser only on payment of the purchase price, then the delivery to the common carrier is not, in law, delivery to the purchaser.
>
> "Under such circumstances, the shipment being, in effect, to the vendor himself, the delivery, when it occurs, would be at the storehouse to the vendor; and the transaction would not be a completed sale at the point of shipment.
>
> "As a general rule, a sale of personal property is not completed when anything remains to be done to identify the thing sold, or discriminate it from other like things."

While the proposition under which the above cases was decided is not presented here, there is sufficient analogy to consider it, for the effect of the holding is that the place where the seller releases possession and control of the beer to the purchaser and the purchaser assumes control thereof and pays the purchase price, is to be regarded as the place of sale.

In the case of Jung Brewing Company vs. Talbot, 59 O. S. 511, where it appeared that the driver of a beer wagon made sales to the retail dealers, and that beer was supplied from a storehouse, where it was kept on hand for sale in that manner, the court announced in the syllabus:

> "1. A manufacturer of intoxicating liquors who carries on the business of selling them elsewhere than in the manufactory, is engaged in the traffic within the purview of sections 4364-9 of the Revised Statutes, and subject to the tax thereby imposed.
>
> "2. It is not essential to a valid imposition of the tax that the traffic be carried on in a building or structure, or fixed place of business. Selling and delivering the liquors to customers from a vehicle provided for that purpose is a method of carrying on the business that is subject to the tax, unless it is done in connection with, and as a part of a traffic in which the proprietor is engaged on which he has paid the tax.
>
> "3. When the traffic is so carried on by the sale and delivery from wagons as a separate and independent business, and the liquors are supplied from a storehouse where they are kept on hand for sale in that manner, in charge of a local agent, the storehouse may properly be regarded as the seller's place of business. Hanson v. Luce, and Monaghan v. Luce, 50 Ohio St., 440, distinguished."

The latest case in point, bearing upon the proposition involved here, is the case of the Diehl Brewing Company v. Beck, et al, 10 C. C., M. S., 351. The court held (in the syllabus):

> "A brewing company manufacturing and selling beer at wholesale, which maintains a cold storage house in a location separate from its manufactory, and from which cold storage house daily deliveries of beer are made to customers on orders previously taken by a soliciting

agent, thereby becomes a trafficker in intoxicating liquors within the meaning of R. S., 4364-9, and is subject to the Dow tax provided for by that act. Diehl Brewing Co., v. Spencer, 9 C. C., N. S., 577, not followed."

This case was affirmed without report, late in 1910, being case No. 11178 in the supreme court.

I am, therefore, of the opinion that if the driver of the wagon or other soliciting agent takes the orders and fills the same from the depot, such sales being at another place than the manufactory, are without the exceptions of the Aiken tax statute and, therefore, one conducting a business in that manner is liable for the payment of the tax.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

416.

OFFICES COMPATIBLE—TOWNSHIP TRUSTEE—BOARD OF REVIEW—VILLAGE BOARD OF PUBLIC AFFAIRS—EMPLOYMENT—BUSINESS.

The office of the board of review may be held by a township trustee, or by a member of the village board of public affairs.

A man may hold a public office which is neither a business nor an employment within the meaning of section 5621, *General Code.*

COLUMBUS, OHIO, October 9, 1911.

HON. E. M. FULLINGTON, *Auditor of State and Secretary of the State Board of Appraisers and Assessors. Columbus Ohio.*

DEAR SIR:—Complying with the request of the state board of appraisers and assessors, made of me by virtue of its resolution adopted July 31, 1911, I have investigated the following legal questions:

1. Are the offices of township trustee and member of board of review compatible?

2. Are the offices of member of a village board of public affairs, the village having been advanced to the grade of city by the late federal census, and member of board of review of such city compatible?

Section 5621 of the General Code provides in part as follows:

"No member (of the board of review) shall be engaged in any other business or employment during the period of time covered by the session of the board."

This is the only provision of statute which would in any way create a question as to the compatibility of these two sets of offices. The duties in no wise conflict and the doctrine of common law incompatibility does not apply.

In my opinion, section 5621 of the General Code does not prevent a member of a board of review from holding another office. If the general assembly had intended to accomplish this purpose its intention would have been otherwise

expressed. As it is, the legislature has merely enacted that the members shall not be engaged in other business, or have other employment.

Now, there are offices which as a matter of fact, constitute a business during the time they are held by the incumbent, and there are still other offices which in point of fact constitute an employment. Thus, the office of city engineer, the office of water works superintendent, that of chief of police, and others too numerous to mention, require the continuous employment and attention of the incumbent.

There is another class of offices, however, which in fact—regardless of the theory of the matter—do not require continuous attention to duty. It is notoriously true that township trustees upon assuming their offices do not forsake their usual occupations; neither, on the other hand, do members of a village board of trustees of public affairs.

Customarily they do not find it necessary to give up their usual occupation. The duties of these respective offices are such as may be discharged by meeting at intervals with the other members of the respective boards, and acting upon matters legally coming before such boards.

In determining whether one person may hold the two offices mentioned in your first question, or whether one person may hold the two offices mentioned in your second question, at the same time, we must consider the law aside from the statute, section 5621, General Code. There may be a disqualification outside of said section, as well as within. The test outside is as follows:

> "Offices are considered incompatible when one is subordinate or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."
>
> State, ex rel., Attorney General vs. Gebert, 12 O. C. R., N. S. 274.

This test governs the question outside of the statute, and we see nothing in this doctrine making incompatible the offices mentioned in either of your two questions.

Coming, now, again, to the statute, section 5621, I take it that so long as a member of the board keeps himself free to be present at the opening hour in the morning, at the usual and proper time, free to remain all day during the session until the proper closing time, he may be engaged in his private business in the morning before hours or in the evening after hours; and there is no conflict of duty or violation of the statutes, because the session referred to is a daily session and not the entire period of time within which the board may, in a given year, sit.

The same principle applies to employment. If a man be an engineer in a city and it requires his time until noon, there would a physical conflict between the two duties of engineer and member of the board of review, and he should not hold the two offices. Anyone with an employment, of whatever general character it may be, whose duties require him to attend to the employment during the time of day when he should be in attendance upon the board of review, is not eligible to hold the two offices. But knowing, personally, the situation in Jackson, Ohio, to which, I think, your question refers, I see no inconsistency in the one man filling the offices embraced in question number one and question number two.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 439.

OFFICES—ADJUTANT GENERAL'S EXPENSES AS COMMISSIONER OF OHIO SOLDIERS' CLAIMS UNDER APPOINTMENT BY THE GOVERNOR.

The right of the adjutant general to incur contingent expenses under appointment from the governor as commissioner of Ohio soldiers' claims is perfectly vaild.

COLUMBUS, OHIO, October 27, 1911.

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

DEAR SIR:—Under section 12 of the General Code the governor has the power to file a vacancy in office by appointment. If such vacancy occurs when the senate is not in session and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment at the next session of the senate.

I am informed that the governor has directed General C. C. Weybrecht to act as commissioner in the department of Ohio soldiers' claims. This being the case, his voucher for ordinary expenses will be safely honored.

I am not hereby passing upon the question of the right of the adjutant general to hold two offices, but I am quite confident that his right to incur contingent expenses under appointment from the governor are perfectly valid, and that you are safe in making warrant for the amount of the attached bill.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 459.

VALID TITLE OF STATE TO LANDS SITUATED IN VILLAGE OF KENT—PURCHASED FOR PURPOSE OF NORMAL SCHOOL.

COLUMBUS, OHIO, November 10, 1911.

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

DEAR SIR:—I beg to state that at your request I have this day examined an opinion of my predecessor, Hon. U. G. Denman, rendered January 5, 1911, respecting the title which the state will acquire by conveyance at that time tendered of real estate situated in the village of Kent, Portage county, Ohio, as a site for the location of the proposed normal school in said village.

In connection with this opinion I have also examined a quit claim deed from Newton H. Hall and Stella A. Hall to the state of Ohio, executed January 5, 1911, and recorded October 18, 1911, in which the grantors convey all their right, title and interest in and to a part of township lot No. 14, Franklin township, Portage county, Ohio. This deed, in my opinion, corrects the only serious defect in the title to the premises noted by my predecessor.

The other matter to which my predecessor called attention is one not affecting the title of the state to any premises conveyed but relates only to a discrepancy of description as between the deeds and other conveyances and the plat submitted in the abstract. This matter in no wise affects the state's title.

Without in any way reviewing my predecessor's opinion but basing my conclusions wholly on those reached by him together with the additional con-

veyances tendered to the state for the purpose of correcting the title, I am of the opinion that the state's title under the deeds of George A. Hines, trustee to the state of Ohio, William Stewart Kent and Mary P. Kent, his wife, to the state of Ohio, Jennett K. Sawyer and Willard N. Sawyer to the state of Ohio, and Newton H. Hall and Stella A. Hall to the state of Ohio, is good and perfect in and to the premises therein described.

I herewith return the papers submitted to me.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

505.

GENERAL ASSEMBLY—SALARY—COMPENSATION—CONSTITUTIONALITY OF SECTION 50, GENERAL CODE AND OF THE AMENDMENT THERETO.

That part of section 50 of the General Code providing in those years in which a session is held for the payment to members of the general assembly, of the balance of the year's salary in a lump sum at the end of the regular session: and also that part of the amendment to section 50 providing for the payment in a lump sum at the end of the session, of the entire balance of the members' salary for their term; are in direct and absolute conflict with the constitutional inhibition against the change of a public officer's salary during his term of office.

The amendment to section 50, General Code, must be disregarded entirely and section 50, with its unconstitutional part eliminated must be allowed to govern.

Vouchers should be issued at the rate of $200.00 per month during attendance at sessions and the balance of the members' salary in equal monthly installments, i. e., at the rate of $83 1-3 per month.

2: *An elected and duly qualified member who temporarily moves away from his district with a bona fide intention to return thereto should not be denied his vouchers.*

COLUMBUS, OHIO, December 26, 1911.

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

DEAR SIR:—A few days ago you verbally requested my opinion as to the validity of an act of the general assembly, known as House Bill No. 594, entitled "An act to amend section 50 of the General Code, relating to the salary and mileage of the members of the general assembly." The following is a copy of said act:

AN ACT

"To amend section 50 of the General Code relating to the salary and mileage of the members of the general assembly.

Be it enacted by the general assembly of the state of Ohio.

SECTION 1. That section 50 of the General Code be amended to read as follows:

"Sec. 50. Every member of the general assembly shall receive as compensation a salary of one thousand dollars a year during his term of office. Such salary for such term shall be paid in the following manner: two hundred dollars in monthly installments during the first session of such term, and the balance of such salary for such term at the end of each session.

"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 each regular or special session. If a 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 2. That section 50 of the General Code be, and the same is hereby repealed."

You further inquire as to your duty with reference to the issuance of vouchers to members of the general assembly of the state of Ohio for the year 1912, especially upon the following points:

"1. Whether such members are, under the constitution of this state, entitled to a salary of one thousand dollars.

"2. If they are, may this salary be paid to the members in a lump sum, in advance?

"3. If they are not entitled to the latter, and are entitled to the salary of one thousand dollars, each, per year, at what times should voucher be issued to such members and for how much?

"4. Whether a member who was elected a member of the general assembly and duly qualified and acted in that behalf during the session, and who moved away from the state, or from his county or district, is entitled to a salary in case the members generally are found to be so entitled."

On account of the importance of the questions you submit, both to the state and to the members of the general assembly, I have given the subject of your inquiry long and careful consideration, and have investigated the matter somewhat fully in order to ascertain the true meaning of section 31 of article 2 of the constitution of the state of Ohio, which is as follows:

"*Compensation of members and officers of the general assembly.* 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 the term of office."

1. What is the meaning of compensation as used in this section?

2. What is meant by the expression "no change in their compensation shall take effect during their term of office?"

Webster's New International Dictionary defines "compensation" as follows:

"That which constitutes, or is regarded as, an equivalent or recompense. Remuneration; recompense.

"Compensation comes from the Latin word 'compensatio' which means weighing, a balancing of accounts.

"Compensate comes from the Latin verb 'compensare'—to weigh several things with one another; to balance with one another; to be equivalent in value or effect to; to counter balance; to make up for; to make amends for."

It will readily be seen that the plain meaning intended to be conveyed by

the word "compensation" is a return; an equivalent rendered; and is, therefore, intended to be a return or an equivalent rendered by the state to a member of the general assembly for his services as such member, and such services may be rendered either in the way of actual attendance upon the session of the general assembly, or in keeping himself in readiness to respond to the call of the governor in case of an extraordinary session, thus keeping himself qualified by residence and otherwise to perform whatever duties may be required of him as such member of the general assembly during the two years for which he is elected.

Section 40 of the Revised Statutes of Ohio, under the head of "Salary and Mileage of Members of the General Assembly," provided as follows:

> "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 out 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."

The first question to be determined is as to the constitutionality of said section 40. Some question has been raised that a member of the general assembly may not be paid a *salary*, but that he should receive his return after service is rendered, in an amount to be prescribed by law, dependent upon the service rendered; that the payment is not one dependent on time but on the amount of service rendered. In my judgment, and for reasons hereinafter stated, the word "compensation" is used in the constitution of Ohio as embracing more than the word "salary," but as including the word "salary"; that so far as the two terms are concerned, compensation is generic and salary specific; and it is perfectly competent for the general assembly to enact a law fixing the compensation upon a salary basis, because the whole may always include a part.

Section 20 of article II of the constitution, under the head of "term of office, and compensation of officers in certain cases," provided:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The supreme court of this state, in a per curiam, in the case of Thompson, Relator, vs. John Phillips, 12 O. S. 617, said:

> "The relator, to show that he is not affected by the act of April 9, 1861, relies on the following section of the constitution:
>
> " 'The general assembly in cases not provided for in this constitution, shall fix the term of office, and *the compensation* of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'
>
> "It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense,

> of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the service rendered. Where the compensation, as in this case, is to be ascertained by a percentage on the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the constitution."

We have from the foregoing the clear statement that the word "compensation" is used in a more comprehensive sense than the word "salary" in the constitution.

up to this point it appears there can be no fair doubt as to the constitutionality of section 40 of the Revised Statutes and, too, said section is in harmony with this provision of the constitution of the state of Ohio, to-wit: section 2 of article II, under the head of "When chosen:"

> "Senators and representatives shall be elected biennially, by the electors of the respective counties or districts, on the first Tuesday after the first Monday in November; their term of office shall commence on the first day of January next thereafter, and *continue two years.*"

From this it clearly appears that a member of the general assembly is an officeholder with a term, and that said term is two years; and payment of one holding an office for a term that is definitely fixed is entirely in harmony with the legislative idea of payment dependent on time, and payment, too, either annually or periodically, such as by the quarter or by the month. But I conceive that any payment based on time should be at the end of the period and not in advance.

Section 40 of the Revised Statutes, passed into the General Code as section 50, which is as follows:

> "Each member of the general assembly shall receive as compensation a salary of one thousand dollars a year, which 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 such year shall be paid at the end of the session. 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 each regular or special session. If a 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."

The only difference as to salary between section 50 of the General Code and section 40 of the Revised Statutes is found in the following clause, contained in said section 50, and not found in section 40:

> "but in any year in which a session of the general assembly is held the balance of the salary for such year shall be paid at the end of the session."

I do not hesitate to hold that that clause is clearly inhibited by the constitution; it comes under neither compensation nor salary; it is neither compensation for services rendered, nor salary dependent upon time. It is a clause

clean-cut against the plain meaning of any reasonable interpretation of the constitution. It violates the most favorable interpretation that can be given to the constitution with reference to payment to members of the general assembly.

However, the last general assembly, in House Bill No. 594, supra, went still further in its amendment of said section 50, General Code. After said section 50, in its amended form, passed both branches of the general assembly, it was presented to the governor for his action thereon, and the governor returned the bill to the house of representatives without his approval, stating his reasons therefor as follows:

> "Under General Code, section 50, the salaries of members are made $1,000 per annum, payable in monthly installments during each year. In any session year 'the balance of the salaries for such year may be paid at the end of the session.' The purpose of the bill is to make the entire remainder of the salaries for the full term of two years payable at the end of the first session, which is always at the beginning of the first year.
>
> "It is drawn so as to take effect at once.
>
> "If it were a mere matter of policy the payment of salaries in advance would not be right. True, 'they also serve who only stand and wait' a further call for active duty, but the service should precede the pay whether it be work or waiting. It cannot be foretold that nothing will occur to require an extra session and if there should be one the lack of present funds might prove inconvenient to some members. There are already three vacancies in the membership and others may occur. In such cases the new members chosen would have to serve without compensation or the public be subjected to double payment for the same service.
>
> "But apart from these considerations the action proposed by the bill would, in my opinion, violate the constitution, article II, section 31, which in terms forbids any change in the compensation of members during their term of office. Time of payment is an essential element of compensations as well as the amount, and the prohibition of any change covers both.
>
> "The remainder of the salaries for 1911 may be paid at the close of the present session by the law as it now stands, but the salaries for 1912 are payable only in monthly installments during that year. With state funds drawing liberal interest, as they now do, the difference against the taxpayers involved in paying the entire salaries for 1912 on May 31st, 1911, can be readily calculated and would be a very considerable amount, though this is not so important as the principle at stake.
>
> "It is said the bill follows precedents. I find that from the time biennial sessions were resumed in 1894, the law provided for monthly installments until 1904, when a law like the bill now before me passed (97 M. 316). But this was repealed at the following session in 1906, and payment for the full year only authorized at the close of the session (98 V. 8). Though this act was in turn repealed and only monthly payments permitted (id. 287), the provision of the earlier act for payment for the remainder of the session year got somehow into General Code, section 50.
>
> "Beginning with 1908 there have been annual sessions. So there is the single precedent of 1904, and that promptly repudiated, standing alone against the action of all the other biennial sessions since 1894.

"For these reasons I am constrained to return the bill to the house of representatives without my approval, which I herewith do."

The reasons stated by the chief executive of the state in reference to the constitutionality of an act should always have great weight, but when coming from one who is not only the governor but at the same time a lawyer of great experience in the interpretation of the laws, both national and state, and one who is recognized as an authority of the highest standing, these reasons become practically binding. In my judgment, the message of Governor Harmon to the house is unanswerable, constitutionally, legally, logically, morally and ethically. Notwithstanding this the general assembly passed the bill over the head of the governor, and it is now section 50, General Code, supra. The question is: is such section constitutional and binding upon you to issue vouchers to members of the general assembly for their salary for the year 1912 in lump sum, and in advance? The answer is no. While the governor's reasons were intended to apply in support of his veto of the measure they well apply here. They apply to the unconstitutionality of the act as well as to the policy against the enactment thereof. Before having read the reasons stated by Governor Harmon that part of this opinion was already written, holding invalid the following clause in section 50 of the General Code:

"but in any year in which a session of the general assembly is held the balance of the salary for such year shall be paid at the end of the session."

With this clause left out of section 50 it is entirely legal and constitutional.

Section 50, General Code, as amended at the last session of the General assembly, is constitutional with the following eliminated:

"Such salary for such term shall be paid in the following manner: two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session."

However, inasmuch as such act was unquestionably passed for the sole purpose of enabling the members to draw their two years' salary or compensation at the end of the first session of the general assembly and inasmuch as there is no provision therein providing for monthly payments, I am satisfied that said House Bill No. 594 should be entirely disregarded by you, and that you should be governed entirely by section 50 of the General Code, with the following clause left out:

"but in any year in which a session of the general assembly is held the balance of the salary for such year shall be paid at the end of the session."

To avoid confusion, be governed by the following:

"Section 50. Each member of the general assembly shall receive as compensation a salary of one thousand dollars a year, which shall be paid in monthly installments of not exceeding two hundred dollars during the year * * *. 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 each regular or special session. If a 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."

This, of course, is to be your rule with reference to all members who, in the language of the chief executive are serving by "standing and waiting."

The answer to your first question discloses that members of the general assembly are not entitled to their second year's salary in one lump sum in advance.

In answer to your second question, to wit:

> "If they are not entitled to the latter, and are entitled to the salary of one thousand dollars, each, per year, at what times should vouchers be issued to such members and for how much?"

I beg to advise that the statute does not determine the amount by which you shall be governed, beyond saying: "Each member of the general assembly shall receive a salary of one thousand dollars a year, which shall be paid in monthly installments of not exceeding two hundred dollars during the year." Evidently, payment was not provided in equal monthly installments for the reason that it was intended that members of the general assembly in attendance upon a session should receive more per month than when not in attendance upon a session, and it is proper that during the session each member should receive the maximum of two hundred dollars per month; but as to the monthly payments when the general assembly is not in session but are keeping themselves in readiness to respond to the executive call, it is clearly to be deduced that the usual rule of equal monthly installments should apply. Therefore, my advice to you, in response to this inquiry, is to issue voucher at the end of each month to each qualified member of the general assembly during the months that the general assembly is not in session, for the sum of eighty-three and one-third dollars.

Answering your fourth inquiry, to wit:

> "Whether a member who was elected a member of the general assembly and duly qualified and acted in that behalf during the session, and who moved away from the state, or from his county or district, is entitled to a salary in case the members generally are found to be so entitled."

I beg to advise that section 3 of article II of the constitution of Ohio provides:

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

The constitutional limitation would deny a man the right to election to the general assembly, who voted in, for instance, Butler county, and resided in Columbus temporarily, unless his absence from Butler county was on account of public business of the United States or of this state, although such person would unquestionably be eligible to election to offices generally in Butler county.

This constitutional provision discloses that the intention to return, so far as qualification for election is concerned, would not save the right to election. However, the constitution only goes to qualification for election to office, and does not reach to the question of forfeiture. In the absence of the latter I am inclined to the view that the same rule would apply in relation to the right of a member of the general assembly to represent his district in such general assembly as applies to the right of one to vote, who was temporarily absent. Section 4866, General Code, paragraph 3, provides as follows:

> "A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state for temporary purposes, merely, with the intention of returning."

Whether or not the absence is temporary and the intention to return, which must be a fixed one, exists, is a question of fact for you to determine in each specific case. Unless the absence is temporary, and unless there is a fixed purpose to return to the state, such person would no longer be a citizen of this state, and, undoubtedly, would not be entitled to any of its privileges as such. But, if you are satisfied, after a careful examination, that any member of the general assembly has removed from his district but temporarily, and that it is his fixed purpose to return, I am not prepared to hold in such case that you would be warranted in declining to issue voucher.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 282.

OFFICE OF STATE HIGHWAY COMMISSIONER VACATED—REPEAL OF STATUTE BY IMPLICATION—VETO OF REPEALING CLAUSE—SALARY.

The office of the state highway commissioner as held by Mr. Wonders under section 1178 G. C., became vacant on the 9th day of June, 1911.

Senate Bill No. 165, excepting sections 5258 and 5259 which were not approved by the governor, became law on the 9th day of June, 1911.

Said bill covers the ground of and is intended as a substitute for sections 1178 and 1231 G. C., providing for a state highway department, and therefore repeals the former sections by implication, in spite of the fact that section 58, repealing section of said bill, was vetoed by the governor.

Where a later act covers the whole subject of an earlier act, and is plainly intended as a substitute for the former, the former act is impliedly repealed.

By the repeal of an act which created an office, the office itself must necessarily be abolished.

The salary of Mr. Wonders and his employes should be calculated up to June 9, 1911.

COLUMBUS, OHIO, June 29, 1911.

HON. A. W. BEATTY, *Deputy Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your favor of June 19, 1911, in which you submit the folowing questions:

> "When did Senate Bill No. 165, passed May 31, 1911, and approved by the governor June 9, 1911, vacate the office of state highway commissioner?
>
> "Did Mr. Wonders legally hold the office until his successor was appointed and qualified?
>
> "When did the terms of the clerks in his office and other employes appointed by and acting under the direction of Mr. Wonders cease, and to what date should salaries of Mr. Wonders and his employes be paid?
>
> "How shall the proportionate part of the salaries of Mr. Wonders and his employes be determined; the salary of Mr. Wonders being fixed by statute at $2,500, and the salary of the employes being fixed by Mr. Wonders, and payable from a blanket appropriation covering the salaries or compensation of the several employes?"

To properly answer your questions, it is necessary to consider the provisions of S. B. 165 and the facts connected with its passage, and the veto of certain of its sections by the governor.

The bill was passed on the 31st day of May, 1911, and on the 9th day of June, 1911, the governor approved all of the provisions of the said act, except sections 52, 58 and 59. Therefore, as section 16 of article II of the constitution provides: "Every bill passed by both houses of the general assembly shall, before said bill can become a law, be presented to the governor. If he approves, he shall sign said bill and thereupon said bill shall be law." Therefore, all of the provisions of Senate Bill No. 165, excepting sections 52, 58 and 59, which were not approved by the governor, became law on the 9th day of June, 1911.

This act, Senate Bill No. 165, covers the whole subject formerly provided for by chapter 18, division 2, title 2 of part I of the General Code of Ohio as embraced in sections 1178 to 1231 of the General Code, providing for the state highway department "for the purpose of affording instruction, assistance and

co-operation in the building and improvement of the public roads of the state." and for the appointment of a state highway commission, and is plainly intended as a substitute for the said former act, as the purpose ofthe act is the same, in all important respects, and the new sections correspond in all important particulars with the old sections. It is clearly apparent from the act as passed, which contained section 58, that it was intended as such substitute for the former act as section 58 especially repeals all of the section of the old act, which were changed in any respect whatever.

This section 58 having been vetoed by the governor, the question arises, and I suppose is partly responsible for your inquiry as to whether or not said repealing sections being vetoed and therefore not now a part of the act, does the present act repeal the former act by implication? My opinion is that it does.

There can be no doubt in this case about the intention of the legislature. The intention is plainly expressed by section 58, which, though repealed, is nevertheless the legislative expression of its intention, and it is further made plain by the message of the governor transmitted with this bill, and expressing reasons why it was necessary for him to veto section 58. I herewith copy a portion of the said veto message which relates to this subject:

> "This of course, is not enough for rapid progress, so the bill raises the amount the counties may levy annually from one mill to one and one-half mills, and Senate Bill No. 225, a twin measure, requires a state levy of half a mill each year on all property correspondingly to increase the amount available for state aid.
>
> "This state levy must be counted in the ten mill limit and reduce by so much what may be levied for other purposes. And section 52 of said bill No. 165, not only increases the authorized levy, as above stated, but in express terms puts the entire mill and a half outside of the ten mill limit. So if both of those provisions were approved the limit would at once become eleven and one-half mills instead of ten, and the availability of the ten mills be reduced by half a mill besides.
>
> "The owners of property of all kinds have been assured that the limit shall be ten mills, and on the faith of this they have generally acquiesced in the action of the taxing authorities with respect to fair returns and valuations. It would be most unfair now to permit the limit to be raised for any purpose which the people do not specifically and expressly approve, as provided in the tax limit law.
>
> "This interference with the tax limit is quite unnecessary, too, because the funds raised by the additional county levies cannot be spent until the state furnishes a like amount. And while the state levy begins at once, the money raised cannot be used until it is appropriated by law, which has not been done and cannot be done until 1913. In fact the object stated in the bill is to provide a fund for future, not for present, use.
>
> "I, therefore, with these objections, file with the secretary of state, unapproved, said section fifty-two (52) of said bill No. 165, and also section fifty-eight (58) and fifty-nine (59) thereof. The two last named are the repealing sections which cover section 1224 of the General Code authorizing the present levy of one mill by the counties. I am compelled to include the repealing sections in my disapproval of section 52, because otherwise no levy at all by the counties would be authorized.

But while the entire repealing sections are struck out by my action, there will be no real difficulty, because they cover only the old state highway law which this bill replaces, re-enacting most of it. Being later and on the same subject the bill will repeal by implication the parts of the old law which are different.

"I regret to take this course, but it is the only one open unless I abandon the settled policy of standing by the tax limit, which I cannot justly nor honorably do."

Even if this were not so, and we were without the expression of the legislature as to its intention to repeal the old act, and without the light thrown upon the situation by the message of the governor, still it is my opinion that if this new act contained no repealing section whatever, it nevertheless would operate as a repeal of the former act. Upon the same subject is the case of State, ex rel. Witt vs. Craig, Auditor, 22 O. C. C. Reports, page 441, the first syllabus of which is as follows:

"The general rule of construction is, that where a later act covers the whole subject of an earlier act, and is plainly intended as a substitute of the former, the former act is impliedly repealed."

The circuit court, in deciding this case, stated that the opinion in court below was given by Judge Phillips of the Cuyahoga county common pleas court, and thereupon proceeded to set forth Judge Phillips' opinion in toto and adopted the same as its opinion in disposing of the case. The opinion of Judge Phillips is a very instructive one and goes fully into the questions of *repeals by implication.* but I shall content myself, as the opinion is somewhat lengthy, by quoting simply the following extracts which seem particularly applicable to the present question:

"It is claimed that this act of 1896 repealed section 8 by implication, the claim being that the new act is a substitute for the old act, covering the whole scheme of compensation by salary, and that, being such substitute, it operates by implication to repeal the whole of the former act upon the same subject.

"The rule is well settled, that where a later act covers the whole subject of an earlier act, and is plainly intended as a substitute for the former, the former act is impliedly repealed.

"The authorities in support of this general doctrine are so numerous they need not be stated. The doctrine is held by our supreme court in United tSates vs. Tynene, 78 U. S. (11 Wall) 88.

"But where the substituted act contains a clause repealing all former enactments inconsistent with the substituted act, such repeal, it is held, is operative; that is, that form of repeal is operative and limits the repealing act according to the terms of its repealing clause.

" 'The doctrine that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, does not apply when the revisory statute itself prescribes its operation upon the previous act; when this is done, no other effect can be given to the revisory act.' What I have just read is part of the syllabus in Patterson vs. Laturn, 3 Sawyer, 164, the opinion in which case was delivered by Justice Field. In this case, the revisory act repealed such provisions of the original act as were inconsistent with the new act."

The syllabus in the case of the Lorain Plank Road Company vs. Newton Cotton, 12 O. S., page 263, reads as follows:

> "2. Said section, which revises the whole subject matter of the amendatory act of March 10, 1836 (S. & C. Stat. 355), 'for the regulation of turnpike companies,' and is evidently intended as a substitute for it, is to be regarded as *superseding* the latter act, and not as furnishing an *additional* or *cumulative* remedy."

And on page 271 the court says:

> "Prior to the passage of the act of 1852, the plaintiff in error was subject to the provisions of the amendatory act of March 10, 1836 (S. & C. Stat. 335), 'for the regulation of turnpike companies,' which contains provisions similar to those of section 58 of the act of 1852, for the suspension of tolls upon roads which the companies have failed to keep in repair, except that inspectors, who are upon view to determine the truth of the complaint, are to be appointed, under the former law, by the court of common pleas, or, as the case may be, by an associate judge of such court. It is insisted that the law of 1836 is neither expressly nor impliedly repealed by the act of 1852, and is, therefore, still in force as to all companies, incorporated prior to the passage of the act of April 9, 1852.
>
> "If this were true, the result anticipated by the counsel for the plaintiff—that proceedings could not be sustained against the plaintiff under said section 58—would by no means follow.
>
> "If we are right in the conclusion, that the general provisions of the law of 1852 are applicable to corporations created prior to its passage, and the law of 1836 is also in force as to them, then the law of 1852 must be regarded as providing a cumulative or auxiliary remedy, to which the party aggrieved may resort, if he elects to do so.
>
> "We incline, however, to a different opinion, and that the law of 1836, above referred to, is *superseded* by the 58th section of the law of 1852.
>
> "Section 58 is a re-enactment of the law of 1836, with the single exception of the tribunal, invested with the duty of appointing the inspectors—the same complaint is to be made—the same facts must exist—the same course of procedure is prescribed for the inspectors—the same notices of the preliminary and final action upon the complaint are to be given, and the same disabilities and penalties are imposed, if the complaint is found to be true.
>
> "It is manifest, therefore, that if section 58 is applicable to pre-existing corporations, it was intended as a *substitute* for the act of 1836, and must be held to supersede it."

This disposes of the contention that might possibly be raised that as the repealing clause of the present act has been vetoed it should not be regarded as repealing by implication the old act, but rather as being cumulative and in addition thereto.

It might also probably be contended that as repeals by implication are not favored, the former act would still be in existence because its provisions are not expressly repealed by the present act as section 16 of article II of the constitution provides:

"* * * and no law shall be revived, or amended unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

Should this contention be raised, it is expressly disposed of by the case of Lehman vs. McBride, 15 O. S., 573:

"5. The clause of the 16th section of the 2d article of the constitution, which provides that 'the sections or sections so amended, shall be repealed,' is directory only to the general assembly and was not intended to abrogate the long established rule as to repeals by implication."

In this case the court says:

"A farther objection is raised as to the validity of this law on account of the form in which it was enacted. The 16th section of the 2d article of the constitution provides as follows:

" 'Every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule. No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contain the entire act revived, or the section or sections amended; and the section or sections so amended shall be repealed.' Now, it is said, that the law in question is invalid, because it fails to comply with the requirements of the third and last clause, or provision, of the section just quoted, in this: that, though in several of its provisions it changes, and, therefore, is amendatory of the general election laws of the state, yet it does not contain the sections of the old law which are thus amended, nor does it expressly repeal any of them. Let us briefly examine this objection. The constitutional provision supposed to be violated (omitting what is irrelevant), reads thus: 'No law shall be * * * amended, unless the new act contain * * * the section or sections amended; and the section or sections so amended shall be repealed.'

"From the argument of counsel, we are led to suppose that the objection to be considered rests, mainly, on what we conceive to be a misunderstanding or the meaning of this clause. We understand the main objection to be, that in the new act, the sections of the prior statute, which it is supposed to modify or amend, are not set out and recited in full. We think the phraseology, reasonably construed, does not require this to be done. As we understand this clause of the constitution, it requires, in the case of an amendment of a section or sections of a prior statute, that the new act shall contain, not the section or sections which it proposes to amend, but the section or sections in full, as it purports to amend them. That is, it requires not a recital of the old section, but a full statement, in terms, of the new one. Such has been the almost uniform legislative construction given to this clause: and a different judicial construction would invalidate nine-tenths of the amendatory acts of state legislation passed since 1851. Whatever inference might be drawn from the debates in the constitutional convention, every provision of the constitution should be con-

strued agreeably to the import of its terms, as they may be fairly presumed to have been understood by the people, whose ratification alone gave validity to the whole instrument.

"Now, in regard to the act before us, it may be said that it does not, either in its title or anywhere in the body of it, purport, in terms, to be amendatory of a former statute or statues, or of any section or sections of a former act. Very few of its provisions were intended to supersede or take the place of any former enactments. It is, in fact, in its main provisions, and in its general scope and purpose, an independent and original act of legislation, upon a subject not embraced in prior statutes, and in respect to which there had been no previous legislation. Its purpose, as declared in its title, was 'to enable qualified voters of this state, in the military service of this state, or of the United States, to exercise the right of suffrage.' On this subject there was no prior legislation to be amended.

"The act was intended to provide for a particular case, not hitherto provided for—that of voters in the military service; and as to the place and manner in which all other electors should exercise the right of suffrage, prior enactments were left unchanged and in full force. As to them, the law was not amended, and it was properly not repealed, because it was intended that it should still operate with full vigor.

"But if we regard the act under consideration as properly amendatory of prior election laws (as some of its provisions, no doubt, are), yet all its sections are fully set out, in express terms. The constitutional provision to which, it is said, this act does not conform, was intended, mainly to prevent improvident legislation; and with that view, as well as for the purpose of making all acts, when amended, intelligible, without an examination of the statute as it stood prior to the amendment, it requires every section which is intended to supersede a former one to be fully set out. No amendments are to be made by directing specified words or clauses to be striken from, or inserted in, a section of a prior statute which may be referred to; but the new act must contain the section as amended. In this particular, we think, the act before us is not liable to exception. It is true, that some of its provisions are intended to change and supersede kindred provisions in the general election laws of the state. For example: it extends the time for receiving and opening the return of votes cast under the act, and of making abstracts thereof, and for giving certificates of election, to thirty days from the day of election; whilst the general election law of 1852 required the same acts to be performed within six days from the day of election; and it extends the time for giving notice of a contest of the election, to twenty days after the opening of the returns, whilst the law of 1852 required such notice to be given within twenty days from the day of election.

"The only just ground of exception to the regularity of these amendatory sections is, that the former provisions of the statute, which are thus amended and superseded, are not expressly declared to be repealed. But, we are satisfied that the clause of the constitution which requires, that 'the sections so amended shall be repealed,' is merely directory to the general assembly; and that a statute cannot be judicially declared invalid because that direction has not been complied with. This section of the constitution contains two distinct provisions preceding the one under consideration: 1st, 'that every bill shall be

distinctly read on three different days,' etc.; 2d, that 'no bill shall contain more than one subject, which shall be clearly expressed in its title.' In the case of Miller & Gibson vs. the State (3 Ohio St. Rep. 475), the first of these provisions came under examination, and was held to be directory only. At least, the court says, 'this is an important provision, without doubt; but, nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences.' The second provision was considered in the case of Pim vs. Nicholson (6 O. State Rep. 176), where the court held, that 'this clause was incorporated into the constitution for the purpose of making it a permanent rule of the houses. It is directory only, and the supervision of its observance must be left with the general assembly.' We think the reasons are equally cogent for regarding the subsequent clause in regard to repeals, as also directory in its character, and that a contrary holding would result in consequences truly 'alarming.' It would at least nulify many statutes which the courts and the people of the state have hitherto regarded as valid and governed themselves acordingly in their transactions. We cannot think that this clause was intended to abolish the doctrine of repeals by implication, and to reverse the established maxim, that where statutes are inconsistent with each other, the latter repeals the former. On the contrary, it was intended to secure and enforce the application of the principle embodied in this maxim, by directing the general assembly to act in accordance with it, by expressly declaring the former inconsistent and amended statute to be repealed.

"The constitution of Maryland contains the following clause: 'No law shall be revived, amended, or repealed by reference to its title only.' In giving a construction of this clause in the case of Davis vs. the State (7 Md. Rep. 152), the court said: 'this was intended to prevent incautious and fraudulent legislation. It does not apply to an independent act establishing a new, or reviving some previous, policy of the state. In such cases the enactment of one law is as much a repeal of inconsistent laws, as if the latter were repealed by express words.' The application of this principle to the act before us is apparent."

This case has been cited with approval many times throughout the courts of Ohio. One specific instance, which indicates that the question is no longer of any doubt is shown by the following extract of the opinion of Judge Okey in the case of Kennedy vs. State, 34 O. S., page 310 (at page 313):

"Chapter 8, section 39, is evidently a substitute for the first clause of the 20th section of the act of 1870 (67 Ohio L. 106), and hence the clause is repealed thereby. Lehman vs. McBride, 15 Ohio St. 573. The remaining part of section 20 falls, in the revision of the laws, under another title, which could not be submitted for re-enactment at the session of 1877, and that is the reason there was no express repeal of the section."

Finally, upon this proposition the whole matter is succinctly stated by Judge Shauck in delivering his opinion in the case of Thornily vs. State, 81 O. S., 108 (at page 118):

"That the section relief upon has been repealed by implication by the act of April 21, 1904 (97 O. L. 254), which placed county commissioners upon a salary instead of allowing them compensation by fees as formerly. That act in its first section (section 897, R. S.) affixes to the office of county commissioners a prescribed salary in every county of the state, and the second section of the act provides: 'the compensation provided in the preceding section shall be in full payment of all services rendered as such commissioners.' It is true that the later act does not expressly repeal the former provision now relied upon as authority for the payment of the fees claimed by the commissioners. *It is also true that repeals by implication are not favored, the meaning of which is, and it must be, only that a court will not, in the absence of an express repeal, consider former legislation as repealed by implication when the former and later acts may be harmonized by reasonable construction so as to continue both in operation. It is consistent with the elementary rule, always recognized as indispensable to the right administration of the written law, that the present will of the legislature is found in its latest expression.*"

On page 119 he says:

"Here is expressed affirmatively by the language employed in the act the legislative will with respect to the subject so comprehensive that it cannot be doubted that the express repeal of section 4903 was omitted by mere inadvertance. *The last named section being incompatible with the later legislation must yield to it because of the impracticability of harmonizing the earlier and the later acts so that they may be enforced together.*"

It seems to me, from the foregoing authorities, there can be no doubt but that Senate Bill No. 165, even with the repealing clause veto as stricken out, and without looking to the plainly expressed intention of the legislature, as shown by the enactment of the repealing section and its veto by the governor, clearly repeals all of the sections of the former act which are incorporated in it, therefore, as it became a law on the 9th day of June, 1911, and as Mr. Wonders, the former state highway commissioner, was appointed under the provisions of section 1178 of the General Code, which section was repealed by the enactment of section 1 of the said Senate Bill No. 165, his office, therefore, became vacant—or, more properly, was abolished on the 9th day of June, 1911, by the repeal of the said section 1178 of the General Code under which he was appointed.

State vs. Jennings, 57 O. S., 415. "1. An office created by an ordinance is abolished by the repeal of the ordinance, and the incumbent thereby ceases to be an officer."

And at page 423, Judge Minshall says:

"There is no question but that the council had the power to repeal the former ordinance: and this being so, and all the offices created by it, whatever they were, being thus abolished, the incumbents cease to be officers, for *there can be no incumbent without an office.*"

and it cites upon this proposition Flynn vs. State, 70 O. S., 333; Gano vs. State

ex rel., 10 Ohio St., 236; State ex rel. vs. Hawkins, 44 Ohio St., 98. This proposition is equally true in regard to offices created by the legislature. By the repeal of an act which created an office, the office itself must necessarily be abolished, for without the law creating it there is no valid reason for its existence. (See also Knoup vs. Bank, 1st Ohio St., 603, where the court say at page 616):

> "It is true, that an officer elected by the legislature, or the people, cannot be expelled from his office, arbitrarily, by a resolution, or act, because the constitution prescribed an impeachment, or other mode of trial for such cases, but if the office be created by the legislature, it may, in the absence of express constitutional restriction, be abolished or suspended; and yet the officer cannot claim compensation, for the loss of his office. He has no property, or individual right in it. He is but a trustee for the public; and whenever the public interest requires that the office should be abolished, or the duties of the office become unnecessary, the incumbent cannot object to the abolition of the office."

In the case of State ex rel. Flinn vs. Wright, Auditor, 7 Ohio St., 334, the fact that an office is abolished by the repeal of the act creating it is clearly expressed. I quote from the decision of Judge Brinkerhoff as follows:

> "By an act of the general assembly, passed March 12, 1852, entitled 'an act to create a court of criminal jurisdiction in Hamilton county,' the criminal court of Hamilton county was established; the court to consist of a single judge to be elected by the electors of that county, and whose term of office should be five years.
>
> "The relator was duly elected and commissioned as such judge for the term of five years from the second Monday of February, 1852.
>
> "On the first day of May, 1854, the general assembly passed an act, to take effect from and after the first day of January following, repealing the aforementioned act, and transferring the business of said criminal court to the court of common pleas of Hamilton county.
>
> "The court and the office being thus abolished by the repeal of the act creating them, and the business pending in that court being transferred elsewhere, prior to the expiration of the time for which he was elected and commissioned, the relator claims that the repealing act insofar as it attempted to abolish his office prior to the expiration of the time for which he was elected and commissioned, is contrary to the constitution of the state, and therefore inoperative; that his office continued in being notwithstanding the repealing act; and he now seeks, by his motion, to compel the auditor of state to issue his warrant on the treasurer of state for his salary accruing subsequently to the time fixed for the taking effect of the repealing act.
>
> "That the general assembly has full power to control, modify, and abolish the courts and judicial offices of the state, except so far as its powers in this respect are restrained and limited by the provisions of the constitution, will be conceded. And the inquiry before us, therefore, is, whether there is, in the constitution, any limitation, either expressed or implied, upon the general power of the legislature over courts and their judges created by its authority?"

The foregoing citations seem to be necessary to properly answer your

questions, and now answering the same in order, and basing my answers upon the authorities above cited and quoted, I take up the rest of your questions.

My opinion is, that the *office of the state highway commissioner*, as held by Mr. Wonders under section 1178 of the General Code, *became vacant on the 9th day of June, 1911*, on which date Senate Bill No. 165 became a law.

You ask whether Mr. Wonders legally held the office until his successor, Mr. Marker, was appointed and qualified on the 17th day of June, 1911. *My opinion is that he did not.* The office held by Mr. Wonders became vacant on the 9th day of June, 1911, by the repeal of the act under which he was appointed, and therefore there was no further office for him to hold. A new office was created by Senate Bill No. 165 (see section 1 of the said act), and there was no incumbent of the said office until Mr. Marker was appointed and qualified.

Your next question is: "When did the terms of the clerks in his office and other employes employed by and acting under the direction of Mr. Wonders cease, and to what date should the salaries of Mr. Wonders and his employes be paid?" The terms of the clerks and other employes appointed by Mr. Wonders and acting under his direction cease upon the same date that the office of Mr. Wonders ceased, namely, the 9th day of June, 1911, as the sections of the code under which they were appointed were repealed by the enactment of the new bill; therefore, as there was no authority in law after said date for their employment or pay, the *salaries of Mr. Wonders and his employes should be paid to June 9th, 1911.*

Your next question is: "How shall the proportionate part of the salaries of Mr. Wonders and his employes be determined; the salary of Mr. Wonders being fixed at $2,500, and the salaries of the employes being fixed by Mr. Wonders, and payable from a blanket appropriation covering the salaries or compensation of the several employes?" The amount of salary due Mr. Wonders up to the 9th day of June, 1911, should be paid out of the appropriation made for the payment of his salary; and the salary of the other employes should be paid, as fixed by him, calculating the amount due up to the 9th day of June, 1911, and from the appropriation made for that purpose.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

291.

OHIO NATIONAL GUARD—APPROPRIATION FOR EXPENSES IN COLUMBUS STRIKE STRIKE—PAYMENT THEREFROM FOR LOSS BY MEMBERS OF CLOTHING THROUGH BURGLARIZATION OF ARMORY.

The appropriation for "the expenses of the National Guard in riot duty at Columbus in the summer of 1910" cannot be drawn upon to reimburse members for loss of clothing through burglarization of the armory.

COLUMBUS, OHIO, July 10, 1911.

HON. A. W. BEATTY, *Deputy Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 6th, answer to which has been unavoidably delayed on account of the unusual pressure of business in this department.

Your letter encloses correspondence between Captain Willis Bacon of Com-

pany I, 8th Infantry, O. N. G., and General Charles C. Weybrecht, adjutant general, with reference to a claim against the state arising in the following manner:

> Certain members of said Company I, the headquarters of which is at Tiffin, upon being called into active service because of the riotous conditions in the city of Columbus in the summer of 1910, were forced in compliance with regulations of the National Guard to make a change of clothing from their ordinary costumes into the uniforms of the service at the armory of said company in Tiffin and to leave their own clothing in their lockers in said armory. While the company was absent at Columbus the armory was burglarized and the clothing in question lost. The members of the guard thus damaged, desire to have the amount of their loss ascertained by a surveying officer of the National Guard and paid out of the appropriation for the expenses of the National Guard on riot duty in Columbus in the summer of 1910.

You request my opinion as to whether or not payment may lawfully be made to the members who have been thus damaged, out of the appropriation above referred to, after ascertainment of the amount of loss in the manner above described.

In my opinion the fund referred to may not be expended in this manner. The appropriation is for "the expenses of the National Guard at Columbus, etc." These items are not in the most liberal sense of the term "expense of the National Guard;" they are the losses of the individual members as private citizens, occasioned, however, by their active service as members of the National Guard. Their claims constitute obligations of the state of Ohio which the general assembly of the state is in good morals bound to pay. The appropriation in question, however, is not broad enough to permit payment therefrom.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Bureau)

33.

COUNTY AUDITOR—PAYMENT OF ESTIMATES MADE BY ARCHITECT OR COUNTY SURVEYOR—POWERS OF COUNTY COMMISSIONERS.

It is legal and regular for the county auditor to pay estimates made by an architect or county surveyor under contracts for buildings or bridges without the approval thereof by the county commissioners.

COLUMBUS, OHIO, January 17, 1911.

Bureau of Inspection and Supervision of Public Office, Columbus, Ohio, MR. A. B. PECKINPAUGH,

DEAR SIR:—I beg to acknowledge receipt of your letter of November 22d, requesting my opinion upon the following question:

> "Sec. 2360, G. C., provides that estimates upon contracts for the construction or repair of bridges and buildings shall be paid upon the warrant of the county auditor, apparently without the allowance of the county commissioners. Section 2572, G. C., provides that all bills payable out of funds controlled by the county commissioners shall be filed five days before allowance and remain on file five days after allowance by the commissioners before their payment by the county auditor. Taking the provisions of these two sections together, is it proper for the county auditor to pay estimates made by an architect or county surveyor under contracts for buildings or bridges without the approval thereof by the county commissioners?"

Section 2360 referred to by you is a part of the chapter of the General Code entitled, "Building Regulations."

Section 2333, et seq., of this chapter, describe in minute detail the procedure to be followed in the construction of county buildings and bridges.

Section 2359 provides in part that,

> "At the times named in the contract for payment to the person with whom it was made, the county commissioners or an architect employed by them to superintend the contract, shall make a full, accurate and detailed estimate of * * * the amount due * * *."

Section 2360 provides in part that,

> "When presented to him, the county auditor shall compare such estimates carefully with the contract * * * and with previous estimates. If he finds the last estimate correct, he shall * * * give to the person entitled thereto, a warrant on the county treasurer for the amount shown by the estimate to be due * * *."

Section 2572 also referred to by you is found in the chapter relating to the powers and duties of the county auditor. It provides in part that,

> "A bill or voucher for the payment of money from any fund controlled by the commissioners or infirmary directors must be filed with

> the county auditor * * * at least five days before its approval for payment by the commissioners or infirmary directors when approved * * * payment thereof shall not be made until after the expiration of five days after the approval has been so entered."

The procedure outlined in the chapter relating to the construction of public buildings is, in my judgment, exclusive and complete in itself. These provisions are specific, while section 2572 is evidently general and applies to the payment of general claims against the county. It is, therefore, my opinion that when an estimate has been approved in accordance with section 2359, the county commissioners have nothing further to do with it, and that the auditor, if satisfied that the estimate is correct, may lawfully pay the amount thereof without allowance by the commissioners.

Your question suggests another question, as to the propriety of the approval of an estimate under the public building act by the county surveyor. Referring to the above quoted provisions of section 2359, it will be noted that the powers to make up an estimate is vested in the commissioners or in the "architect employed by them." While the word "architect" is used in this section, I believe the plain intent of it is, that when the structure to be constructed is a county bridge, the engineer employed by the commissioners shall make up the estimate.

Since the adoption of section 2792, General Code, formerly section 1166 R. S. in its present form, the supreme court has held in the unreported case of Hibbard vs. Biddle, 81 O. S., that all engineering work for the county must be performed by the county surveyor, who is entitled to be employed by the county commissioners for that purpose. The designing of a county bridge and superintending the construction thereof, constitute, in my opinion, such engineering work, and the county commissioners are entitled, if not required, to employ the county surveyor therefor. The surveyor so employed, is, in my opinion, entitled to make up the estimates required to be made by section 2359 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

37.

COSTS IN FELONY CASE—JAIL RULE FIXED BY COMMON PLEAS COURT —PAYMENT WHEN DEFENDANT PROVES INSOLVENT.

A jail rule fixed by common pleas court providing for the inclusion in the bill of costs of the prisoner's expenses of board, and incidental expenses, cannot extend to felony cases and such costs may not be paid out of the state treasury under 13726 *G. C. in case defendant proves insolvent.*

January 15, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of January 9, 1911, in which you state:

> "Under section 3162 of the General Code, the court of common pleas, in one part of the jail rules governing the county jail, established the following:

"'He (the sheriff) shall keep a separate account of in his jail register with each prisoner and charge the same with board, washing, shaving, clothing and any articles by him or her damaged, the expense of guards, physicians, nurses and all other expenses incidental to his or her imprisonment, to be taxed in the bill of costs and collected as other costs are or may be by law collected.'"

and you ask my opinion whether under this provision of the jail rules, such expenses as board, etc., may be included in the costs in a felony case, and, in case the defendant proves insolvent, be legally paid out of the state treasury under section 13726 of the General Code.

Section 3162 ofthe General Code is as follows:

"The court of common pleas shall prescribe rules for the regulation and government of the jail of the county, not inconsistent with the law, upon the following subjects:

"First. The cleanliness of the prison and prisoners.

"Second. The classification of prisoners as to sex, age, crime, idiocy, lunacy and insanity.

"Third. Bed and clothing.

"Fourth. Warming, lighting and ventilation of the prison.

"Fifth. The employment of medical or surgical aid when necessary.

"Sixth. Employment, temperance, and instruction of the prisoners.

"Seventh. The supplying of each prisoner with a copy of the Bible.

"Eighth. The intercourse between prisoners and their counsel, and other prisoners.

"Ninth. The punishment of prisoners for violation of the rules of the prison.

"Tenth. Other regulations necessary to promote the welfare of the prisoners."

This section, it will be observed, gives a schedule of the subjects upon which the courts shall prescribe rules for the regulation and government of the jail of the county, and there is nothing in this section which can possibly be held to grant any authority to include the expenses charged against the prisoner, in the rule you refer to, in the cost bill so as to have the same paid by the state.

Section 2850 provides 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, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate."

Under this section, it will be observed, the sheriff is to be allowed by the county commissioners a certain amount for keeping and feeding prisoners in jail; and that he is also to furnish, *at the expense of the county*, to *all prisoners* confined in jail (except those confined for debt only), fuel, soap, disinfectants,

bed, clothing, washing, and nursing when required, and *other necessaries* as the court in its rules shall designate. In case a common pleas court has authority to make such a rule as the one you refer to, and which is quoted in the first part of this opinion, the expenses charged against the prisoner under such a rule would have to be paid by the county under section 2850; and to make a rule by which the same could be shifted upon the state, instead of the county, would be contrary to the plain meaning of the statutes and without authority in law.

Further calling your attention to section 13722, which is as follows:

> "Upon sentence of a person for a 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 the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

The only items that can be included in the cost bill in the prosecution for a felony are costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict, etc.

Therefore, my opinion is that under this provision of the jail rules the expenses enumerated in said rule cannot be included in the costs in a felony case, and, legally paid out of the state treasury under section 13726 of the General Code, in case the defendant proves insolvent.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

46.

COMPENSATION—REDUCTION OF SALARY OF CHIEF OF POLICE—CIVIL SERVICE RULES—POWERS OF COUNCIL.

On February 9, 1909, the city council of the city of Troy was authorized to fix a new salary of chief of police, and to reduce the same from $75 to $70, and against this action the then incumbent had no ground of complaint.

The statutory restraints imposed upon the powers of removal and other similar powers, in the civil service provisions are applicable to the executive or administrative branch of the city government and not to the legislative branch.

It is the rights of the individuals rather than the rights of the office or position which is sought to be safeguarded by the civil service rules.

The chief of police has no official term, and is therefore not affected by section 126 M. C., providing against increase or decrease of salary during the term of office.

COLUMBUS, OHIO, January 20, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department for opinion thereon, an inquiry of the city auditor of Troy, which is as follows:

"On February 9, 1909, council of the city of Troy, enacted an ordinance fixing the salary of the chief of police at seventy dollars per month. The ordinance previously in effect had fixed the salary of this position at seventy-five dollars per month. The same person occupied the office of chief of police prior to the enactment of the ordinance, and has at all times since so occupied said office. Was the ordinance valid?"

The city auditor, in his letter addressed to you, cites section 4487 of the General Code, formerly section 166 Municipal Code, which provides as follows:

"No officer, secretary, clerk, sergeant, patrolman, fireman or other employe in the police or fire departments of any city shall be removed or reduced in rank *or pay* except as provided in this chapter for removals by the chiefs of the police and fire departments."

This section, however, can have no direct application to the question at hand. It was originally section 166 of what is popularly known as the Paine law, 99 O. L. 567. This law was passed after the date above referred to, and did not go into effect with respect to chiefs of police until January 2, 1910. However, there were similar provisions in the law in force at the time of the adoption of this ordinance. Section 149, Municipal Code, provided in part, "The chief of police shall be appointed from the classified list of such (safety) department." This reference to the "classified list" is to the list prescribed by former section 164 Municipal Code, one of the sections relating to the civil service then in force. Section 167 of the code, in force in February, 1909, provided in part that,

"No officer, secretary, clerk, sergeant, patrolman, fireman or other employe of any city of the state, at the time this act goes into effect, shall be removed or reduced in rank *or pay* except in accordance with the provisions of this act."

a provision essentially similar to that of section 4487 General Code, above quoted. Without quoting from the other sections of the civil service provisions of the former Municipal Code, suffice it to say that the restraints imposed upon the power of removal and other similar powers therein, are all applicable to the executive or administrative branch of the city government, and not to the legislative branch. I find there is no intention, either express or implied, to restrict council in its general power to fix the salaries of officers of the city, and persons holding official positions and employments in the department of public safety.

Furthermore, the clear intention of the old civil service regulations, as well as of those now incorporated in the General Code, is to protect the *individual* members of the civil service. It is the rights of the person that are safeguarded—not the rights, if such they may be called, of the position. I am, therefore, of the opinion that, the provision that no officer shall be reduced in pay, except after the perferment of charges, that the bearing thereon, etc., is intended to protect an officer of the police department, for instance, from reduction of pay by executive order. It is not intended to preclude council from changing the salaries which shall be paid to the occupants of a given position, whenever it may see fit. All the provisions of the Municipal Code relating to a given subject must be read together; and section 167 must be construed together with section 126 Municipal Code, which provides that:

> "Council shall fix the salaries of all officers, clerks, and employes in the city government, except as otherwise provided in this act. * * * The salary of any officer * * * so fixed shall not be increased or diminished during a term for which he may have been or appointed."

The chief of police has no official term and is not therefore protected by the last sentence above quoted.

In view of all the foregoing considerations, I am of the opinion that, the city council was on February 9, 1909, authorized to fix anew the salary of the chief of police; and that the then incumbent of the office was not protected by any provision of law then in force, from the effect of a reduction of salary resulting from such an act of council.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General.

65.

SHERIFF'S AUTOMOBILE EXPENSE—AUTHORIZATION OF STATUTE TO "MAINTAIN" VEHICLES, DOES NOT INCLUDE "PURCHASE."

By section 2997, General Code, the county commissioners are authorized to allow a sheriff the expenses of "maintaining" the necessary horses and vehicles necessary for the proper administration of his office, but such authorization does not extend to the purchase or permanent renting of horse, automobile, or other vehicle.

COLUMBUS, OHIO, January 25, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 19, 1911, in which you state:

> "We enclose herewith a letter from the prosecuting attorney of Franklin county, in which he submits the question as to the legality of the purchase or rental by the county commissioners of an automobile for the use of the sheriff in the performance of his official duties."

The letter you refer to, from the prosecuting attorney of Franklin county, has been mislaid, and I am, therefore, unable to refer to it, but I presume from your statement that you desire an opinion as to whether the county commissioners have legal authority to purchase or rent an automobile for the use of the sheriff in the performance of his official duties.

You refer to the opinion of the attorney general rendered your department on December 20, 1906, holding that the commissioners were authorized to purchase the necessary horses and vehicles for the use of the sheriff and to maintain the same, and to the case of State vs. Commissioners, 10 Circuit Court n. s. 398, which disapproves of this opinion.

The only section of the statutes upon which the authority of the commissioners to purchase or rent an automobile for the use of the sheriff is section 2997 of the General Code, which is as follows:

> "In addition to the compensation and salary herein provided, the

county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institute for the feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare and street car fare, mentioned in this section before they shall be allowed by the commissioners."

This section was originally section 19 of the salary law, as passed March 27, 1906, 98 O. L. 89, etc., and as thus passed it did not contain the clause allowing the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases. As the law stood, and without this added clause, allowing the sheriff his railroad fare, etc., the opinion of the attorney general that you refer to, and the case of State vs. Commissioners, *supra*, were both rendered. I call your attention to the language of the circuit court in said case, beginning on page 399 as follows:

"As we view it there is nothing in the section which indicates an intention on the part of the legislature in the use of the word 'maintaining' of using it in, or giving to it, any other than its ordinary meaning. On the contrary, every word in the section indicates otherwise.

"There is no provision in it for the allowance of expenses in the purchase of any article by name, but feed; and all other intended articles can be ascertained only by implication. Public officers can be allowed only such compensation, or fees, as are provided for in express terms, or by necessary impilcation from the terms used, and the words 'expense of maintaining,' as applied to horses and vehicles, cannot, by implication, include, or refer to, the expense of their purchase. If the legislature intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it certainly would have so provided in unambiguous terms. Simple words only were needed to make such a provision.

"What, then, is the definition—the ordinary meaning—of the word 'maintaining,' especially when applied to animals and vehicles?

"All lexicographers define maintenance as 'maintaining; supporting; upholding; keeping up; sustenance; supply of the necessaries of life; subsistence;' and the word maintain, 'to hold or keep up in any particular state or condition; to support; to sustain; to keep up.' So

> that the meaning of the word 'maintaining' as used in this section in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the legislature therefore in this provision only meant and intended that sheriffs should be allowed the necessary expenses incurred in supporting, sustaining and supplying their horses with the necessaries of life, and in keeping their vehicles in good condition, and not in the purchase of them."

You will note that the court expressly says, "public officers can be allowed only such compensation, or fees, as are provided for in express terms or by necessary implication from the terms used." (See also 82 O. S. 186 and 81 O. S. 108).

And again in this same decision the circuit court says:

> "If the legislature intended to have the county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expenses necessarily incurred in their purchase, it certainly would have so provided in unambiguous terms. Simple words only were needed to make such a provision."

As stated above, this decision of the circuit court had been rendered, and the defects, if any, in this law pointed out at the time the legislature amended the law on April 7, 1908, (See 99 O. L. 73) and yet the only amendment the legislature made was to allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases.

Therefore, my opinion is that the commissioners are without authority to purchase or rent an automobile for the use of the sheriff in the performance of his official duties. If the legislature had intended to give the commissioners any such right, or the right to purchase horses and vehicles, or to rent the same, it certainly would have said so in this section, especially after attention had been called to this section in such an emphatic manner by the opinion of the circuit court; and it would have made the provision in unambiguous terms, as the court says, "simple words only were neeed to make such provisions," and as such a provision was not made, and there is nothing in the statutes expressly giving the commissioners such power my opinion is that they did not possess it.

The commissioners, I believe, have the right to allow the sheriff his actual necessary expenses, whatever the same may be, incurred and expended in pursuing or transferring persons accused or convicted of crimes or offenses, etc., as provided in section 2997, General Code, but only for the express purposes therein provided; and if it becomes actually necessary to hire an automobile for any of the purposes therein expressly enumerated he should be allowed for the same, but not otherwise.

In construing this section and upon all the questions arising as to the compensation or fees of county officers, not expressly provided for by statute, I call your attention to the clear statement of the rule on this subject, by Judge Shauck, on page 188 of 82 Ohio State Reports, as follows:

> "That if a statute imposes a duty upon a public officer it is presumed to be performed by him in consideration of the general emolu-

ments of his office unless the legislature has clearly indicated the intention that the compensation shall be paid for the performance of the duty so imposed."

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

71.

BOARD OF EDUCATION—TEACHER AND JANITOR SERVICE—COUNTY COMMISSIONERS.

Before a teacher may be entitled to $2.00 per day for attendance at an institute as provided by section 7870 G. C., he must have attended such institute at least for four days, and the rule is the same whether during such attendance school is in session or not.

A teacher cannot be compelled to do janitor work by the board of education unless under the terms of a special contract with said teacher and providing for extra compensation therefor.

Section 7610 provides for relief through the county commissioners, where the board fails to provide janitor service.

January 26, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You submit the following questions:

1. How many days must a teacher attend an institute while the schools are not in session to entitle him to the $2.00 per day, provided for such attendance by section 7870 of the General Code?

2. How many days must a teacher attend an institute while the schools are in session to entitle him to his regular salary for the week he attends such institute?

3. What remedy has a teacher when a township board of education by resolution has provided that each sub-district teacher in the township might employ a janitor at not to exceed $1.00 per month, to be paid out of the school funds, and such teacher is unable to secure janitor services for less than $2.00 per month, whereas the board refuses to make any allowance in excess of $1.00 per month?

1. Section 7870 of the General Code provides that:

"If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid $2.00 a day for actual daily attendance as certified by the president and secretary of such institute, *for not less than four nor more than six days of actual attendance* to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed."

It would seem from the above language of the statute that a teacher must actually attend an institute for "not less than four" days in order to be entitled to $2.00 per day provided for such attendance by section 7870 of the General Code.

2. The statute makes no specific provision for the number of days a teacher

must attend an institute while schools are in session in order to be entitled to a regular salary for the week of such institute. However, the above quoted language of section 7870, forbidding any payment to a teacher unless such teacher attends an institute for "not less than four days" of actual attendance, amounts to practically a definition of what constitutes an institute within the meaning of said section 7870 as far as the payment to teachers is concerned.

I am, therefore, of the opinion that attendance at an institute such as to entitle a teacher to compensation under section 7870 while schools are in session, means "not less than four days" of actual attendance, and that a teacher must attend an institute while schools are in session at least four days to be entitled to his regular salary for the week of such institute.

3. Section 7707 of the General Code provides that:

> "No teacher shall be required by any board to do the janitor work of any school room or building, except as mutually agreed by special contract, and for compensation in addition to that received by him for his services as teacher."

Under the above section the board of education cannot compel a teacher to do janitor work with or without compensation, and no teacher is compelled to perform janitor work with compensation unless such teacher agrees to the same by special contract. I find no authority of law which authorizes the board of education to permit the hiring of janitor by the teacher, such janitor to be paid out of the school funds. Unless the teacher makes a contract to do the janitor work himself, it is the duty of the board of education and not the teacher to engage the services of a janitor.

If the board of education refuses to perform such duty, and if by reason of such refusal such board of education fails "to provide suitable school houses for all the schools under its control," then under section 7610 of the General Code the county commissioners "shall perform any or all of such duties and acts, in the same manner as the board of education by this title is authorized to perform them."

I am, therefore, of the opinion that the board of education above mentioned has no right to expect or compel its teachers to employ janitors as they have attempted to do according to the above facts presented in your letter.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

79.

TAXES AND TAXATION—PERSONAL PROPERTY EXEMPTIONS TO "INDIVIDUALS" ONLY—RETURNS OF TRUSTEES OF SOCIETIES, ESTATES AND MINOR HEIRS.

As the constitution restricts personal property exemptions to "individuals" only:

A trustee of an "estate" designated by will, may not deduct $100 *as exemption in personal property returns, nor may the trustees of a secret society. A guardian for minor heirs however, may deduct such exemptions in returning the property of his ward or wards.*

COLUMBUS, OHIO, January 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of January 24th received. You request my opinion upon the following:

> "Under section 5360, General Code, may a trustee of an estate deduct $100.00 from the amount of taxable property in his return to the assessor? Also, may a guardian for minor heirs make such deduction from the property of his ward or wards? Also, may the trustees of a secret society make such deduction from their taxable property?"

The state may impose such taxes on persons or things within its dominion as it deems proper, and it may apportion them according to its discretion or judgment; and it may, if it deems advisable to do so, exempt certain descriptions of property from taxation. The constitution of the state of Ohio, article 12, section 2, uses very comprehensive language in describing what property may be taxed under the laws of Ohio, and embraces therein property of every description. Said section 2 also sets forth what property may be exempted under the laws of Ohio, and among the exemptions, it provides that *"personal property,* to an amount not exceeding in value two hundred dollars, for each individual may, by general laws, be exempted from taxation."

It is not mandatory upon the general assembly under the provision just quoted to exempt any personal property from taxation; but it has been the policy of the state to allow a certain amount of personal property as exempt, and in carrying out this policy the legislature enacted section 2732, Revised Statutes, paragraph 9, which reads as follows:

> "Each individual residing in this state may deduct a sum not exceeding one hundred dollars as exempt from taxation, from the aggregate listed value of his taxable personal property of any kind of which such individual is the actual owner, except dogs."

This section has been carried to the General Code, is now section 5360 of the General Code, and reads as follows:

> "A resident of this state may deduct a sum not exceeding one hundred dollars, to be exempt from taxation, from the aggregate listed

value of his taxable personal property of any kind, except dogs, of which he is the actual owner."

The language having been changed, but the legal effect thereof remaining the same. However, it has been held by a numerous line of decisions that statutes exempting property from taxation must be construed strictly.

You ask first—may a trustee of an estate deduct one hundred dollars from the amount of taxable personal property in his return to the assessor? Under authority of section 5360, General Code, the supreme court of Ohio, in construing article 12, section 2 of the constitution, in the case of Exchange Bank of Columbus vs. Hines, page 14, says in reference to the exemptions of personal property allowed by the constitution:

> "The only exception or exemption allowed in favor of individuals, is to be found in the words, 'personal property to an amount not exceeding two hundred dollars in value, for each individual, may, by general laws, be exempted from taxation.' It has ever been the humane policy of our laws to allow a certain amount of personal property, sufficient to include the most essential and necessary articles for the support of a family, to be exempt from execution for the payment of debts. And it is in accordance with this benevolent regard for the necessities of life, that this limited exemption from taxation, in favor of individuals, is authorized by the constitution. But the very fact of this express exemption, excludes the idea that any other or further exemption can be made."

The court takes the view that, the exemption of $100 from taxation is following out the humane policy of our laws to allow certain amounts free from payment of debts; and it is in accordance with this benevolent regard for necessities of life that this exemption is made by the constitution. The court indicates that the exemption is to be to individuals and not to corporations, societies, estates, etc.,

In view of the fact that exemptions from taxation are to be construed strictly, and in view of the decision of the supreme court in the case above cited, I am of the opinion that the word "individual" in the constitution and in the statutes is used in its ordinary meaning, and does not include corporations, societies, estates, etc.

I am, therefore, of the opinion that, a trustee of an estate designated by will may not deduct $100 from the amount of taxable personal property in his return to the assessor; and following out the same principle I am of the opinion that a guardian for minor heirs may make such deductions from the property of his ward or wards: but the trustees of a secret society, liable to be taxed by the Ohio laws may not deduct the $100 allowed by section 5360 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 79.

JUSTICE OF THE PEACE—MONTGOMERY TOWNSHIP—COLLECTION AND DISPOSAL OF FEES.

From a view of all provisions, justice of the peace in and for Montgomery township, Franklin county, Ohio, must charge fees for performing marriage ceremonies, fees for the execution of deeds and like instruments for taking affidavits for private parties, and for other similar services, and the clerk of the justice's court must collect such fees and pay them over to the city as provided in the ordinance.

COLUMBUS, OHIO, January 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 20th, in which you request my opinion as to whether, under ordinance No. 23608 of the city of Columbus, justices of the peace in and for Montgomery township, Franklin county, Ohio, are entitled to retain for their own use, fees for performing marriage ceremonies, for execution of deeds, leases and mortgages, for taking affidavits for private parties and like services?

You state that the boundaries of Montgomery township, Franklin county, Ohio, are identical with those of the city of Columbus, and that the said ordinance is passed under section 3 M. C., section 3512 General Code, which provides that:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, * * * except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes * * *."

The ordinance in question is in part as follows:

> "Sec. 1. That in the township of Montgomery, city of Columbus, Ohio, each justice of the peace *for services rendered, shall receive in lieu of all fees, an annual salary* of two thousand dollars ($2,000.00) * * * but no * * * warrant shall be issued by said auditor until the justice asking for the same has made and filed with him a statement setting forth the number of days he has been in actual attendance at his court room, ready for business, during the period which the warrant is intended to cover; and for such time thus spent in attendance to business only, shall he be allowed in such warrant, a deduction of six dollars being made for each day's absence * * *."
>
> "Sec. 2. There shall be one clerk * * *, for said justice of the peace. The said clerk shall be known as the clerk of the justices' courts of said city * * *."
>
> "Sec. 5. Before entering upon the duties of office, the clerk shall file in the office of the city clerk, a bond in the penal sum * * * conditioned that the clerk shall faithfully perform the duties of such office. It shall be the duty of said clerk to keep a true and complete record of all proceedings before each of said justices, and all judgments

shall be entered in the docket in the time and manner prescribed by law. He shall also keep true and correct accounts of all moneys received by him or his deputies, as *court fees*, for the use of said city or for any other purpose, and shall properly account for and pay over the same to the party entitled thereto * * *.

"*It shall be the duty of the clerk to tax and collect* the fees as provided in section 615 and 621 of the Revised Statutes of Ohio, and make return under oath to the auditor of said city * * * monthly * * * of all fees collected by him and all fees taxed by him and uncollected during the month previous, *give the style of the case* and number of pages of the docket in which they are recorded. He shall pay into the city treasury before noon of each day all *such fees* collected by him during the next preceding day.

"It is made the duty of said clerk to have one deputy clerk devote three half days each week exclusively to the collection of unpaid fees and costs. It is further made the duty of said clerk to turn over to the city solicitor * * *, all cost bills which he has failed to collect within sixty days after same are due and payable."

The foregoing are all the pertinent provisions of said ordinance regulating the disposition of the fees of said justices of the peace.

Sections 615 and 621 Revised Statutes, referred to therein are at present sections 13427 and 1746 General Code. The former provides the fees of justices of the peace for signing bills of exceptions and copying and certifying transcripts and bills of exceptions for error proceedings.

Section 1746 contains a general schedule of fees for justices of the peace in civil and criminal actions. Among other items included therein are the following:

"Acknowledging deeds or other instruments of writing with certificates thereon, forty cents * * * taking depositions and certifying them, ten cents per hundred words; marrying and making return, two dollars; taking and certifying proof of an account or claim against the estate of testators or intestates, twenty-five cents; taking and certifying affidavit, forty cents."

The specific question presented by the ordinance above quoted is, as to whether it is made the duty of the clerk to collect all fees included in section 621 Revised Statutes (section 1746 General Code); in other words, whether the ordinance disposes of these fees? If it does, and the clerk must collect them and turn them over to the city treasurer, then, of course, the justices are not entitled to retain them for their own use. If, on the other hand, it is not made the duty of the clerk to collect the kind or class of fees illustrated by the specific examples above referred to, then, no machinery being provided whereby the justices of the peace themselves shall account for these fees, they would in my judgment be entitled to retain them.

All the sections of the ordinance must be read together for the purpose of ascertaining the intent thus called in question.

Section 1, above quoted, provides that the salary therein provided for, shall be *for services rendered and in lieu of all fees;* but the remaining provisions of the section indicate that the services for which the justices are to be paid are services rendered in actual attendance at the court room.

Again, section 5, above quoted, makes it the duty of the clerk to keep a

true and complete record of all proceedings before each of such justices, and it is specifically provided that all judgments shall be entered as therein prescribed; he is required to keep a true and correct account of all *court fees;* is required to *tax and collect* the fees prescribed in section 621 R. S., and make return of *such fees* to the auditor of the city.

A fair construction of all these related provisions indicates to me that the clerk is required to collect all fees which may lawfully be charged by justices of the peace under section 621 R. S. It is to be noted that the clerk is required especially to keep a true and correct account of all court fees, for the use of the city or for any other purpose, but that he is required to collect "the fees" as provided in section 615 and 621. This difference in language is significant; it shows that the council in adopting the ordinance had in mind the distinction between court fees and other fees; and in failing to use the phrase "court fees" in connection with the phrase "as provided in section 615 and 621 of the Revised Statutes of Ohio," council clearly indicated that the fees referred to in said phrase are *all* the fees provided in said section. This is the more clear from a consideration of section 1, which provides that the salaries therein provided shall be *in lieu of all fees.*"

In spite, therefore, of the decision in St. Louis vs. Summers, 148 Mo., 398, I am of the opinion, that justices of the peace in and for Montgomery township, Franklin county, Ohio, must charge fees for performing marriage ceremonies, fees for the execution of deeds and like instruments, fees for taking affidavits for private parties and fees for other similar services, and that the clerk of the justice's court must collect such fees and pay them over to the city as provided in the ordinance above quoted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

80.

PROBATE JUDGES—STATEMENT OF UNPAID FEES, ETC., TO COUNTY COMMISSIONERS—END OF CALENDAR YEAR.

The amendment to section 2983 *G. C., in* 101 *O. L.* 199, *requiring probate judges to file with the county commissioners a statement of unpaid fees, costs, etc., at the end of each year of his incumbency, is to be construed as intending the end of the "calendar year."*

January 30, 1911.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date inclosing a letter addressed to you by Hon. John W. Hutchinson, probate judge, in which he calls attention to section 2983 of the General Code as amended 101 O. L. 199, and asks when he is required to file with the county commissioners the statement of unpaid fees, costs, etc., required to be paid. You request my opinion as to the question asked by Judge Hutchinson.

The amended section in question is in part as follows:

> "At the end of each quarter, each such officer shall pay into the county treasury * * * all fees * * * of whatever kind * * * and he shall also, *at the end of each year of his incumbency in office*

and at the close of the term for which he shall have been elected, make and file sworn statement with the county commissioners, of all fees, costs, penalties, percentages, allowances, prerequisites of whatever kind, which are due his office and unpaid."

This section is a party of the county officers' salary law, which is chapter one, division three, title X, part one, General Code. This chapter embodies a scheme of the fiscal year management of certain county offices, which scheme is based upon yearly allowances and quarterly payments. The year for which such allowances are made is defined by section 2980 as being the "calendar" year. The word "year" is repeatedly used in the act, and wherever so used the presumption is that it designates the calendar year; in like manner the word "quarter" is repeatedly used throughout the act, and wherever so used must be presumed to refer to a quarter of the calendar year. It is therefore, apparent that the word "year" as used in the above quoted section must be deemed to mean the calendar year, unless a contrary intention clearly appears. The phrase "at the end of each of his incumbency in office" is fairly susceptible of two meanings:

1. At the end of one year from the time the officer assumes his office.
2. At the end of each calendar year during his incumbency in office.

The presumption above referred to would lead to the adoption of the second meaning thus suggested. In addition thereto, it would seem that if the first meaning were adopted the phrase "at the close of the term for which he shall have been elected" would be unnecessary, inasmuch as county officers are elected for terms of years, and the adoption of this meaning would require the last annual report to be filed at the close of the term. That meaning should be given to this doubtful phrase which will conform to the general scheme of the act of which it is a part.

I am, therefore, of the opinion that the annual report required to be made by each county officer affected by section 2983 of the General Code must be made at the end of the calendar year, and that in addition to such annual reports, each such officer at the close of his term must file a like statement of the unpaid fees, etc., due to his office. The probate judge also inquires as to when he shall commence his statement. The question is immaterial inasmuch as that all that is required is a list of fees, costs, percentages, allowances and perquisites due the office and unpaid on a day certain.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

101.

STATUTORY CONSTRUCTION—SURPLUSAGE OF SECTION 2845 G. C.

The words in section 2845 G. C., "for summoning a jury, to be allowed on each issue, including traveling fees forty cents" under the present practice has no application or bearing and should be treated as surplusage.

COLUMBUS, OHIO, February 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your favor of January 19, 1911, received.

You state:

> "Section 2845 of the General Code fixing the fees of sheriffs, contains the following:
>
> "For summoning a jury, to be allowed on each issue, including traveling fees, forty cents."

and you inquire:

> "Will you kindly render this department your written opinion as to the meaning of this provision?"

The supreme court of Ohio, 46 O. S. 510, construed that part of section 1230 Revised Statutes, relating to compensation of sheriffs, although they include in their opinion the whole paragraph of the fee bill, relating to the summoning of juries by the sheriffs, yet, in their opinion they do not throw any light on the meaning of that part of the fee bill about which you inquire.

I have gone carefully into the history of section 1230 Revised Statutes, and find it was passed in 1877, found in 84 Ohio laws 118. That part of the section quoted by you, originally read as follows:

> "For *removing* a jury, to be allowed on each issue, including traveling fees, fifty cents."

In codifying this section, the codifiers changed the word "*removing*" to "*summoning.*" The statute referred to provides for fees for the summoning of regular and special juries; and the supreme court in the case just cited, decided that sheriffs should not be allowed any additional fees for filling up a panel. The fee bill allows $4.50 for summoning a petit or a grand jury, and the same amount for summoning a special jury; the fees for summoning a jury in the probate court are especially provided for by statute. Therefore, under the present practice, that part of the section quoted by you—"for summoning a jury, to be allowed on each issue, including traveling fees, forty cents" has no meaning, and should be treated as surplusage; but as the section originally read—"for removing a jury, to be allowed on each issue, including traveling fees, fifty cents," I am of the opinion, it was intended that the sheriff should be allowed fifty cents on each issue, for taking charge of juries in viewing premises, etc., and he could charge fifty cents in each case for such services. However, they do not use a very appropriate word to express even that meaning.

I am, therefore, of the opinion, as above stated, that

"For summoning a jury, to be allowed on each issue, including traveling fees, forty cents,"

has no application or bearing under our present practice, and should be treated as surplusage.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

114.

SURVEYORS—ASSISTANTS—EXPENSES—COUNTY TREASURY—VIEWERS, REVIEWERS, CHAIN CARRIERS AND MARKERS.

Viewers and reviewers, chain carriers and markers are entitled to actual and necessary expenses to be paid out of the county treasury.

COLUMBUS, OHIO, February 13, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 2d, in which you submit for my opinion the following question:

"Are viewers and reviewers, chain carriers and markers entitled to actual and necessary expenses to be charged as costs and expenses and paid out of the county treasury under section 6920, General Code?"

Section 6920 of the General Code is as follows:

"Persons required to render services under this chapter shall receive compensation for each day they are necessarily employed, as follows: Viewers and reviewers, chain carriers and markers, two dollars each, and surveyor, five dollars, and actual and necessary expenses to be charged as costs and expenses and paid out of the county treasury when approved and allowed by the county commissioners, on the order of the county auditor."

While this section is very ambiguous, I am of the opinion that the natural and primary meaning thereof is, the actual and necessary expenses therein provided for, may be allowed and paid to all of the persons mentioned in the section. Therefore, viewers and reviewers, chain carriers and markers should, in my judgment, be allowed their actual and necessary expenses, as well as their per diem fees for services rendered under the provisions of the chapter relating to county roads.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

115.

PROBATE JUDGE'S STATEMENT OF FINES DUE—STATUTORY CONSTRUCTION.

In the amendment to section 2983, 101 O. L. 199, providing for a statement of costs due and unpaid the word "due" is used in its ordinary sense.

COLUMBUS, OHIO, February 13, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 2d, in which you request my opinion upon the following question:

> "Are fees in the probate judge's office for the purpose mentioned in section 2983 G. C., as amended in 101 O. L., 199, to be considered due and unpaid prior to the final disposition of the case or the matter in which they were taxed?"

Said amended section 2983 provides in part as follows:

> "* * * each such officer shall * * * at the end of each year of his incumbency in office and at the close of the term, for which he shall have been elected, make and file a sworn statement with the county commissioners, of all fees, costs * * * and perquisites of whatever kind, which are *due* his office and unpaid."

I do not find in this section anything to indicate that the word "due" is therein used in any unusual sense. The probate judge's office being a court, costs in court proceedings therein become due as costs in other actions. It is unnecessary, in my judgment, to lay down any general set rule as to when such costs become due; as a general rule, they are not payable until judgment is awarded, because until that time the party liable therefor, is not ascertained. There are exceptions to this general rule, but as I take it, neither the rule itself, nor the exceptions are important in this connection. The principal question is sufficiently answered by stating that the section under consideration is not to be construed as, in any way, or for any purpose, creating a different rule with respect to the time that costs in the probate court become payable, from the rule which would otherwise obtain.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

119.

STATUTORY CONSTRUCTION—MEANING OF THE WORD "DUE"—PROBATE JUDGE'S STATEMENT OF FINES DUE AND UNPAID.

The fees of the probate judges in the administration of estates become "due" under the meaning of 101 *O. L.* 20, *amending section* 2953 *G. C., when they are payable under* 10740 *G. C.*, 15-18 *months after the filing of the administration bond.*

February 14, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—We are in receipt of your letter of January 21st, in which you state:

> "The act of April 30, 1910 (101 O. L. 200), amending section 2983 G. C., provides that each of the officers named in the salary law shall at the end of each year of his incumbency in office and at the close of the term for which he shall have been elected, make and file a sworn statement with the county commissioners, of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind, which are due his office and unpaid."

and ask:

> "When the fees of the probate judges in the administration of estates become due."

Section 10714 of the General Code provides in part as follows:

> "Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:
> "1. The funeral expenses, those of the last sickness, and the expenses of administration."

Section 10740 provides in part:

> "No executor or administrator shall be liable to the suit of a creditor of the deceased until after the expiration of eighteen months from the date of his administration bond, etc."

It follows, therefore, that no executor or administrator can be required to pay any claims against the estate until the expiration of eighteen months from the date of his administration bond, and the costs of administration would not be preferred over funeral expenses and expenses of last sickness.

The only question is what is meant by these "costs, fees, etc.," becoming "due." In United States vs. Bank, 31 U. S. (6 Pet.) 29, 36, Mr. Justice Story, says the word "due" is used in different senses:

> "It is sometimes used to express the mere state of indebtment, and then is equivalent to owed, or owing; and it is sometimes used to express the fact that the debt has become payable. Thus, in the latter

sense, a bill or note is often said to be due when the time for payment has arrived."

I think that the word "due" is used in the statute in the sense of payable; that the time of payment has arrived. I hold that said fees, costs, etc., spoken of, do not become due until eighteen months after the date of filing the administration bond. Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

125.

COUNTY RECORDER—FEES—FILING, SEARCHING AND REFILING CHATTEL MORTGAGES.

Under 8572 *G. C., the county auditor is entitled to* 24 *cents for all services connected with the filing of a chattel mortgage, with one grantor and one grantee.*

The statutory words, "Searching each paper" means to go through and examine carefully and in detail.

The same fees may be charged for refiling as are charged for the original filing of a chattel mortgage.

COLUMBUS, OHIO, February 21, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 17, 1911, requesting my written opinion upon the following questions:

"Under section 8572 G. C., what are the legal fees for all the services rendered by a county recorder in the filing of a chattel mortgage with one grantor and one grantee, when such instrument is not recorded?

"What does the phrase, 'for searching each paper' mean, and under what circumstances is a county recorder entitled to make a charge of 6 cents for the same?

"May the same fees be charged for refiling as for the original filing of a chattel mortgage?"

Section 8572 General Code, which provides the fees of the recorder for services in respect to chattel mortgages, is as follows:

"For services in respect to chattel mortgages, or instruments for conditional sales, as provided in this chapter, the officer shall be entitled to receive the following fees: for filing each instrument or copy, six cents; for searching each paper, six cents; for making the entries upon the filing of an instrument, six cents for each party thereto; for recording such instrument, ten cents per hundred words; for recording any affidavit, credit or statement added to an instrument between the time of its record and refiling, twenty-five cents; and the like fees for certified copies of such instrument, or copies, as are allowed by law to county recorders for like service."

This section is unambiguous in its provisions as to what fees shall be

charged, and the same are as follows: for "filing each chattel mortgage or copy, six cents; for searching each paper, six cents; for making the entries upon the filing of an instrument, six cents for each party thereto;" and as your question is as to what the fees shall be when there is but one grantor and one grantee in a chattel mortgage, the recorder would be entitled to charge six cents for each party thereto—twelve cents for the two; and the total fees provided in this section on filing a chattel mortgage would therefore, be twenty-four cents.

Your second question is as to the meaning of the phrase, "for searching each paper."

Section 8562 General Code, specifies the duties to be performed by the recorder upon the filing of a chattel mortgage with him, and is as follows:

> "The officer receiving such an instrument shall indorse thereon the time of receiving it and its consecutive number, and enter in a book to be provided by the county the names of all parties thereto, alphabetically arranged, with the number of the instrument, its date, the day of filing it, and the amount secured thereby, which entry must be repeated, alphabetically, under the name of every party thereto. He also shall deposit the instrument in his office to be there kept for the inspection of all persons interested. When such mortgage is refiled or cancelled, the date of such refiling or cancellation must be entered upon the margin of such record opposite the original entry."

My view of the meaning of the words, "for searching each paper," is that it means, "to go through and examine carefully and in detail." (See Century dictionary, definition of the word search). This is in order to obtain the data for making the entries required by section 8562, to-wit: the names of the parties, the date of the instrument, and the amount secured thereby, etc.

Your third question is as to whether the same fees may be charged for refiling as for the original filing of a chattel mortgage.

Section 8565 of the General Code, provides for what is commonly known as refiling a chattel mortgage, which is done by filing a true copy of the original statement and verification; section 8572, first quoted in this opinion, providing for the fees to be charged, states that for "filing each instrument or copy"; and the recorder would, therefore, be entitled to charge the same fees upon a refiling as for the original.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

137.

JAIL MATRON—TERM OF EMPLOYMENT—REMOVAL.

A jail matron holds only for the term of the sheriff appointing her, during which term she may be removed only for cause after hearing before the probate judge.

February 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—*In re jail matron; length of term.* Under date of February 7th, you inquire as follows:

"Can a jail matron duly appointed under the statutes, hold for a term longer than that of the sheriff who made the appointment? What is the length of term of a jail matron?"

Section 3178 of the General Code provides as follows:

"The sheriff *may* appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use and convenience of such matrons while on duty. Such appointments shall not be made, except on the approval of the probate judge, who shall fix the compensation of such matrons not exceeding sixty dollars per month, payable monthly from the general fund of such county upon the warrant of the county auditor upon the certificate of the sheriff. No matron shall be removed except for cause, and then only after hearing before such probate judge."

The law makes it optional with the sheriff to appoint a jail matron. I construe this section to mean that it is a matter that is optional with each succeeding sheriff.

My opinion is, that a jail matron holds during the term of the sheriff so appointing her and no longer, but that she is removable at any time during her employment, for cause, after hearing before the probate judge.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 138.

COUNTY SURVEYOR AS TAX MAP DRAUGHTSMAN—COMPENSATION—POWERS OF COUNTY COMMISSIONERS TO COMPENSATE.

Inasmuch as section 5552 G. C. provides an annual salary for a tax map draughtsman, it is very questionable whether the county commissioners can fix a per hour compensation.

But assuming this power, such draughtsman cannot draw a per diem as tax map draughtsman, and also as county surveyor for the same day.

COLUMBUS, OHIO, February 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You call the attention of this department to an opinion rendered by Attorney General Denman to your department on June 20, 1910; and submit the following question:

"The county surveyor is employed by the county commissioners as tax map draughtsman, his compensation being fixed by the commissioners at a certain amount per hour for the time actually employed in such work. In the event the surveyor charges the county a full per diem of $5.00 for a particular day, may he charge for a day or any part of a day as tax map draughtsman on that day?"

It is very doubtful whether the county commissioners can fix the compensation of tax map draughtsman at a fixed amount per hour for the time actually employed in such work, as section 5552 of the General Code provides for an annual salary for such draughtsman. Said section is as follows:

> "The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

But disregarding, for the purpose of your inquiry, this question, it is my opinion that when the commissioners have so fixed the compensation of the tax map draughtsman at a fixed amount per hour for the time actually employed in such work, and have appointed the surveyor as such tax map draughtsman, that such surveyor cannot charge for services as tax map draughtsman, rendered on a given day, subsequent to his receipt of a per diem as surveyor for that particular day; and that if he received pay under such employment as tax map draughtsman on a certain day, he cannot receive his per diem for the same day as surveyor. In brief, that he cannot draw a per diem as surveyor and as tax map draughtsman for the same day.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

154.

TELEPHONE IN SHERIFF'S OFFICE OR RESIDENCE IN COUNTY JAIL—POWERS OF COUNTY COMMISSIONERS.

By virtue of the discretion vested in them by section 3157 G. C., the county commissioners may provide the office of a sheriff in a county jail with a telephone.

The same is true with regard to their right to place a telephone in the residence of a sheriff when such residence is in the county jail.

COLUMBUS, OHIO, March 7, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—We are in receipt of your favor of the 7th ult., in which you state:

> "Where an office of the sheriff is maintained in the court house supplied with telephone (paid out of the county funds), is the rent of a telephone in the sheriff's residence a legal charge against the county where the sheriff's residence is in and a part of the county jail? Would such rent be a legal charge against the county if placed in an office of the sheriff maintained and kept in the county jail separate and apart from his residence?"

Section 2419 of the General Code provides as follows:

"A court house, jail, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions, and expense, as the commissioners determine * *."

Section 3157 of the General Code is as follows:

"The sheriff shall have charge of the jail of the county, and all persons confined there, keep them safely, attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas."

The county commissioners are vested, by the virtue of the above section, 2419 of the General Code, with a wide discretion in building a county jail, and they have determined in this case that in order to carry out the provisions of the above section 3157 General Code, it is for the best interest of the public that the residence of the sheriff should be located in said jail. If in the judgment of said county commissioners it is for the best interest of the county that a telephone for the use of the sheriff and the public shall be located in the jail for the proper performance of the duties of said sheriff, they may so locate one, and it is also discretionary with them as to the exact location of said telephone in said jail.

My opinion, therefore, is that the rent of a telephone in the sheriff's residence where said residence is in and a part of the county jail, is a legal charge against the county, provided the county commissioners shall determine that it is for the best interest of the public and necessary for the sheriff in the proper performance of his duties that such a telephone shall be so located in the jail.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

174.

CITY SOLICITOR—COMPENSATION—REIMBURSEMENT FOR OFFICE EXPENSES PAID BY HIMSELF—NECESSITY FOR APPROPRIATION OR AUTHORIZING ORDINANCE.

The council has the power of paying office rent for quarters for the city solicitor by virtue of section 4214 G. C., but it is not morally nor legally obligated to do so.

Therefore, when the council neglects to make an appropriation for such purpose, its failure to authorize by ordinance the reimbursement of the city solicitor for office rents, makes it impossible for the city solicitor to be reimbursed for office expenses paid out of his own pocket, for the reason that he is in the position of an unauthorized agent, and could not bind the corporation.

The fact that the solicitor's salary was based upon the assumption that such expenses were to be paid in addition thereto, is too light a supposition to sustain the interpretation of a legislative direction to that extent

COLUMBUS, OHIO, March 10, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of February 3d, request-

ing my opinion upon a question submitted to your department by the city solicitor of Coshocton. You have phrased the question in your inquiry to me as follows:

> "May a city council, in their appropriation for the first six months of 1911, provide for the payment of office rent for the city solicitor incurred during the year 1910, without an appropriation for that purpose available?"

Upon examination of the correspondence enclosed, however, I am persuaded that the real question is more specific than that submitted by you. The facts disclosed in the letter enclosed in your original communication, and in the letters that have subsequently passed between your department and the city solicitor, are as follows:

> "It has always been the custom in the city of Coshocton that the city solicitor should be furnished an office. The practice has been for the council to appropriate to the incidental fund of the city solicitor, an amount sufficient to pay office rent because the buildings owned by the city do not contain rooms suitable for offices for the city solicitor. There has never been any ordinance, however, expressly providing that the city should furnish the solicitor with an office, or that the solicitor, as part of his compensation should be reimbursed for office rent."

During the year 1910, doubtless by inadvertence, council neglected to make the customary appropriation for the office rent for the city solicitor; the solicitor, however, contracted for an office and paid the rent thereof monthly out of his personal funds. In the first semi-appropriation ordinance of 1911, council inserted an appropriation for the office rent of the city solicitor for the year 1910. The validity of this appropriation is called into question by your department.

It will be observed, therefore, that the question is somewhat narrower than as phrased by you, and relates in reality to the legality of the appropriation made under the facts and circumstances above detailed. I might state my opinion at the outset, that if the city were under a legal or moral obligation to pay the office rent of the city solicitor, the mere fact that an appropriation for that purpose is retroactive would be immaterial, as would be the fact that the obligation had been incurred in the absence of a specific appropriation for that purpose. In either of such events it would be perfectly legal for council to make an appropriation similar to that described in your general question.

Was there, then, an existing legal or moral obligation in favor of the solicitor, or his lessor, and against the city, which council might legally recognize in the matter above described?

The following sections of the General Code are applicable to the solution of this question:

> "Section 3806. No contract, agreement or other obligation involving the expenditure of money shall be entered into * * * by any board or officer of a municipal corporation, unless the auditor or clerk thereof first certifies to council that the money required for such contract, agreement or other obligation * * * is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose * * *.

"Section 3807. All contracts, agreements or other obligations * * * entered into * * * contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder * * *.

"Section 3808. No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any part of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other things he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.

"Section 4211. The powers of council shall be legislative only, and it shall perform no administrative duties * * *. 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 * * *.

"Section 4214. Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * * *.

"Section 4240. That council shall have the management and control of the finances and property of the corporation, except as may otherwise be provided * * *.

Section 4326. The director of public service shall manage * * * have charge of the maintenance of public buildings and other property of the corporation not otherwise provided in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

I can find no other sections of the General Code relating in any way to the question under consideration. I have sought in vain for a provision expressly authorizing council to empower the executive officers of the city to rent offices for their use. I have failed to find any section of the General Code which commands, either expressly or by implication, council to furnish offices for the executive officers of the city. I am forced to the conclusion that it is not the duty of council to furnish such offices or to authorize the executive officers to contract for them.

In my opinion, however, council has full power to authorize an executive officer of the city to rent an office for his official use, and to bind the city by a contract in furtherance of such authority. Such offices and such contracts are not under the control of the director of public service under the sections above quoted, relating to the power and duty of that officer. Whence then does council derive the power in question? The power is not one of the enumerated powers of a municipal corporation as found in section 3615 etsq. of the General Code, nor, as above intimated, is it expressly conferred upon council by any statute whatever.

I base my conclusion, above expressed, that council has the power to authorize the city solicitor to incur office rent and to reimburse him therefor, from section 4214 of the General Code, above quoted. The power to fix the compensation of an officer carries with it the power to reimburse him for expenses incurred by him in the discharge of his official duties, and to authorize

the incurring of such expenses. In my opinion, the expense of office rent, when the city does not furnish an office to the solicitor, is one which is necessarily incurred by the solicitor in the performance of his duties. Council could lawfully provide, in fixing the compensation of the city solicitor, that in addition to the salary or other compensation to be allowed to the solicitor, he should be reimbursed for all necessary and actual expenses incurred by him in the performance of his official duties, including office rent not to exceed a certain sum annually, and that the solicitor should be authorized to enter into a contract, either in his own name or in behalf of the city, for suitable offices and not to exceed an annual rent prescribed in ordinance.

The procedure above outlined is, in my opinion, the only proper and legal method of providing offices outside of a city building for the executive offices of a city otherwise than from year to year by semi-appropriation ordinance. Of course, when council in such an appropriation ordinance sets aside a fund for the use of the city solicitor for office rent, such fund may be lawfully expended by the city solicitor for that purpose, and the appropriation carries with it the authority to make such contract as may be proper to carry the appropriation into effect. In such a case, of course, the absence of general legislative authority of council, such as above described, would be immaterial. It is only in case council neglects, as in the present instance, to make such an appropriation that its failure to authorize by general and permanent ordinance the reimbursement of the city solicitor for office rent does become material. In such event the solicitor finds himself without any authority whatever to bind the city by a contract for the rental of his office. If he attempts to bind the city under such circumstances he renders himself liable to the provisions of section 3808, above quoted.

Again, the executive officers of the city other than the director of public service and the director of public safety are given no express authority to enter into contracts binding the city. Their authority, if any, with regard to such contracts must arise out of an ordinance of council adopted in pursuance of authority above described. The case, therefore, is not merely one in which a public agent, having the authority to act, has failed to observe the formalities such as those enumerated in section 4036, above quoted, but it is rather the case of total lack of authority on the part of the agent with regard to the subject-matter of a contract by which he attempts to bind his principal. It is therefore, unnecessary to rely upon such cases as Wellston vs. Morgan, 65 O. S. 219; Lancaster vs. Miller, 58 O. S. 558; Buchanan Bridge Company vs. Buchanan, 60 O. S. 406, and Comstock vs. Nelsonville, 61 O. S. 288, nor in the case similar to that of State ex rel. vs. Fronizer, 77 O. S. 7. In all of these cases, officers vested with authority to make certain contracts have neglected to take certain steps in entering into such contracts, and the rule established then is that under such circumstances, a public corporation acquires no ex-contractu liability, but in case it recognizes a claim and pays out its moneys thereon, it cannot recover them back.

Because, therefore, the city solicitor has not been authorized by council to rent an office for his use, and because also by virtue of this omission he was without authority to bind the city by any contract in the premises, I am of the opinion that the lessor of the office acquired no contractual right against the city by virtue of his agreement with the solicitor.

The principles above defined establish the conclusion that the solicitor himself acquired no contractual right against the city, and indeed the solicitor could acquire no contractual right. His rights in the premises are such as he has by virtue of his office and no other. Unless he is clearly entitled to reim-

bursement for expenses as a part of his official compensation, he is deemed to incur such expenses gratituously, and as an officer of the corporation, he is prohibited both by principles of common law and by the express provision of section 3808 from having any contractual relations with the city. That is to say, the law is that a municipal officer may have no interest in municipal contracts.

Upon the foregoing, I conclude that neither the city solicitor himself nor the lessor of the office used by him has, in the absence of previous appropriations made by council, or an ordinance reimbursing the solicitor for expense of office rent, or authorizing him to enter into contract for office room, an enforcible and legal right against the city.

Have either of these individuals, then, a moral right giving rise to a moral obligation on the part of the city which would justify a subsequent appropriation to discharge such obligation?

I have intimated that if such a moral obligation exists, it may be discharged in the manner described in your question. As to this principle there seems to be no doubt, but a moral obligation is not created by a mere determination of council as it exists. While the term "moral obligation" would seem to be so broad as to include all claims as to the justice and equity of which a legislative body or an administrative officer might be satisfied, such is not its legal significance. The term has a fixed and definite meaning in law; that meaning may be defined as follows: "A moral obligation sufficient to support as a consideration a subsequent agreement consists of a legal obligation which by virtue of some positive rule of law is or has become unenforcible." Instances of such moral obligations are claims barred by the statutes of limitation, agreements of persons of abnormal status and perhaps public contracts entered into by officers authorized in the premises without following the procedure required by law. See Page on Contracts, section 320. Bailey vs. Philadelphia, 167 Pennsylvania State 569; Goulding vs. Davison, 25 How. Pr. 483; Tabetts vs. Dowd, 23 Wend. 379.

In the case which the city solicitor presents the essential element of moral obligation is lacking. There never was a legal obligation, nor could there have been; the solicitor being without any power whatever to enter into contract could not have bound the city either to himself nor to his lessor by complying with any of the formalities relative to entering into contract prescribed by the General Code. The fact that it had been the custom of the city of Coshocton, through the appropriation ordinances enacted from time to time by its council, to furnish the solicitor with an office by apportioning to his use a sum to be expended for office rent, does not alter the case. Each such appropriation constituted, it is true, and as I have above stated, authority to the city solicitor to rent an office and to pay for same out of the funds so appropriated, but such authority was temporary merely and was terminated in each instance by the lapse of the appropriation.

It is clear, therefore, that by his attempted contract he could not create against the city and in favor of his lessor a moral obligation in the legal sense.

It is clear, also, that there was no moral obligation against the city and in favor of the solicitor. The principle that a public officer is not entitled to reimbursement is too well settled in this state to require citation of authority. reimbursement for expenses unless the law or an ordinance expressly authorizes such reimbursement is too well settled in this state to require citation of authority. Here, again, the mere fact that it has been customary to allow reimbursement for a certain expense under authority of periodical appropriation ordinance is immaterial. Custom establishes no legal obligation against a municipal corporation. The right of the officer against the city being non-contractual, this principle applies *a fortiori* to the determination of such right.

For all of the above reasons and upon the assumption that at the time the solicitor incurred the expenses in question there was no permanent ordinance of the city of Coshocton providing that he should be reimbursed for such expenses, I am of the opinion that the city is under no legal or moral obligation to allow the same. In the absence of an obligation of one of these two classes, it is not lawful for the council to appropriate money for the payment of office rent paid out by the solicitor under the circumstances above outlined, and this item of the current appropriation ordinance is void.

I have reached the above conclusion most reluctantly in view of the facts stated in the various letters of the solicitor. It is indeed unfortunate that the solicitor cannot be permitted to be reimbursed for his outlay, especially in view of the facts as stated by him that the annual salary of the solicitor was undoubtedly based upon the supposition that he was to receive his office rent in addition thereto. The rights of the solicitor in the premises, however, must be established upon a foundation more substantial than a supposition. If council, in fixing the salary of the solicitor, had enacted in a permanent ordinance the real intent that may have been in the minds of the members of council, and if such ordinance had been in the form above suggested, a different conclusion would have followed.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

184.

MUNICIPAL CORPORATIONS—PRESIDENT OF COUNCIL—POWER OF COUNCIL TO FIX COMPENSATION—MAYOR'S SALARY PAYABLE DURING TEMPORARY ABSENCE.

The president of council of a city cannot be allowed compensation for services as acting mayor during the temporary absence of the mayor, and the mayor is to be allowed his usual salary while temporarily absent.

The president of the council is not a member of the council and his salary is not governed by the provisions of section 126, *Municipal Code. The council may fix the compensation of the president of the council under sections* 4213 *and* 4214, *General Code, at a yearly or a per meeting rate as it sees fit.*

COLUMBUS, OHIO, March 21, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter in which you submit to this department the following questions:

> "1. May the president of council receive compensation for services as acting mayor, provided he is required to render services as acting mayor during the absence of the mayor from the city, in addition to the regular salary or compensation fixed in the salary ordinance of the city? Is the mayor entitled to the salary attached to the office for the period of time absent from the city and during which the duties of the office are performed by the president as acting mayor?
>
> "2. Is it legal for city councils to fix a compensation of $1.00 per

meeting for the services of the president of council, or should it be a regular annual salary?"

Answering your first question, it is the opinion of this department that the president of council cannot receive compensation for services as acting mayor during the absence of the mayor, and that the mayor is entitled to the salary attached to the office even if temporarily absent from the office.

Answering your second question, original section 126 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 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 25,000, or less, and for every 30,000 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 the salaries of members of council shall be paid semi-monthly and a proportionate reduction in said salaries shall be made for the non-attendance of any member upon any regular or special meeting thereof."

The foregoing original section of the Municipal Code appears in the General Code under section 4213 and section 4214, and is as follows:

Section 4213.

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Section 4214.

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe, with surety subject to the approval of the mayor."

The foregoing citations show some difference between the original section in the Municipal Code and as the same now appears in the General Code.

On October 5, 1909, this department rendered an opinion upon said section 126 of the Municipal Code, as follows:

"That the president of council is not a member of council, and that section 126 of the Municipal Code does not govern the salary of the president of council as it does the other members of the city council."

I am unable to find any statutory provision for the compensation of the president of council, other than section 4213 and section 4214 of the General Code, cited above.

It is my opinion that council, by the authority vested in it by said sections, can legally fix the compensation of the president of council at $1.00 per meeting or can grant him a regular annual salary, as in the discretion of the council seems best.

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

201.

DEPUTY SHERIFF ACTING AS COURT BAILIFF—COMPENSATION AND ITS DISPOSITION WITH REFERENCE TO SHERIFF'S FEE FUND.

When deputy sheriff receiving a regular salary from the sheriff's fee fund is oppointed bailiff, a per diem compensation for such service cannot be paid into the county treasury to the credit of the sheriff's fee fund for the reason that there is no statutory provision for the same.

COLUMBUS, OHIO, March 28, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith note the receipt of your inquiry of March 2, 1911, in which you ask the following question:

"May a deputy sheriff receiving a regular salary from the sheriff's fee fund be appointed court bailiff, his per diem compensation for such service to be paid into the county treasury to the credit of the sheriff's fee fund?"

Section 2977 General Code provides as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected, and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2983 General Code as amended, 101 O. L. 200, provides:

"At the end of each quarter, each such officer shall 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 this office during such quarter, for his official services, which

money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received, 'and he shall also, at the end of each year of his incumbency in office and at the close of the term for which he shall have been elected, make and file a sworn statement with the county commissioners, of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind, which are due his office and unpaid.'"

In the construction of the above sections, it is the opinion of this department that the court bailiff not being such officer as enumerated in said section 3977, and further, that the per diem compensation paid to the court bailiff or constable not being any part of and not being in any way connected with the fees, costs, penalties, percentages, allowances and perquisites of whatever kind of the sheriff's office, therefore, such per diem compensation received by the court bailiff cannot be paid into the county treasury to the credit of the sheriff's fee fund for the reason that, there is no statutory provision for the same.

I trust that this satisfactorily answers your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

205.

COUNTY RECORDER—RIGHT TO BID ON CONTRACT FOR MAKING PLATS FOR USE OF THE QUADRENNIAL REAL ESTATE BOARD—LEGALITY OF PAYMENT FOR SERVICES RENDERED ON SUCH CONTRACT FROM THE COUNTY TREASURER.

Where the county commissioners advertise for bids for making plats for the use of the quadrennial real estate appraisers and the recorder of the same county submitted a bid, was awarded the contract, rendered the services and was paid the amount of his bid, there should be no recovery as there is no prohibition in the law against the letting of such a contract to the county recorder.

March 30, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of March 22d, wherein you state:

"In 1910 the county commissioners advertised for bids for making plats for the use of the quadrennial real estate appraisers, and the recorder of the same county submitted a bid and was awarded a contract, rendered the service and was paid from the county treasury an amount approximating $2,000. What finding shall be made by this department in the matter?"

Section 5549 General Code provides:

"If, in the opinion of the county commissioners, it is necessary to the proper appraisal of the real estate of such county, on or before their June session, one thousand nine hundred and thirteen, and every fourth year thereafter, they may 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 assessors in the county, or any district thereof, to correctly reappraise all real estate. The maps and plats shall be made under the supervision of the county auditor, 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 conditioned that said bidder will not fail or refuse to enter into contract in accordance with the advertised proposals, in case his bid is accepted. The commissioners shall open the bids on the day named in the advertisement, and, 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."

Section 5550 General Code provides:

"If the contract is awarded, the bidder to whom it is awarded, shall forthwith give a good and sufficient bond, with two or more sureties, in an amount of not less than two thousand dollars, nor more than ten thousand dollars, as required by the county commissioners, conditioned for the prompt, faithful, and accurate performance of the work to be done. On completion of any city, village, township or district, the work shall be paid for out of the county treasury, on the warrant of the county auditor, after it has been duly accepted, and approved by the county commissioners. No bill shall be allowed until the auditor and commissioners are satisfied that the labor has been performed in accordance with the contract on file with the county auditor. In counties or districts having no map, the commissioners shall furnish it under the provisions of this chapter."

The county recorder having under the provision of section 5549 supra, submitted a bid for the making of plats for the use of the quadrennial appraisers, and the contract having been duly awarded to him and said county recorder having rendered the services under said contract, and received the money therefor, upon approval of the county commissioners, the presumption is that he rendered said services at such times, either personally or by third parties, as that such work of making said maps did not interfere with his service as county recorder, and that, therefore, the payment of such services was proper.

As the county has received the benefit of such services and has paid for the same the charge should be allowed, there being no prohibition in the law to the letting of such a contract to a county recorder.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

A 207.

INSURANCE—RIGHT OF MEMBER OF BOARD OF REVIEW OF A CITY TO SELL TO A COUNTY—NECESSITY OF ADVERTISEMENT AND BIDS—PUBLIC OFFICIAL'S RIGHT TO CONTRACT WITH PUBLIC DIVISIONS.

Inasmuch as a member of the city board of review is not connected with the county within the meaning of section 12910 *G. C., he is not absolutely precluded from selling insurance to the county in which the city is located.*

If, however, the interest of the insurance company therein exceeds the sum of $50.00, *the contract is within section* 12911 *G. C., and must be let on bids duly authorized by law.*

COLUMBUS, OHIO, March 31, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 18th, submitting for my opinion thereon the following question:

> "Is a member of a city board of review prohibited by either section 12910 or 12911, General Code, from selling fire insurance to the county in which the city is located?"

Said sections 12910-12911 in so far as they are applicable to the question at hand are as follows:

> "Whoever, holding an office of trust or profit by election or appointment, * * * is interested in a contract for the purchase of * * * fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12911:

> "Whoever, holding an office of trust or profit * * * is interested in a contract for the purchase * * * of fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

These sections together constitute section 6969 Revised Statutes. In their present form they afford some doubt as to whether the phrases "with which he is connected" in section 12910 and "with which he is not connected" in section 12911, modify any of the preceding nouns excepting the word "institution." If, however, they do not modify any of the preceding nouns the two sections are mutually inconsistent. I am satisfied that this point is doubtful enough at least to permit of comparison of the two sections being in pari materia, and also of the original section 6969 Revised Statutes. In the said original section, the language is such as to make it perfectly apparent that these two phrases modify all the nouns immediately preceding them respectively.

Nevertheless there still remains some ambiguity in section 12911 because of

the use of the article "the" before the word "county." The corresponding word in section 6969 was "any" and the effect of that section, as embodied in the engrossed bill which was passed by the general assembly, was to make it unlawful for any public officer to have any contract with any political subdivision unless that contract was let on bids. Section 12911 corrects that defect in the former section 6969, and in my judgment the mere use of the word "the," although it makes the meaning somewhat obscure, does not vitally affect it. Under section 12911 any public officer commits a crime if he sells fire insurance for an amount exceeding fifty ($50.00) dollars to any public institution or political subdivision unless the contract is let on bids duly advertised as provided by law.

In my opinion, a member of the city board of review is not "connected with" the county in the sense that he is a county officer. To be sure, the board of which he is a member discharges, within a limited area, functions otherwise devolving on county officers, namely, the equalization and revision of tax valuations. However, the office is not in the complete sense a county office, and in view of the strict construction which must be given to penal statutes, I am inclined to the opinion that section 12910 does not preclude a member of the board of review from selling fire insurance to the county in which the city is located.

It is otherwise, however, with section 12911. In my opinion, this section applies to the case cited by you and makes it unlawful and felonious for a member of a city board of review to sell fire insurance to the county in which the city is located if the premium—i. e. the interest of the company, not of the agent—thereon exceeds the sum of fifty ($50.00) dollars, unless the contract is let on bids duly advertised according to law.

If, however, the amount of the company's interest in the contract is less than fifty ($50.00) dollars, a member of a city board of review may lawfully sell fire insurance to the county.

While some courts have held this section is declaratory of the common law, these holdings relate, in my opinion, to that part of the former section which is included in section 12910. It never was unlawful at common law for a public agent to be interested in a contract with a political subdivision with which he was in no way connected as an officer.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

211.

COUNTY OFFICERS' FEE FUND—PAYMENT THEREFROM OF OFFICERS' SALARY—TRANSFER TO FUND BY COUNTY COMMISSIONERS.

Where under authority of 2984 *G. C., the commissioners make the last transfer in the fee fund on the* 1*st Monday in January,* 1911, *the fees earned in the several county offices for the quarter beginning January* 1, 1911, *are not applicable to the payment of the salaries of officers and their deputies for the quarter beginning April* 1, 1911.

COLUMBUS, OHIO, April 4, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of March 11th, in which you submit to this department the following inquiry:

"Kindly advise this department when the last transfers to officers' fees funds may be made under the provisions of section 2984, as amended in Ohio laws, vol. 101, page 200. Are the fees earned in the several county offices the present quarter, and which are required to be paid in to the credit of the respective fee funds April 1st, applicable to the payment of salaries of the officers and their deputies for the quarter beginning April 1st, if transfers are made to said fee funds any time during the present quarter?"

The amended section referred to, reads as follows:

"Section 2984. On the first Monday of April, July, October, and January, whenever necessary, during the year after April 1, 1910, the county commissioners, by order entered on their journal, shall transfer from any other fund or funds of the county, in their discretion, to any county officer's fee fund, such sums as are necessary to make good any deficiency in such fee fund likely to arise during the ensuing quarter in consequence of the payment of such officer, deputies, assistants, bookkeepers, clerks or other employes during such period from the amounts then in or estimated to come into such fee fund for that period from such office. Provided that the aggregate amounts so transferred to the fee fund of any such officer, except the county clerk, probate judge and sheriff, shall not exceed the aggregate amounts paid into or authorized to be paid into the general fund from the fee fund of such officer during such period."

I take it that the phrase "*On the first Monday of April, July, October and January, whenever necessary after April* 1, 1910," means whenever it is necessary to transfer during one year after April 1, 1910, on any of the occasions therein specified, to-wit: the first Monday of April, July, October and January respectively, that is to say, the first transfer would be made on the first Monday of April, the second transfer would be made the first Monday of July, the third transfer would be made the first Monday of October, and the fourth and last transfer on the first Monday in January, 1911.

Under authority of the said act, as amended, the commissioners make the last transfer on the first Monday in January, 1911, so that it necessarily follows that the fees earned in the several county offices for the quarter beginning January 1, 1911, are not applicable to the payment of the salaries of officers and their deputies for the quarter beginning April 1, 1911.

I trust that this answers your inquiry, and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 211.

STATUTES OF LIMITATIONS AGAINST THE STATE AND AGAINST ITS SUBDIVISIONS—SUITS AGAINST CITIZENS AND OFFICERS—SUITS ON BOND—WHARFAGE CHARGES.

Statutes of limitations do not run against the state in the absence of special provisions to the contrary, and this rule applies wherever the state is the real party in interest regardless of the form of action or the style of the record.

This immunity from the statute of limitations does not exist, however, in favor of subdivisions of the state such as counties, township, school districts and municipal corporations.

A claim in behalf of a municipality for wharfage charges is a claim founded upon a statute within the meaning of section 11222 *G. C., and action thereon is barred within six years.*

Action is advised, however, on all claims including those more than six years back, leaving the defence of the statute to be interposed by the parties delinquent. The form of statute which runs against a city in an action against a citizen (not an officer or employe) depends on the nature of the claim and is governed by the ordinary rules relative thereto.

The limitation against a city, suing a collector of public funds unaccounted for, is 10 *years if action is brought upon the bond and six years if brought upon the contractual or statutory liability, unless other provisions appear, or a penalty is connected with the delinquency.*

The same principles apply to an action brought by a city against a city officer for fees or compensation illegally drawn.

If fraud exists in any of the above cases the statute would be suspended until the discovery of the fraud.

The time when rights of action accrue differ with different circumstances.

COLUMBUS, OHIO, April 4, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 18th, requesting my opinion upon the following questions:

> "1. An audit discloses that the owner of a wharf boat on the Ohio river moored to the bank of said river within the corporate limits of a city is delinquent in the payment of wharfage charges as fixed by city ordinance, since February, 1900. The delinquency approximates $3,000.00, and the owner is financially responsible. Should our finding include the delinquency from February, 1900, or would the statute of limitations prevent the recovery of any part?
>
> "2. We desire the opinion of your department as to when the statute of limitations begins to run against a city in an action to recover from a citizen (not an officer or employe) moneys found due to the city; also against the city in an action to recover from a collector of public revenue, who may not have accounted for the public funds collected by him in his official capacity; also against the city in an action to recover for fees or compensation illegally drawn by a city official.
>
> "3. Does the statute of limitations run the same against the principal and surety on official bonds?

"1. Said statute begins to run at the time the right of action accrues. *Query*: When does right of action accrue, at the time the act was committed, or at the time it was discovered and demand made of the party concerned, or at the time it is given publicity in a legally filed report?"

You have also submitted to me, a letter addressed to your department by Hon. Jay S. Paisley, prosecuting attorney of Jefferson county, which raises a question not specifically stated, but from which I assume, that he desires to be advised as to the application of the statutes of limitation to certain findings of a report of the examiner of your bureau as to delinquencies of county officials. At the outset, permit me to state that I cannot return specific and complete answers to all of your questions. I shall endeavor, however, to state as fully as practicable the general principles relating to the application of the statutes of limitation to the various classes of cases enumerated in your letter.

Sections 11221, 11222 and 11223 of the General Code, constitute the statutes of limitation respecting causes of action upon contracts other than official bonds, and are as follows:

"Section 11221. An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued.

"Section 11222. An action upon a contract not in writing, expressed or implied, or upon a liability created by statute other than a forfeiture of penalty, shall be brought within six years after the cause thereof accrued.

"Section 11223. If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise.

Section 11224 General Code provides in part as follows:

"An action for either of the following causes, shall be brought within four years after the cause thereof accrued:

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

"2. For the recovery of personal property, or for taking, detaining, or injuring it;

"3. For relief on the ground of fraud;

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

"If the action be * * * for the wrongful taking of personal property, the cause thereof shall not accrue until the wrongdoer is discovered; nor, if it be for fraud, until the fraud is discovered."

Section 11225 provides in part as follows:

"An action * * * upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued."

Section 11226 provides in part as follows:

"An action on the official bond, or undertaking of an officer, * * * or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

Section 11227 provides in part that,

"An action for relief not hereinbefore provided for, shall be brought within ten years after the cause thereof accrued * * *."

Section 11236 provides in part that,

"The provisions of this chapter, respecting lapse of time as a bar to suit, shall not apply in the case of a continuing and subsisting trust * * *."

While the letter of the prosecuting attorney, submitted to me in connection with your request for an opinion, does not so state, I have assumed that among the items which might be included in the findings of an examiner of your bureau with respect to a county is taxes collected by a treasurer and not accounted for by him in his settlements with the auditor of the county. I mention this case particularly because it presents a rather novel problem in connection with the general question. There is a general principle that statutes of limitation do not run against the state unless it is expressly so provided, regardless of the nature of the cause of action which exists in favor of the state. In Wasteney vs. Schott, 58 O. S. 410, the first branch of the syllabus, it was held that,

"The rule that statutes of limitation do not run against the state unless it is expressly so provided, is applicable in actions where the state, though not a party to the record, is the real party in interest."

The action was one by the county treasurer for the recovery of delinquent personal taxes. It was argued that inasmuch as the treasurer was party plaintiff, the statute would run against his cause of action as against a private individual; that inasmuch as a part of the taxes at least, were for county and local purposes, the question was as to whether or not the statute of limitations applied to a cause of action in favor of the county and the municipalities and townships for the use of which the taxes were being collected, on the theory that these political subdivisions were real parties in interest; and that in any event, the petition not so stating, it could not be presumed that the state was a party in interest at all. The supreme court accepted none of these views, but held per Williams, J. at page 414:

"It is not claimed that our statute of limitations is, in terms, made applicable to the state; and the rule is universal that, in the absence of such provision, statutes of limitation do not run against the state, for the reason that laches cannot be imputed to it, and its rights cannot be prejudiced by the neglect of its officers. The proper application of the rule, in an action, is controlled however, by the nature of the rights involved, and the real parties in interest, rather than by the form of the action and names of the parties as they appear on the record. When the action, though brought in the name of the state, is prosecuted for the enforcement of some private or individual right, and the state has no substantial interest in the litigation, the plea of the statute may be

interposed. On the other hand, if the state is the real party in interest, the plea of the statute is not available though the action be not prosecuted in its name; and actions under section 2859 of the Revised Statutes, for the recovery of personal taxes are, we think, of that character, and not subject to the bar of the statute, notwithstanding they are required to be brought in the name of the county treasurer. Revenues are essential to the maintenance of the state and the execution of its governmental functions. Taxation is a recognized constitutional and lawful means of raising such revenues for most, if not all public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid, or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government. Hence for all such taxes levied on real property the lien thereon provided by statute is declared to be in favor of the state; and while it was probably deemed impracticable to create a lien on personal property for the taxes laid against it, the fund derived from them is expended in common with that arising from real estate taxes, and for the same purposes."

Under this decision it seems to me perfectly logical to hold that taxes, if collected by the treasurer and wrongfully detained by him, may be collected from him or from his estate at any time. If, however, a treasurer's liability in such a case is sought to be enforced by action on his official bond, a question which, so far as I am informed, has never been raised in this state, would be presented. Many official bonds are in terms, required to be made payable to the state of Ohio by statute. It might be said that, because official bonds are required to be made payable to the state, section 11126 must be regarded as expressly applicable to the state, and as affording protection to the sureties on an official bond, regardless of the fact that the state might be the real party in interest in an action brought thereon. On the other hand, however, it is a familiar fact that many actions on official bonds may be brought by private individuals for the enforcement of rights purely private. This being the case, it does not necessarily follow that section 11226 is intended as a waiver, so to speak, of the state's immunity to its own statutes of limitation, but that, on the contrary, the limitation is applicable only when the action on the bond is for the enforcement of private rights. I hesitate to express any opinion as to whether or not an action on an official bond for the enforcement of a right possessed by the state as the real party in interest, is limited either as to principal or sureties by section 11226.

The foregoing distinction relates exclusively to actions in which the state is the real party in interest. If the state as such real party in interest seeks to enforce its rights either in its own name or through an officer duly author-

ized in the premises by action on an official bond, for recovery on account of defalcations occurring more than ten years prior to the filing of the action, the questions above suggested would be squarely raised.

I have thus discussed the liability of a county treasurer as distinguished from other matters presented in your letter, and that of the prosecuting attorney, because I assume that this question might have been raised in the reports to which the prosecuting attorney refers. The immunity from the statute of limitations above described, does not exist in favor of any of the subdivisions of the state. Counties, townships, school districts and municipal corporations are subject to the statutes like private individuals. Cincinnati vs. First Presbyterian Church, 8 Ohio report, 299.

Coming now to the specific questions asked in your letter, I beg to state that, in my opinion, the liability of an owner of a wharf boat for wharfage charges, exacted by a city ordinance, is a "liability created by statute other than a forfeiture or penalty" or an "implied contract" within the meaning of section 11222 above quoted. I deem it unnecessary to distinguish between these two forms of liability for the purpose of this opinion, as in my judgment, section 11222 clearly governs the cause of action described in your first question. That is to say, the authority of a municipal corporation to impose wharfage charges is derived from statute. In this respect it is similar to the authority to make and levy assessments. Liability for such assessments has been held to be "a liability created by statute" within the meaning of the section referred to.

Hartman vs. Hunter, 56 O. S. 175.
Eddy vs. Leithe, 26 C. C. 657; 74 O. S. 462.
Brown County vs. Martin, 50 O. S. 203.

To hold, however, that the six-year statute of limitations applies to classes of this sort is not to hold that the findings of your department should not include liabilities incurred more than six years prior to the date of your examiner's report. The statute of limitations does not operate as an extinguishment of the right of action. It is in the nature of a privilege of which a defendant may avail himself at his pleasure. (See section 11218 General Code.) I would advise, therefore, that the findings of the bureau be based upon liabilities actually existing in favor of the city, and that suit be brought to recover the several installments of wharfage upon which the city's claim is based, thus making it necessary for the defendant to interpose the plea of the statute, especially, as provided in the above cited section.

Your second question consists of three subdivisions. With respect to that portion of it which relates to claims of a city against a third party, not an officer or employe, I beg to state that the nature of the claim will, in each instance, determine the statute of limitation applicable thereto. If the action is for the recovery of real property, the twenty-one-year limitation imposed by section 11219 would apply; if it is upon a contract in writing, the claim will be barred in fifteen years, and so on.

The second subdivision of your second question inquires as to the statute of limitations applicable to an action by a city to recover from a collector of public revenue public funds collected by him in his official capacity and due the city, but unaccounted for. The answer to this question in part involves the answer to your third general question, and I shall, for the sake of clearness, consider the two together. If the moneys collected, held for the city and unaccounted for, are within the terms of the official bond of the collector, so that his failure to account for them constitutes a breach thereof, an action for

recovery may be brought within ten years. Such an action may be against the collector as principal and against his sureties, although the exact nature thereof will depend upon the form of the bond. Since the adoption of the present code of civil procedure it has been held that all actions on official bonds, with the possible exception above referred to, in case the state is the real party in interest, are barred in ten years, regardless of the period within which the individual liability of the principal would otherwise have been barred.

King vs. Nicholas, 16 O. S. 80.
State vs. Orr, 16 O. S. 523.
State vs. Kelley, 32 O. S. 421.

If the action is not on an official bond, however, and the duty to account to the city results, as it undoubtedly would result from the provisions of some statute, then the liability of an officer would be one created by statute other than a forfeiture or penalty, and the action must be brought within six years under section 11222 General Code.

State vs. Kilgore, N. P. (m. s.) 81.
Commissioners vs. McClure, 7 N. P. 187.
State vs. Newman, 2 O. S. 567 (an action on a bond brought prior to the adoption of the present code of civil procedure).

The third subdivision of your second question relates to an action brought by a city against a city officer for fees or compensation illegally drawn. Here again, the principle above defined applies. If the drawing of the illegal compensation constitutes a breach of the official bond of the officer, then an action may be brought at any time within ten years; otherwise, the action is one for the enforcement of a liability created by statute, or at the least upon an implied contract, and is barred within six years.

Your fourth question is not capable of an explicit answer. As a general rule, rights of actions upon contracts or upon liabilities created by statute, or upon breach of official bonds accrue at the time the act giving rise to such rights, was committed, and the mere failure of the city or other political subdivision through its officers or citizens to discover the commission of the act does not postpone the commencement of the statutory period. Some causes of this sort, however, do not accrue until demand is made. But here, again, the rule is, that demand must be made within reasonable time, and the statute will begin to run even against a political subdivision after such reasonable time, succeeding the commission of the wrongful act, has elapsed.

The foregoing comments all relate to actions upon contractual liabilities. That is to say, if a director of public service fails to account for water rents collected by him, and so conceals his action as to prevent the discovery, and a suit is brought for the recovery of the moneys withheld by him, on the theory that it was a statutory duty to pay them over, or that he was liable as upon an implied contract to pay them over to the city, then the action will be barred in six years from the time that his duty to pay first existed and was broken. Such an action would be said to sound in contract or to be an ex-contractu action. If however, the defalcation of a public officer is such as to give rise to a right of action in tort, or to afford ground for special relief in equity a different rule will prevail. That is to say, if the action is for damages rather than for the recovery of a specific sum due, with interest, and the injury giving rise to the right of action has not been discovered until some time subsequent to the com-

mission of the act the cause of action does not under section 11224 accrue until the discovery of the fraud. At the present time I can imagine no occasion for the resort of a city to a court of equity for special relief on the ground of fraud; but in case such a situation should arise, the same principle would apply.

Carpenter vs. Canal Company, 35 O. S. 307.
Fee vs. Fee, 10 Ohio 470.
Stanglein vs. State, 17 O. S. 462.
Leffland vs. Bush, 26 O. S. 559.
State vs. Standard Oil Co., 49 O. S. 188.

As a general rule, however, I am convinced that the postponement of the accrual of the cause of action until the discovery of the fraud does not apply to most, if not nearly all, of the causes of action discovered by the investigations of your department.

I deem it proper to state that where the statute affords a penalty or a forfeiture as a punishment for official malfeasance, an action therefor must be brought within one year after the cause thereof accrued, and regardless of the discovery of the fraud. I mention this particularly because of the provisions of section 3808 General Code, which provides that an officer of a city who violates those provisions of the municipal code prescribing the formalities with which contracts shall be entered into, and prohibiting such officer from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation, shall be liable to the corporation for all sums of money or other thing he may receive through such violation of law. I do not hold that in all cases the application of this statute would constitute the exaction of a penalty or forfeiture. It certainly would amount to such a penalty however in some cases, and if an action were brought under this section against an officer personally it would be barred in one year. Harrison vs. Halliday, 4 C. C. (n. s.) 281.

I deem it also not out of place to state that the statutes of limitation above quoted, apply only in the absence of a special statute of limitation. I have not examined the statutes relating to municipal and other public officers, but if there are therein any such special statutory limitations qualifying the right of the political subdivision in a given case, such special provisions will not only take precedence over the general provisions of the statute of limitations, but they operate as an extinguishment of the right.

Errett vs. Howard, 78 O. S. 112.
Railway Co. vs. Howatt, 35 O. S. 284.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

214.

COUNTY COMMISSIONERS—COMPENSATION AS MEMBERS OF THE QUADRENNIAL COUNTY BOARD OF EQUALIZATION.

County commissioners are not entitled to receive for their own use the sum of $3.00 each per day for acting as members of the quadrennial county board of equalization.

When statutes are repealed and re-enacted for the purpose of revision and codification the presumption is that no change in the existing law is that no change in the effect of existing laws is intended.

COLUMBUS, OHIO, April 7, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 18th, enclosing copy of opinion drawn by the prosecuting attorney of Guernsey county, addressed to the board of county commissioners of that county respecting the compensation of the commissioners as members of the quadrennial county board of equalization.

You call my attention to an opinion of my predecessor reaching a conclusion opposite to that reached by the prosecuting attorney. I have carefully examined both the opinion of the prosecuting attorney and that of my predecessor. The prosecuting attorney concedes that prior to the adoption of the General Code the county commissioners were not entitled to additional compensation as members of the board of equalization. His contention is that the adoption of the code gave equal force and effect to all sections therein, and that the re-enactment of section 5597 served to neutralize the effect of the adoption of the county officers' salary law, and particularly that portion of it which is embodied in section 3001 General Code.

I find myself unable to agree with the prosecuting attorney. It seems to me that there is a patent ambiguity in the General Code as disclosed by comparison of sections 3001 and 5597; the former expressly provides that the annual salary of county commissioners "shall be in full payment of services rendered as such commissioners," while the latter provides that each member of the quadrennial county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties the sum of $3.00.

The prosecutor acknowledges this ambiguity but seeks to remove it by *harmonizing* the two sections. In order thus to harmonize the sections it becomes necessary to hold that services as members of the quadrennial county board are not "services rendered as such commissioners" within the meaning of section 3001. This, however, is contrary to the meaning of that provision of the law of which section 3001 was a re-enactment. Under the old law it was held, upon the better reasoning, as the prosecuting attorney himself concedes, although not without dissent, that the above quoted language referred to services as members of the board of equalization as well as to other services which might be exacted of county commissioners in their official capacity.

Neither of the statutory provisions under consideration in the opinion of the prosecuting attorney were in any way materially changed in the General Code as compared with the form in which they appeared in the Revised Statutes. The rules of statutory construction to which the prosecutor refers are not applicable to the code; that is to say, when sections are repealed and re-enacted

for the purpose of revision and codification the presumption is that no change in the effect of existing laws is intended, and this presumption over-rides all the considerations which the prosecuting attorney mentions.

In order then to reach the conclusion which the prosecuting attorney has reached it will be necessary to assume that before the adoption of the General Code, and after the adoption of the county commissioners' salary law, the law was in effect that county commissioners were entitled to additional compensation for serving as members of the annual and decennial county boards of equalization. It seems to me that it is now clearly established that this was not the law.

For all the foregoing reasons I concur in the opinion of my predecessor to the effect that county commissioners are not entitled to receive for their own use the sum of $3.00 each per day for acting as members of the quadrennial county board of equalization.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 214.

CITY POLICE COURT—DISPOSITION OF FINES AND COSTS IN CITY CASES—REPORT OF CLERK OF POLICE COURT TO CITY AUDITOR.

Money collected in city police courts must be turned over to the clerk of court and by him paid over to the city treasurer and reported to the city auditor.

April 7, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your recent inquiry in which you state:

> "What disposition should be made by the superintendent of the Columbus work house of fines and costs collected of prisoners sentenced to said work house from the police court of said city, said fines being imposed for violation of city ordinances? Should they be paid into the city treasury direct or to the clerk of the police court?"

Section 4599 of the General Code provides:

> "On the first Monday of each month, he shall make, under oath, to the city auditor, a report of all fines, penalties, fees and costs imposed by the court in city cases, showing in what cases they have been paid, and in what cases they remain unpaid, and, at the same time, he shall make a like report to the county auditor as to state causes. He shall immediately pay into the city and county treasuries, respectively, the amount then collected, or which may have come into his hands, from all sources, during the preceding month."

As the above section contemplates that it shall be the duty of the clerk of the police court to keep an accurate report of all fines, penalties, fees and costs imposed by the court in city cases, and that he shall so report to the city auditor and shall pay the moneys received into the city treasury, it is my opinion, that all moneys that are paid by way of fines and costs imposed by the judge of the police court of a city should be turned over to the clerk of the police court and

by him paid into the city treasury and that he should report the same to the city auditor.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

D 222.

DIRECTOR PUBLIC SAFETY CONTRACTS FOR SUPPLIES—NOTICE IN NEWSPAPER.

From a general view of statutory provisions a director of public safety in contracting for apparatus and supplies for the use of his department, need under section 4328 General Code publish notice of such contracts in only one newspaper of general circulation.

COLUMBUS, OHIO, April 14, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have handed to me a letter addressed to you by Horace Holbrook, publisher of the Western Reserve Democrat, and have requested my opinion upon the question which he asks therein, which is as follows:

> "Must a notice for bids given by a director of public safety in contracting for apparatus and supplies for the use of his department be published in two newspapers of opposite politics?"

Section 4371 of the General Code relates to and prescribes the powers and duties of the director of public safety in making contracts and expenditures, and is in part as follows:

> " 'The director of public safety may make all contracts and expenditures of money for * * * the purchase of engines, apparatus and other supplies necessary for the police and fire departments, and for other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless 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 the preceding chapter relating to public contracts, except that all bids shall be filed with and opened by him. * * *"

"The provisions of the preceding chapter" referred to in this section are those of section 4328, et seq. General Code, which apply to and govern the director of public service in making contracts within his department. Said section 4328 provides in part as follows:

> "* * * the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

These two sections read together would seem to dispose of the question. However, section 4229 of the General Code provides as follows:

> "Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions * * * notices, and reports required by this title * * * to be published, shall be published in two newspapers of opposite politics of general circulation therein * * * and for the following times: * * * notices of contracts * * * once a week for four consecutive weeks; * * *"

It is "otherwise provided in this title" with respect to the publication of notices for bids by directors of public service and public safety, by the sections above referred to. I am therefore, of the opinion that publication of notices to contractors under section 4328 in one newspaper of general circulation within the city is sufficient.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

M 222.

TAX COLLECTOR—COMPENSATION—ILLEGAL PAYMENT BY COUNTY TREASURER—STATUTORY CONDITION PRECEDENTS—RECOVERY AGAINST TREASURER.

Where a tax collector appointed by the treasurer has been compensated for his services in that connection, but the journal of the proceedings of the county commissioners does not show that the provisions of section 5696 have been complied with, the compensation has been illegally paid and the treasurer and his bondsmen would be liable in an action to recover said money so paid.

COLUMBUS, OHIO, April 17, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—We herewith note the receipt of your inquiry of the 4th inst., of which the following is a copy:

> "Section 5696 G. C., authorizes the employment of collectors to collect delinquent personal taxes.
>
> "Such collector was appointed by a treasurer and allowed 20 per cent. of all such taxes collected. The journal of the proceedings of the county commissioners does not show that the list of persons delinquent was publicly read or that they authorized the treasurer to employ collectors or that they prescribed the compensation of such collectors. Can an action be maintained against such collector for the recovery of the collector's fees paid in such case? If not, what should be the finding of this department in the premises (see Commissioners vs. Arnold, 65 O. S. 479)."

Section 5696 General Code, to which you refer in your letter is as follows:

> "The county commissioners, at each September session, shall cause

the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes."

Said statute provides the procedure by which a collector shall be employed to collect delinquent taxes on personal property. The case of County Commissioners vs. Arnold, 65 O. S. 479, holds that this section is mandatory and must be strictly followed. It is ordinarily the rule that payments made voluntarily, contrary to the law, cannot be recovered back. This rule, however, does not apply to public money so wrongfully paid contrary to law.

Page in his work on contracts, volume 2, section 796, says:

"Payments of public money form an exception to the ordinary rule as to voluntary payments and payment under mistake of law, since payments are always made by public officers *and not by the public*, which is really beneficially interested in such money. Thus, money which is paid out by public officers in violation of the law, may be recovered from the person to whom it is paid. The fact that the payment was voluntary on the part of the officer does not prevent the public from recovering. A government may recover money paid by a public officer under an erroneous construction of the law, and without any legal authority therefor. So if the money is paid out by a public officer upon a contract which the corporation represented by him had no power whatever to make, or upon a claim which the corporation had no power under any circumstances to allow such payment may be recovered.

"Accordingly, if a public officer *draws* money from the public treasury as his compensation, such as his salary, or fees collected by him from the public treasury without authority of law, such payments may be recovered in an action for money had and received.

"The fact that money paid to a state officer as compensation for services was paid upon the advice of the attorney general does not prevent the recovery thereof, if unauthorized by law; nor does the fact that the payment was made voluntarily, with full knowledge of the facts and without fraud, or under a mistake of law, even if such mistake is shared by the officer to whom payment is made, who takes in good faith."

In the case of City of Tacoma vs. H. M. Lilis, 18 L. R. A. 372, it was held:

"A payment of salary in excess of the lawful amount by order of a municipal council to one of its members is not within the rule which precludes recovery of money voluntarily paid."

In Railroad vs. United States, 164 U. S. 190, the court held:

"Parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono to* refund them."

In McElrath vs. United States, 102 U. S. 426, it was held:

"A claimant received from the government the amount ascertained by the proper accounting officer to be due him, protesting at the time that he was entitled to a larger sum, and announcing his purpose not to be bound by such settlement of his accounts. He then sued the government for the additional amount claimed by him. Held, that the government was entitled to go behind the settlement of its accounting officers, and reclaim any sum which had been improperly allowed the claimant in such settlement."

In the last cited case the court further says in its opinion,

"The government declining to plead the settlement of 1874 in bar of the suit, meets the claimant upon his own chosen ground, insisting that its officers, misapprehending the law, paid to him out of the treasury money to which he was not legally entitled, asks, as we think it may rightfully do, judgment for the amount thus improperly paid to claimant."

In view of the foregoing, and the reasoning therein contained, I am of the opinion that an action can be maintained against such collector for the recovery of the collector's fees paid to him in the manner described in your inquiry, under and by authority of section 2921 of the General Code.

I noted from your letter that the journal of the proceedings of the county commissioners does not show that the list of persons delinquent was publicly read, nor that the commissioners authorized the treasurer to employ collectors, nor that they prescribed the compensation of such collectors. The case of Commissioners vs. Arnold, 65 O. S. 479, holds in express terms that all three of the requirements above noted, namely: the reading of the list, the authorizing of the treasurer to employ a collector, and the prescribing of the compensation must be complied with before a valid employment of a collector by the treasurer can be made. Your letter states that none of these steps were taken by the commissioners; therefore, the employment of the collector by the treasurer was absolutely without authority and void. I am, therefore, of the opinion that any money paid to the collector by the treasurer on account of such employment was a misapplication of funds of the county in the hands of the county treasurer, and an illegal payment of the same, and that the treasurer and his bondsmen would be liable in an action to recover said money so paid.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 229.

COUNTY FEE FUNDS—MANDAMUS TO COMPEL TRANSFERS THERETO—TRANSFER FROM SINKING FUNDS—WITHIN WHAT TIME, VALID—EXISTENCE OF SUFFICIENT UNCOLLECTED FEES AS A DEFENCE TO MANDAMUS.

Where the proper officials under 2984 *G. C., as amended,* 101 *(O. L.)* 200, *fail to make transfers to deficient fee funds as direct in the act, these officials can be compelled to make the transfer, and a transfer so compelled which was made on April* 1, 1911, *is valid.*

Such transfer cannot be made from a sinking fund specifically provided for the payment of interest on bonds.

A transfer otherwise legal, is not invalidated by reason of the fact that it is made on a legal half holiday.

The fact that the county clerk has sufficient fees which are earned but uncollected and might easily be collected is not a defence in mandamus to compel a transfer as such a defence would defeat the intention of the statute which was to create a guaranty of county fee funds for the respective officers.

COLUMBUS, OHIO, April 24, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication of April 6th enclosing therein letter from J. E. Brate, auditor of Butler county, upon which you request my written opinion in regard to the following statement of facts and inquiries in relation thereto:

> On Tuesday, March 28th, a peremptory writ of mandamus issued from the court of common pleas of Butler county to the commissioners of Butler county, Ohio, on the relation of Charles Brunson, clerk of courts, ordering said board to make certain transfers of funds to the clerk's fee fund to meet the deficiencies therein up to January 1, 1911. On Saturday, April 1, 1911, at 12:40 p. m., resolutions making transfers to meet said deficiencies, and deficiencies existing on March 31, 1911, were attempted to be made by said board of county commissioners out of the "sinking fund A," which was created by act of the legislature of Ohio, found in 94th vol. of Laws of Ohio, page 489 and 490, for the purpose of paying principal and interest of a certain bond issue of $70,000.00 authorized by said act. By section 3 of said act the auditor of Butler county, Ohio, "is hereby ordered, directed and empowered at each semi-annual distribution of taxes to deduct and take out of the amounts due and payable to each of the said several funds replenished by the issue of the bonds as herein provided, such sum of money as is sufficient to pay such bonds and the interest thereon as may at said time be due and payable, which said sum so deducted, shall not exceed at any one time the sum of five per centum of each of said funds, which amount shall be paid into what shall hereafter be known and designated as 'sinking fund A,' which is hereby created, and said several funds shall be used for the payment of the bonds and the interest thereon issued under the provisions of this act, and the same shall be so taken out and deducted until said bonds and interest are fully paid, and any surplus

remaining at the expiration of such period shall be refunded and paid back into said several funds."

The county auditor was not a party to the mandamus proceedings, and desires to know whether he has the legal right to recognize said transfers so attempted to be made by said board of county commissioners. He, therefore, desires your written opinion on the following questions:

"1st. Under section 2984 of the General Code, as amended April 30, 1910, 101 vol. laws of Ohio, page 200, said transfers are authorized 'on the first Monday of April, July, October and January whenever necessary during one year after April 1st, 1910,' does the transfer made April 1, 1911, come within this limitation of time?

"2d. 'Sinking fund "A"' from which said transfers were sought to be made, not being raised by levy of the county commissioners, nor expended by them for any purpose whatsoever, but being solely for the purpose of meeting principal and interest on the bonds issued under said act, may the county commissioners legally transfer permanently from this fund any amount of money, however small, to any other county fund whatsoever, or is the language of section 2984 of the General Code, above cited, broad enough to supersede the act in question?

"3d. On February 14, 1911, the legislature of Ohio amended section 5978 of the General Code, as follows: 'Every Saturday of each year shall be a one-half legal holiday for all purposes, beginning at twelve o'clock noon, and ending at twelve o'clock midnight.' This transfer not having been made prior to twelve o'clock noon on said April 1, 1911, will the attempted transfer at 12:40 p. m., on said date be a legal and valid act of the county commissioners, such as would be binding upon the county auditor?

"4th. If the fee book of the clerk of courts shows that ample fees have been earned and uncollected, which might easily be collected with reasonable effort by said officer to meet all deficiencies in said fee fund existing January 1, 1911, or March 31st thereafter, would this be a good defense as against a proceeding in mandamus against the county auditor to compel him to recognize said attempted transfers? Or must this question be raised on appeal from commissioners?"

(The writer's opinion on this proposition was supported in a case wherein he represented the plaintiff, Homer V. Atkinson, clerk of the court of common pleas, Vinton county, Ohio, tried in the common pleas court there, and decided by Hon. Geo. E. Martin, now judge of the customs court of appeals.)

In answer to the first question submitted to you by the auditor of Butler county, it is my judgment that inasmuch as the transfer of funds is for the purpose of guaranteeing the salary of county officers, if the commissioners of the county fail to so transfer at the time they are required by law, such county officers are not bound by that fact to be deprived of the benefit of such guarantee, and that the county commissioners can be required to transfer such fund on any other day of the quarter, since they failed to make such transfer at the time fixed by law. I am of the opinion that the transfer could be made on April 1, 1911, under the above circumstances.

In answer to your second question I think that the expression "any other fund or funds of the county" means general funds thereof, and does not refer to a special fund which is for a particular purpose, such as section 3 of the act found in 94 O. L. 489-490, which reads as follows:

"For the purpose of paying the interest on all outstanding bonds issued and sold under this act, and to redeem the said bonds as they respectively mature, the county auditor of Butler county, Ohio, is hereby ordered, directed and empowered at each semi-annual distribution of taxes to deduct and take out of the amounts due and payable to each of the said several funds replenished by the issue of the bonds as herein provided, such sum of money as is sufficient to pay such bonds, and the interest thereon as may at said time be due and payable, which said sum so deducted shall not exceed at any one time the sum of five per centum of each of said funds, which amount shall be paid into what shall hereafter be known and designated as 'sinking fund A,' which is hereby created, and said several sums shall be used for the payment of the bonds and the interest thereon issued under the provisions of this act, and the same shall be so taken out and deducted until said bonds and interest are fully paid, and any surplus remaining at the expiration of such period shall be refunded and paid back into said several funds."

I am of the opinion that the commissioners cannot legally transfer permanently from that fund any amount of the fund to any other fund for the reason above given.

As to your third question that such attempted transfer was made on Saturday after twelve o'clock, noon, which by statute is a legal half-holiday, has no legal bearing on the question one way or the other. That is to say, I do not believe that the transfer being made on a legal half-holiday would in and of itself invalidate the transfer, if such transfer was legal in the first instance.

As an answer to your fourth inquiry, I am of the opinion that inasmuch as the provision for the transfer of funds was for the purpose of guaranteeing the salaries of the respective county officers, the fact that the county clerk has sufficient fees which are earned and uncollected, and which might be easily collected, and which are sufficient to meet all deficiencies up to January 1, 1911, or March 31, 1911; would not be a good defence for the reason that to hold otherwise would not be giving such clerk the legal rights to which he is entitled under the law of the guarantee of county fee funds of the respective county officers. I am further of the opinion that the question cannot be raised on appeal from a decision of the county commissioners.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

B 231.

BOARDS OF EDUCATION—POWER TO INSURE IN MUTUAL FIRE INSURANCE COMPANIES—CONSTITUTIONAL PROHIBITION.

Under the restriction of art. 8, section 6, of the constitution of Ohio, the legislature could not authorize boards of education to insure in mutual fire insurance companies when the board might be compelled to meet a pro rata share of the loss.

Furthermore, the board of education is not an "owner" of property so as to enable it to come within the meaning of section 9593 G. C., as amended 101 Ohio laws 294.

COLUMBUS, OHIO, April 28, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of April 20th, wherein you inquire as follows:

> "Is it a violation of the constitution of the state of Ohio for a board of education to insure the property of the school district in a mutual fire insurance company where, in case of loss, the board of education could be compelled to meet a pro rata share of such loss? (See article 8, section 6.)"

I am of the opinion that as a fundamental principle, the board of education of a school district could not legally have the right to make a contract of insurance wherein the amount of premium, for which such board might be liable, is indefinite and uncertain, that is to say, that the board of education has no statutory authority to make any contract whereby the board may become liable for an indefinite and uncertain amount.

Section 9593 of the General Code, as amended in 101 Ohio laws, page 294, reads as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state, and owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire, and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any members of such association. The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association, which shall require such assessments to be made directly and specifically upon the members and to be paid directly and specifically by them and not out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner except that any such association may borrow money for the payment of losses and expenses, such loans not to be made for a longer period than the collection of their next assessment; and such association may also accumulate a surplus from its assessments not exceeding $2.00 on each $1,000.00 of insurance in

force, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code. Such associations may only insure farm buildings, detached dwellings, school houses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality; provided that an association whose membership is restricted to persons engaged in any particular trade or occupation, and its insurance confined to any particular kind or description of property may insure property classed as extra hazardous and located in any county or counties in this state."

In construing the said section, I might add that the board of education does not own property in their respective school districts in the sense as such ownership is understood by the term "owner" in the said section, but holds it only in trust for the purposes and uses to which the public of such school districts have dedicated the property. It is, therefore, my conclusion, as deducted from the foregoing, that the board of education, being unable to meet the requirements of the said section, 9593 of the General Code, cannot, therefore, legally insure the property of the school district in a mutual fire insurance company. Article VIII, section 6 of the constitution, to which you refer, would make unconstitutional any attempted act on the part of the legislature to even authorize a school board to become a stockholder in any joint stock company, corporation or association.

I trust that I have fully answered your inquiries, and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 231.

CENSUS—VILLAGES BECOMING CITIES WHEN—OFFICERS OF CITY—HOW ELECTED AND WHEN.

Villages becoming cities by the recent census will adopt a city form of government January 1, 1912, the officers thereof being elected at the regular November election, 1911, and the village officers continue until succeeded by the proper officers of the city at the next regular election.

April 26, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your inquiry in which you state:

"When will villages which, by the recent federal census, have a population of over 5,000, be required to assume the city form of government? It is presumed that they will be required to adopt the city form of government on January 1, 1912, the city officials being elected at the regular November election, 1911, but is there any process of law by which villages can assume the city form of government at an earlier date?"

Section 3499 General Code, reads as follows:

"Officers of the village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation, shall continue in force until changed or repealed."

I am of the opinion that the municipalities will adopt a city form of government on January 1, 1912, the officers thereof being elected at the regular November election, 1911, as there is no provision of law for holding any special election for the purpose prior to such time, and as the statute continues the officers of the village in office until succeeded by the proper officers of the city at the next regular election.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 233.

COUNTY FEE FUNDS—DATE OF LAST TRANSFER—FEES PAID IN ONE QUARTER MAY BE APPLIED TO SALARIES OF ENSUING QUARTER—DISPOSITION OF EXCESS FUNDS.

Under the provisions of section 2984 *as amended* (101 *O. L.* 200), *the last transfer to officers' fee funds in the first Monday in January*, 1911.

Under section 2985 *fees earned in the several county offices during the first quarter of* 1911 *which are paid into the credit of the respective fee funds April* 1, 1911, *are applicable to the payment of salaries to officers and their deputies for the ensuing quarter beginning April* 1, *and if there is an excess in the fee fund above the amount required to pay said expenses for the ensuing quarter then the excess can be transferred by the commissioners to reimburse a fund theretofore used under authority of section* 2984 *G. C.*

April 29, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of March 11th, in which you submit to this department the following inquiry:

" Kindly advise this department when the last transfers to officers' fee funds may be made under the provisions of section 2984, as amended in Ohio laws, vol. 101, page 200. Are the fees earned in the several county offices the present quarter and which are required to be paid in to the credit of the respective fee funds April 1st, applicable to the payment of salaries of the officers and their deputies for the quarter beginning April 1st, if transfers are made to said fee funds any time during the present quarter?"

The amended section referred to reads as follows:

"Section 2984. On the first Monday of April, July, October and January, whenever necessary, during one year after April 1, 1910, the county commissioners, by order entered on their journal, shall transfer

from any other fund or funds of the county, in their discretion, to any county officer's fee fund, such sums as are necessary to make good any deficiency in such fee fund likely to arise during the ensuing quarter in consequence of the payment of such officer, deputies, assistants, bookkeepers, clerks or other employes during such period from the amounts then in or estimated to come into such fee fund for that period for such office. Provided that the aggregate amounts so transferred to the fee fund of any such officer, except the county clerk, probate judge and sheriff, shall not exceed the aggregate amounts paid into or authorized to be paid into the general fund from the fee fund of such officer during such period."

I take it that the phrase "*On the first Monday of April, July, October and January, whenever necessary after April* 1, 1910" means whenever it is necessary to transfer during one year after April 1, 1910, on any of the occasions therein specified to wit: the first Monday of April, July, October and January respectively, that is to say, the first transfer would be made on the first Monday of April, the second transfer would be made the first Monday of July, the third transfer would be made the first Monday of October, and the fourth and last transfer on the first Monday in January, 1911.

Replying to your second inquiry:

"Are the fees earned in the several county offices the present quarter and which are required to be paid in to the credit of the respective fee funds April 1st, applicable to the payment of salaries of officers and their deputies for the quarter beginning April 1st, if transfers are made to said fee funds any time during the present quarter?"

Fees derived from any county office must be paid into the county treasury on the warrant of the county auditor at the end of each quarter. The receipts collected from each county office after January 2, 1911, becomes a credit to the expense of conducting said office, and the amount credited to each office is available at any time to pay the current expenses of each respective office regardless of the time said collection is paid into the county treasury. Thus each office may draw their expense from any funds that have been collected by them and are in the hands of the county treasurer for distribution.

Section 2985 (amended 101 O. L. 346) of the General Code provides:

"In case any transfer of moneys has been theretofore made to a fee fund, the board of county commissioners, at the end of any such quarter, *shall transfer from the fee funds any amount therein, derived from any such offices, in excess of that necessary to pay the compensation of such officer and his deputies, assistants, bookkeepers, clerks, or employes, except court constables, for the ensuing quarter, to the funds from which such transfers were made, until fully reimbursed.* Thereafter, or where no transfer has been made such funds shall be transferred from the fee funds to the credit of the general fund of the county. Such transfers may be made upon the authority herein provided, any law to the contrary nothwithstanding. From such action of the commissioners, an appeal may be taken to the common pleas court by a taxpayer of the county, which shall be heard and determined by the court or judge thereof within twenty days after being perfected."

You will note that section 2985 provides that the moneys that theretofore have been paid into the fee funds that the board of county commissioners at the end of any quarter shall transfer from the fee funds any amount therein, derived from any such offices *in excess* of that necessary to pay the compensation of such officers, and their deputies, assistants, bookkeepers, clerks or employes for the *ensuing* quarter to the funds from which said transfers are made until fully reimbursed. That is, section 2985, just quoted, seems to provide that only the excess of the amount necessary to pay the expenses of the office for the *ensuing* quarter can be transferred by the commissioners from the fee funds back to the funds used by the commissioners under authority of section 2984 G. C.

Therefore, fees earned in the several county offices during the present quarter which are paid into the credit of the respective fee funds April 1, 1911, are applicable to the payment of salaries to officers and their deputies, for the ensuing quarter beginning April 1, and if there is an excess in the fee fund above the amount required to pay said expenses for the ensuing quarter then the excess can be transferred by the commissioners to reimburse a fund theretofore used under authority of section 2984 General Code.

Respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

A 241.

RELIEF OF POOR—TOWNSHIP CONTAINING A MUNICIPAL CORPORATION —TOWNSHIP CO-EXTENSIVE WITH A MUNICIPAL CORPORATION— DIRECTOR OF PUBLIC SAFETY.

Levies for relief of poor are made upon all property in the township, and therefore township trustees may not lawfully refuse to extend aid to indigent persons who happen to reside within the limits of a municipal corporation within their township.

Where the identity of the township however is lost by reason of the limits of both corporation and township being co-extensive, the director of public safety in the municipality is the proper officer to have recourse to.

COLUMBUS, OHIO, May 3, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 25th, enclosing letter by Harvey Elam, township clerk Xenia, Ohio, in which the following question is presented upon which my opinion is asked:

> "Where a municipal corporation lies entirely within a township, should temporary relief to the poor within such municipal corporation be afforded by the township trustees or by the director of public safety?"

Section 3476 of the General Code provides that:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township are the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such

township or municipal corporation, public support or relief to all persons therein, who are in condition requiring it."

Section 3480 of the General Code provides:

"When a person in a township or municipal corporation requires public relief * * * complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees or proper municipal officer. * * *"

Section 3481 of the General Code provides in part that:

"When complaint is made to the township trustees or to the proper officers of a municipal corporation that a person therein requires public relief or support, one or more of such officers * * * shall visit the person needing relief, forthwith, to ascertain his name * * * present condition and in what township and county in this state he is legally settled. The information so ascertained shall be transmitted to the township clerk, or proper officer of the municipal corporation. * * *"

The foregoing sections are typical of all the sections in the chapter in which same are found. All of them prescribe the powers of "trustees of the township or the proper officer of the municipal corporation" in the matter of affording outside relief, and otherwise, in connection with their duties pertaining to the relief of the poor.

Section 4089 of the General Code provides in part:

"* * * the granting of outdoor relief to the poor, shall be vested in the director of public safety."

These sections by themselves seem to create an ambiguity which is difficult of solution. It is to be observed that none of them provide that a city as such shall afford temporary relief to the poor within its corporate limits to the exclusion of a township, the boundaries of which are more extensive than those of a city.

Section 5646 of the General Code provides in part:

"* * * The county auditor shall levy, annually, for township purposes, including the relief of the poor * * * such rates of taxes as the trustees of the respective townships certify to him to be necessary * * * *on each dollar of the taxable valuation of the property of the township.* * * *"

Section 5647 of the General Code provides:

"In counties where there are no county infirmaries, a township tax in addition to the tax provided in the next preceding section * * * may be levied for the relief of the poor * * * *on each dollar of the taxable property of the township.*"

Section 5648 of the General Code provides in part that,

> "The trustees of any township which incurs liabilities for the relief of the poor, beyond the amount raised by the levy authorized by law, may make an additional levy * * * on the dollar of the taxable property of such township."

From these three sections it is apparent that the township levy for the relief of the poor is upon all the property within the township though there may be within the boundary of such township a city. It seems clear, therefore, that it cannot be regarded as the intent of the general assembly to make the proceeds of such levy applicable only to the relief of the poor in the township outside of the municipal corporation.

I am of the opinion, therefore, that township trustees may not lawfully refuse to extend aid to indigent persons who happen to reside within the limits of a municipal corporation within their township.

I am of the opinion that the trustees of the township are the proper persons to take care of the indigent poor mentioned in your communication, in all cases except where the township and municipal boundaries are coextensive, and the township thereby loses its identity. Where the township, as is commonly understood, loses its identity, the director of public safety in the municipality is the officer that corresponds with the trustees so far as poor persons are concerned in the municipal corporation. We have in Ohio some municipal corporations that are in two counties; we perhaps have one municipal corporation at least, in three counties. We can see only one consistent way for relief to be afforded to the poor in such municipal corporations, and that is that each township must take care of its own poor within that corporation.

My conclusion therefore is, that where a municipal corporation lies entirely within a townhip, temporary relief to the poor within such municipal corporation should be afforded by the township trustees unless the boundaries of the township and the municipal corporation are coextensive. In the latter case there would of course be no township trustees.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 242.

PROBATE JUDGE—AUTHORIZATION OF PUBLICATION OF REPORT OF EXAMINATION OF THE COUNTY TREASURY—NEWSPAPERS.

The publication of the report of the examination of the county treasury, as authorized by the probate judge, is governed by section 2703 only of the G. C.

Such publication is not a "notice" nor an "advertisement of general interest to taxpayers," but is merely news "which shall be published one week in two newspapers of opposite politics, and of general circulation in the county."

COLUMBUS, OHIO, May 5, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 25th, in which you submit for my opinion thereon the following question:

> "What publication of the report of the examination of the county treasury is the probate judge authorized to make?"

You call my attention to the provisions of sections 2703, 6252 and 6253 of the General Code, which are in part as follows:

Section 2703.

> "The accountants shall certify in writing * * * the exact amount of money in the treasury, the amount belonging to each fund, and all property, bonds, securities, vouchers, assets and effects, one copy of which * * * shall be delivered to the probate court and entered on record therein. The probate court shall furnish a copy of such record for publication one week in two newspapers of opposite politics and of general circulation in the county."

Section 6252.

> "A proclamation for an election, an order for fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notices to contractors and such other advertisements of general interest to taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat."

Section 6253.

> "In addition to the publications provided in the next preceding section, the county officers therein named shall publish such notices and advertisements in a newspaper printed in the German language, if such newspaper be printed and of general circulation among the inhabitants speaking that language in the county within which such advertisements are intended to be made."

In my opinion, the publication of the report of examination of the county treasury is governed solely by section 2703, and sections 6252 and 6253 have no application thereto. Let it be noted that all of the advertisements specifically mentioned in section 6252 are of a certain type, viz: advertisements in which the element of *notice* has a quasi condition to the performance of some duty is present. Thus, the duty to vote at an election, and consequently the validity of an election may be in a sense said to depend upon notice to the electors of the time and place of holding such an election.

It is well settled that where a catalogue of things is set forth in the statutes, concluding with the general language "and other things," or words to that effect, such general language will be deemed to refer to other things of the *same sort*. It seems to me that the publication of the report of the examination of the county treasury is in no sense a notice. It does not define the date of any future official act; it merely states an existing condition; it is not an "advertisement" in the full sense of the word; it is merely "news;" therefore, in my opinion, the probate judge is without authority to determine that the report of the examination of the county treasury is "an advertisement of general interest to taxpayers." Accordingly he is authorized to publish the same in two newspapers of opposite politics, of general circulation in the county, and in such newspapers only. With respect to such newspapers it is to be noted that

they need not be published at the county seat, as is required in section 6252; furthermore, both must be printed in the English language,

Cincinnati vs. Bickett, 26 O. S. 29;

it follows, therefore, that the probate judge has in no event authority to authorize publication of the report of the examination of the treasury in German newspapers. The case cited by you (Schloenbach vs. State, 53 O. S. 345), while not fully reported, sustains this conclusion.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 244.

PROSECUTING ATTORNEY—NO ALLOWANCE OF EXTRA COMPENSATION FOR SERVICES UNDER 2923 G. C.—STATUTORY CONSTRUCTION—REPEAL OF FORMER STATUTE BY IMPLICATION.

Section 3003 of the General Code, providing for the payment of county prosecutors' salaries in a lump sum was passed subsequently to and by implication, repeals section 2923 of the G. C., which provides an extra compensation for certain services.

COLUMBUS, OHIO, May 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith acknowledge receipt of your letter of April 20, 1911, in which communication you submit the following inquiry:

> "We call your attention to the opinion of your predecessor rendered this department under date of May 11, 1910, in regard to the allowance to prosecuting attorneys for services rendered under section 2921, General Code, and respectfully request that you review and advise us whether or not you approve the same."

Section 2923 of the General Code, section 1278-A Revised Statutes, provides as follows:

> "If the court hearing such case is satisfied that such taxpayer is entitled to the relief prayed for in his petition and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney, and for all services rendered by the prosecuting attorney under the provisions of section twenty-nine hundred and twenty-one, in which the state is successful, the court shall allow the prosecuting attorney reasonable compensation for his services and proper expenses incurred."

Section 3003 of the General Code, section 1297 Revised Statutes, provides as follows:

> "Each prosecuting attorney shall receive an annual salary, not to exceed sixty dollars for each full one thousand of the first fifteen

thousand of the population of the county as shown by the federal ceusus next preceding his election;

"Fifty dollars for each full one thousand of the second fifteen thousand of such population of the county;

"Sixty dollars for each full one thousand of the third fifteen thousand of such population of the county;

"Forty dollars per thousand for each full one thousand of the fourth fifteen thousand of such popuation of the county;

"Thirty dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county;

"Ten dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county;

"Ten dollars per thousand for each full one thousand of such population of the county in excess of ninety thousand.

"No prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars. Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

Section 2923 of the General Code, cited above, was passed by the legislature in 1896, and section 3003 was passed in 1906. The two sections are clearly contradictory to each other. It was undoubtedly the intention of the legislature that the salary of the prosecuting attorney provided by section 3003, General Code, should be in full payment for all official duties required of him. This being the case, and said section 3003 of the General Code having been enacted subsequent in time to the enactment of section 2923 of the General Code, it is my opinion that the latter section was repealed by the enactment of the former section by implication.

My conclusion herein is not affected by the fact that both sections happened to be included in the new General Code and were adopted therein at the same time. The question of priority as to time is to be determined by the date of the original enactment of the said respective sections.

Since the opinion referred to in your inquiry was rendered by my predecessor, the supreme court has held, and I have rendered an opinion of date April 29, 1911, based on the said court decision; that county commissioners cannot receive the per diem mentioned in section 5597 General Code, in addition to salaries mentioned in section 3001 of the General Code; and also that the county auditor cannot receive per diem provided in said section 5597 in addition to the salary mentioned in said section 2996 of the General Code, for the reason that the salary of the auditor provided in section 2996 of the General Code, and the salary of the commissioners provided in section 3001 of the General Code, shall be in full payment for all services that such respective county officers shall perform.

The two cases are on an exact par in reference to the above inquiry in regard to the prosecuting attorneys, and the same reasoning applicable to the county commissioners and county auditors with respect to drawing per diem compensation as members of the county equalization board as applies to prosecuting attorneys in enforcing the provisions of section 2921 of the General Code, for the reason that the enforcement of the said latter section comes within the official duties and requirements of the prosecuting attorney. Therefore, because of the foregoing reasons, I cannot concur in the opinion of my predecessor of

date May 11, 1910, but on the contrary, I am firmly of the opinion that the prosecuting attorneys of the various counties are only entitled to the compensation provided for in section 3003 of the General Code, and are not legally entitled to the compensation provided in section 2923 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 248.

COUNTY PROSECUTOR—NO FEES FOR COLLECTING FINES AFTER TERM HAS EXPIRED AND AFTER SECTION 1298 R. S. WAS REPEALED.

A county prosecutor, who prosecuted certain violations of the liquor laws before the act of April 14, 1906, which repealed section 1298 R. S., which provided for certain fees to prosecuting attorney for the collection of such fines, cannot step in after the passage of the repealing act aforesaid, and after his term as prosecutor has expired and by then collecting the fines receive the compensation provided for in the act which was repealed.

COLUMBUS, OHIO, May 10, 1911.

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 February 15th, submitting for my opinion thereon the following questions:

> "Some years ago, certain parties in Knox county, Ohio, were prosecuted for violation of the liquor laws and certain fines were assessed by the court, but the cases were carried to a higher court which affirmed the common pleas. The fines were then collected and the ex-prosecuting attorney (who was in office at the time the suits were instituted and prosecuted the cases) drew a certain amount of fees for the collection of the said fines and costs under section 1298. A state examiner of this department is now making an audit of the financial affairs of Knox county and we desire your advice as to what finding should be made in this case."

The papers which you submit, and which I return herewith, show that the collections in question and the allowances of the commissioners were all made subsequently to April 14, 1906, the date when the repeal of section 1298 Revised Statutes, in its original form, by the prosecuting attorneys' salary act, so called, 98 O. L. 161, became effective. Said original section 1298 Revised Statutes, provided as follows:

> "In addition to his salary the prosecuting attorney is entitled to ten per cent. on all moneys *collected* on fines, forfeited recognizances and costs in criminal causes, provided that such commission shall not in any one case exceed one hundred dollars."

From your statement of facts and from the papers submitted, it appears that a certain prosecuting attorney instituted certain prosecutions and secured convictions in the lower court prior to the expiration of his term, and prior also to the repeal of section 1298 of the Revised Statutes, as above quoted; that these cases were carried to a higher court and there affirmed, but that before any

fines and costs therein were collected the term of the prosecuting attorney expired and section 1298 was repealed; and that after the expiration of such term and the repeal of the section in question, the former prosecuting attorney assumed to direct the clerk of court to issue process for the collection of these fines, which said process was issued, the fines collected, and ten per cent. thereof paid by allowance of the county commissioners to such former prosecuting attorney.

In my opinion, the allowance by the commissioners to the former prosecuting attorney was illegal, and the amount thereof may now be recovered from him for the use of the general fund of the county.

This conclusion follows, it seems to me, both from a construction of original section 1298 and from the fact that the same has been repealed. In the first place, the ten per cent. fee is not in the nature of payment for services rendered in *prosecuting* criminal causes; the amount of the fee is computed upon the *collection* of money and is in the nature of compensation for such collection. Accordingly, even under section 1298, were it still in force at the time of the payment in question, an ex-prosecuting attorney, who had successfully prosecuted a criminal case, would not be entitled thereby to a per cent. of the fine and costs collected by his successor. This has been the uniform ruling of this office under original section 1298. (See Opinions of the Attorneys General of Ohio, volume 3, page 477.)

The case is easily distinguishable from that of Thomas vs. Auditor, 6 O. S., 113, cited by the former prosecuting attorney. In that case a statute provided that a county treasurer, in case taxes remained unpaid until the 21st day of December of any year, should "forthwith demand payment of the amount of such tax, and five per centum penalty thereon, which penalty shall be for the use of the treasurer." The court, per J. R. Swan, J., held that, the penalty accrued and the right of the treasurer thereto attached upon demand as provided in the section. It will be seen that the statutes involved in the two cases are quite dissimilar.

In the case submitted by you, the ex-prosecuting attorney seems in part to have realized the necessity of his making the actual collection; for he issued precipes to the clerk of courts for process in aid of the collection of the fines and costs. It appears, therefore, that he actually did make the collections. This, however, does not alter the case. At the time he filed the precipes, he was not an officer of the county; he was performing services for the county as a mere volunteer, and such performance vested in him no right, either legal or moral, against the county, much less any right to compensation prescribed by law as pertaining to an office which he did not hold.

In addition to the foregoing reasons, however, another and perhaps a stronger one appears for establishing the illegality of the allowance in question. At the time these collections were made no law authorized the payment of any percentage thereon to the prosecuting attorney or to any person. As above pointed out, the right under the old statute to the percentage did no accrue until the collection was made. This must necessarily have been so; for the amount upon which it was to be computed was not ascertainable until the money was actually paid into the county treasury. When, therefore, old section 1298 was repealed, such repeal put an end to any right of any person to receive percentages on fines and costs thereafter collected; and on this ground alone, the illegality of the payments in question is established.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

251.

BOARD OF REVIEW—APPOINTMENT AND COMPENSATION OF CLERK, WHO IS ALSO DEPUTY COUNTY AUDITOR—PAYMENT FROM COUNTY FEE FUND.

When a clerk of the board of review is selected by the board and the same person is appointed deputy county auditor, his compensation being fixed at $3.00 *a day by the county auditor, and no further compensation fixed by the board, he can receive such compensation only as deputy auditor and the same must be paid from the auditor's fee fund.*

May 11, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of May 4th, in which you ask my opinion upon the following state of facts, to wit:

"The city board of review of Wellston, upon its organization in 1910, appointed a clerk.

"The county auditor is ex-officio secretary of the city board of review and received $5.00 per day, which was properly paid into his fee fund. The clerk selected by the board was appointed at the same time a deputy county auditor, and the secretary's duties were rendered by the clerk selected by the board and appointed deputy auditor by the county auditor. The said clerk was paid $3.00 per day for his services, *the rate thereof being fixed by the auditor.* Should the compensation of said clerk have been paid from the auditor's fee fund or from the general fund of the county?"

Section 5622 General Code provides:

"The board of review may employ a chief clerk, and appoint such other clerks, not exceeding six, and such messengers, not exceeding six, as it may deem necessary, and fix their compensation, which shall be paid out of the county treasury upon the order of said board, and the warrant of the county auditor. * * *"

Section 5623 of the General Code provides:

"The county auditor of a county in which any of such municipal corporations are located shall be secretary to such board, and in addition to his other duties provided by law, shall be present at each meeting of the board in person or by deputy. * * *"

Section 2563 of the General Code provides that the county auditor may appoint one or more deputies to aid him in the performance of his duties.

Section 2981 of the General Code provides:

"Such officers (among which is the county auditor) may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. * * *"

Section 5622 supra authorizes the board of review on appointing a person as clerk thereof to fix his compensation, which shall be paid out of the county treasury upon order of said board and the warrant of the county auditor.

In the case in question, the board did not fix any compensation of the clerk, and not having so fixed it, the clerk is not entitled to any as such clerk.

Section 2981 supra authorizes the county auditor to appoint the necessary deputies and fix their compensation.

In the case in question, the auditor did so appoint such deputy auditor and fix his compensation. The only compensation, therefore, that was received by the party in question was compensation as deputy auditor, and his salary should have been paid from the auditor's fee fund and not out of the general fund of the county.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

C 251.

COUNTY AUDITOR—NO FEES FOR INDEXING COMMISSIONER'S JOURNAL UNDER THE G. C.—STATUTORY CONSTRUCTION—REVISION AND CODIFICATION.

When general statutes on a particular subject are revised and codified and it is clear from the words that a change in substance was intended, the changed form must be allowed to govern.

Since, therefore, in the codified sections, provision for compensation to the county auditor for indexing the commissioners' journal is omitted, none can be allowed for that purpose.

Personal compensation to that official is further precluded by the sections providing for the dispensement of fees to county officials.

May 12, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your favor of recent date you submit to me the following inquiry:

> "Before the adoption of the General Code, section 850 R. S. authorized the payment of compensation to the county auditor for indexing the commissioners' journal. Said section is now 2406 of the General Code. The codifiers omitted that part of the section relating to the compensation of the county auditor for indexing.
>
> "Can county auditors now be legally paid any compensation for indexing the commissioners' journal?"

Prior to the enactment of the General Code, section 850 Revised Statutes, provided as follows:

> "The clerk shall keep a full and complete record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose, entering every motion with the name of the person making the same on the record, and he shall call and record the yeas and nays on every motion which involves the levying of taxes or the

appropriation or payment of money; he shall state fully and clearly in the record any question relating to the power and duties of the board which is raised for its consideration by any person having an interest therein, together with the decision upon the same, and shall call and record the yeas and nays by which said decision was arrived at; and shall record, when requested by the parties interested in the proceedings, or by their counsel, any legal propositions decided by the board, together with the decisions thereon and the votes by which the decision was reached; and if either party, in person or by counsel, except to said decision, the clerk of the board shall record such exceptions in connection with the record of the decision. Immediately upon the opening of each day's session of the board, the complete records of the proceedings of the session of the previous day shall be read by the clerk and, if the same be found correct, approved and signed by the commissioners. The record book of the board of county commissioners shall be kept, when the board is not in session, in the auditor's office, and open to public inspection at all proper times; it shall be duly certified by the president and clerk, and shall be received as evidence in every court in the state; *and in counties where no index has been made of such record, the commissioners thereof are hereby authorized to cause an index to be made of such past records for such period of time subsequent to the first day of January A. D.* 1880, *as the judgment of the county commissioners may determine; and the clerk shall receive for indexing, provided for in this section, such compensation as is provided for like services in other cases.*"

Section 2406 General Code provides as follows:

"The clerk shall keep a full record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose, entering each motion with the name of the person making it on the record. He shall call and record the yeas and nays on each motion which involves the levying of taxes or the appropriation or payment of money. He shall state fully and clearly in the record any question relating to the power and duties of the board which is raised for its consideration by any person having any interest therein, together with the decision thereon, and shall call and record the yeas and nays by which the decision was made. When requested by a party interested in the proceedings, or by his counsel, he shall record any legal proposition decided by the board, the decision thereon and the votes by which the decision was reached. If either party, in person or by counsel, except to such decision, the clerk shall record the exceptions with the record of the decision."

Section 2407 of the General Code provides:

"Immediately upon the opening of each day's session of the board, the records of the proceedings of the session of the previous day shall be read by the clerk, and if correct, approved and signed by the commissioners. When the board is not in session, the record book shall be kept in the auditor's office, and open at all proper times to public inspection. It shall be duly certified by the president and clerk, and shall be received as evidence in every court in the state."

Sections 2406 and 2407 purport to be a re-enactment of said section 850 R. S., but it will be noted that the words in italics in section 850 R. S., as above set forth, were omitted in said sections 2406 and 2407 General Code.

The question is, therefore, whether such omitted words are to be read into the sections of the code which purport to codify said section 850 R. S.

Section 850 of the Revised Statutes was repealed on the adoption of the Code. (See section 13767 sub-section 22). While it was not the intention of the codifying commission to omit or repeal any substantive law, and such codification is not presumed to change the law, yet when the general assembly repealed section 850 R. S. and adopted in the place thereof sections 2406 and 2407 General Code, the law as it now stands must govern.

The rule of law governing codification of statutes is clearly set forth in the opinion of Okey, J., in the case of Allen vs. Russell, 39 O. S. 337, as follows:

> "But where all the general statutes of the state or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revision and consolidated form, although the language may have been changed. * * * *Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form.*"

I am, therefore, of the opinion as the Generad Code omits that part of section 850, R. S., relating to the compensation of county auditor for indexing, that such auditor cannot now be legally paid any compensation for commissioners' journal.

Furthermore, section 2977, General Code, provides:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, * * * shall be so received and collected for the sole use of the treasury of the county in which they are elected, and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2989 provides as follows:

> "After deducting from the proper fee fund the compensation of all deputies, assistants, clerks, bookkeepers and other employes, as fixed and authorized herein, each county officer herein named shall receive from the balance therein the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

Section 2990 fixes the fees of the county auditor in the various counties in accordance with the population of each of said counties.

If the county auditor could have received the compensation for indexing the commissioners' journal he would under section 2997 supra have been required to pay it into the auditor's fee fund, and would have received under section 2990, General Code, only the salary specified therein. Consequently under no circum-

stances could the county auditor have received any compensation personally for indexing the said journal.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

260.

ASSISTANTS TO CITY SOLICITOR ENGAGED BY CHAMBER OF COMMERCE —CANNOT BE COMPENSATED BY CITY—MORAL OBLIGATION—SEMI-ANNUAL APPROPRIATION ORDINANCE.

When a chamber of commerce employs legal talent to assist the city solicitor in a matter of city business, and later refuses to pay for the services, the city cannot by a special ordinance authorize the payment of the bill.

Where there is no legal moral obligation a council cannot expend the funds of the corporation for matters not provided for in the semi-annual appropriation ordinance. A special appropriation passed at another time is invalid.

A moral obligation does not exist in law unless there has been a legal obligation, which, because of the operation of some rule of law, has become barred or otherwies inoperative or without full satisfaction or discharge.

COLUMBUS, OHIO, May 24, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 9th, requesting my opinion upon the following question:

> "The proper officers of a city were enjoined from entering into a contract for certain improvements. The chamber of commerce of the city employed counsel to assist the city solicitor. The contractor to whom the contract had been let also employed counsel who assisted the city solicitor.
>
> "The lawyers employed by the chamber of commerce failed to receive their compensation from their employers, and sought payment from the city. The council of the city on January 6, 1911, after the employment of the services which are conceded to be of value to the city, and in a special ordinance—not in the semi-annual appropriation ordinance—authorized the payment of the bill of said lawyers, and appropriated the sum of $300 from the general fund of the city for that purpose.
>
> "The city auditor refuses to pay the bill, and requests an opinion as to the legality of the same.

In my opinion, the appropriation of council was illegal for two reasons. In the first place, it was not included as an item in the semi-annual appropriation ordinance. The authority of council to make appropriations is limited to two semi-annual ordinances, and this department has repeatedly held that a special appropriation passed at another time is invalid.

The ordinance is invalid further, because the attorneys for whom the appropriation was made had no claim against the city at the time of the passage of the appropriation ordinance. The attorneys in question were not officers of the

city, nor did they at any time have any contractual relations with the city. They performed the services as mere volunteers, and while the services were beneficial to the city, they are on that account not entitled to payment. Nor is there a moral obligation on the part of the city toward the beneficiaries of the appropriation. In a recent opinion addressed to your department in the matter of the office rent of the city solicitor of Coshocton, I attempted to define a moral obligation. At the risk of repetition, permit me to state that a moral obligation in law does not exist unless there has been a legal obligation which, because of the operation of some rule of law, has become barred or otherwise inoperative without full satisfaction and discharge. In this case there never was any legal obligation.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

C 260.

COUNTY PROSECUTOR—LEGAL ADVISER OF COUNTY INFIRMARY DIRECTORS—NOT ENTITLED TO EXTRA COMPENSATION FOR SUCH SERVICES—REMOVAL OF GUARDIAN OF INMATE.

It is a part of the prosecuting attorney's official duties to act as legal adviser for the county infirmary directors. He is not entitled therefore, to a fee of $35.00 *in addition to his salary for removing a guardian of an inmate of the infirmary, and collecting moneys due said inmate from the said guardian.*

COLUMBUS, OHIO, May 29, 1911.

Subject: A prosecuting attorney is not entitled to extra compensation for collecting for the board of infirmary directors the pension of an inmate of the county infirmary.

Department of Auditor of State, Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In reply to your letter of February 9th, 1911, wherein you furnished this department with a letter from Harry P. Black, prosecuting attorney of Seneca county, presenting certain facts and asked this department for a written opinion upon the question therein contained and which is as follows, viz:

> "The prosecuting attorney of Seneca county, Ohio, Harry P. Black, filed a motion in the probate court of said county to remove Charles Deppen, as guardian of Delilah Six, a pensioner of the United States by reason of being a widow of a soldier, and an inmate of the infirmary of said county, because of the fact that as such guardian, said Deppen, collected the pension of said Delilah Six and failed to account to the board of directors of the county infirmary. Deppen was removed, and suit instituted against Deppen's bond, the money was collected and paid to the infirmary directors by the prosecuting attorney, less thirty-five dollars ($35.00), a fee charged for said services by prosecuting attorney. Is such charge legal and is said prosecuting attorney entitled to retain the said fee?"

Beg to advise that it is made the duty of the prosecuting attorney to represent the board of infirmary directors, and assuming that the board of infirmary directors were entitled to the money due Delilah Six, from her guardian, Charles Deppen, for her maintenance, it was the duty of Harry P. Black, prosecuting attorney, to collect the money and pay it over to the board of infirmary directors without deducting a fee for his services.

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county board, and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county, except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund. (R. S., Sec. 1274).
>
> General Code, Sec. 2917.

The prosecuting attorney is the legal adviser of the board of directors of the county infirmary, and he shall prosecute all suits which such board may direct, connected with their official duties, and for such service is not entitled to extra compensation.

Therefore, this charge of thirty-five dollars ($35.00) is not authorized and the same should be refunded.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

A 261.

BOARD OF TRUSTEES OF A UNION CEMETERY—PAYMENT TO MEMBER FOR AUDITING BOOKS—VACANCY—ELECTION OF SUCCESSOR—ELECTION AND POWERS OF CLERK—EXPENSES OF SUPERINTENDENT IN ATTENDING STATE ASSOCIATION MEETING.

Trustees of a union cemetery hold office until a successor is elected and qualified.

By virtue of section 8, G. C., in elective offices no vacancy occurs because of failure to elect a successor at the regular time, and incumbents hold their offices until their successors are duly elected and qualified, unless special provision appears to the contrary.

The trustees of a union cemetery cannot elect a secretary and invest him with authority to collect and disburse money on his individual checks, as this is specifically made the duty of the managing trustee.

An expenditure of $400, given to a member of said board for auditing the books of the board is illegal.

As there is no duty imposed upon the superintendent of the cemetery to attend the meetings of the state association of cemetery superintendents, and no authorization for the payment of expenses incurred thereby, such expenses may not be paid by the board.

May 31, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—In reply to your letter of March 21, 1911, in which you ask this department for an opinion on the following questions, viz:

> "1. In the audit of a union cemetery owned by a city and adjacent township, we find that there has been no election of trustees since 1905. Is there a vacancy in said offices, and should the same be filled by the council and trustees of the township as provided by law, or does the old board continue in office until the election and qualification of their sucessors?
>
> "2. May said trustees elect a secretary other than a member of the board and invest him with the authority to collect the revenue and disburse same upon his individual check?
>
> "3. A member of the board of trustees was paid $400.00 for auditing the books of the cemetery. Is such payment legal?
>
> "4. Are the personal expenses of the superintendent of the cemetery, incurred in attending the meetings of the state association of cemetery superintendents, a legal charge upon the cemetery funds?"

In answer to your first question, beg to advise that there is no vacancy on such board of trustees of a union cemetery, by reason of the facts set forth in your query.

The trustees of a union cemetery are elective and not appointive officers:

> "When such bodies are united for cemetery purposes, or where a municipal corporation and a precinct in which it is located have united in establishing a joint cemetery, three cemetery trustees shall be chosen

for a term of two years by the electors residing within the limits of the territory comprising the joint cemetery district, at the time and places provided by law for the election of corporation and township officers, and the terms of office of such cemetery trustees shall commence on the first Monday of January next after their election. Vacancies in the board shall be filled by council of the corporation or corporations, and the trustees of the township in joint session convened for that purpose. (R. S. sec. 2533.)"

General Code, section 4184.

In elective offices, such as the trustees of a union cemetery, where no special provision is made by law, no vacancy occurs because of failure to elect their successors, but only by death, resignation, disability or removal, and they should hold their offices until their successors are duly elected and qualified, by virtue of section 8, General Code.

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

General Code, section 8.

The supreme court decided this question in the case of State vs. Wright, in construing what is now section 4294, General Code. In passing on a "quo warranto" to oust a mayor under a statute providing for a term of two years or until his successor be elected and qualified. Section 8 of General Code (supra) is construed with section 4184, General Code (supra), and this case is decisive on the point under consideration.

"A mayor of a municipal corporation, who has been regularly elected to the office, is entitled to serve until his successor is qualified; and while he continues to so serve on account of a failure to elect his successor, there is no vacancy in the office, nor is the council authorized to make an appointment thereto."

56 Ohio state, 540.

In answer to your second inquiry, will advise that when the duly elected and qualified trustees of a union cemetery organize, the president, secretary and managing trustee should be members of said board, and the board cannot elect a secretary and invest him with authority to collect and disburse money on his individual checks, as this is made the positive duty of the managing trustee, who is specifically required to be a trustee, and especially enjoined not to expend any of the funds except on order of the board.

"The board of trustees, when chosen as provided in the preceding section, shall organize by electing a president, a secretary and a managing trustee, the latter of whom shall receive and hold all moneys coming into the hands of the board.

"Before entering upon the discharge of his duties, the managing trustee shall give bond, with sureties to be approved by the president and secretary of such board of trustees payable to them as such officers in such sum as they determine, and conditioned for the faithful discharge of his duties and the paying over according to law upon the order of the board, of all moneys that may come into his hands by virtue of his office."

General Code, section 4185.

In determining your third query the authority for an expenditure of four hundred dollars to a member of the board of trustees of a union cemetery to audit the books of said board is not given, and such expenditure is not only excessive, but illegal. Section 4189 of the General Code referring to union cemeteries provides:

> "The cemetery so owned in common, shall be under the control and management of the trustees, and their authority over it and their duties in relation thereto, shall be the same as where the cemetery is the exclusive property of a single corporation."
>
> General Code, section 4189.

While section 4178 of the General Code referring to cemeteries of villages, and being the section referred to in section 4189 (supra), in part provides,

> "The board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the director of public safety. * * *"
>
> General Code, section 4189.

While section 4170 of the General Code referring to cemeteries, defining the duties of the director of public service is applicable to section 4189 of the General Code (supra), by construing with section 4178 of the General Code (supra), and provides as follows:

> "The director shall appoint a clerk and keep accurate minutes of all his proceedings and report quarterly to the council all the moneys received and directed by him in the management and control of the cemetery."
>
> General Code, section 4170.

It is the duty, therefore, of the board of trustees of a union cemetery to keep accurate books of their proceedings, and they have no power other than those expressly granted by law. The trustees of union cemeteries are public officers of the municipality or township and are elected by the people, and cannot employ one of their number for extra pay to do any necessary work.

The same question was presented to Norris, J., in the case of Findlay vs. Parker, 17 Ohio Circuit Court Reports 294, where he held that trustees of gas works were public officers, and his reasoning in this case is applicable and reaches the same conclusion to the hypothesis presented in this your third question, where he uses this language:

> "These trustees of the gas works are public officers; they are elected by the people, they qualify, they take the oath of office and give an official and are entitled to the emoluments of the office, and without any of this, the nature of their duties makes them officers of the corporation and make more applicable to them than any other officers of the municipality these sections of the statute which look to the honest administration of every department of the municipal government."

And on page 301 says:

> "And an officer of a municipal corporation who has retired from the office to which he has been elected or appointed may not be inter-

ested either directly or indirectly in any work or service for said corporation until after the expiration of one year after his retirement from office."

The duties of the board of trustees of union cemeteries being defined by law as above set forth, no member of such board has the right to receive any compensation for any work or labor except such as is paid to every member of the board by virtue of the public office which they hold.

In answer to your fourth question, the superintendent of a cemetery is not required by law to attend the meetings of the state association of cemetery superintendents, and no authority is granted by statute which permits him to charge his personal expenses in attending such state association meeting to the cemetery funds, the rule being that where the authority is not granted by statute or where the officer is not required by statute to perform a duty no implied authority exists for him to make a charge either for his services or his expense against a public fund.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

A 262.

WHARFAGE RATES—COUNCIL TO FIX IN MUNICIPAL CORPORATION—LEGISLATIVE POWER—DIRECTOR OF SERVICE.

The matter of fixing wharfage rates for landing of steamboats is a legislative power and under sections 3640, *G. C., and* 4211, *G. C., belongs to the council and not to the director of service.*

COLUMBUS, OHIO, June 1, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of April 11th you ask my opinion upon the following question:

"What is the proper authority of a city to fix wharfage rates for landing of steamboats at municipal wharves, the council or the director of service?"

Section 3616, General Code, provides:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

In the same chapter as section 3616, General Code supra, is found section 3640 of the General Code, which provides:

"To regulate public landings, public wharves, public docks, public piers and public basins, and to fix the rates of landing, wharfage, dockage and the use thereof."

Section 4211, General Code, provides in part:

"The powers of council shall be legislative only, and it shall perform

no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title."

Section 4324 of the General Code provides in part 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 powers and perform all duties conferred upon him by law."

From an examination of the above sections it will be seen that the council of a city is vested with legislative power only, and that the director of public works is vested with administrative power over municipal wharves.

The question, therefore, is whether the fixing of wharfage rates for landing of steamboats at municipal wharves is the exercise of a legislative or administrative power.

It is my opinion that such power is legislative, and that if it is desired to fix such wharfage rates council is the proper authority so to do.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

264.

FINDINGS OF EXAMINERS AND INSPECTORS OF THE BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—COMPROMISES OF CLAIMS BY COUNTY COMMISSIONERS—STATUTORY REQUIREMENTS.

Compromises made by county commissioners prior to the act of May 10, 1910 (101 O. L., 382), by virtue of 2416, G. C., with respect to claims in favor of the county as disclosed by the examinations of the bureau of inspection and supervision of public offices are valid if (a) none of the commissioners are personally interested. (b) A statement of the facts in the case and the reasons for the release are enterd upon the journal, and (c) the power is honestly exercised and the officials act free from semblance of fraud or mistake.

COLUMBUS, OHIO, June 2, 1911.

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 May 6th, enclosing two transcripts from the journal of the county commissioners of Jackson county, and requesting my advice as to the duty of the bureau of inspection and supervision of public offices in the premises.

The first of these transcripts, in point of time, is that of the session of January 4, 1909, volume 9, page 139, which is in part as follows:

"WHEREAS, on the 4th day of April, 1903, W. J. Shumate, auditor of Jackson county, Ohio, presented to the board of county commissioners a bill for fees due under the provisions of section 1070 (95 O. L., page 488) for the year ending October 19th, 1903, and

"WHEREAS, said bill was then and there approved by A. E. Jacobs, prosecuting attorney of said county and was thought to be a true bill legal debt of the said county and properly due the said W. J. Shumate and was on the 6th day of April, 1903, duly allowed by the board of county commissioners and paid to the said W. J. Shumate, and

"WHEREAS, said section 1070 (95 O. L., page 575) was repealed and some contention has now arisen as to whether said bill was due and a legal charge against the said Jackson county, and

"WHEREAS, the said W. J. Shumate has agreed and does hereby agree to pay to the said Jackson county, in full settlement of said claim and as an adjustment under the provisions of section 855 of the R. S. of Ohio, the sum of ten and no hundredths ($10.00) dollars, the same is hereby accepted as in full settlement by said Jackson county."

Another abstract from the Commissioners' Journal No. 4, page 80, shows that the amount of compensation under section 1070, R. S., paid to W. J. Shumate on April 6th, 1903, was $300.00.

The second of the two transcripts referred to in your letter is in part as follows:

"WHEREAS, by the findings of L. C. Tattmon, state examiner of county offices of date Dec. 1st, 1908, W. J. Shumate, as county auditor, is found to have drawn from the county treasury the following amount, to wit:

Turnpike record	$197 71
Recording journal	45 00
Appraising railroad	28 40
	$271 11

"And where as there is some controversy and question as to the legality of such drawing said amounts, and

"WHEREAS, there is due the said W. J. Shumate the sum of $166.40 for record work not charged on county road record, and

"WHEREAS, the said W. J. Shumate has tendered the county the sum of $76.31 in full settlement of said controversy, and

"WHEREAS, it is the opinion of this board of commissioners that there is some question as to the recovery of said amounts and that the same will cause the county great expense for litigation with perhaps failure of collection, and that the acceptance of said proposition is and will be for the best interests of the county; it was moved by H. D. West, seconded by R. D. Thomas, that the above proposition of settlement of said W. J. Shumate be and the same is hereby accepted in full settlement of said claim."

(From Commissioners' Journal, September 20, 1909, vol. 10, p. 17.)

By computation it will be ascertained that the difference between the tender of W. J. Shumate, referred to in the last paragraph above quoted, and the amount of the finding against him is the sum of $28.40 which, it will be observed, is the amount of the finding against him for "appraising railroad."

Prior to the amendment of section 286 of the General Code by the act of May 10, 1910 (101 O. L., 382), there was no special restriction upon the power of the county commissioners to compromise claims in favor of and against the

county disclosed by the examination of the inspectors and examiners of the bureau of inspection and supervision of public offices. This power to compromise was derived from section 855, R. S., now section 2416, General Code. Said section 855, in force at the time of the alleged settlements described in the transcripts, above quoted, provided as follows:

> "The board shall have power to compromise for or release in whole or in part any debt, judgment, finding or amercement due the county and for the use thereof, except in cases where it or either of its members is personally interested; and when the commissioners compound for the release in whole or in part any debt, judgment, finding or amercement it shall enter upon their journal a statement of the facts in the case and the reasons that governed them in making such release or composition."

The power conferred by this section has been defined as "plenary" in re McAdams, 21 O. C. C., 450. Indeed, the language used would seem to justify such a definition. It will be noted that the board was expressly given power to release the whole claim. The only limitations upon the plenary power of the board were those apparent upon the face of the statute, to wit, that the claim must be due the county for its use, that none of the commissioners must be personally interested and that a statement of the facts in the case and the reasons for the release be entered upon the journal, together with that limitation which applies to the acts of all officers having discretionary power—that the power shall be honestly exercised and the official act free from fraud or mistake.

So far as the records above quoted show, the claims compromised by the county commissioners, as therein described, were due the county and for its use.

The compensation of the county auditor under section 1070, R. S., as amended 95 O. L., 488, and later repealed would, if lawfully drawn at all, have been drawn from the general revenue fund of the county, and the claim of the county against the auditor was in favor of that fund. In like manner the fees drawn by the auditor as referred to in the second of the above quoted transcripts were drawn from the general revenue funds of the county and the claims in each case existed in favor of said fund.

The record does not show that any person other than the auditor himself had any interest in the claims. The record shows that the board of commissioners has in each case attempted at least to enter upon its journal a statement of the facts and the reasons for the respective releases and compositions made by it.

With regard to the second settlement above described, I think there can be no doubt as to the sufficiency of the reason set forth as a compliance with section 855. It is recited, "there is some question as to the recovery of said amounts and that the same will cause the county great expense for litigation with perhaps failure of collection, and that the acceptance of the proposition is and will be for the best interests of the county."

This recital renders the action of the commissioners, with respect to the findings described in the entry in which it appears, lawful and binding upon the county in the absence of fraud.

The case is not so clear in respect to the first entry above quoted. The statement of facts in the case is fully set forth in said entry, but there does not seem to be any reason alleged in the entry for the release and composition made thereby. Furthermore, the peculiar facts apparent upon the face of this entry

tend to negative the existence of any valid reasons for making the compromise in question and raises some inference of fraud.

My conclusions with respect to the question submitted are in brief as follows:

1. The compromise of January 4, 1909, was, in my judgment, illegal because the commissioners did not enter upon their journal a statement of the reasons for making a release or composition of the county auditor's claim against him, and for the further reason that there would seem to be some evidence of fraudulent action on the part of the commissioners.

2. With respect to the entry of September 20, 1909, I beg to state that in my judgment the same is legal on its face and sufficient to constitute a binding release of the claim of the county against the county auditor therein described, unless it can be shown that the whole transaction was tainted with fraud. There is no evidence on the face of the record tending to show such fraud. The mere fact that the amount released coincides with the item of compensation for appraising railroads is not material in view of the fact that in any event the commissioners had authority to release entire claims.

I trust that the foregoing will enable your department to determine its policy in the premises.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

267.

CITY SCHOOL DISTRICT—RIGHT TO PAY FOR PUBLICATION OF RECEIPTS AND EXPENDITURES IN A NEWSPAPER—LIABILITY OF PARTIES.

A city school district is not authorized to pay for publication in a newspaper of a statement of receipts and expenditures for the year.

When such action is performed.

1. *The newspaper cannot be held, as the payment was voluntary.*

2. *The members of the board of education who voted for the move are guilty of a misfeasance and are subject under the terms of* 286, *G. C., to civil action by the proper legal officer for a recovery.*

3. *The president, clerk and treasurer, acting in good faith, in their respective capacities performed merely ministerial acts and are therefore not liable.*

COLUMBUS, OHIO, June 9, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your favor of June 1st, wherein you state as follows:

> "A city board of education published a detailed statement of receipts and expenditures for the year in a newspaper, paying the newspaper the sum of $94.45 for such publication. What finding should be made by this department? Can recovery be had of the paper which published the report? If not, is the board itself liable for the amount? (See section 4776, G. C.)."

Section 4776, General Code, provides:

"*Except* city districts, the board of education of each district shall require the clerk of the board annually, ten days prior to the election, to prepare and post at the place or places of holding such elections, or publish in some newspaper of general circulation in the district, an itemized statement of all money received and disbursed by the treasurer of the board within the school year next preceding."

Section 2921 of the General Code provides in part:

"Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, * * * have been misapplied, or that any such public moneys have been illegally drawn, * * * the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, * * * to recover, for the use of the county all public moneys so misapplied or illegally drawn. * * *"

Section 4752, General Code, as amended 101 O. L., 316, provides in part as follows:

"A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion * * * to pay any debt or claim * * * , the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting 'aye' and the names of those voting 'no.' If a majority of all the members of the board vote aye, the president shall declare the motion carried."

Section 284, General Code, as amended 101 O. L., 384, reads in part as follows:

"The chief inspector and supervisor * * * shall examine the condition of each public office, such examination of * * * school district offices to be made at least once in every two years."

Section 286, General Code, as amended 101 O. L., 384, reads in part as follows:

"A report of the examination shall be made in triplicate, one copy thereof filed in the office of the auditor of state, and one copy filed in the auditing department of the taxing district reported upon, and one in the office of the legal officer of the taxing district or in the case of a village having no solicitor or legal counsel, with the mayor thereof. If the report discloses malfeasance * * * on the part of an officer or an employe, upon the receipt of such copy of said report it shall be the duty of the proper legal officer * * * to institute * * * civil actions in behalf of the state or the political divisions thereof to which the right of action has accrued, and promptly prosecute the same to final determination to recover any * * * public funds misappropriated or to otherwise determine the rights of the parties in the premises."

Section 4768, General Code, as amended 101 O. L., 264, provides in part as follows:

"No treasurer of a school district shall pay out any school money except on an order signed by the president or vice-president and countersigned by the clerk of the board of education, and when such school moneys have been deposited as provided by sections 7604-7608 inclusive, no money shall be withdrawn from any such depository, except upon an order signed by the treasurer and by the president or vice-president and countersigned by the clerk of the board of education."

Section 4782 of the General Code provides as follows:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, may dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

From a reading of section 4776 supra, it is clear that a city board of education is without authority to publish a detailed statement as set forth in your letter, and that consequently payment to the newspaper therefor is illegal. It was, however, a voluntary payment to such newspaper which in the absence of an enabling statute could not be recovered back unless such payment was made through fraud or mistake of fact.

Printing Company vs. State, 68 O. S., 362.

The only enabling act I can find in the law is section 2921 supra, which applies solely to the frauds of a county and not to school funds.

I am, therefore, of the opinion that no recovery can be had from the newspaper in question.

By virtue of section 4752 supra, it is the duty of the board of education to pass on the payment of debts and claims, and I assume that the payment to the newspaper was made upon motion duly adopted by the board of education. Such payment being illegal, the members who voted for it were guilty of malfeasance in authorizing the payment, and the money so paid out was misappropriated under the provisions of section 286 supra.

I am, therefore, of the opinion that the members of the board of education who voted for the payment to the newspaper as set forth above should be held liable for the funds so misappropriated.

From a reading of section 4768 supra and section 4782 supra, I am of opinion that the duties of the president, clerk and treasurer, as therein set forth, are purely ministerial in character, and that they were not required, if acting in good faith, to inquire into the question of the legality of the motion passed by the board authorizing the payment to the newspaper, but were fully protected in signing, countersigning and paying the order issued in pursuance of said motion.

To sum up, therefore, I am of the opinion that:

(a) The newspaper cannot be held.

(b) That the members of the board of education who voted for the motion authorizing the payment for the publication can be held for malfeasance.

(c) That the president, clerk and treasurer, acting in good faith, were protected in signing the order, and paying the claims by virtue of the motion passed bythe board of education, their act in the matter being purely ministerial.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 273.

TEACHERS—INSTITUTE—POWERS OF BOARD OF EDUCATION TO PAY TRANSPORTATION OF TEACHERS.

By virtue of the powers conferred in 7872, G. C., a board of education may pay the transportation and expenses of teachers in visiting schools of other cities.

COLUMBUS, OHIO, June 20, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of May 12, 1911, in which you inquire as follows:

"May a board of education, under section 7872, G. C., pay the transportation and expenses of teachers in visiting schools of other cities?"

Section 7872, General Code, provides as follows:

"The expenses of such institute shall be paid from the city institute fund hereinbefore provided for. In addition to this fund the board of education of any district annually may expend for the instruction of the teachers thereof, in an institute or in such other manner as it prescribes, a sum not to exceed five hundred dollars, to be paid from its contingent fund."

You will note the reading of the above section in this, that it provides that in addition to the regular institute fund the board of education of *any* district annually may expend for the instruction of the teachers thereof in an institute *or in such other manner* as it prescribes, a sum not to exceed five hundred dollars, etc.

By the authority vested in the respective boards of education of the state, as prescribed in the above section, I am of the opinion that a board of education may pay the transportation of teachers in visiting schools of other cities, provided such visitation is for the instruction of the teachers.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 280.

TOWNSHIP HALL—POWERS OF TOWNSHIP TRUSTEES TO PURCHASE OR ERECT—WHEN VOTE OF ELECTORS NECESSARY.

If the township has sufficient unappropriated funds in the treasury the trustees, upon the clerk's certification of such fact, may purchase a site and erect a township house at a cost not to exceed two thousand dollars.

When the money is not on hand, however, and it is necessary to pledge the credit of the township for such purpose, the question must be submitted to a vote of the electors, as provided by 3260, *G. C.*

June 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Beg to acknowledge receipt of your letter, in which you ask this department for a written opinion upon the following questions, viz:

> "Providing they have sufficient money, are township trustees authorized to acquire a site and erect a township hall without a vote of the people?
>
> "What restrictions, if any, are imposed upon township trustees in acquiring a site and in advertising for bids for the erection of a township hall?"

The first legislation upon this subject was passed by the general assembly of Ohio, March 14th, 1853, in an act for the incorporation of townships, 51 Ohio Laws, 489, section 24, which is as follows:

> "The trustees of each and every township in this state, shall have power to determine on, and fix the place of holding elections within their townships, for which purpose they are hereby authorized to lease any house already erected, or contract for, on permanent lease, or otherwise, a site, and erect thereon a house for the purposes aforesaid."
>
> Section 24, 51 Ohio Laws, 489.

This law was amended May 6th, 1869, 66 Ohio Laws, 120, which act provides:

> "That the trustees of any township in this state be and hereby are authorized to levy tax on all the taxable property of their township, not exceeding ten thousand dollars, to purchase a site and erect a township house; and they are hereby authorizd to purchase said site and erect thereon a town house, at a cost for both site and building not to exceed the sum of two thousand dollars."
>
> 66 Ohio Laws, 120.

Again the general assembly had this question before it April 18, 1874, and passed an act to amend the act authorizing township trustees to levy a tax to purchase a site and erect a township house thereon, passed May 6, 1869, 71 Ohio Laws, 95:

> "That the trustees of any township in this state be and they are hereby authorized to levy a tax on all the taxable property of their

township, not exceeding two thousand dollars, to purchase a site and erect a township house, and they are hereby authorized to purchase said site and erect thereon a town house, at a cost for both site and building not exceeding said sum of two thousand dollars: Provided, that before any tax shall be levied under this act, the trustees of the township shall submit the question to a vote of all the electors of their township at a general election, and shall give at least thirty days' notice before said election by posting up written notices in at least five of the most public places therein, and said vote shall be taken at the usual place of holding elections in said township, and if a majority of the votes cast at any such election shall be in favor of a tax, then the trustees of said township shall be authorized to levy the tax and carry out the provisions of this act.

"Sec. 2. That said original section one shall be and hereby is repealed."

71 Ohio Laws, 95.

This act was again amended by the general assembly April 11, 1876, and the act of April 18, 1874 (supra), was repealed, 73 Ohio Laws, 203:

"That the trustees of any township in this state, be and they are hereby authorized to levy a tax on all the taxable property of any township, or any voting precinct in the same, not to exceed two thousand dollars to purchase a site and erect thereon a town hall, at a cost for both site and building not to exceed the sum of two thousand dollars. Provided, that before any tax shall be levied under this act the trustees of said township shall submit the question to a vote of such township or precinct (as the case may be), at a general election and shall give at least thirty days' notice before said election by posting up written notices in at least five of the most public places in such township or precinct, and said vote shall be taken at the usual place or places of voting in said township or precinct; and if a majority of the votes be cast at such election shall be in favor of the tax, then the trustees of such township shall be authorized to levy the tax and carry out the provisions of this act. The act passed April 18, 1874, is hereby repealed."

73 Ohio Laws, 203.

These statutes remained practically without change and now appear in the General Code, Section 3260, in the following form:

"The trustees shall fix the place of holding elections within their township, or of any election precinct thereof. For such purpose they may purchase or lease a house and suitable grounds, or by permanent lease or otherwise acquire a site and erect thereon a house. If a majority of the electors of the township or a precinct thereof, voting at any general election, vote in favor thereof, the trustees may purchase a site and erect thereon a town hall for such township or precinct and levy a tax on the taxable property within such township or precinct to pay the cost thereof, which shall not exceed two thousand dollars. At least thirty days' notice shall be given in at least five of the most public places in the township or precinct, that at such election a vote will be taken for or against a tax for such purchase."

Section 3260, General Code.

By a careful survey of the history of this legislation we find that the restriction as to voting is a restriction that applies only when the trustees are about to involve the township in an expenditure for a township house when they have not sufficient money to pay for the same, but must levy and collect a tax for the purpose. When it becomes necessary to so levy a tax to pay for the erection of such township house the question must be submitted to a vote. But, if the trustees of the township have a sufficient amount of money with which to build a suitable township house without raising the same by taxation, then they are authorized to purchase suitable grounds and erect thereon a house, under, of course, the restrictions which apply to all contracts entered into by township trustees.

In the beginning of this legislation the trustees of each and every township were authorized to contract for a site, and erect thereon a house for the purpose of holding elections, and they were not restricted in any particular. In the growth of this legislation the restriction grew out of the fact that in many instances it was necessary to pledge the credit of the township for the erection of such township house, and, then the restriction that the credit of the township or precinct should not be pledged for the erection of a township house without the consent of the taxpayers by amendment became the law of 1853, which is apparent for comparison, 51 Ohio Laws, 498, section 24 (supra), read:

> "Trustees * * * are hereby authorized to lease any house already erected, or contract for, on permanent lease, or otherwise, a site, and erect thereon a house."

While the present law, section 3260, General Code (supra), reads as follows:

> "The trustees * * * may purchase or lease a house and suitable grounds, or by permanent lease or otherwise acquire a site, and erect thereon a house."

The restriction put into this law by amendment, therefore, is one of taxation, for the amendment which was added reads:

> "If a majority of the electors * * * voting at any general election, vote in favor thereof, the trustees may purchase a site and erect thereon a town hall * * * and levy a tax on the taxable property * * * to pay the costs therefor, which shall not exceed two thousand dollars."

Therefore, it was the intention of the legislature to restrict the trustees of the township in pledging the credit of the township for the erection of a township house without the consent of the taxpayers, and not to restrict them in building a suitable township house to provide a place of holding elections when they have sufficient money without levying and collecting a tax. This construction of this legislation is fortified by the fact and the reason is made very clear by the restriction that is placed upon the township trustees in entering into any contract by the terms of section 5660, General Code. A general restriction is imposed as follows:

> "The trustees of a township * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or the expenditure

of money, unless the clerk thereof * * * certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose."

Section 5660, General Code.

Therefore, with the money in the treasury the clerk can make the necessary certificate and the trustees can proceed with the erection of a township house. If the money be not in the treasury and must be raised by taxation, the legislature provided for the erection of a township house by having a tax question submitted at a general election and after a favorable vote thereon said tax would be in the process of collection and the restriction of section 5660, General Code (supra), would not apply and prevent the township trustees from purchasing a site and erecting thereon a township house. Of course, it is clear that the cost thereof must not exceed the sum of two thousand dollars as expressly stated in the statute.

If a more expensive township house is contemplated, the township trustees are governed by entirely different statutes.

In conclusion, if the township trustees have on hand sufficient money in the treasury unappropriated to the credit of the fund from which it is to be drawn, and the clerk shall so certify, then they may proceed to purchase a site and erect a township house at a cost of not more than two thousand dollars, and in the erection of such township house the trustees must use their sound discretion, for there are no other restrictions than those above set forth.

Respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

281.

CONTRACTS—INTEREST OF MEMBERS OF BOARDS IN CONTRACTS OF BOARD—BOARD OF HEALTH—HIRE OF MEMBER'S AUTOMOBILE—OVERPAYMENT OF ESTIMATE THROUGH MISTAKE OF FACT—RECOVERY BY CITY

It is against public policy and prohibited both by the common law and by statute for a member of the board of health to be paid for the use of his automobile used by members of the board of health, the health officer and a representative of the state board of health.

If a city pays to a bank, as the assignee of a contractor having a claim against the city, under a mistake of fact, a greater amount of money than was actually due to said contractor, the city may recover the excessive amount so paid from the bank itself.

COLUMBUS, OHIO, June 28, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—On account of an unusual pressure of business in this office your letter of April 6th, submitting for my opinion certain questions, has been unanswered until the present. The questions submitted therein are as follows:

"1. Is it legal for a member of the board of health of a city to be

paid for the use of his automobile used by the members of the board of health, health officer and a representative of the state board of health investigating a smallpox epidemic?

"2. An audit of the transactions of a city discloses that overpayments have been made upon a street paving contract. These payments were made upon an estimate of the engineer and at a price higher than named in the contract. Payment was made by the city auditor without discovering such overpayment. The contractor assigned all of his estimates to a bank and in accordance with said assignment, the bank drew the warrants and received checks from the treasurer for all payments on said work. These checks show the endorsement only of the bank and not of the contractor. In a suit to reimburse the city, against whom should the action be brought?"

In respect to the first question asked by you, I beg to state that section 3808 of the General Code prohibits any member of any board of a municipal corporation from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation.

Section 4404 of the General Code authorizes the establishment of a board of health, which said board of health exercises very broad powers and undoubtedly constitutes a board "of the corporation" within the meaning of section 3808.

The members of the board of health serve without compensation and in a liberal view of section 3808, said section might be deemed not to apply to such member.

I am of the opinion, however, that section 3808 does apply to members of the board of health and does preclude such members from receiving any money whatever out of the city treasury.

Whether or not section 3808 applies, however, there is a principle of common law, supported by a uniform line of authorities, upon which payment of money to a member of the board of health, under the circumstances stated by you, would have to be condemned. The principle in question prohibits, as against public policy, any interest on the part of a public officer in a contract with the making or enforcement of which he has anything to do in his official capacity. In the case you suggest, payment to the member would be justified at all only upon the theory that his automobile had been hired either by himself or by the health officer—a person under his direct supervision. The case would amount therefore to the making of a contract by the officer with himself as an individual, and would clearly be void as against public policy.

Statutes other than section 3808, above cited, as well as that section itself, authorizes the recovery of money illegally expended.

I am, therefore, of the opinion that it is not lawful for a member of the board of health of a city to be paid for the use of his automobile used by members of the board of health, the health officer and a representative of the state board of health out of the city treasury. I assume, of course, that your question relates to the payment from the city treasury.

Answering your second question, I beg to state that in my opinion if a city pays to a bank, the assignee of a contractor having a claim against it, under a mistake of fact, a greater amount of money than was actually due to said contractor, the city may recover the excessive amount so paid from the bank itself. The action in such case would have to be for money had and received, and not in any sense upon the contract. It is well settled that an assignee may be sued in certain cases, as for a breach of the contract of his assignor. That question,

however, is not in this case. The right to recover the excessive payment is not, strictly speaking, contractual, but is more appropriately defined as quasi contractual, and the original contractor may be left out of consideration entirely.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 284.

MUNICIPAL CORPORATIONS—INTEREST ON PROCEEDS OF BONDS—DISPOSITION OF—SINKING FUND TRUSTEES.

As the statutes contain no reasonable ground from which to deduce an intent to the contrary, the general rule that interest follows the fund will be allowed to govern so that interest upon the proceeds of bonds sold for the purpose of meeting the expense of a particular improvement, will not be turned over to the sinking fund trustees but will be credited with the special fund created by the bond issue, and expended for the purpose of the fund, after the accomplishment of which purpose all balance of said fund will go to the sinking fund as provided in section 3804, G. C.

COLUMBUS, OHIO, June 30, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of two letters from you, one under date of June 13th and one under date of June 26th, both stating substantially the same question, and requesting my opinion thereon, viz:

> "Should the interest received by a city from the proceeds of bonds sold for the construction of a particular improvement from the city depository, be turned over to the sinking fund trustees, or should it be credited to the special fund created by the issuance of the bonds and expended for the purposes for which the bonds were issued?"

The following sections of the General Code must be considered in the determination of this question.

Section 3932.

> "Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others."

Section 4295.

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer. * * *"

Section 4512.

> "Upon demand of the board, the city auditor or village clerk shall report to it balances belonging to the city or village, to the credit of

the sinking fund, interest accounts, or for any bonds issued for or by the corporation, and all officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select."

Section 4514.

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be re-invested in like manner."

Section 4515.

"At least once every three years, the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve, and shall deposit such reserve." (As amended 101 O. L. 243.)

Section 4517.

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. *They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law.* For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the 'securities or money in their possession.'"

Section 3804.

"When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

I know of no other statutory provisions in any way affecting the solution of the question presented. Upon an analysis of the foregoing provisions the following facts will appear:

Under section 3932 it is the duty of the fiscal officers of the city to transfer the premiums and accrued interest received by the corporation from a sale of its bonds to the trustees of the sinking fund. This, in my opinion, refers to the amount of money received by the corporation at the time the bonds are sold in excess of the face value, so to speak, of the bond issue. By comparison of section 4295 and succeeding sections with section 4514, etc., as above quoted, a clear distinction appears as between the moneys in the custody of the trustees of the sinking fund on the one hand and the moneys to be kept in the legal custody of the city treasurer on the other hand. These two classes of funds are to be deposited in different depositories and constitute separate interest producing accounts.

Section 4512 refers to the city auditor making a report of the balances to the credit of the sinking fund and interest accounts, and provides that he shall

pay the balances to the trustees of the sinking fund; this section, however, does not define, of itself, what moneys are to be credited to the sinking fund and interest accounts.

Section 4517 further defines the sphere of the powers of the trustees of the sinking fund, and authorizes such trustees to receive from the city auditor all moneys collected for the purpose of retiring bonds.

Section 3804 makes it the duty of the fiscal officers of the city to transfer to the sinking fund unexpended balances remaining in a fund created by an issue of bonds.

By further analysis of the foregoing sections it is apparent that two kinds of funds are always created in the issue and retirement of the bonds of a municipal corporation, viz: 1. The fund derived from the sale of the bonds—the amount borrowed by the municipality; 2. The fund derived from taxation, assessment and other moneys collected for the purpose of retiring bonds of the corporation, and paying interest thereon—the moneys raised for the purpose of paying the corporate debt. These two funds are separately managed and controlled. The sum borrowed by the municipal corporation is, of course, immediately expended for some corporate purpose, such as the making of a particular improvement. Its disbursement is in the hands of one of the administrative departments of the city government, and its care and custody is within the sphere of the duties of the city treasurer. It must be deposited in what may be referred to as the regular city depository.

Funds raised for the payment of municipal debts, on the other hand, pass at once into the control of the sinking fund trustees and will be administered and expended by such trustees.

The foregoing general rules are subject to certain well defined exceptions. In the first place, the premiums and accrued interest received by the city authorities at the time of the sale of the bonds, and being as above defined the excess over and above what may be termed the face value of the bond issue are, because of the provisions of the statute, not to be regarded as a part of the amount borrowed, but rather as a part of the fund raised to pay the debt. Again, the unexpended balance remaining in the fund created by an issue of bonds after the object for which the money was borrowed has been achieved belongs not to the fund of which it was originally a part, nor to the general revenue fund of the municipal corporation, but to the fund from which the municipal debt is to be discharged.

The statutes are silent with respect to the disposition of the interest received by the city from its depositories and derived from the deposit produced by the sale of bonds; but by the express provision of section 4514, above quoted, interest produced by deposit of moneys in the hands of the sinking fund trustees is by them to be reinvested or otherwise devoted to the purpose mentioned in section 4517.

The general principle is that interest produced by the investment or deposit of a public or trust fund follows the principal and becomes a part of the principal. There being no specific provision of statute creating an exception to this principle in the case of interest produced by the deposit of the proceeds of a bond issue, it remains to be ascertained whether or not the general assembly has evidenced an intent from which by implication it must be determined that such interest must be disposed of in some other manner. On the one hand it might be urged that inasmuch as premiums and accrued interest received from the sale of municipal bonds must at once be credited to the sinking fund, the legislative intent evidenced by this provision, is that the amount of money which may be expended and otherwise administered by the administrative

authorities of the city, as above described, is to be limited to the face value of the bond issue, and that if in any manner in a sale of bonds or otherwise, the amount of money produced by a given issue exceeds such face value, the excess should at once be applied to the payment of the debt.

Color is lent to such an assumption by that provision of section 4517 which authorizes and directs the trustees of the sinking fund to receive from the city auditor "all taxes, assessments and moneys collected" for the purpose of providing for the payment of the principal and interest of the bonds of the municipality. That is to say, the language of this provision shows that the legislature contemplated the possibility of moneys available for sinking fund purposes being "collected" otherwise than by way of taxation or assessment. This, however, is inconclusive inasmuch as water rentals and the like are in certain cases to be devoted to the retirement of municipal bonds. On the other hand, section 3084 contemplates the possibility of a bond issue exceeding the ultimate needs of the corporation for the particular purpose, and at the same time provides that the excess shall go into the sinking fund. From this section it appears that the ascertainment of such excess is to be postponed until the particular purpose for which the money was borrowed is achieved.

On the whole, I am of the opinion that no controlling intent on the part of the general assembly is disclosed by any of the foregoing provisions, to make an exception to the general rule in the case of interest derived from the deposit of moneys raised by the sale of bonds.

Because then the evident intention of the statutes is that what may be termed "improvement fund" shall be kept separate from what may be termed the "retirement fund," and that both such funds shall be deposited and invested so as to produce interest, and because no intent clearly appears to make an exception as to either kind of interest to the general rule that the interest follows the principal, I am of the opinion that the interest produced by the deposit of the money derived from the sale of bonds for a specific improvement less the premiums and accrued interest received at the time of sale must be credited to such fund and not to the sinking fund, and must remain so credited until the object for which the bonds were issued has been achieved, at which time it must, together with any balance remaining in the principal fund, be transferred to the trustees of the sinking fund to be applied to the payment of the bonds.

I have not, of course, considered a possible case in which the particular bonds in question are retired prior to the ascertainment of the fact that the balance in the fund created by their sale is no longer needed for the purpose for which such fund was created. It would seem, however, that in such case the interest and the balance in the fund should be transferred to the general revenue fund of the corporation.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 289.

COUNTY AUDITOR—NOTICE OF MEETING OF BOARD OF EQUALIZATION AND COMPLETION OF QUADRENNIAL EQUALIZATION—ONE PUBLICATION SUFFICIENT.

In order to comply with sections 5596 and 5600, G. C., requiring the auditor to give ten days' notice by advertisement of both the completion of the quadrennial equalization as well as the time and place the board of equalization will convene as a board of revision, one publication by the auditor will suffice.

COLUMBUS, OHIO, July 7, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication, wherein you ask this department for a written opinion upon the following question, viz:

> "How many insertions is the county auditor required to make in giving ten days' public notice by advertisement in one or more newspapers that the quadrennial equalization has been completed, or of the time and place the board of equalization will convene as a board of revision?"

The notices inquired about are required to be given by sections 5596 and 5600 of the General Code, which provide as follows:

> "Section 5596. The auditor shall immediately thereafter, give ten days' public notice by advertisement in one or more newspapers, that the equalization has been completed, and that complaints against any valuation may be filed with the auditor of the county on or before the fifteenth day of April next following and will be heard by the board of revision, stating in the notice the time and place of the meeting of said board. Such complaints shall be filed on or before the fifteenth day of May next following.
>
> "Section 5600. After the completion of the equalization by the board, complaints against any valuation may be filed with the auditor of the county, and, if such complaint has been filed on or before April 15th thereafter against any valuation of a quadrennial county board, or, if the auditor deems it advisable, he shall notify the members of the proper board of equalization in writing to meet and sit as a board of revision on the day at the place provided by law for the meeting of the board. He shall give ten days' public notice, by advertisement, in one or more newspapers, of the time and place of the meeting of the board of revision and the purpose thereof."

By the terms of section 5596 and 5600 of the General Code, just quoted, the county auditor is required to give ten days' public notice by advertisement in one or more newspapers that the equalization of the property in the county has been completed and that complaints may be filed with the county auditor on or before the date mentioned in section 5596, General Code; and the auditor is also required to give ten days' notice by advertisement in one or more newspapers of the time and place of the meeting of the board of revision and the purpose thereof.

In order to comply with the terms of sections 5596 and 5600, General Code, you inquire, how many insertions is the county auditor required to make in one or more newspapers in giving the ten days' public notice.

A similar statute (Swan's Statutes 474) requiring public notice of time and place of sale on execution, by advertisement at least thirty days before the day of sale in some newspaper printed in the county, was construed in the case of Adm'x of Craig vs. Fox et al., 16 Ohio report, page 564. It is urged in this case that thirty days' notice required consecutive insertions of the notice during the period of thirty days. The court in passing upon the question held:

> "The next objection to the notice is, that the publication was not made according to law. The statute requires that lands taken in execution shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county (Swan's Stat. 474), and it is urged that these words require consecutive insertions of the notice during the period of thirty days.
>
> "This construction of the statute has been practiced upon very generally in many parts of the state; and were it possible that private rights could be injuriously affected by not adopting and sustaining it, I might hesitate in expressing an opinion that consecutive insertions of the notice are not required. No such right can, however, be affected. I look then to the statute in order to gather the meaning and intention of the legislature. Its words will be answered by one publication, inserted in a newspaper thirty days before the day of sale, and will not require an insertion in each paper that may be issued between the date of the first insertion and the sale. Insertions daily or weekly, when intended to be provided for, are always indicated in indefinite language, as in the advertisement for a tax sale, where this is the form of expression 'shall cause notice to be advertised four weeks successively.'"

This statute, regarding notice of sale on execution, has been since amended, requiring that notice be published for five consecutive weeks.

It is, therefore, my opinion that the county auditor complies with sections 5596 and 5600 of the General Code, by one publication of the notice required by said section in one or more newspapers ten days before the date of sale.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

D 304.

SHERIFFS—FEES FOR KEEPING PRISONERS—DISPOSITION OF—COUNTY FEE FUNDS.

The thirty-five cents a day provided by section 1981, G. C., is a fee which should be paid into the county fee fund and the allowance made by the county commissioners under section 2850 for keeping and feeding prisoners in jail may be retained by the sheriff for his own use in addition to his salary.

COLUMBUS, OHIO, July 26, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of June 1st, in which you request my opinion upon the following question:

> "Whether the thirty-five cents (35c) per day to the jailer for keeping an idiot or insane person, allowed under section 1981 of the General Code, is a fee which should be paid into the sheriff's fee fund or is it a compensation in the nature of the board of such prisoner to be retained by the sheriff for his personal use?"

In answer to your question I would say section 2850 of the General Code provides 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."

I am of the opinion that an insane person while confined in the jail is a prisoner within the meaning of the above quoted provision of section 2850 of the General Code.

Section 2997 of the General Code provides in part as follows:

> "In addition to the compensation and salary herein provided the county commissioners shall make allowances quarterly to each sheriff for *keeping and feeding prisoners* as provided by law.

Section 2977 provides that all the fees, costs, percentages, penalties, allowances and other perquisites collected for services by a county sheriff shall be collected for the sole use of the treasury of the county in which he is elected, etc.

The section about which you inquire, section 1981, provides for a fixed fee for the sheriff or jailer of thirty-five cents (35c) per day for keeping an idiot or insane person.

There is a difference between the two sections above quoted, namely: sections 2997 and 1891 of the General Code, in that the allowance to be made to the sheriff in addition to his compensation and salary allowed is for "*keeping and feeding*," while the fee provided in section 1981 is for "*keeping*" only.

In view of the difference between said sections of the General Code, above quoted, I am of the opinion that the 35c per day provided by said section 1981 is a fee which should be paid into the sheriff's fee fund and the allowance made

by the county commissioners under section 2850 may be retained by the sheriff for his own use, in addition to his salary.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

306.

COUNTY WORKHOUSE—BOARD OF DIRECTORS—POWERS OF BOARD AND COUNTY COMMISSIONERS TO ERECT AND ALTER BUILDING.

The erection, or alteration of the Stark county workhouse are matters beyond the authorization of the board of workhouse directors.

Under Section 2343, the work is that of county commissioners to be undertaken in accordance with the methods prescribed therein.

COLUMBUS, OHIO, July 28, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 26th, requesting my opinion upon the following question:

> "Have the trustees of the Stark county workhouse, constructed and operated pursuant to act in vol. 89, O. L. 687, et seq., authority to employ an architect at an expense of $500.00, and erect new cells, etc., at an expense of $8,000? If so, should the bills for the same be allowed by the county commissioners upon the certificate of the secretary of the board of workhouse directors, or should they be paid from the county treasury upon such certificate alone?
>
> "The custom has been for the commissioners to allow the bills certified to them by the directors, but they now question their authority to allow bills of the nature mentioned above unless the same have been duly advertised and let by competitive bidding as provided by law."

I have examined the act of April 18, 1892, 89 Ohio Laws 687. Without quoting any of its provisions in detail I may say that the purchase of a site for the workhouse thereby authorized to be constructed and maintained and the erection thereon of a building was entrusted by said act to the commissioners of Stark county; but that it was provided by section seven of said act that after the erection of the building and when it was ready for use, the direction, management and control of the workhouse and maintenance and care of the convicts therein should be vested in a board of workhouse directors. This board was given complete power over the ordinary management of the workhouse, including power to make and enter into contracts.

Section twenty of the act provided that the ordinary cost of maintaining the workhouse over and above the proceeds arising from its income should be paid from the county treasury upon the certificate of the secretary of the workhouse and the approval of the commissioners of the county.

The act is absolutely silent as to the mode and manner of proceeding in case of enlargement or alteration of the building.

It is my opinion that the powers of the board of workhouse directors, as enumerated in the act above cited, are not sufficiently broad to authorize them to exercise supervision over the making of an alteration in and addition to the

workhouse building. Such building is a county building, and such matters in respect to it are within the jurisdiction of the county commissioners. In my judgment, therefore, the provisions of section 2343 et seq. of the General Code, which prescribes the steps to be taken when the commissioners of a county find it necessary to erect an addition to or alteration of a public building, apply to and govern the proposed addition to the Stark county workhouse.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

B 309.

TOWNSHIP CLERK AND TOWNSHIP TREASURER—POWERS OF ACTING AND REFUSING TO ACT AS CLERK AND TREASURER RESPECTIVELY OF SCHOOL BOARD—VACANCIES AND FILING THEREOF BY THE BOARD OF EDUCATION.

From the principles established by the decision in the case of State ex rel. Stolzenbacher vs. Felty, Auditor, No. 9372, decided by the supreme court in 1905, *but not reported.*

1. *The treasurer of a city, village or township may by failing to qualify as treasurer of the school funds refuse to serve as such treasurer.*

2. *If the township clerk fails to qualify as clerk of the township board of education, such failure does not affect his status as township clerk.*

3. *If a township treasurer resigns as treasurer of the school funds the board of education has the right if it chooses, to accept his resignation, and in such cases may elect a successor to him as treasurer of the school fund.*

4. *If by reason of the establishment of a depository, the treasurer of the school district is dispensed with according to law, and the clerk gives the additional bond required of him as treasurer by virtue of section* 4783, *G. C., he will then be obliged to perform the duties of the treasurer without extra compensation unless he resigns. He may, however, refuse to qualify as such treasurer and the board may elect a substitute.*

5. *The refusal of a township clerk to qualify for the duties which devolve upon him by the establishment of a depository under* 4783, *G. C., will not in any way affect his status as township clerk, and under such circumstances the board may select a substitute to act as treasurer.*

COLUMBUS, OHIO, July 31, 1911.

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 May 18th, submitting for my opinion thereon the following questions:

> "Section 4783, G. C., provides that each city, village and township school district, the treasurer of the city, village or township funds, respectively, shall be the treasurer of the school funds. May such treasurers refuse to serve as treasurers of the school funds if they deem the compensation fixed by the board of education insufficient?
>
> "If a township clerk should refuse to act as clerk of the township board of education, what effect, if any, will such refusal have upon his status as township clerk?

"A township treasurer being a member of the township board of education and deeming the position of treasurer and member of the board incompatible, resigned as treasurer of the school funds. What is the proper proceeding in such case?

"If a board of education dispenses with its treasurer under the provisions of sections 4782, 4783 and 4784, G. C., is the clerk of said board required to perform the duties of the treasurer without extra compensation?

"If, under such conditions, a township clerk refuses to qualify and act as treasurer for the compensation fixed by the board, what effect, if any, will this have upon his status as township clerk?

Would the board of education in case of such refusal be authorized to select its own treasurer?"

The statutes involved in these questions are as follows:

"Section 4763. In each city, village and township school district, the treasurer of the city, village and township funds respectively, shall be the treasurer of the school funds.

"Section 4764. Before entering upon the duties of his office, each school district treasurer shall execute a bond. * * *

"Section 4765. Thereafter such treasurer may be required to give additional sureties on his accepted bond. If he fail for ten days after service of notice in writing of such requisition, to give such bond or additional sureties as so required, the office shall be declared vacant and filled as in other cases.

"Section 4782. When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, may dispense with a treasurer of the school moneys, belonging to such school district. In such case the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

Section 4747, as amended 101 O. L., 138:

"The board of education of each school district shall organize on the first Monday of January after the election of members of said board. One member of the board shall be elected president, one as vice-president and in township school districts the clerk of the township shall be the clerk of the board. * * *"

In connection with these several questions I have examined the case of State ex rel. Stolzenbacher vs. Feltz, Auditor, No. 9372, decided by the supreme court of this state in 1905 but not reported. I have read the record and briefs of opposing counsel therein and find that the facts in that case were as follows: A city treasurer upon the taking effect of the school code of 1904 in which the language above quoted from section 4763, General Code, first appeared, filed with the board of education of the city school district a bond, but made such filing conditional upon his salary as custodian of the school moneys being fixed at a certain sum. The board refused to accept the bond so filed, and having declared that the city treasurer had failed to qualify as treasurer of the school funds, and

that a vacancy in such office therefore existed, proceeded to elect another treasurer of the school funds. To this treasurer so elected, the county auditor refused to pay over funds due from the county to the school district, and the action which originated in the supreme court was in mandamus to compel such delivery.

The judgment of the court was that a pre-emptory writ issue commanding the county auditor to pay over to the treasurer elected by the school the funds due the district from the county. Upon analysis of the decision in this case the following I think will appear clear:

1. If the board of education had no authority to elect a treasurer of its own in any case then the court would not have decided the case as it did.

2. If the effect of the failure of the city treasurer to qualify was to disqualify him from holding the office of city treasurer as well as from acting as treasurer of the school fund, then there would have been a vacancy in the office of city treasurer which should have been filled in the manner prescribed in the municipal code, and the person thus appointed would have been the local custodian of the school funds, so that if the court had taken this view of the law it could not well have decided the case as it did.

I think therefore, that the only propositions of law consistent with the court's decree in the case above cited are as follows: and they are those put forth by counsel for the relator.

1. The offices of city, village and township treasurer on the one hand and treasurer of the city, village and township school funds on the other hand are separate and distinct.

2. Each successive treasurer of the city, village or township, as the case may be, must in the first instance qualify as treasurer of the school funds of the appropriate district. If, however, he fails to do so, then the board of education has the right, and it is its duty to secure another treasurer.

3. The failure of the treasurer of the city, village or township, as the case may be, to qualify as treasurer of the school funds of the appropriate district does not create a vacancy in the first office.

I am further of the opinion that there is no essential difference between the provisions of section 4747 as amended in 1910, and which relates to the clerk, and the above created provisions of section 4763 relating to the treasurer of the school funds. The same principles of law apply to both cases.

Answering now the particular questions which you submit, I beg to state in answer to your first question that in my opinion the treasurer of a city, village or township may by failing to qualify as treasurer of the school funds refuse to serve as such treasurer.

In answer to your second question I beg to state that in my opinion if a township clerk fails to qualify as clerk of the township board of education, such failure does not in any respect affect his status as township clerk.

Answering your third question I beg to state that if a township treasurer resigns as treasurer of the school funds, the board of education has the right, if it chooses, to accept his resignation, and in such case may elect a successor to him as treasurer of the school fund.

Answering your fourth question I beg to state that in my opinion if the treasurer of the school district has been dispensed with according to law, and the clerk gives the additional bond required of him as treasurer by virtue of section 4783, General Code, he will then be obliged to perform the duties of treasurer without extra compensation, unless he resigns. He has, however, a perfect right under the decision above quoted to refuse to qualify by filing the additional bond or to resign as treasurer of the school funds at any time. Furthermore, if he

should refuse to perform the duties of his office the board may lawfully declare that he has abandoned the same, thus creating a vacancy therein, and elect another treasurer of the school funds.

Answering your fifth and sixth questions together I beg to state that in my opinion the refusal of a township clerk, in the event that the duties of treasurer of the school district devolve upon him by virtue of the selection of a school district depository and the other proceedings set forth in section 4783, to qualify and act as treasurer of the school fund, will not have any effect whatever upon his status as township clerk, and that under such circumstances the board of education might lawfully proceed to select its own treasurer.

The conclusions above set forth are the only ones, in my opinion, consistent with the decision of the supreme court in the case above cited.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

311.

CLERK OF COURTS—COMPENSATION BY COUNTY COMMISSIONERS FOR EXTRA WORK PERFORMED OUTSIDE OF OFFICE HOURS—SORTING, ARRANGING, JACKETING AND REFILING PAPERS.

The work of resorting, rearranging, rejacketing and refiling papers filed in the office of the clerk of courts under former administration, is not within the regularly prescribed duties of that official and when he is employed by the county commissioners to perform such task outside of his regular office hours, he is legally entitled to extra compensation therefor.

COLUMBUS, OHIO, July 31, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I herewith acknowledge receipt of your inquiry of May 4, 1911, and wish to say that the delay in answering your inquiry has been due to the large number of inquiries which this department has received for consideration. In your communication you inquire as follows:

> "The commissioners of Defiance county installed new metallic filing cases and upon the request or recommendation of the common pleas court contracted with the clerk of the courts for sorting, arranging, jacketing and refiling the papers in the new case at a price that seems reasonable for the work involved. It is not disputed that the work was performed by the clerk outside of his regular office hours. The compensation for the service received by the clerk was retained by him and not paid into his fee fund, the contract having been entered into subsequent to the time the salary law took effect. Should the clerk be held to account to his fee fund for the money received for this service?"

In reply thereto I wish to say that section 2874 of the General Code provides for the general duties of the clerk of the court as follows:

> "The clerk shall indorse on each pleading or paper in a cause filed in his office the time of filing, enter all orders, decrees, judgments

and proceedings of the courts of which he is by law the clerk; and make a complete record of each cause unless by law or by the order of the court record is dispensed with, and pay over to the proper parties all moneys coming into his hands as clerk."

Section 2875 of the General Code provides that the clerk shall file and preserve the papers delivered to him as follows:

"The clerk shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding."

Section 2876, General Code, provides as follows:

"The clerk shall indorse upon every paper filed with him the date of the filing thereof, and upon every order for a provisional remedy and upon every undertaking given thereunder, the date of its return to his office."

Section 2878 of the General Code provides, what books are to be kept by the clerk of the court as follows:

"The clerk shall keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial docket for the use of the court and the officers thereof, journal, record and execution docket. He shall keep an index to the trial docket and to the printed duplicates of the trial docket and of the journal direct, and to the appearance docket, record and execution docket, direct and reverse."

Section 2880 provides that the clerk shall keep the books and make records as follows:

"The clerk shall keep the journals, records, books, and papers appertaining to the court and record its proceedings."

Section 2883 of the General Code provides that the clerk of the court shall make a complete record of each cause as follows:

"Unless by order on the journal a record is dispensed with, the clerk shall make a complete record of the cause within six months after final judgment or order of the proper court. On his failing to make such record within such time, the clerk may be removed by the court of common pleas."

Section 2884 of the General Code provides that the clerk shall make an index of all judgments not dormant as follows:

"Each clerk of the common pleas, circuit and superior courts shall make an alphabetical index of the names of all plaintiffs and defendants to pending suits and living judgments, showing therein in separate columns the names, court and number of the suit, or execution, and when there is more than one suit or judgment for or against the same party, it shall be sufficient to index the name but once and make entries

opposite thereto, of the court and the number of the suit or execution. No such index shall be made in counties where it has already been done."

The sections of the General Code cited above, provide generally as to what are the duties of the clerk of the courts, and it is not part of the duties of the clerk of the courts to sort, arrange, jacket and refile the papers filed in the office of the clerk of the courts under former administrations, therefore, the work of sorting, arranging, jacketing and refiling is not the duty of that particular office, and inasmuch as the clerk of the courts of said county performed said work of sorting, arranging, jacketing and refiling said papers in his office which had been filed under former administrations, and inasmuch as he performed this work outside of his regular office hours, I am of the opinion that said clerk of the courts of Defiance county is legally entitled to said fees, and that he should not be held to account for the same to the fee fund of his respective county for the performance of the aforementioned services.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

312.

COUNTY OFFICERS—YEAR'S SALARY—NO REDUCTION WHEN ACTUAL TERM IS SLIGHTLY MORE OR LESS THAN A CALENDAR YEAR.

Each county officer is entitled under section 2989, G. C., to receive a full year's salary for each year of the term which he served, regardless of whether or not he happened to serve a few days more or less than a full year by reason of his term beginning on a certain Monday of a certain month and ending on the same Monday of the same month.

COLUMBUS, OHIO, August 1, 1911.

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 21st, in which you inquire as follows:

"If a county officer elected for a certain number of years, by reason of beginning his term on a certain Monday of a certain month and ending upon the same Monday of the same month, should actually serve a few days more or less than a full year, should his compensation be based upon the actual time served, and if so should the last month's salary be prorated as the days served in the last month are to the whole number of days in the month, or should the year's salary be prorated as the number of days served in the last year is to the number of days in the year? Or should he receive a full year's salary for each year of the term which he served?"

In reply to your inquiry section 2989 of the General Code provides as follows:

"After deducting from the proper fee fund the compensation of all deputies, assistants, clerks, bookkeepers, and other employes, as fixed

and authorized herein, each county officer herein named shall receive from the balance therein the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

You will note that the above section speaks of the salary of the respective county officers as an *annual* salary. I am acordingly of the opinion that each respective county officer of the respective counties of the state is entitled to receive a full year's salary for each year of the term which he served, regardless of whether or not he happened to serve a few days more or less than a full year by reason of his term beginning on a certain Monday of a certain month and ending on the same Monday of the same month.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

313.

TAXES AND TAXATION--CREDITS ERRONEOUSLY RETURNED AS MONEYS BY PARTY WHO MISTAKENLY BELIEVED HIMSELF OWNER—LEGISLATIVE REMEDY.

When a person has for several years, returned for taxation $1,000 *in money which the courts decide later to belong to another person, the county cannot allow a refunder to the aggrieved party even in the face of the further fact that such money was returned as "money" when in reality it should have been listed "credits," which would have permitted a reduction of debts.*

The only remedy is through an act of the legislature.

COLUMBUS, OHIO, August 1, 1911.

Bureau of Inspection and Supervision of Public Offices. Department of Auditor of States, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of July 6, 1911, of which the following is a copy:

"We hand you herewith a letter from C. W. Pettay, prosecuting attorney, Cadiz, Ohio, and respectfully request that you give us your written opinion in answer thereto."

Mr. Pettay's letter is as follows:

"We have a case in this county in which a man, some three or four years ago, gave in $1,000.00 to the assessor of personal property as money for tax purposes, and paid taxes on said money for at least three years without protest, he thinking that the $1,000.00 belonged to him and that it belonged to him by virtue of a certain will and testament, but the will having been placed in the courts for construction, the courts have recently held that this $1,000.00 was not willed to him, but to another person, and the courts held that he pay the $1,000.00 to the person in question to whom the court finally decreed the legacy to belong, also to pay interest on the said money for the time which he had held it in his possession.

"Now, this party who has lost his supposed legacy has not only

had to pay back the money that he thought was bequeathed to him under the will according to a late decree of the circuit court of this district, but also to pay interest on same. Therefore, since he has had to pay this money back together with interest, he thinks that the taxes which he has paid on the said money for the past three or four years, as the case may be, should be refunded to him by order of the county commissioners; and in going into the case carefully it occurs to me that the law is in favor of the board of commissioners retaining the money, but on the contrary the equity in the case seems to be very strongly in favor of complainant, and it is up to us to decide as to whether the law and equity in the case will justify the commissioners in ordering the taxes on the said money returned to this said party.

"Now, as said before, this money was handed into the assessor as money and not as credits, but said complainant says that as a matter of fact, even though it was put down by the assessor as so much money, it was in reality credits and that since it was credits in fact, that he now should be allowed to deduct his debits from that sum, which would not leave him anything in money to be returned to the assessor aforesaid.

"Would say that the question has come up that even though this man should escape paying the taxes on the said money as aforesaid, that the real legatee as held by the circuit court in construing the said will, should be held to pay said taxes, but that legatee seems to be greatly in debt and therefore the same principle would apply to him, and if he be allowed to deduct his debits then he too would have nothing left for taxes.

"Then again, if we have interpreted section 5402 of the General Code as enacted May 31st, 1911, correctly, we probably would be barred from charging these taxes to anyone else any way.

"From the above you have a pretty fair statement of this case, and from a standpoint of equity it seems as though the said complainant has been wronged and the question now is, has he a remedy?"

"Would be pleased to hear from you at once giving me a ruling on this case, for if the law on the subject will justify the county commissioners in passing a resolution for the refunding of this money I think there is enough equity in the case to justify them in so doing, but if your bureau holds that that would be error to do so we shall not do it.

"Hoping that we may have this matter taken up at once, I am, etc."

Under date of July 14, 1911, Mr. Pettay submitted to your additional data, as follows:

Re-taxation and taxes.

Refund on legacy subsequently held by court to belong to another party.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

"GENTLEMEN:—On the 29th ult., I wrote you with reference to your opinion as to whether or not, there is any law that would justify the board of county commissioners in refunding the taxes on a legacy which the court subsequently held to belong to another party, and I might incidentally add that the said court not only compelled the pay-

ment of the legacy, but also the interest on said legacy, for the number of years that it had been erroneously held by the party who is now complaining of having had to pay said taxes on money which did not belong to him.

"This money was turned into the assessor for three or four years as so much money, but the complainant now says that if we will give him a chance that he will prove to our satisfaction that the property so handed in as money was in reality credits instead of money, and further that he will make sufficient proof that not only the amount of the said legacy that was held by him under a misconstruction of the will and testament that gave said legacy, but also interest on said legacy, has had to be paid over to another party.

"Now the question is, 'Is there any law that will justify or uphold the county commissioners in taking steps to refund said taxes that have been paid as aforesaid, if said complainant can make the proper showing that said property was credits instead of money?'

"In reply to the said letter you stated that you had referred the question to the attorney general and would give me a copy of his opinion as soon as received, but to date I have not received said opinion.

"Thanking you in advance for trying to get me an opinion on this matter within the next few days, I am, etc."

Inasmuch as the party about whom you inquire gave in the $1,000.00 for the purpose of taxation thereon for three or four years, as stated in the above data, I am of the opinion that he is without any remedy as against the county. I am unable to find any statutory authority whereby the county commissioners can legally refund to said party the taxes so paid by said party under the statement of facts as given above.

It is certainly to be regretted that the legatee under the will who lost out in the litigation returned the amount of $1,000.00 each year as stated in Mr. Pettay's letter, for taxation, for several years. His honesty would appeal to anyone to afford relief if it were possible. The trouble is the only authority to do this is the legislature. This comes in the nature of a claim against the state, which I believe the legislature would rectify, especially if a recommendation were made by you as prosecuting attorney or your successor in case you should not be prosecutor at the time.

Every principle of equity and morality is in favor of this legatee, but as I have hereinbefore indicated, I am unable to find any statute warranting the county commissioners in making a refunder. One of the chief difficulties with respect to any taxing board making a refunder, as you know, is this: the amount of taxes received each year is distributed to the various taxing districts, such as municipalities, townships and counties, and of course, the county cannot stand legally the expense of a refunder in respect to moneys that have been distributed to the various taxing districts. The legislature is the only source of remedy that I can see. If there were any legal route reaching to a correction of the wrong to which you refer in your letter I certainly would be pleased to follow it under these circumstances.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

317.

COUNTY INFIRMARY—METHOD OF PAYMENT FOR PLANTING OF SHRUBBERY ON THE INFIRMARY GROUNDS—DUTIES OF SUPERINTENDENT, DIRECTOR AND COUNTY COMMISSIONERS.

Bills for shrubbery on the infirmary grounds are not bills for "current supplies" and may not be legally paid by the superintendent of the infirmary out of his reserve fund under 25289, G. C. They are rather "purchases necessary for the county infirmary" within the meaning of section 2522 and are to be contracted for by the infirmary directors under authority of section 2522.

The powers and duties of county commissioners with respect to the county infirmary are primarily to provide a site and erect buildings thereon.

COLUMBUS, OHIO, August 8, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 1st, submitting for my opinion thereon the following:

> "The infirmary directors of Stark county desiring to beautify the infirmary grounds by planting a large quantity of shrubbery, requested the county commissioners to enter into a contract for the purchase and planting of the same, which request was refused by the said commissioners.
>
> "Thereupon the infirmary board (it is claimed upon legal advice other than that of the prosecuting attorney) contracted for the planting of shrubbery expecting to pay for the same in four or five different vouchers, each amounting to less than two hundred dollars, out of the 'reserve' fund of the superintendent, none of which have been paid.
>
> "Query: Can such bills be legally paid by the superintendent out of his 'reserve' fund, or may they be paid upon the allowance of the infirmary directors?
>
> "Which board, the county commissioners or the infirmary directors, has the authority to contract for improving or beautifying the infirmary grounds?"

Section 2528 of the General Code provides in part as follows:

> "At the request of the superintendent, the infirmary directors shall set apart from the poor fund a reserve fund not to exceed at any time two hundred dollars, which upon their order shall be paid to the superintendent and expended by him as needed for current supplies and expenses. * * *"

Section 2522 of the General Code provides in part as follows:

> "The board of infirmary directors shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. * * *"

Without citing or quoting from sections, suffice it to say that the powers and duties of county commissioners with respect to the county infirmary are, in the main, to provide site and erect buildings thereon. In my opinion the planting of shrubbery upon the grounds of the county infirmary is a matter of maintenance rather than a matter of original cost, and is within the jurisdiction of the infirmary directors to the exclusion of that of the commissioners.

Such shrubbery is not, however, in my opinion, "current supplies" within the meaning of section 2528 above quoted. It is rather a "purchase necessary for the county infirmary" within the meaning of section 2522.

I therefore conclude that the bills to which you refer may not legally be paid by the superintendent of the infirmary out of his reserve fund, but that they may be contracted and paid by the infirmary directors under authority of section 2522.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 317.

PUBLIC RELIEF—LEGAL RESIDENCE—REIMBURSEMENT OF FOREIGN COUNTY WHICH GIVES "POOR RELIEF" TO A LEGAL RESIDENT OF ANOTHER COUNTY.

Where a family which had lived for twelve months in Licking county and under 3437 *obtained a "legal residence" therein and then moved to Union county where they were given "poor relief" and before they had acquired a legal residence therein, had moved to Madison county and caused the latter county to incur an expense of* $315.00 *for caring for the family during a spell of smallpox, Madison county can be reimbursed by Licking county under the terms of sections* 4438 *and* 3394, *G. C.*

COLUMBUS, OHIO, August 8, 1911.

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 7th, requesting my opinion upon the following question:

> "In 1908, one B, wife and child, moved from Licking county to Union county. Before they had resided in the last mentioned county for a period of one year, they applied for and received public relief at the hands of the township trustees of the township in which they resided in Union county. This was in February, 1909, October, 1909, and March, 1910.
>
> "The said B and family, in the summer of 1910, moved to Madison county where, on December 2, 1910, the entire family contracted smallpox. Madison county incurred an expense of $315.00 in caring for the said family. Will you kindly advise this department which county is liable for the amount of the said bill?"

Section 4438 of the General Code provides as follows:

> "When a person with a contagious disease quarantined in a county is a legal resident of another county of the state, and is unable to pay

such expenses, they shall be paid by the county in which he has a legal residence, if notice and a sworn statement of the amount of such expenses are sent to the infirmary directors of such county within thirty days after the quarantine in such case was discharged."

This section is found in that portion of the General Code which relates to the powers and duties of a municipal board of health. But section 3394, General Code, however, provides that township trustees, acting as a township board of health, are vested with "the same duties, powers and jurisdiction within the township * * * as by law are imposed upon or granted to boards of health in municipalities." My opinion, therefore, is that section 4438 applies to township boards of health as well as to municipal boards of health.

The reference in section 4438 to "legal residence" must be regarded, in my judgment, as being made to the term as defined in the poor laws. Section 3477, General Code, provides as follows:

"Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of the law for the relief of the poor, subject to the following exceptions: * * *"

(Exceptions are unimportant in this connection, as they do not apply to the case at hand.)

The difficulty in the question that you submit arises, if at all, because of the fact that the family in question received public relief at the hands of the township trustees of the township in which they resided in Union county, in the year 1909. This could not lawfully have been done except upon the theory that the family had acquired a legal settlement in Union county. The determination of the township trustees upon this point, however, is not conclusive upon the officials of Madison county, and if erroneous they may, in my judgment, ignore it.

Although your letter does not so state I shall assume that the family have resided without public support twelve consecutive months in Licking county. If that is the case, then, the legal settlement of the family is in Licking county.

Inasmuch as the legal settlement of the family is in Licking county, and inasmuch as, as I have above indicated, the phrase "legal residence" as used in section 4338, General Code, above quoted, should be construed as meaning "legal settlement," I am of the opinion that the infirmary directors of Licking county are liable for the amount of the bill contracted by the authorities in Madison county in caring for the family referred to, while suffering from smallpox.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 320.

BOARD OF EDUCATION—PUBLICATION OF STATEMENT OF RECEIPTS AND EXPENDITURES—RIGHT TO EMPLOY NEWSPAPER THEREFOR.

The word "publish" as employed in section 7785, G. C., leaves it discretionary with the board of education to publish said annual report in any manner it sees fit, and a publication in a newspaper of such annual report is fully authorized by said section.

COLUMBUS, OHIO, August 9, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of June 1st you requested my opinion on the following state of facts:

> "A city board of education published a detailed statement of receipts and expenditures for the year, in a newspaper, paying the newspaper the sum of $94.45 for such publication. What finding should be made by this department? Can recovery be had of the paper which published the report? If not, is the board itself liable for the amount? (See section 4776, G. C.)."

From the wording of your request and the fact that you cited me to section 4776, General Code, I assumed that the published detailed statement of receipts and expenditures was the one provided for in said section 4776, and that such publication was in addition to the annual report of the city school board. From a later letter addressed to me, I am informed that I was in error in regard thereto, and that the report referred to by you in your former request was the annual report which is provided for in section 7785, General Code, and, I, therefore, write this supplementary opinion in order to cover the facts as I now understand them.

Section 7785 of the General Code provides in part as follows:

> "The board of education of each city district shall prepare and publish annually a report of the condition and administration of the schools under its charge, and include therein a complete exhibit of the financial affairs of the district."

Said section authorizes the board of education to *publish* annually a report. The word "publish" is defined in the Century dictionary as follows:

> "To make public; to make known to the people in general, promulgate or proclaim as a law or edict."

In Webster's dictionary:

> "To make public, to make known to mankind or people in general; to divulge, as a private transaction; to promulgate or proclaim as a law or edict."

In United States vs. William, 3rd Fed., 484-486 "publish" is defined:

> "As to issue; to make known what before was private; to put into

circulation; the idea of publicity, of circulation, or intending distribution."

In the case of City of Chicago et al. vs. McCoy, 136 Ill., 344, the court on page 350 in construing section eighteen of the schedule to the constitution of 1870 which provides "all laws of the state of Illinois, and all official writings, and executive, legislative and judicial proceedings, shall be conducted, preserved and *published* in no other than the English language."

The court on page 352 of its opinion says:

> "It is insisted that the word 'published' as used in said section of the constitution, is restricted in its application to publications in book or pamphlet form. The word 'publish' is broad enough to include, and in its ordinary and usual acceptation does include, publications in newspapers. * * * The constitutional provision in question contemplates publications in newspapers as well as publications in books and pamphlets."

I hold, therefore, that the word "publish" as used in said section 7785 of the General Code leaves it discretionary with the board of education to publish said annual report in any manner it sees fit, and that a publication in a newspaper of such annual report is fully authorized by said section.

Therefore, no finding should be made by your department against a city board of education which publishes its *annual* report as provided for in section 7785, General Code, in a newspaper.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 323.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—ROAD DISTRICT LIMITATIONS—VOTE OF ELECTORS AUTHORIZING BOND ISSUE.

A levy for the purpose of meeting the interest and principal of bonds issued by a special road district under section 7033, G. C., is included within the ten mill limitation of the Smith One Per Cent. law so-called?

The procedure formerly outlined in section 3939, G. C., now supplanted by substantially similar provisions, is not applicable to the issuance of bonds in a township road district under 7035, G. C. The issuance of such bonds must, by virtue of section 7042, G. C., be authorized by a vote of a majority of the electors voting thereon.

COLUMBUS, OHIO, August 14, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 4th, requesting my opinion upon the following questions:

> "1. Is a levy for the purpose of meeting the interest and principal of bonds issued by a special road district under section 7033 of the General Code, to be included within the ten mill limitation of the Smith One Per Cent. law, so-called?

"2. Section 7036 of the General Code provides that the proposition of issuing bonds for road district improvements shall receive a majority vote of the electors voting thereon, while under sections 3939 and 3295, General Code, the township trustees are authorized upon the approval of two-thirds of the electors to issue bonds for highway improvement purposes. Do these sections conflict; and in the event that they do conflict, do these sections, 3939 and 3295, control, so that a township which is also a road district may not issue bonds without the approval of two-thirds of the electors?"

Answering your first question, I am of the opinion that levies for the purpose therein mentioned are within the ten mill limitation of the act of June 2, 1911. I have already held that levies "over which the budget commissioners shall have no control" as provided by section 5649-3a, are not necessarily excluded from consideration in ascertaining the ten mill limitation, although they are expressly excluded from the internal limitations of five, three and two mills, respectively.

Section 7035 of the General Code, which is one of the sections authorizing the creation of township road districts for the purposes therein mentioned, provides in part that the bonds to be issued by the trustees thereunder "shall not run longer than twenty years." Under this section, therefore, it is possible to distribute the indebtedness of the township, incurred under authority thereof, over a period of twenty years; bonds are to bear interest at a rate not exceeding five per cent., payable semi-annually: so that, in the case of an issue of one hundred thousand dollars, the amount mentioned by you, it would be necessary for the township road district to levy an annual tax, slightly in excess of five thousand dollars, in order to provide for the retirement of, and the interest on such issue. If, then, the levies made by the township, the county, the state and the school district, and any other levies operating within LaGrange township—the township mentioned by you—are such as not to leave room, so to speak, for a levy in the township of such an amount in excess of five thousand dollars, without exceeding the ten mills allowed by the Smith bill, then, as you suggest, it would probably be necessary for the electors to vote additional taxes under authority of section 5649-5 of the Smith bill, for road district taxes are not exempt from the one per cent. limitation.

Answering your second question I beg to state that sections 3295 and 3939 jointly constitute what is popularly referred to as the Longworth Bond act, as applicable to townships. Section 3952, in pari materia therewith, does provide that no issue of bonds, as to which a vote of the electors is required, under favor of the remaining provisions of the act, shall be made unless two-thirds of the voters, voting at the election, vote in favor thereof.

It seems to me, however, that there is a vital difference between section 7033, et seq., and section 3939. Sections 7033 to 7052, inclusive, provide in general, a scheme for improving all the public ways of a township as distinguished from the improvement of specific highways. Furthermore, although this is not clear, there seems to be a suggestion in section 7038, and again in section 7033, that the boundaries of the township road district need not be coincident with those of the township. In other words, the road district and the township are quite separate and road district improvements are quite distinct from the specific improvements to which section 3939 refers. See particularly, paragraphs 4, 22 and 23 of said section 3939, all of which describe specific improvements.

For all the foregoing reasons I am of the opinion that the procedure outlined in sections 3939 and succeeding sections is not applicable to the issuance

of bonds in a township road district under section 7035, General Code. The issuance of such bonds, must, by virtue of section 7042 of the General Code, be authorized by a vote of a majority of the electors voting thereon.

For your information I beg to state that sections 3939 to 3954 have been repealed by the late session of the general assembly, and an act substantially identical therewith, by making a few changes therein, has been enacted in their stead. This fact, however, in no way influences the decision of the question submitted to me.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

D 323.

SHERIFF—RIGHT TO HAVE COUNTY COMMISSIONERS PAY FOR INJURIES INCURRED BY HORSE—PAYMENT TO VETERINARY SURGEON.

The county commissioners under 2997 may pay for the services of a veterinary surgeon, made necessary by the injury to a horse owned by the sheriff while being used by the sheriff in performing his official duty.

COLUMBUS, OHIO, August 13, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 24, 1911, in which you inquire as follows:

> "May the county commissioners, under section 2997, pay for the services of a veterinary surgeon, made necessary by the injury to a horse owned by the sheriff while same was in use by the sheriff in performing his official duty?"

In reply thereto I desire to say that section 2997 of the General Code, as amended, 102 O. L. 93, provides as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each

sheriff shall file under oath with the quarterly report herein provided, a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

You will observe that the county commissioners shall make allowance quarterly to each sheriff for many things, among them as follows: "and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office." In the maintenance of a horse the services of a veterinary may become necessary and when a sheriff is performing the duties of his office and it is proper that he should procure the services of a veterinary surgeon for his horse while he is using it in the discharge of his duties, the expenses thereof in my judgment are not only lawful but proper to be charged against the county.

My conclusion, therefore, is that the county commissioners should pay for the services of a veterinary surgeon under the conditions which you named.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 324.

SECRET SERVICE OFFICERS—APPOINTMENT AND COMPENSATION—ACT GRANTING RIGHT OF APPOINTMENT BY PROSECUTOR REPEALED—THE NUGATION OF A REPEALING ACT REVIVES THE REPEALED SECTION.

When a repealing act is held inoperative and void the acts attempted to be repealed thereby remain in force unless legislative expression to the contrary appears.

Under this rule since section 2915, *G. C., which provides for the appointment of a secret service officer by the prosecuting attorney is invalid and void and the original sections which it attempted to repeal,* 2916, 1541, 6184, 6186, *G. C., remain in full force and effect.*

COLUMBUS, OHIO, August 16, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I have received from you the following inquiry dated August 12, 1911:

> "Your opinion as to the matter of appointing secret service officers, in which you hold that section 2915-1 of the General Code, passed April 18th, 1911, is ineffective and void has been received.
>
> "Now, in view of the decision in the 67 O. S. 303, 68 O. S. 273, 59 O. S. 368, 48 O. S. 211 and 5 N. P. N. S. 161, I should like to have your opinion as to whether or not sections 1541, 2915, 2916, 6184, 6185 and 6186 of the General Code remain in full force and effect. In other words, are said sections repealed by the act of the general assembly?
>
> "Please give me your opinion at your earliest convenience and oblige."

My former opinion applied to supplemental section No. 2915-1 and was not that said section was unconstitutional, but that it was inoperative because there was

no officer known to the law named by said section to fix the compensation of a secret service officer.

This supplemental section 2915-1 is incorporated in, and a part of House Bill No. 17, passed April 18, 1911, and found in 102 O. L. 77, the title of said act being as follows:

> "To better provide for the administration of criminal justice by amending sections 1541 and 2916 and supplementing section 2915 of the General Code in such manner as to more clearly define the powers and increase the facilities of prosecuting attorneys and to repeal sections 6184, 6185 and 6186 of the General Code."

Section 1541, as it originally stood, was as follows:

> "The judges of the court of common pleas of a county, or the judges of such court in a county in joint session, if they deem it advisable, may appoint either or all of the following:
>
> "First. A court interpreter, who shall take an oath of office, hold his position at the will of such judge or judges, and under the direction of the court, or any judge thereof, shall interpret the testimony of witnesses, translate any writing necessary to be translated in court, or in a cause therein, and perform such other services as are required by the court or a judge thereof. The interpreter shall, without extra compensation, render such services in the circuit court, superior court, probate court, and the court of insolvency, as the judges of those courts may require. He shall receive for his services a compensation fixed by the judges appointing him, not to exceed twelve hundred dollars in any year, or such sum in each particular case as the court requiring his services deems just. If a stipulated salary, such compensation shall be paid monthly from the county treasury, upon the warrant of the county auditor, in other cases at the conclusion of his services, upon the certificate of the judge of the court in which they were rendered.
>
> "Second. A criminal bailiff, who shall be a deputy sheriff and hold his position during the pleasure of the judge or judges of such court. He shall receive compensation to be fixed by such judge or judges at the time of his appointment, not to exceed the amount permitted by law to be allowed court constables in the same court, which shall be paid monthly from the county treasury upon the warrant of the county auditor.
>
> "Third. A secret service officer for the prosecuting attorney's office, who shall aid the prosecuting attorney in the collection and discovery of testimony to be used in the trial of criminal cases and in matters of a criminal nature. Such appointment may be made for such term as the judge or judges deem advisable, subject to termination at any time for cause sufficient within the judgment of the judge or judges of the court. He shall receive such compensation, payable monthly from the county fund upon the warrant of the county auditor, as the judge or judges so appointing shall determine, not exceeding the rate of fifteen hundred dollars for each year."

It will be seen that the only change made by its amendment was to omit the third paragraph of the said section, authorizing the appointment of a secret service officer for the prosecuting attorney's office by the judge or judges of the

common pleas court. The first and second paragraphs of the said section 1541 in the amended act are identical with the first and second sections in the original act.

The only change made by the amendment to section 2916 from said section as it originally stood is to give the prosecuting attorney power to inquire into the commission of crimes in the county. This section, 2916, as amended, is in no way influenced by section 2915-1, unless it be that said supplemental section 2915-1 was intended to give the prosecuting attorney the means with which to exercise the power of inquiry granted him by section 2916, but it can be readily seen that section 2916, as amended, by this act, can stand alone and should be considered independently of section 2915-1, and, therefore, neither my original opinion, nor this opinion, should be considered as casting any doubt upon section 2916, as amended 102 O. L. 78.

It will be noted, however, that the act of April 18th, 1911 (102 O. L. 77), in addition to repealing the original section 2916, also expressly repeals original sections 1541, 6184, 6185 and 6186 of the General Code. Original section 1541 was copied in the first part of this opinion; and the original sections 6184, 6185 and 6186 of the General Code are as follows:

> "Section 6184. The 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. Such appointment shall be made for such term as the prosecuting attorney deems advisable and subject to termination at any time by the prosecuting attorney.
>
> "Section 6185. If the prosecuting attorney fails to appoint the secret service officer or officers, under the provisions of the next preceding section, within three months after the date on which the prosecuting attorney enters upon the duties of his office, the probate judge of such county may appoint such secret service officer or officers.
>
> "Section 6186. Such secret service officer or officers, appointed as provided in the next two preceding sections, shall not receive for any month a total amount of more than one hundred and twenty-five dollars. If appointed as provided in section sixty-one hundred and eighty-four, such officer or officers shall be paid out of the county fund on the warrant of the prosecuting attorney, or, if appointed as provided in the next preceding section, shall be paid out of the county fund on the warrant of the probate judge."

It will be seen that these sections, prior to the enactment of supplemental section 2915-1, gave the prosecuting attorney in counties in which the sale of intoxicating liquor is prohibited, the power to appoint a secret service officer or officers to aid in securing evidence in cases of violation of local option laws, and also provided for the appointment of such officer by the probate judge in case of the failure of the prosecuting attorney to appoint within a specified time, and also provided for the fixing of the compensation to be paid such secret service officer and for the payment of the same.

It seems clear that it was the intention of the legislature, by the enactment of supplemental section 2915-1, not to restrict or take away from the prosecuting attorneys the power to appoint secret service officers given by sections 6184, 6185 and 6186 of the General Code, in dry counties, nor to preclude the appointment of secret service officers generally, as given by original section 1541; but

that the intention was to increase and add to the powers of the prosecuting attorneys as to the appointment of secret service officers; and, instead of having two methods of appointment, namely, one by the prosecuting attorney in dry counties, the other by common pleas judges in all counties, to provide one manner of appointment and one method of fixing compensation of said secret service officers, which would apply throughout the state, and which would place the power of the appointment entirely in the hands of the prosecuting attorneys. This being so, sections 6184, 6185, 6186 and 1541 (so far as said section provides for the appointment of secret service officers) were repealed for the reason that with the enlarged powers given to the prosecuting attorneys by section 2915-1, the old sections were entirely unnecessary; that is, the powers and duties given and imposed by the said original sections were merged and included in the larger powers and duties provided by the new act.

In brief, it is clearly the intention of the legislature to provide more fully for the appointment of secret service officers and not to forbid their appointment or restrict their powers. Consequently, if said section 2915-1 had been held to be unconstitutional and void, the repealing clause of this act (which must be—so far as sections 6184, 6185, 6186 and 1541 are concerned—the repealing clause attached to supplemental section 2915-1) would also fall, and said original sections 6184, 6185, 6186 and 1541 and would remain in full force and effect. (See 67 O. S. 303, 60 O. S. 273, 59 O. S. 368, 48 O. S. 211, 219 and many other decisions in point.)

The only difficulty that has suggested itself to my mind upon this matter is that I have held this supplemental section 2915-1 not to be unconstitutional, but simply inoperative, but the basis of these decisions is that the statute under consideration was void; whether void because unconstitutional or for some other reason makes no difference. In addition, there is a case which seems to me to be directly in point. That is the case of State vs. Schoepf et al, 5. N. P. n. s., 161. This case held that the same ruling applies to inoperative or void acts which applies to unconstitutional acts. The second paragraph of the syllabus in this case is as follows:

> "Where an inoperative or void act, amendatory of a previous valid statute, contains a section attempting to repeal such previous valid statute, said repealing section is also void and said previous valid statute remains in full force and effect as it was prior to said attempted amendment, unless it clearly appears that it was the intention of the legislature to repeal said former statute without reference to whether the attempted amendment was valid or not."

The decision is by Judge Bromwell, of the Hamilton county court of common pleas, and is a well considered and strong opinion. On page 164 he states the exact question we have here very succinctly, as follows:

> "Briefly stated, the issue raised is this: What is the effect upon a valid existing act if an attempt is made to amend it by an inoperative or void act which at the same time attempts to repeal the original valid act? Does it destroy the original act by the attempted repeal and, at the same time, create a new act incapable of enforcement? Or, does it merely render the amendment futile both as to the new matter attempted to be added to the offense, and as to the attempted repeal of the original act?"

and his answer is:

> "Having already decided that the act * * * was inoperative, we now further decide that the repealing section of that act is also inoperative, and the original act stands as it was prior to the attempted amendment."

The reasoning in this case seems to me to be sound, and the holding in it, and also in the present case, consistent with the clearly expressed intention of the legislature; and, therefore, basing my opinion upon the decisions of the supreme court above referred to and upon this last decision from which I have quoted, I would say that, in my judgment, section 2915-1, being inoperative for the reasons pointed out in my former opinion, the repealing of sections 6184, 6185, 6186 and 1541 of the General Code is also inoperative, and that these last sections stand as they did before the passage of said supplemental section 2915-1.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

October 28, 1911.

ADDENDUM.

The foregoing opinion was prepared on August 16, 1911, but was not given out at that time because an action was then about to be brought in the common pleas court of Franklin county to compel the auditor of Franklin county, by mandamus, to issue a warrant for the payment of the salary of a secret service officer appointed by virtue of section 2915-1. Said secret service officer had originally been appointed under the third section of section 1541, and, after the passage of 2915-1, and consequent repeal of the original section 1541, a new appointment was made by the prosecuting attorney under 2915-1, and it was upon this latter appointment that the suit was instituted.

This case was clearly presented to the court and full briefs submitted on behalf of the prosecuting attorney and on behalf of the auditor. The case was tried before Judge Rathmell of the Franklin county common pleas court, and after considering it very carefully, he decided that section 2915-1 was inoperative and void; and he further decided that on account of said section being inoperative and void, section 1541, which was attempted to be repealed by it, was still in force, and that the appointment of the secret service officer made under it was valid, and that such secret service officer was entitled to have a warrant issued for his salary as fixed by the judges in making said original appointment.

I am informed that the circuit court of Richland county issued a mandamus under section 2915-1, yet, as I am advised, the order directing said mandamus to issue was made in a case which was in its nature ex parte. No pleading seems to have been filed on behalf of the defendant auditor, and no briefs submitted; there is no opinion given by the court and nothing to indicate upon what its decision was based; while the decision of Judge Rathmell was the result of the most careful examination and investigation and after having both sides of the controversy fully presented to him by brief. This department will, therefore, follow the opinion of Judge Rathmell, unless his judgment be reversed, and prosecuting attorneys are requested to do likewise.

C 324.

COUNTY RECORDER AND DEPUTY—COMPENSATION--DISPOSITION OF MONEYS RECEIVED ON CONTRACT WITH COMMISSIONERS FOR INDEXING REAL ESTATE—FEE FUND.

A county recorder is obliged under the statutes to index all records of real estate upon the direction of the commissioners, and to keep up such indexing as a part of his official duties. He cannot be allowed any personal compensation therefor, outside of his regular salary and the fees allowed for such work shall be paid into the county treasury.

A contract with such county recorder or with his deputy for such work is invalid. Any moneys received from such contract shall be paid into the county except, where the office is not self sustaining in which case, the amount due as salary to the said recorder or deputy, may be deducted from the moneys received on such contract and the balance paid into the county treasury to the credit of the fee fund.

COLUMBUS, OHIO, August 15, 1911.

Bureau of Inspection and Supervision of Public Offices, SAM A. HUDSON, *Deputy, Columbus, Ohio.*

DEAR SIR:—Under date of July 11, 1911, you ask the opinion and advice of this department upon the following:

> "Nov. 5, 1906, the commissioners of Crawford county authorized C. F. Matthew, recorder, to make sectional or abstract indexes under the provisions of section 1154, R. S. (2776, G. C.). For services under this contract, said Matthew was paid between March 22, 1907 and March 3, 1910, $6,651.80. Said Matthew paid no part of said sum or any other of the fees earned by him after the first quarter of 1907, into the recorder's fee fund, neither were the salaries of himself and his deputies paid out of the county treasury after first quarter of 1907. In short, he ignored the salary law entirely.
>
> "On the 16th day of April, 1909, the commissioners of said county entered into a contract with one George Matthew, deputy recorder, "to bring up to date the revised numbers of lots, both inlets and outlets in the various lots and tracts of land in the cities, villages and municipalities within said county." The compensation to be paid on this contract was fixed at 10 cents per line. Under this contract, February 7th, 1910, the said George Matthew drew from the county treasury $2,915.20.
>
> "While the contract is worded a little differently, the services rendered by George Matthew were identical with those rendered by Charles Matthew.
>
> "What finding should be made by the state examiner of this department in this case."

I will first consider the duty and the acts of the commissioners and the recorder under sections 2766 and 2767 of the General Code.

Section 2766 provides:

> "When in the opinion of the commissioners of any county they are needed, and they so direct, in addition to alphabetical indexes, the

county recorder shall make, in books prepared for that purpose, general indexes to the records of all the real estate in the county by placing under the heads of the original surveyed sections or surveys, or parts of a section or survey, squares, subdivisions, or lots, on the left page of such index book; first, the name of the grantor or grantors; second, next to the right, the name of the grantee or grantees; third, the number and page of the record where the instrument is found recorded; fourth, the character of the instrument, to be followed by a pertinent description of the property conveyed by the deed, lease, or assignment of lease; and on the opposite page, in like manner, all the mortgages, liens, or other incumbrances affecting such real estate. For his services in making such description and noting incumbrances, *he shall receive for each tract described five cents, in addition to his other fees.*

Section 2767, General Code, provides:

"When brought up and completed, *the recorder shall keep up the general indexes described in the next preceding section*, or any other indexes authorized by the county commissioners. *He shall receive for indexing any lot or parcel of land, ten cents, to be paid from the county treasury.*"

By virtue of section 2766, General Code, the commissioners are authorized to determine when general indexes are needed, and to direct that the same be provided. When they have so determined and directed "the county recorder shall make" "general indexes to the records." The commissioners cannot exceed the power conferred upon them by statute. When the commissioners of Crawford county directed that sectional or abstract indexes be made, they exercised all the power conferred upon them by statute. Their fixing the compensation was unauthorized and illegal.

The commissioners having directed this work to be done, it was the duty of the recorder to do it. If not completed at the expiration of his term of office his successor should complete the work without further direction of the commissioners. The recorder's fees, until the indexes had been brought up and completed are fixed by section 2766, General Code, at five cents for each tract described, which would be five cents for each transfer or incumbrance of a tract or lot.

The contract of April 16, 1909, entered into with George Matthew, was illegal and unauthorized. It was the duty of the recorder to do this work by the direction of the commissioners under date of November 5, 1906.

"Where the commissioners of a county have directed the county recorder to bring up and complete such general indexes to a given date, and thereafter the recorder keeps up such indexes by entering thereon each instrument as it is recorded, in an action brought by the recorder to recover for such subsequent services, the fact that they were not ordered by the commissioners, is irrelevant."

In re Holiday, 6 Cir. Dec., 751.

When such indexes are brought up and completed, it is the duty of the recorder to keep up such indexes, and then his compensation is fixed by section 2767, General Code, at ten cents per lot or parcel of land indexed.

I now come to the county salary law and the disposition of the fees.

Section 2977 provides as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2978, General Code, provides:

"Each probate judge, auditor, treasurer, clerk of courts, sheriff and recorder, shall charge and collect the fees, costs and percentages, allowances and compensation allowed by law."

Section 2983, General Code, provides:

"At the end of each quarter, each such officer shall 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 such quarter, for his official services, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received."

The provisions of the foregoing sections are broad and comprehensive. They include every fee collected by the officials in their official capacity. The fees due from the county for the making of sectional or abstract indexes are included and should be paid into the county fee fund.

The salary of the recorder is fixed by section 2995, General Code, and section 2996, General Code, provides what that salary shall be for, as follows:

"Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

The circuit court, in the case of Rutan, et al vs. Tinlin, et al, 20 C. D. page 572, as follows:

"Public officers are not entitled to compensation, in addition to their salary, for services required of them by statute, unless the statute provides therefor in express terms; and as Rev. Stat. 1029 (Lan. 2369) does not expressly so provide, auditors are not entitled to such additional compensation for services in furnishing blanks to assessors."

The recorder is entitled to no further compensation than his salary fixed by section 2995, General Code.

Section 2989, General Code, provides how salaries shall be paid:

"After deducting from the proper fee fund the compensation of all deputies, assistants, clerks, bookkeepers, and other employes, as fixed

and authorized herein, each county officer herein named shall receive from the balance therein the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

The allowance for and compensation of deputies, clerks, and other help is fixed by the following sections:

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Section 2987. General Code, provides:

"The deputies, assistants, clerks, bookkeepers, and other employes of each of such offices shall be paid upon the warrant of the county auditor, from the fees, costs, percentages, penalties, allowances, and other perquisites or sums of whatever kind collected and paid into the county treasury and credited by the treasurer to the fee fund of such offices, or transferred as hereinbefore provided."

Section 2999, General Code, provides as follows:

"Nothing in this chapter shall be construed to make a county, or an officer thereof, liable to any of the officers named herein or his deputies, assistants, clerks, bookkeepers, or other employes, for the payment of compensation in excess of the amount herein authorized, or except in the manner herein provided."

It is apparent that all fees collected by a recorder in this official capacity must be paid into the county fee fund, and that the salary of the recorder and of his deputy and other assistants shall be paid from the fee fund credited to that office.

A finding should be made against C. F. Matthew for all fees paid him for work done on general indexes on and after January 1, 1907. It appears, however, from the report of Examiner Tallman, attached to your letter, that the recorder's office in Crawford county is not self sustaining. If the other fees of his office were not sufficient to meet the salary of himself and assistants, as provided in the sections quoted, the deficiency can be allowed from the fees paid him for these general indexes and a finding made against him for the balance.

The work done on these general indexes by George Matthew should have been done by the recorder and the fees paid into the fee fund. The only compensation he could draw for his services was that allowed him as deputy

recorder. A finding should be made against him for all fees paid him under contract of April 15, 1909, above the allowance made him as deputy recorder. provided such allowance has not been otherwise paid.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

A 325.

MUNICIPAL CORPORATIONS—PUBLICATIONS OF ORDINANCES—NEWSPAPERS AND POSTING—STATUTORY REQUIREMENTS.

1. *Publications of ordinances of a general nature providing for improvements in villages in which two newspapers of opposite politics are published and of general circulation in the municipality shall be published in these papers.* 4228, *G. C.*

2. *Such ordinances in villages in which no newspaper is published and in which there is no newspaper having general circulation may be published by posting as provided in* 4232, *G. C.*

3. *In villages in which no newspaper is published but in which two newspapers of opposite politics have a general circulation, such ordinances shall be published in these newspapers.* (*Sec.* 4229, *G. C.*)

4. *In villages in which no newspaper is published but in which an independent paper only has a general cirulation such ordinance may be published by posting.* (4232, *G. C.*)

5. *In villages in which no newspapers are published but in which one political newspaper and also one independent newspaper have general circulation, such ordinances may be published by posting.* (4232, *G. C.*)

6. *In villages in which an independent newspaper only is published and has general circulation and in which also two newspapers of opposite political faith have general cirulation such ordinances may be published in the political papers.* (4229, *G. C.*)

7. *Villages in which an independent newspaper only is published and has general circulation are not within any of the provisions of the General Code.*

Applying the principle of Allen vs. Russell, 39 *O. S.* 336, *stating that "Revised and consolidated statutes shall, if possible, receive their original interpretation," the situation may be governed by section* 1695, *R. S., of which* 4227 *and* 4230 *are a codification and such ordinances may be published in the independent newspaper.*

8. *In villages in which an independent and political newspaper are published and have a general circulation therein, under the rule of construction aforesaid publication may be made in either of such papers.*

9. *The same rule applies to villages in which one political newspaper is published and has a general circulation therein, where no other paper is published or circulated.*

10. *In villages wherein a political newspaper is published and has a general circulation therein, and in which an independent paper also has general circulation but is not published therein, under this same rule such ordinances may be published in either of said papers.*

COLUMBUS, OHIO, August 18, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of August 7th, wherein you state:

"We respectfully request your opinion upon the following questions relative to the legal publication of the ordinances and resolutions of village councils. We would ask how publication of ordinances of a general nature or providing for improvements shall be made under the following conditions:

"First: Villages in which two newspapers of opposite politics are published and of general circulation within the municipality.

"Second: Villages in which no newspaper is published nor no paper having general circulation.

"Third: Villages in which no paper is published, but two papers of opposite politics have a general circulation therein.

"Fourth: Villages in which no paper is published, but an independent paper only has a general circulation therein.

"Fifth: Villages in which no paper is published, but one political newspaper and also one independent newspaper have general circulation therein.

"Sixth: Villages in which an independent paper only is published and has general circulation therein, as do also two newspapers of opposite political faith.

"Seventh: Villages in which an independent paper is published and has general cirulation therin, but no other paper has a general circulation or is published therein.

"Eighth: Villages in which an independent and political paper are published and have a general circulation therein.

"Ninth: Villages in which one political paper is published and has general circulation therein and no other paper circulates or is published in the municipality.

"Tenth: Villages in which a political paper is published and has general circulation, and also an independent paper has general circulation but is not published therein.

"These are a few of the many conditions obtaining in the 700 villages of the state and we ask an interpretation of the laws relating to said publications in order that we may advise the proper parties by printed circular."

Section 4227 of the General Code provides:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements *shall be published* as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first *publication of such notice*. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 4228 of the General Code provides:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within

such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4229 of the General Code provides:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of 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."

Section 4230 of the General Code provides:

"When ordinances are revised, codified, rearranged and published in book form and certified as correct by the clerk of council and the mayor, such publication shall be sufficient publication, and the ordinance or several ordinances so published in book form, under appropriate titles, chapters and sections, shall be held the same in law as though they *had been published in a newspaper or newspapers.* A new ordinance so published in book form, which has not been published according to law, and which contains entirely new matter shall be published as heretofore required by law. Such revision and codification may be made under appropriate titles, chapters, and sections, and in one ordinance containing one or more subjects."

Section 4231 of the General Code provides:

"Immediately after the expiration of the *period of such publication,* the clerk shall enter on the record of ordinances, in a blank to be left for such purpose, under the recorded ordinances, a certificate stating in which newspaper and of what dates such publication was made, and sign his name thereto officially, and such certificate shall be prima facie evidence that legal publication of such ordinance has been made."

Section 4232 of the General Code in part provides:

"In municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by this title to be published, to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof."

Section 1695 of the *Revised Statutes* provides:

"By-laws, resolutions and ordinances shall be authenticated by the

signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published 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. And as soon as any by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose, provided that whenever ordinances shall be revised, codified, rearranged and published in book form and certified as correct by the city or village clerk and the mayor thereof, such publication in book form shall be taken and held to be in lieu of publishing the same in a newspaper or newspapers as required by law, and shall be a sufficient publication to all intents and purposes, and the ordinance or several ordinances so published in book form under appropriate titles, chapters and sections, shall be held the same in law as though they had been published in a newspaper or newspapers, provided that any new ordinance so published in book form, which has never been published according to law, and which contains entirely new matter shall be published as heretofore required by law."

Sections 4227 and 4230 of the General Code supra purport to be a codification of section 1695 of the Revised Statutes above set out.

Coming now to answer your questions I shall do so in the order in which they are stated, taking each one separately.

First. Your inquiry in reference to publication of ordinances of a general nature or providing for improvements in villages in which two newspapers of opposite politics are published and of general circulation within the municipality.

This condition is fully provided for in section 4228, General Code supra.

Second. You inquiry as to the publication of such ordinances in villages in which no newspaper is published and in which there is no newspaper having general circulation.

This condition is fully provided for in section 4228, General Code supra.

Third. Your inquiry as to the publication of such ordinances in villages in which no newspaper is published but in which two newspapers of opposite politics have a general circulation.

This condition is fully met by the provisions of section 4229, General Code supra.

Fourth. Your inquiry as to the publication of such ordinances in villages in which no newspaper is published but in which an independent newspaper only has a general circulation.

This condition may be met by the provisions of section 4232 of the General Code supra.

Fifth. Your inquiry as to the publication of ordinances in villages in which no newspapers are published but in which one political newspaper and also one independent newspaper have general circulation therein.

This condition may be met by the provisions of section 4232 of the General Code supra.

Sixth. Your inquiry as to the publication of such ordinances in villages in which an independent newspaper only is published and has general circulation therein, and in which also two newspapers of opposite political faith have general circulation.

This condition is fully met by the provisions of section 4229 of the General Code supra.

Seventh. Your inquiry as to the publication of ordinances in villages in which an independent newspaper is published and has general circulation therein, but in which no other newspaper is either published or has a general circulation.

This condition is not met by the provisions of either sections 4228, 4229 or 4232 of the General Code supra, yet section 4227 of the General Code supra requires that ordinances of a general nature or providing for improvements shall be published * * * before going into operation. The word "publish" does not necessarily mean that the publication shall take place in a newspaper, yet the section further provides that no ordinance shall take effect until the expiration of ten days after the first publication of such notice. Furthermore, section 4230 provides that "when ordinances are revised * * and published in book form * * * such publication shall be sufficient publication, and the ordinance * * * so published in book form * * * shall be the same in law as though they had been published in a newspaper or newspapers."

We are, therefore, confronted with the proposition that publication must take place before the ordinances shall take effect, and yet there is no provision as to how such publications shall be made. In other words, there is an ambiguity in the statute. The proper interpretation of the statutes that are revised and consolidated is set forth in the case of Allen vs. Russell, 39 Ohio State 336, at page 337, wherein the court says:

> "But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed."

It seems to me, therefore, that it is necessary in order to determine the proper meaning of sections 4227 and 4230 of the General Code to refer back to the section of the Revised Statutes, which in this instance we find is section 1695, and in which we find that the language of section 4227, General Code, to wit:

> "Ordinances of a general nature, or providing for improvements shall be published *as hereinafter provided before going into operation.*"

was prior to the codification 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, if a weekly, once before going into operation.*"

Finding such language in the Revised Statutes which fully covers the conditions which the present condition of the Code leaves uncovered, I am of the opinion, that it is necessary to reach such words in section 4227, General Code supra; therefore, I am of opinion that the publication of such ordinances shall be made in the independent newspaper.

(Conditions stated in the fourth and fifth questions of this opinion are

likewise within the provisions of section 4227 supra with the language restored to such section as above stated.)

Eighth. Your inquiry as to how publication is to be made of such ordinances in villages in which an independent and a political newspaper are published and have a general circulation therein.

I am of opinion in view of my reading of section 4227, General Code supra, with the necessary change of the language thereof, that the ordinances may be published in either the one or the other of said papers.

Ninth. Your inquiry as to the publication of such ordinances in villages in which one political newspaper is published and has general circulation therein, and no other newspaper circulates or is published in the municipality.

In view of my interpretation of section 4227, General Code supra with the necessary change of the language thereof, I am of opinion that the ordinances shall be published in such newspaper.

Tenth. Your inquiry as to the publication of such ordinances in villages in which a political newspaper is published and has general circulation and also in which an independent newspaper has general circulation but is not published therein.

I am of opinion in view of my reading of section 4227, General Code, with the necessary change in the language thereof that the ordinances may be published in either the one or the other of said papers.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 325.

COUNTY PROSECUTOR—SALARY—NO COMPENSATION BY TOWNSHIP TRUSTEES FOR SERVICES RENDERED THAT BODY.

The county prosecutor is the statutory legal adviser of the township trustees and as his compensation is to be provided for from the county treasury he cannot be further compensated by the township trustees for legal services rendered that body.

COLUMBUS, OHIO, August 18, 1911.

Bureau or Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 24th, in which communication you inquire as follows:

> "May the prosecuting attorney receive from the trustees of a township of his county compensation for conducting a suit in behalf of said township or any of its officers, in addition to his annual salary?"

In reply to your inquiry I desire to say that section 2917 of the General Code provides as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to

which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Section 3003 of the General Code provides for the salary of the prosecuting attorney and further provides that such salary shall be paid in equal monthly installments from the general fund *and shall be paid in full payment of all services*, etc.

I am, therefore, of the opinion that the prosecuting attorney cannot receive from the trustees of his township or any other officer of any township of his county any compensation for conducting or defending a suit in behalf of the said township or any of its officers.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

D 326.

CORONER—COMPENSATION FOR TRANSCRIBING RECORD—NO POWER TO ENGAGE OFFICIAL STENOGRAPHER AT EXPENSE OF COUNTY.

There is no statute authorizing the coroner to engage a stenographer and when he does, it must be at his own expense.

When upon the certification of the coroner, compensation is paid to a stenographer from the county treasury, a finding should be made against the coroner for the amount so paid.

COLUMBUS, OHIO, August 19, 1911.

Bureau of Inspection and Supervision of Public Offices, SAM A. HUDSON, *Deputy*, *Columbus, Ohio.*

DEAR SIR:—Your favor of July 7, 1911, is received, in which you ask an opinion upon the following:

"A coroner employes a stenographer to take notes of the testimony of the witnesses in coroner's inquest, certifies and pays from the county treasury upon the allowance of the county commissioners a per diem for taking the notes and the regular rates per folio for transcribing the same. The coroner himself received from the county full pay at 10 cents per 100 words for necessary writings. What finding should be made under such circumstances? Should it be against the stenographer for the entire amount received, or should it be for the same amount against the coroner, or should it be against the coroner for the amount received by him for necessary writings?"

The compensation and fees of a coroner are fixed by section 2866, General Code, which provides as follows:

"Coroners shall be allowed the following fees: For view of dead

body, three dollars; for drawing all necessary writings, and return thereof, for every one hundred words, ten cents; for traveling, each mile, to the place of view, ten cents; when performing the duties of sheriff, the same fees as are allowed to sheriffs for similar services."

Part of the duies of a coroner are found in section 2856, General Code, and it is in this section that I find the only reference in the statutes to a stenographer of a coroner.

Section 2856 provides:

"When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, *except when stenographically reported by the official stenographer of the coroner*, and, with the finding the recognizances thereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law."

This section provides that when the testimony of a witness at an inquest is stenographically reported by the official stenographer of the coroner, the witness need not sign the same. It does not authorize the payment from the county of the compensation of the stenographer. There is no statute empowering a coroner to employ a stenographer, and if he does so it must be at his expense.

It is a well known principle of law that no officer, or person, can draw compensation from public funds except by authority of statute or ordinance.

The allowance to the coroner of ten cents per one hundred words for a necessary writings is the only proper charge to be paid from the county for such writings. The amount paid to the stenographer was illegal. The allowance was made upon certificate of the coroner for work for which he drew the full pay. The payment by such certificate was unauthorized and the finding should be made against the coroner for the amount so paid.

Respectfully,

TIMOTHY S. HOGAN.

Attorney General.

328.

OFFICES COMPATIBLE—DEPUTY SHERIFF AND COURT CONSTABLE—DEPUTY CLERK OF COURTS AND COURT CONSTABLES.

The offices of deputy clerk of courts and of court constable are not of themselves incompatible nor are those of deputy sheriff and court constable. Nor is such a union of official services prohibited by statute. Such incumbents, however, cannot be paid twice for the same services.

COLUMBUS, OHIO, August 25, 1911.

Bureau of Inspection and Supervision of Public Offices, SAM A. HUDSON, *Deputy, Columbus, Ohio.*

DEAR SIR:—Your favor of May 27, 1911, is received, in which you ask an opinion of this department upon the following:

> "A deputy sheriff and deputy clerk of courts, in addition to their regular salaries of such deputies, receive compensation from the county treasury for services as court constables. What should be the finding of this department?"

The provisions of the statute governing court constables are as follows: Section 1692, General Code:

> "When, in the opinion of the court, the business thereof so requires, each court of common pleas, circuit court, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

Section 1693, General Code:

> "Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year, in counties where more than one judge and not more than three judges hold court at the same time, not to exceed one thousand dollars each year, and in counties where only one judge holds court, two and one-half dollars each day, and shall be paid monthly from the county treasury on the order of the court. Such court constable, when placed by the court in charge of the assignment of cases, may be allowed further compensation not to exceed one thousand dollars as the court by its order entered on the journal determines."

The duties of a deputy sheriff and of a deputy clerk of courts are to assist and do the work of sheriff and clerk of courts respectively.

The general duties of a sheriff are prescribed in sections 2833 and 2834 of the General Code, which read as follows:

> "Section 2833. Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other processes to him directed by proper and lawful authority. He shall attend upon the common pleas court and the circuit court during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of a county as may be necessary. Under the direction and control of the county commissioners, he shall have charge of the courthouse.
>
> "Section 2834. The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by common law."

The general duties of a clerk of courts is found in section 2874, General Code, which provides:

> "The clerk shall indorse on each pleading or paper in a cause filed in his office the time of filing, enter all orders, decrees, judgments and proceedings of the courts of which he is by law the clerk, make a complete record of each cause unless by law or by order of the court such record is dispensed with, and pay over to the proper parties all moneys coming into his hands as clerk."

The constitution has provisions preventing the same person holding two of certain offices. Neither of these provisions apply to the question in hand.

Section 11 of the General Code provides as follows:

> "No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

Your question has two phases: First, the right of a deputy sheriff to act as court constable and to draw compensation for each position; second, the right of a deputy clerk of courts to act as court constable and to receive compensation for each office.

The first proposition has been decided in the case of Wolf vs. Shaffer, 18 Ohio Dec., 303, the syllabus of which case is as follows:

> *"The same person may, at the same time, hold the positions of deputy sheriff and court constable,* neither of which is a public office as that term is known to the law, and *such incumbent may lawfully receive the emoluments peculiar to each, provided he is not paid twice for the same service.*
>
> "A person holding the appointment of deputy sheriff is not ipeo

facto, required to present himself to the court, at the expense of the sheriff, in that capacity, and the court may very properly appoint him court constable as these offices are not incompatible."

A note to the above decisions states that it was affirmed without report by the circuit court on December 6, 1906.

This decision was made before the salary law went into effect. The court, on page 306 of opinion, discusses the effect of the salary law and holds that it will not change the rule therein laid down.

"* * * and under the new salary law it is possible for the same person to be deputy sheriff and court constable and draw pay in both capacities, provided he is not paid twice for the same service."

Second, the right of a deputy clerk of courts to act as court constable. The statute provides that no person shall hold the office of sheriff and clerk of courts at the same time. The court constable is not a sheriff, nor deputy sheriff, although performing similar duties, such as preserving order, attending court; neither is he a clerk of courts, nor deputy, although he may attend to the assignment of cases for trial. As he is neither a deputy sheriff nor deputy clerk of courts the statute, section 11, above quoted, would not prohibit a deputy clerk of courts holding the position of court constable.

If the two positions are incompatible they cannot be held by the same person although the statute is silent thereon.

The rule of incompatibility of office is laid down in the opinion of Dustin, J., in case of State vs. Gerbert, 12 C. C. N. S. 274, on page 275 as follows:

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

Applying this rule to the case at hand. A court constable is neither subordinate to, nor a check upon the position of deputy clerk of courts, nor of a deputy sheriff. Whether it is physically impossible for one person to discharge the duties of both, will depend upon the amount of work to be done in each position. There are many counties in this state in which such work could be done by the same person. It is for those who appoint these officers and fix their compensation to determine whether or not it is physically impossible for the same person to fill both positions. The law does not prevent it.

The offices of deputy clerk of courts and of court constable are not of themselves incompatible; neither are the offices of deputy sheriff and court constable incompatible. They may be held respectively by the same person. Such person, however, cannot draw compensation twice for the same service; that is, he cannot be paid for performing certain duties as a deputy sheriff or deputy clerk of courts, and then be paid for the same work as a court constable. The service performed in each capacity must be separate and distinct from the other.

Compensation can be drawn from the county treasury by the same person as deputy sheriff and court constable; and also as deputy clerk of courts and as court constable.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

A 330.

SHERIFF'S PROCLAMATION OF ELECTIONS—COMPLIANCE WITH STATUTORY FORMS AND NON-COMPLIANCE WITH THE FORMS PRESCRIBED BY THE BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES.

A sheriff in making proclamations of elections in even numbered years is to be guided primarily by statutory directions and may therefore include in such proclamations a detailed list of the polling places in the county notwithstanding the fact that the Bureau of Inspection and Supervision of Public Offices has prescribed a different form.

COLUMBUS, OHIO, August 31, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of August 1, asking for my opinion upon the following:

> "On page 20 of a pamphlet issued by this department, entitled, 'Instructions for Legal Advertising and Forms,' issued by this department September 1, 1909, you will note a form for sheriff's proclamation and that the same reads that electors will assemble at the places duly appointed for holding elections in their several townships, etc. Section 4825, General Code, provides that the sheriff shall give notice by proclamation through his county of the time and place of holding such election.
>
> "Kindly give us your opinion as to whether the form of notice as found on page 20 of said pamphlet complies with said section as to publishing the place of holding election, or whether the sheriff should give a detailed list of the voting places in each precinct. If you should hold that the form in the pamphlet is sufficient compliance with the law, what finding should be made by the examiners of this department who find that sheriffs have published a long detailed list of the voting places in each township, ward or precinct?"

As you state, the form on page 20 of the pamphlet referred to does not designate the places of holding elections in the odd numbered years, save by referring to them as "places duly appointed for holding elections in the several townships, wards and precincts." The statute under which the proclamation is to be issued is 4827 of the General Code (not 4825, which applies to notices of election for presidential electors).

Section 4827 provides as follows:

> "At least fifteen days before the holding of any such general election, the sheriff of each county shall give notice by proclamation throughout his county of the time and place of holding such election and the officers at that time to be chosen. One copy of the proclamation shall be posted at each place where elections are appointed to be held, and such proclamation shall also be inserted in a newspaper published in the county."

Notice of three things must be given by the sheriff to the electors: 1. The time of the election. 2. Places of election. 3. Officers to be chosen.

The time of holding the elections are fixed by law. All persons are presumed to know the law. Notice required by statute as to this item, then, is for the purpose of acquainting the electors with things they are already supposed to know.

The officers to be elected at a general election are also safe in certain cases which might arise by the necessity of filling a vacancy supposed to be known by the electors. The statutes state what officers shall be elected in even numbered years, and the notice as to this item would seem to be in a strict legal sense superfluous.

On the other hand the places of holding elections are not fixed by law. In registration cities such places are determined by the board of deputy state supervisors of elections; in other cities by the council, and in township precincts by the township trustees (Section 4844, General Code). I have searched in vain for any statutory provision authorizing or directing deputy state supervisors, council or township trustees to notify the electors in any manner of the places they have severally fixed upon for holding elections. Apparently the dissemination of this necessary knowledge is left to chance.

However, the sheriff is required in the proclamation to notify electors as to the place of elections. The peculiar condition of the statutes would seem to indicate that this item is of more importance than the other two. In practice, of course, this is not so, and I think it can be stated as a fact that electors are usually more familiar with the polling place of their ward, precinct or township than they are with respect to the officers to be elected.

It is perfectly well settled, of course, that the failure of the sheriff, or other officers charged with like duties, to issue and publish the necessary election proclamation does not vitiate such an election, unless it can be shown that because of such failure electors did not have a fair opportunity to record their choice. In other words, courts have not regarded election proclamations as of great importance in the machinery of elections. We are not considering this aspect of the question, however. We might concede that it might not be necessary for a sheriff to publish a detailed list of the polling places in the county without deciding that if he did publish such a detailed list he or the newspaper publishing it would be liable as for an excessive publication.

The question is one of power or authority rather than one of necessity; of the maximum power rather than the minimum power.

Because there is no other way legally to acquaint the electors of the places of holding elections in the county, I am constrained to hold that it is perfectly proper for a sheriff to include in his proclamation of elections a detailed list of the polling places in the county, and in so holding I do not wish to be thought as criticizing the form as promulgated by the bureau. This in almost every conceivable case would be entirely sufficient on account of the principle of law above referred to. The Bureau of Inspection and Supervision of Public Offices, however, has no power to prescribe exactly what shall be published by a sheriff in his proclamation. He is to be guided in making such publication only by the statutes.

For the foregoing reasons I am of the opinion that a sheriff may lawfully include in his proclamation of elections in even numbered years a detailed list of the polling places in his county and that in such cases the examiners of the department of Inspection and Supervision of Public Offices should make no finding whatever.

I might add that the above statements and conclusion apply as well to the publication under section 4825 as to the publication under 4827.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

A 331.

CHIEF OF POLICE—FEES IN MAYOR'S COURT—RIGHT TO RETAIN.

For all services in a mayor's court which a chief of police is called upon to perform and for which if performed a constable fee is provided by the sections relating to constables, that fee should control. Where a chief of police is called upon to perform a service for which no fee is provided in the case of constables, and for the same service a fee is provided in the case of a sheriff, the latter measure shall control.

A fee taxed in favor of a chief of police may, when paid in, be turned over to the chief and retained by him personally in addition to his salary.

COLUMBUS, OHIO, August 30, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 5th, submitting for my opinion thereon the following questions:

> "1. Under section 4534 of the General Code, as amended June 17, 1911, what, if any, fee may legally be taxed in favor of the chief of police or his deputies in cases other than those arising out of violations of ordinances?
>
> "2. May such fee in these cases be taxed in favor of a patrolman of a city police department, and if so, may such patrolman retain such fee in addition to his regular salary?
>
> "3. In case any fee may legally be taxed under said amended section in favor of any member of the police department of cities, including its chief, may any such member retain such fee in addition to his salary, or must same be paid into the city treasury?"

Said amended section 4534 of the General Code (102 O. L., 476) provides in part as follows:

> * * * "The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed the justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances, *shall be the same as those allowed sheriffs and constables in similar cases.*"

The entire section relates to the criminal jurisdiction of the mayor and applies to cities in which there is no police court. The fees "allowed sheriffs and constables in similar cases" are plainly the fees allowed such officials in criminal cases. The following statutory provision determines these fees as applicable to the two officers named: Section 2845, as amended 102 O. L., 277-285:

> "For the services hereinafter specified, when rendered, the sheriff shall charge and collect the following fees and no more; * * * warrant to arrest, each person named in the writ, one dollar; attachment for contempt, each person named in the writ, seventy-five cents; * * * subpoena, each person named in the writ, twenty-five cents;

venire, each person named in the writ, twenty-five cents; summoning each juror, other than on venire, ten cents; * * * all summons, writs, notice or notices, for the first name, seventy-five cents; and for each additional name, twenty-five cents; in addition to the fee for service and return the sheriff shall be authorized to charge on each summons, writ, order or notice, except as otherwise specifically provided by law, a fee of eight cents per mile going and returning * * *; taking bail bond, twenty-five cents; jail fees for receiving, discharging or surrendering each prisoner, to be charged but once in each case, fifty cents; taking a prisoner before a judge or court per day, seventy-five cents; * * * calling jury, ten cents; calling each witness, five cents." * * *

Section 3347 of the General Code provides:

"For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: For service and return of copies, orders of arrest, warrant * * * or mittimus, forty cents for each person named in the writ; service and return of summons, twenty-five cents for each person named in the writ; service and return of subpoena, twenty-five cents for one person, service of each additional person named in the subpoena, ten cents; service of execution on goods or body, four per cent.; * * * on each day's attendance before a justice of the peace, or jury trial, one dollar; each day's attendance before justice of the peace on criminal trial, one dollar; * * *; summoning jury, one dollar; mileage, twenty cents for the first mile, and five cents per mile for each additional mile; assistants in criminal causes, one dollar and fifty cents per day each; transporting and sustaining prisoners, allowance made by the magistrate and paid on his certificate; serving all other writs or notices not herein named, forty cents and mileage as in other cases; copies of all writs, notices, orders or affidavits served, twenty-five cents; * * * each day's attendance on the grand jury, two dollars."

It is apparent at a glance that the fees of the sheriff and those of the constable are different in nearly every instance for services which may be rendered in a criminal case; there is, therefore, no such thing as "fees allowed sheriffs and constables in similar cases."

Amended section 4534 may be construed so as to allow the taxation in favor of the chief of police of either the fees allowed a sheriff for similar services or those allowed a constable, as the mayor taxing the fees might, in his discretion, determine. Such a construction, however, would at once destroy the validity of the section. It would impose in the magistrate the arbitrary power to tax a higher fee against one litigant and a lower fee for the same services against another. The power would be arbitrary because no guide is furnished by the statute as to the class of cases in which the sheriff's fees shall be taxed and as to those in which the constable's fees shall be taxed against a litigant or a defendant. Such arbitrariness is violative of that provision of the fourteenth amendment of the federal constitution which forbids the several states to deny persons in their respective jurisdictions the equal protection of the law. Therefore this construction must be rejected.

At first glance it might seem that the rejection of this construction destroys the only possible meaning of the section. However, the legislature will be presumed to have intended something definite. I would not assume to hold

any statute void for indefiniteness, although in an extreme case a court might do so.

It should at least be the duty of the administrative officers affected by the statute to find its most probable meaning and to adhere to that meaning so long as the invalidity of the statute is not judicially determined.

On careful consideration of the amended section I can conceive of but one meaning other than that already referred to and rejected which can be inferred from the ambiguous phraseology thereof. In seeking for such a meaning I have had regard to the remainder of the section as above quoted, which relates to the fees of the mayor and provides that these fees shall be "the same as those allowed justices of the peace for similar services." Now it is, I think, obvious that the services rendered by a mayor in his magisterial and judicial capacity are in nearly all respects similar to those required of a justice of the peace in such capacities. Evidently then the legislature was seeking to authorize the taxation of costs in a mayor's court by the same rule as it had already authorized the taxation of costs in the court most nearly like that of a mayor, viz., that of a justice of the peace. This intention then may be fairly imputed to the legislation as its controlling motive. Applying it to the exact question it is at once seen that a chief of police is more like a constable than he is like a sheriff. He is an officer of a court of limited jurisdiction just as is the constable. He ordinarily exercises his executive functions within a limited territory just as does the constable. His office lacks the common law dignity of that of the sheriff, nor is it one created by the constitution of the state, in which respect it is similar to that of constable and dissimilar to that of sheriff.

For these reasons then I am of the opinion that for all services which a chief of police is called upon to perform, and for which, if performed by a constable a fee is provided by the sections relating to the constable, that fee should control.

Such a holding does not entirely reject the word "sheriff and" in the section—at least not necessarily. There may be, and doubtless are, many minor differences between the duties of the constable and those of the chief of police. Such difference may cause the catalogue of fees prescribed for constables to be incomplete as applied to the duties of a chief of police. If that is the case then, and in such case only, would the chief of police, in my opinion, be entitled to the fees of the sheriff for such services, if such fees are prescribed by statute relating to the sheriff. At least I believe this to have been the intention of the legislature. As strengthening the conclusion thus reached permit me to point out the difference between section 2845 and section 2347, General Code, with respect to the item of mileage.

A sheriff is entitled to eight cents per mile going and returning; a constable is entitled to twenty cents for the first mile and five cents per mile for each additional mile. There is a reason for this difference between the two officers. The sheriff in the ordinary course of his official duty is called upon to serve writs throughout a county, and a constable in a great majority of cases confines his activities to the township, or at least to an adjoining township. Ordinarily then, the constable travels shorter distances than does the sheriff and for this reason he is given a greater mileage upon the first mile than upon the other miles traveled by him, while the sheriff is compensated by the same mileage fee for every mile he travels. This fact illustrates the controlling principle which has actuated the legislature in passing these statutes. That principle is that compensation for specific services is to be measured by the kind of services to be rendered as determined in turn by the manner in which the particular officer customarily discharges his duties; that is to say, the general assembly has striven to make the fees appropriate in each case. That

being the case, it is fair to presume that the legislature intended that the controlling fee taxable to a chief of police under section 4534 should be that of the constable—the appropriate fee.

By reason of all the foregoing I am of the opinion that in cases other than those arising out of violations of ordinances, the fees of a constable should be taxed in favor of the chief of police under section 4534, General Code, as amended, unless section 3347, which prescribes the fees of a constable fails to provide a fee for the specific service performed by the chief of police; in which case the chief is entitled to the fee provided for the sheriff by section 2845 as amended.

Answering your second question, I beg to state that in my opinion such a fee may not lawfully be taxed in favor of a patrolman of a city police department. He is not the "deputy" of the chief of police unless he is made so by ordinance. One is a deputy, who has authority to perform all and singular the duties of his principal. Section 9, General Code. Ordinarily a mere patrolman would not have all the powers and duties of a chief of police. Ordinarily also, there is no such officer as "deputy chief of police." The existence of deputies, however, in the city government, is recognized in the municipal code, especially by section 4479, which speaks of "deputies in the office of the city auditor and city treasurer." Council has general power under section 4214, General Code, to determine the number of officers in each department of the city government. It is my opinion that council may constitute an incumbent of any position in the police department the "deputy" of the chief, but that in the absence of any such legislation by council no chief could be said to have a "deputy."

Answering your third question, I beg to state that in my opinion the fee, which by virtue of section 4534, as amended, may be taxed to and in the name of the chief of police or his deputy as defined above, may be retained by the person in whose favor it is taxed in addition to his salary, and need not be paid into the city treasury.

Your third question involves another reconsideration of the two cases of Portsmouth vs. Millstead and Matthews vs. Delaware, the decisions in which have been the subject of advice by this department to the bureau in the past. It will be recalled that the last opinion emanating from this department upon these two cases distinguished them upon the following ground: In Portsmouth vs. Millstead it was assumed by the court that the right to tax fees in the name of the chief of police existed, and the question was simply as to whether or not the city might recover the fees taxed in his name and retained by him personally. The court did not directly pass upon the question as to whether the fees could lawfully be taxed in the first instance. In Matthews vs. Delaware, however, the circuit court in an action brought by the chief to recover fees paid by him into the city treasury, held that there was no right of recovery for the reason that there was no right to tax fees in his name in the first instance. If the court had been able to hold by virtue of a statute like section 4534, as amended, that the fees had originally been taxed in the name of the chief of police, its decision would not necessarily have been the same, and certainly if it had followed the reasoning of Portsmouth vs. Millstead an opposite opinion might have been reached.

Inasmuch as both of these circuit court decisions have been affirmed without report by the supreme court they must both, for reasons pointed out in the previous opinion, be regarded as correct statements of the law. Therefore, the sole question is as to whether or not the reasoning of Portsmouth vs. Millstead is applicable to section 4534, as amended, and to section 4213, General Code, which provides that "all fees pertaining to any office shall be paid into the

city treasury." The decision in question is reported in 8 C. C. n. s. 114. I shall not quote from it. Suffice it to say that it is decided upon the following reasoning:

Section 126, Municipal Code, now 4213, General Code, does not confer upon municipal corporations the power to provide salaries for any of its officers who have extra municipal duties to perform, which shall be in lieu of all fees which such officers might receive by reason of the performance of such extra municipal duties. Of itself and in itself it is not to be construed as authorizing a city to require any of its officers having such duties to perform to pay fees arising therefrom, and pertaining to the extra municipal functions of their offices, into the city treasury. The true meaning of the section is that a municipal corporation may not provide that the fees payable under statutes or ordinances to municipal officers for purely municipal duties shall be retained by such officers in addition to the fixed salaries provided for them by ordinance. In a word, the section does not relate to fees in state cases and other matters not local at all. The distinction recognized in this case is the fundamental one between the two kinds of functions of a municipal corporation and the officers thereof. It is well recognized that a municipality partakes both of the nature of an independent corporate body having functions purely local and municipal to discharge and of a territorial governmental subdivision within and for which the police power of the state itself is exercised. In like manner the powers and duties of the mayor and chief of police, the principal magisterial and executive officers of the city, possess this dual nature. The mayor is an ex-officio justice of the peace with criminal jurisdiction territorially coextensive with the boundaries of the county. In the exercise of this jurisdiction he furthers no municipal purpose but acts as the agent and officer of the state. So also the chief of police, when acting as an officer of the mayor's court in a state case is not accomplishing a purely local and municipal object, but is just as much an officer of the whole state as is a constable or a sheriff. Therefore, the presumption is that legislation as ambiguous as the court found section 126 Municipal Code, now section 4213, General Code, to be, is intended to relate solely to the municipal side, so to speak, of the officer's duties.

This reasoning, which must be taken to be correct, for reasons already stated, applies as well to section 4534, as amended, as it did to the statutes as the court in Portsmouth vs. Millstead assumed them to be. In other words, it is just as true of section 4534, as amended, that it deals with a non-municipal matter as it was of the section which the court relied upon in that case, and it is just as true of section 4213 that it deals with matters purely municipal as it was of section 126, Municipal Code, as construed by the circuit court.

For all the foregoing reasons I am of the opinion, as above stated, that a fee taxed in favor of a chief of police by the rule above laid down may, when paid in, be turned over to the chief and retained by him personally in addition to his salary.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

336.

OFFICES INCOMPATIBLE—CITY TREASURER AND COUNTY TREASURER.

As it is the duty of the city treasurer to require the county treasurer to account to him for all taxes and assessments collected for city purposes, the offices act as a check upon one another and therefore cannot be held by the same individual at the same time.

COLUMBUS, OHIO, September 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Jos. T. Tracy, Deputy, Columbus, Ohio.

DEAR SIR:—Your favor of August 1, 1911, is received, in which you ask an opinion of this department upon the following:

> "We respectfully request your written opinion upon the following question:
>
> "May the treasurer of the city of Fostoria, Ohio, whose term of office will expire January 1, 1912, continue to serve as such city treasurer after assuming the office of treasurer of Seneca county on September 4, 1911? We find no statutory inhibition and recall no incompatibility unless it be that the offices are separated by a distance of about twelve miles."

There is no statutory or constitutional provision against one person holding, at the same time, the offices of city treasurer and county treasurer. In the absence of such a prohibition the same person may hold two offices at the same time, provided the two offices are not incompatible.

The rule of incompatibility is laid down in the case of State ex rel. vs. Gebert, 12 Cir. Ct. N. S., 274, by Dustin, J., on page 275 of the opinion, as follows:

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

In order to determine this incompatibility it is necessary to look to the statutory duties of a city treasurer to receive money from the county treasurer.

Section 3795, General Code, provides:

> "The taxes of the corporation shall be collected by the county treasurer and *paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes.* The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council."

Section 2688, General Code, provides:

"After he has made each semi-annual settlement with the county auditor, the county treasurer shall pay into the state treasury, on the warrant of the state auditor, the full amount of all sums found by the auditor of state on an examination of the duplicate settlement sheets sent to him by the county auditor, to belong to the state."

Section 3892, General Code, provides:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, *and when collected pay such assessments to the treasurer of the corporation*, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

Section 4298, General Code, provides:

"*The treasurer (cities and villages) shall demand and receive from the county treasurer taxes levied and* assessments made and certified to the county auditor by authority of the council, and by the auditor placed on the tax list for collection, and from persons authorized to collect or required to pay them, moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses and costs taxed in the mayor's or police courts, and debts due the corporation, and he shall disburse them on the order of such person or persons as may be authorized by law or ordinance to issue orders therefor."

Section 4301, General Code, provides:

"On the first Monday of February and August in each year, *the county treasurer shall pay over to the treasurer of the corporation all moneys received by him up to that date arising from taxes levied and assessments made belonging to the corporation.*"

Section 4300, General Code, provides:

"The treasurer shall receive and disburse all funds of the corporation including the school funds, and such other funds as arise in or belong to any department or part of the corporation government."

It appears that the county treasurer collects the taxes and assessments in the first instance from the taxpayer, then he is required to make settlement with and pay over to the city treasurer, all moneys collected for municipal purposes

including the school funds. Section 4298 requires the city treasurer to "demand and receive from the county treasurer" money paid for taxes and assessments. Section 4301 provides that the city treasurer shall receive from the county treasurer "all moneys" belonging to the corporation.

In order to perform the above duties properly the city treasurer should check up and ascertain if the accounts of the county treasurer are in accordance with the settlement made, and that all moneys belonging to the corporation are accounted for. He would also be required to give a receipt for same, when paid him.

Applying the rule laid down in 12 Cir. Ct. N. S. 274, supra, are not the acts and duties imposed upon a city treasurer by the above sections a check upon the county treasurer? It is my opinion that they are.

In the case of State vs. Bus, 135 Mo. 325, Macfarlane, J., in the opinion of the court on page 338, lays down the rule of incompatibility as follows:

> "At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; *some conflict in the duties required of the officers, as where one has* some supervision of the other, *is required to deal with*, control or assist him."

Also in the case of Wells vs. State, 94 N. E. 321 (Indiana Supreme Court), the sixth syllabus reads as follows:

> "Under Burns' Ann. St. 1908, section 6475, making it the duty of the auditor and his deputy to apportion the school revenue, sections 6406, 6477, making it their duty to approve the bond of school trustees, sections 6442, 6443, 6454, 6461, 10312-10317, requiring school trustees to make certain tax levies and the auditor to make certain assessments and to compute and extend the taxes and collect the funds arising from the transfers of pupils between school corporations, *and sections 6434, 6475, requiring the auditor or his deputy to apportion and disburse certain of the school funds and the trustees to receive them through him, the offices of deputy county auditor and school trustee are incompatible, so that* a school trustee vacates his office by accepting the office of deputy county auditor."

In rendering the opinion in the above case, Myers, C. J., at page 323, says:

> "Whether the duties of deputy county auditor and trustee of the school of a town are incompatible, and therefore forbidden by the policy of the common law, it is not necessary to determine, as the statutory prohibition is the same in effect, as the common law prohibition. *There are, however, several particulars in which the duties are incompatible.* Among the duties of the auditor, and of his deputy, is that of apportionment of the school revenue (Burns 1908, sec. 6475); approving the bonds of school trustees, Burns 1908, sec. 6406, 6477. The school trustees make certain tax levies, and the auditor makes certain assessments, and the auditor and his deputy computes and extends the taxes on the duplicates. He collects the funds arising from the transfer of pupils between school corporations. Burns, 1908, sections 6454, 6461, 6442, 6443, 6454, 10312–10317. *The auditor or his deputy apportions and disburses certain of the*

school funds and the trustees receive them through him. There is such a connection between the two offices with respect to the school funds that leads to such incompatibility with respect to their management, and the supervision of one over the other, that the acceptance of one is the vacation of the other."

The city treasurer deals with the county treasurer and therefore comes within the rule laid down in 135 Mo. 325, supra. He receives funds from the county treasurer and therefore comes within one of the particulars of incompatibility specified in 94 N. E. 321, supra. As far as city funds are concerned the city treasurer, in a sense, must have supervision of the collection of taxes by the county treasurer, or rather its distribution. That is, it is his duty to require the county treasurer to account to him for all taxes and assessments collected for city purposes.

The offices of city treasurer and county treasurer are a check upon each other so far as city and school funds are concerned. It is not the policy of the law that such offices should be held by the same person at the same time. It would likely lead to many irregularities in the performance of official duties.

The offices of city treasurer and county treasurer are incompatible and cannot be held at the same time by the same person.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

B 345.

SHERIFFS—DISPOSITION OF FEES RECEIVED WHEN ACTING AS RECEIVER — OFFICIAL AND PRIVATE CONNECTION — COUNTY FEE FUND.

Where a sheriff is obliged to act as receiver by provision of statute he acts as such receiver in his official capacity and all fees received in this connection shall be paid into the county fee fund.

When a sheriff is appointed receiver in any manner outside of that which is directly imposed by statute as an incident to his office as sheriff, he is entitled to the fees accruing as an individual.

COLUMBUS, OHIO, September 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Sam A. Hudson, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of June 3, 1911, you ask an opinion upon the following:

"If a sheriff is appointed receiver, should the allowance made him by the court for services as such receiver be paid into his fee fund, or is he entitled to retain the same for his own use."

The following sections govern the payment of fees into the county fee fund:

Section 2977, General Code, provides:

"*All the fees, costs,* percentages, penalties, allowances *and other perquisites collected or received by law as compensation for services by a* county auditor, county treasurer, probate judge, *sheriff,* clerk of courts,

or recorder, *shall be so received and collected for the sole use of the treasury of the county* in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2983, General Code, as amended 102 Ohio Laws, page 136, provides:

"On the first business day of April, July, October and January, and at the end of his term of office, *each such officer shall pay into the county treasury* on the warrant of the county auditor, *all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding quarter or part thereof for official services.* which money shall be kept in separate funds and credited to the office from which received; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which has been due his office and unpaid for more than one year prior to the date of such statement is required to be made."

The Code provides that the sheriff may act as receiver in the following instances:

Section 11842, General Code, provides:

"When a receiver is not appointed, the officer who attaches the property shall have the powers and perform the duties of a receiver appointed by the court or judge and, if necessary, as such officer may commence and maintain actions in his own name. He also may be required to give security other than his official bond."

Section 11782, General Code, provides:

"The judge by order, may appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor. He also, by order, may forbid a transfer, or other disposition of, or interference with, the property of the judgment debtor not exempt by law."

Section 11783, General Code, provides:

"If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver. If another person be appointed, he must take an oath and give a bond as in other cases."

Section 11842, General Code, is applicable to proceedings to attach property. Section 11782, General Code, governs in proceedings in aid of execution. These are the only instances in which the sheriff is required by statute to act as receiver. In both instances he seizes property upon legal process. He does this in his official capacity as sheriff. If he acts as receiver of the property by appointment of court under section 11782, or by failure of the court to appoint as prescribed in section 11842, he acts in his official capacity as sheriff and not as an individual.

Fees received as receiver in such cases, namely, proceedings in aid of execu-

tion and for attachment, are received in his official capacity as sheriff and should be paid into the fee fund.

There are a number of other instances in which receivers are appointed by the courts. The statute places no duty upon a sheriff, as such, to act as receiver in such cases. There is no inhibition against a person, who is sheriff, acting in the capacity of receiver. Such receivership would be an additional employment, the same as if the person who is sheriff should carry on a private business. The same person may, and often does, hold two of certain offices, for each of which he draws compensation from public funds. In the same manner, a person may perform the duties of a public office and also conduct a private business.

Each public official should perform the duties required by his office. If he does this, that is all the public can require of him as such officer. It is not required that he perform no other service, so long as such additional work does not interfere with nor impede the performance of his official duties.

The fees to be paid into the county fee fund by a sheriff are those received in his official capacity as sheriff, for services prescribed by law to be performed by a sheriff. The fees received by a sheriff as receiver, except in proceedings in aid of execution and for attachment, do not come to him in his official capacity as sheriff. The allowance for such services belong to the sheriff individually and do not go to the county fee fund.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

A 353.

CITY AUDITOR—DUTY TO CONTROL FORMS OF ACCOUNTS OF OTHER DEPARTMENTS—DUTY TO REFUSE VOUCHERS FOR PAYMENT OF EXPENSE OF KEEPING UP SYSTEM RECOMMENDED BY OTHERS.

Under section 4289, General Code, it is the mandatory duty of the city auditor to prescribe the form of accounts and reports to be rendered to his department, and subject to the State Bureau of Inspection and Supervision he shall have the inspection and supervision thereof.

It is therefore the duty of that official to refuse vouchers drawn by other city departments for expenses of keeping additional forms of accounts prescribed or installed upon the recommendation of other bodies or individuals. He should also refuse payment of vouchers for the necessary books and supplies to keep said additional accounts.

COLUMBUS, OHIO, September 12, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 7th, in which you request my opinion upon the following questions:

> "1. Is it the duty of the city auditor of any city to refuse vouchers drawn by other city departments for expense of keeping additional forms of accounts prescribed or installed upon the recommendation of other bodies or individuals?
>
> "2. Should he refuse payment of vouchers for the necessary books and supplies to keep said additional accounts?"

In reply I beg to state that section 277 of the General Code provides as follows:

"The auditor of state, as chief inspector and supervisor, shall prescribe and install a system of accounting and reporting for public offices. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public."

Section 4284 of the General Code provides as follows:

"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. 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 indebtedness."

It is plain to be seen that the intent of the legislature was that, first, it should be the duty of your department, and also the duty of the city auditor, to prescribe forms of accounts in the various city departments. In that respect, these statutes are mandatory and not discretionary. Again, it becomes the mandatory duty of the city auditor, under section 4284 above quoted, to prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts *by all other departments;* and, subject to the powers and duties of the State Bureau of Inspection and Supervision of Public Offices, he shall have the *inspection and revision thereof.* These duties being mandatory on the city auditor I am of the opinion, in answer to your first question, that it is also the duty of the auditor to refuse vouchers drawn by other city departments for expense in keeping additional forms of accounts prescribed or installed upon recommendation of other bodies or individuals, there being no legal authority for the contracting of any expense for supplies for keeping accounts by any department of a city, other than those prescribed by the city auditor, as provided in section 4284.

It is the duty of any person at the head of any department of a city government, other than the city auditor, to apply to the auditor for forms of accounts and vouchers to be used by their respective departments, and no other body or individual has the right, under the code, to recommend or prescribe such forms.

In respect to your second question I desire to say that the city auditor, for the reasons set forth in my answer to your first question, should refuse payment of vouchers for the necessary books and supplies to keep any additional accounts, the bills for which were created by the head of any department upon the recommendation of any other person than the city auditor.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 356

COUNTY TREASURERS—TERM ENDING SHORT OF TWO CALENDAR YEARS—NO REDUCTION OF SALARY BY REASON THEREOF.

Though a county treasurer whose term by statute ends September 4, 1911, in reality serves four days less than two calendar years, nevertheless he has srved his statutory two years and there shall be no reduction in salary.

COLUMBUS, OHIO, September 12, 1911.

Bureau of Inspection and Supervision of Public Offices, Jos. T. Tracy, Deputy. Columbus, Ohio.

DEAR SIR:—Under favor of June 23, 1911, you ask an opinion of this department upon the following:

> "All county treasurers will retire by expiration of term on the first Monday of September, 1911, which is the fourth day of the month. What, if any, portion of the monthly salary for September will be due to a retiring treasurer? We would cite you to 47 Pacific Reporter, 937."

The term of office of a county treasurer is set forth in section 2632, General Code, as follows:

> "A county treasurer shall be elected biennially in each county, who shall hold his office for two years from the first Monday of September next after his election."

Section 2989, General Code, as amended in 102 Ohio Laws, page 137, provides the manner of paying the salary, as follows:

> "Each county officer herein named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

The county treasurer whose term expired September 4, 1911, was elected in 1909, and took his office on September 6, 1909. He has served two days less than two full years, that is, calendar years. There is no provision that salaries shall begin on the first day of the month and end on the last day of the month. The statute says the county officer shall receive his annual salary payable monthly, which would mean twelve equal installments. This disposes of your question.

However, you have cited me to 47 Pacific 937, and another question presents itself. The treasurer has served two days less than two calendar years. Should he have a reduction in his salary for these two days?

An examination of the calendar shows that the terms of a county treasurer will run as follows: From September 6, 1909, to September 4, 1911; from September 4, 1911, to September 1, 1913; and from September 1, 1913, to September 6, 1915. Practically the same result will occur from any three consecutive terms. One serves two days less than two full calendar years, another three days less and another five days more. Two serve for 104 weeks and the other for 105 weeks to complete his term. If each was to be paid in accordance with the calendar years it would make no difference to the public treasury, for the days short for the two officers are equalled by the days over for the other.

The syllabus in the case cited by you, namely, Dillon vs. Bicknell, 47 Pa. 937, is as follows:

> "2. Under the county government act of 1891, providing that certain county officers, whose compensation is fixed at an annual sum shall hold office from the first Monday after the first day of January next succeeding their election, till their successors are qualified, such officers are entitled to be paid for the actual time they serve."

Haynes, Judge, on page 937, says:

> "* * * Section 4109 of the political code as amended March 7, 1881, is as follows: 'All elective county, city and township officers, except superior court judges, superintendents of schools and assessors, shall be elected at the general election to be held in the year 1882, and at the general election to be held every second year thereafter, and shall take office on the first Monday after the first day of January next succeeding their election, and shall serve for two years. The years that said officers are to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and including the first Monday after the first day of January of the next succeeding year; provided, etc.' It is conceded that, if that section of the political code is still in force, it is conclusive as to what constitutes the official year, and that under its provisions the demand made by the plaintiff was unauthorized."

Plaintiff in the above case served five days more than two full calendar years and demanded extra pay for those five days.

Again on page 938 the court says:

> "Indeed, under the statute fixing the commencement and termination of the terms of county officers it can never happen that the term consists of precisely two years, it being sometimes more and sometimes less; and therefore the provision fixing the compensation at an annual sum should be construed as fixing the rate of compensation to be paid for the time the officer actually serves. This construction will do exact justice between the preceding and succeeding officers, and not increase the burden to be borne by the people."

Our statute, section 2632, General Code, says the county treasurer "shall hold office for two years from the first Monday of September next after his election."

Section 8 of the General Code provides:

> "A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

No definite term of office is specified in the rule laid down in the syllabus of the above case. The officers serve from a certain day till their successors are qualified. Section 2632, General Code, specifies a definite term, and the rule laid down in the syllabus does not apply, unless the officer should hold over by virtue of section 8 of the General Code.

Our statute is more like that set out in the opinion, but not going so fully

into detail as to what is the official term. A county treasurer is elected every two years and takes office from the first Monday of September following his election. It is apparent that the statute intends and means that the treasurer shall serve for two years from the first Monday of September following his election to the first Monday of September following the election of his successor, two years later. That is the official term. Whether it is shorter or longer than two calendar years makes no difference, as the statute makes that the term of two years.

Each county treasurer is entitled to his full two years' salary as provided by statute whether his term is two or three days less or five days more than two calendar years, provided of course that he serves his full term. There is no authority for deductions or for extra allowances.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

359.

COUNTY AUDITOR—REIMBURSEMENT FOR POSTAGE AND DRAY EXPENSE INCURRED IN DISTRESS AND SALE OF PERSONAL PROPERTY—POWERS OF COUNTY COMMISSIONERS—TREASURER'S FEES IN SUCH CASES—STATUTORY CONSTRUCTION.

There is no express provision in the statutes for the payment to the county treasurer of his expenses incurred in hiring a dray or moving van in making distress and sale of goods and chattels of delinquent taxpayers under section 2650, General Code, nor of postage expense incurred in notifying delinquent taxpayers of his instructions to distrain property.

By implication, however, the county commissioners are authorized to reimburse him for such expenses.

Section 2659, General Code, providing that the treasurer's fees in such cases shall be the same as those of constables refers to section 3347, General Code. These fees are to be paid into the fee fund of the county treasury.

COLUMBUS, OHIO, September 14, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—At the request of Hon. Edward C. Turner, prosecuting attorney of Franklin county, Ohio, I beg to state my opinion upon the following questions submitted by him to you:

> "What, if any, authority of law is there for the county treasurer to incur the following items of expense in connection with making distress and sale of goods and chattels of delinquent personal taxpayers under section 2658 of the General Code:
>
> "1. Hiring or purchasing a dray or moving van;
>
> "2. Postage incurred in notifying delinquent personal taxpayers of the treasurer's intention to distrain property."

As to the first question I beg to state that section 2658 authorizes the treasurer, when taxes are past due and unpaid to "distrain sufficient goods and chattels belonging to the persons charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued

* * *" Nowhere in the chapter relating directly to the election, powers and duties of county treasurers is there any express provision of law authorizing the reimbursement of the treasurer for any expense incurred by him in the discharge of his official duties. The county officers' salary law, sections 2977 to 3000, inclusive, General Code, and the various amendments thereto do not expressly authorize the county officers therein named to be reimbursed for any expenses incurred by them or any of them in the performance of duties enjoined upon them by law.

It is manifest, however, that some expense must be incurred by the county treasurer in performing the various duties of his office. He must, for instance, at the very least consume large quantities of stationery and the like. If I am not mistaken, the practice has been to call upon the county commissioners to furnish such supplies and to pay for them out of the general county fund. No specific statute directly authorizes this practice, but it is justified, I think, by section 2640 of the General Code, which by inference authorizes the commissioners to allow and pay claims against the county, and by section 2419 of the General Code, which enjoins upon the commissioners the imperative duty of furnishing "offices for county officers."

This seeming departure from the otherwise strict rule that statutory authority must be found for the payment of any money from the public treasury may be explained upon the assumption, which I think is proper, that the county commissioners constitute the board of general or residuary power.

To all intents and purposes this board is the county, and where power to do a thing necessary to the transaction of the county's business is not expressly conferred upon some other officer or board of the county, that power by implication must be held to reside in the board of county commissioners.

For the foregoing reasons I am of the opinion that the county treasurer, if he deems it advisable, with a view to collecting a large amount of delinquent personal taxes, to mail notices to the delinquent taxpayers, and to hire a vehicle for the purpose of distraining goods under the section above cited, should make his opinion known to the county commissioners and request of them that they furnish from the general county fund the necessary postage and other supplies, including the vehicle in question. The commissioners may, in such case, in my opinion, lawfully grant the request of the county treasurer.

The case at hand is to be distinguished from two other similar cases, to-wit:

1. Under the law as it existed prior to the enactment of the county officers' salary law, expenses of this sort were chargeable against the officer personally, and he was expected to reimburse himself out of his fees. Now, that each county officers affected by the county officers' salary law, including the county treasurer, receives a stated salary from the general county fund (by virtue of the amendment of recent date) his expenses are properly chargeable against such fund, especially inasmuch as they are not made chargeable against the various fee funds.

2. Cases like that of the sheriff, whose expenses under section 2997 of the General Code, are expressly provided for are to be distinguished. Section 2997, for example, is to be regarded as a limitation upon what would otherwise be the general power of the county commissioners rather than as an indication that without such a section no county officer is entitled to be reimbursed for expenses incurred by him, or outlays occasioned by the purchase of necessary supplies for his office.

The prosecutor's second question involves the construction of section 2659 of the General Code, which provides as follows:

"For making distress and sale * * * the treasurer shall be allowed the same fees as are allowed to constables for making levy and sale of property on execution. Traveling expenses shall be computed from the seat of justice of the county to the place of making the distress."

The reference here is, in my opinion, to those provisions of section 3347, which are as follows:

"For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: * * * service of execution on goods or body, forty cents; on all money made on execution, four per cent.; * * * mileage, twenty cents for the first mile and five cents per mile for each additional mile." * * *

The fees thus earned and so computed must in my opinion be paid into the fee fund of the county treasury.

I have sent a copy of this opinion directly to Mr. Turner.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

370.

COUNCIL—NEWSPAPERS—PUBLICATION OF ORDINANCES UPON CONTRACT—MANDATORY TO PUBLISH AT MAXIMUM RATE—REFUSAL OF PAPER TO PUBLISH.

Where there are published in a municipality, two newspapers of general circulation in accordance with section 4228, General Code, it is mandatory upon the council to publish its ordinances at the maximum rate provided in section 6251, General Code, if they cannot contract for a less rate.

If one newspaper refuses to contract at said maximum rate, the council may act as it would in a situation where only one newspaper is published.

COLUMBUS, OHIO, September 16, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of July 15th, wherein you state:

"If, in a city there be only two papers published, the same being of opposite politics and the authorities of the city and the publisher of one of the papers cannot agree on the prices to be paid for publication of city ordinances and in consequence no publication of 'ordinances of a general nature or providing for improvements' is made, what would be the effect on the validity of such ordinances published only in one newspaper?"

Section 4228 of the General Code provides:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general

circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4229 of the General Code is as follows:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and sale of bonds once a week for four consecutive weeks; all other matters shall be published once."

Section 6251 of the General Code provides:

"Publishers of newspapers may charge and receive for the publication of advertisemts, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rule is otherwise fixed by law, to wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work, fifty per cent. may be charged in addition to the foregoing rates."

You do not state in your inquiry that the two newspapers have a general circulation in such municipality, but I assume for the purposes of answering your inquiry, that they and each of them has a general circulation therein.

The first syllabus of the case of McCormick vs. the City of Niles, 81 O. S. 246, reads as follows:

"The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

The plain provision of the law as set forth in section 4228, General Code, supra, is that if there are two newspapers of opposite politics published in a municipality the ordinances and resolutions requiring publication *shall be published* in such newspaper.

As I view the above section it leaves no discretion in council to publish ordinances requiring publication in any other manner if there be two newspapers of opposite politics published and of general circulation in the municipality.

The case of McCormick vs. City of Niles, supra, has declared that in order for a newspaper to be entitled to compensation for publishing ordinances an express contract must exist.

Section 6251, General Code, supra, provides a maximum rate that can be paid for publication of such ordinances.

First: It is my opinion that if there are two newspapers and only two newspapers that meet the requirements of section 4228, supra, and such newspapers are willing to publish the ordinances of the municipality at the maximum rate fixed by section 6251, supra, and the municipality cannot obtain a lower rate it is incumbent upon such municipality to enter into a contract at the maximum rate in order to give validity to the ordinances of such municipality.

Second: If one of the newspapers refuses to contract at *all* for the publication of such ordinances it is the same, as I view it, as if such paper did not exist, and, consequently the provisions of section 4229, supra, may be consulted in order to see if there are two newspapers in such municipality as therein provided for.

If there are no newspapers of opposite politics of general circulation in such municipality other than the two published therein as stated in your question, I am of opinion that under the ruling recently given you in reference to section 4227 the publication in the one of said papers would render the ordinances valid should the other refuse to contract for the publication thereof even at the maximum rate.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

373.

MEDICAL WITNESSES—RIGHT TO SUMMON IN TRIAL OF INMATES OF BOYS' INDUSTRIAL SCHOOL AND GIRLS' INDUSTRIAL HOME—FEES SAME AS ORDINARY WITNESSES.

There is no statutory requirement as to the physical suitableness of an inmate of the Boys' Industrial Home, nor is there any power conferred upon the trustees of that institution to determine such suitableness and therefore, medical witnesses may not be summoned in the trial of a prospective inmate.

The trustees of the Girls' Industrial Home, however, are empowered to determine the physical fitness of prospective inmates and in the trial of such, medical witness, may be summoned but may receive as fees for attendance, not more than the amount allowed to ordinary witnesses.

COLUMBUS, OHIO, September 1, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 4th, submitting for my opinion thereon, the following question:

> "What, if any, are the legal fees of a physician called by the probate judge to make examination and certificate in commitments to the Boys' Industrial School and Girls' Industrial Home (Sections 2093 and 3109, G. C.)?

The two sections to which you refer, one of which applied to the Boys' Industrial School, and the other of which applied to the Girls' Industrial Home, provide in part as follows:

> "Section 2093. * * * The costs in such case in like manner shall be paid upon the certificate of the proper officer of the court in which the youth was convicted. * * *
>
> "Section 2109. The fees of the probate judge, sheriff and other costs incurred in the proceedings shall be the same as are paid in similar cases, and be paid by the proper county in the same manner."

Neither of these sections in itself provides any fees taxable in favor of and payable to a physician called by the probate judge to make examination and certificate in commitments to the institutions in question. No provision of the chapter of the General Code which relates to the Boys' Industrial School, or of that which relates to the Girls' Industrial Home, defines any such fee; nor does any provision of either chapter authorize or direct the calling of a physician by the probate judge to make any examination or to execute any certificate in such cases. You inform me that the custom of calling a physician for such purpose has arisen because of the exercise by the board of trustees of each institution of its supposed power to make rules and regulations for the admission of inmates. In this connection permit me to state that I find no statute conferring any such power upon the board of trustees of the Boys' Industrial School. I am at least of the opinion that no rule or regulation of the board of trustees of the Boys' Industrial School is sufficient to authorize the taxation of any particular fee to any physician making any certificate required by such rule.

I find no express recital of power on the part of the trustees of the Girls' Industrial Home to require any examination or the execution of any such certificate as that referred to by you. However, under section 2108 a probate judge is required to be satisfied that a girl is a suitable subject for the home before committing her thereto. In my opinion the board of trustees are justified in defining what constitutes suitableness in this sense and probate judges are justified in adhering to the definition adopted by the board.

The question of suitableness being one of the issues in the proceeding, any testimony which the probate judge may see fit to avail himself of for the purpose of determining this question is proper and a person producing such testimony is to be regarded as a witness and entitled to the fees of a witness in the probate court. It is expressly provided that the same fees shall be taxed in proceedings of commitment to the Girls' Industrial Home as are taxed "in similar cases." The case most similar, in my judgment, to the one at hand is that of commitment to a hospital for the insane, or to some other state institution. The schedule of fees payable in such cases is found in section 1981 of the General Code as amended, 101 O. L. 359. This section is in part as follows:

> "* * * The taxable costs and expenses to be paid under the provisions of this chapter shall be as follows: * * * to the medical witnesses who make out the certificate, three dollars and mileage as allowed by law in civil cases each; to witnesses * * * the same fees allowed by law for like services in other cases; * * *"

The fee allowed by law to witnesses in other cases is, of course, a fee of one dollar for each day's attendance, and five cents a mile from his place of resi-

dence to the place of holding court and return, as described in section 3012, General Code.

The only question is as to whether a physician who testifies or certifies as to the facts which constitute a girl a suitable inmate of the Girls' Industrial Home is to be regarded as a medical witness or as an ordinary witness. In my opinion such physicians are to be regarded as ordinary witnesses. Section 1954 of the General Code provides that in lunacy cases two medical witnesses shall be called. There is no such provision, as I have already pointed out, in the statutes relating to the Girls' Industrial Home. The law therefore fails to make any distinction between a medical witness and any other witness called in proceedings for commitment to the Girls' Industrial Home; and I am of the opinion that the technical term "medical witness" as used in section 1931, as amended, supra, cannot be applied to a physician who testifies in such a case.

It is my opinion, therefore, that inasmuch as the suitableness of a boy as an inmate of a Boys' Industrial School is not a proper issue in a proceedings to commit to such institution, brought under the chapter relating thereto, expert medical testimony is not competent in such proceedings, and, therefore, the probate judge is without authority on his own motion to call such a witness; and that if he does call a physician under a rule promulgated by the board of trustees of the institution his act is not thereby rendered valid, because the board of trustees had no power to make such a rule. If a physician is called, however, for the purpose of testifying to a material matter in a proceeding to commit to the Boys' Industrial School—and it will be presumed in all instances, if he is called, that it would be for the purpose of inquiring of him as to some material matter—then the physician would be entitled to the ordinary witness fees.

I am further of the opinion that in case of commitment to the Girls' Industrial Home the physician who certifies to the physical condition of the girl is entitled to a fee of one dollar for each day's attendance and mileage as provided by law for witnesses in civil cases.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

374.

COUNTY COMMISSIONERS—POWER TO HIRE LEGAL COUNSEL—NECESSITY FOR WRITTEN REQUEST OF PROSECUTING ATTORNEY.

The county commissioners are not empowered to employ legal counsel to act either independently or as assistant to the prosecuting attorney except upon the written request of that official.

COLUMBUS, OHIO, August 14, 1911.

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 7th, in which you request my opinion as follows:

> "If a suit is brought by the prosecuting attorney against the board of commissioners of his county to restrain them from allowing a bill for material furnished by them, have such commissioners, as a board, the right to employ attorneys for their defense at the expense of the

county? In such case, has either of the commissioners the right to employ independent counsel at the expense of the county in defense of such action?"

In reply thereto I wish to say that section 2917 of the General Code provides as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

You will note the language contained in the above quoted section, to the effect that no county officer may employ other counsel or attorney at the expense of the county, except as provided in section 2412 of the General Code. Said section 2412 provides as follows:

"If it deems it for the best interests of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecuting or defense of any suit or action brought by or against the county commissioners or other county officers and board, in their official capacity."

Under date of February 16, 1909, this department rendered an opinion upon practically the same question about which you inquire. That opinion was rendered to the prosecuting attorney of Darke county, and I herewith quote said opinion in full:

"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."

I fully concur with that opinion and it is my final conclusion in answer to your inquiries, that the county commissioners are without authority to employ legal counsel at the expense of the county, except upon the written request of the prosecuting attorney, and that, furthermore, the board of county commissioners have not the legal right to employ independent counsel at the expense of the county, except upon the written request of the prosecuting attorney, as provided in section 2412 of the General Code, quoted above.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

377.

WARRANTS—PROBATE JUDGE MAY NOT ISSUE TO HIMSELF—COLLECTIONS OF FEES EARNED FOR SERVICE OF SAME BY PROSCUTING ATTORNEY.

A probate judge is obliged to issue warrants for the conducting of persons to the various state institutions to the sheriff and he is not authorized nor in any way empowered to issue such warrants to himself. When he does so, findings should be made against him for the amount received and the same collected by the prosecuting attorney and paid into the county treasury.

COLUMBUS, OHIO, September 19, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith acknowledge receipt of your inquiry of August 31st, in which you ask:

"Under date of June 24th we submitted an inquiry to your department, stating that a probate judge follows the practice of issuing warrants to convey persons to various state institutions to himself, and that he himself serves the warrant. We call your attention to sections 1959 and 2044, G. C., and ask your advice as to the finding to be made by state examiners of this department under such circumstances.

"What we intended to inquire was whether or not the fees on warrant to convey paid out of the county treasury to the probate judge in such cases may be recovered of said judge, and if the finding of our department should be that the money should be refunded? If in your opinion such finding is not proper to be made, what should be the finding of the state examiner?"

In reply thereto I desire to say that section 1959 of the General Code provides as follows:

"When advised that the patient will be received, the probate judge shall *forthwith issue his warrant to the sheriff*, commanding him forth-

with to take charge of and convey such insane person to the hospital. If the probate judge is satisfied, from proof, that an assistant is necessary, he may appoint one person as such. If the insane person is a female, he shall appoint a suitable female assistant to accompany the sheriff and such insane person to the hospital."

Section 2044 of the General Code provides as follows:

"In the commitment and conveyance to the hospital, the care and custody while there, and the discharge therefrom, of epileptic insane or epileptics whose being at large is dangerous to the community, like proceedings shall be had, and like powers exercised by officers charged with like duties in the premises as is provided by law for the commitment and care of the insane."

I furthermore desire to say that there is no statutory provision which gives the probate judges of the various counties of the state the authority and right to issue warrants to themselves for conveying persons to the various state benevolent institutions. The sections of the General Code which are above cited clearly provide that the probate judge, upon being advised that the patient will be received in such institution, shall forthwith issue his warrant to the sheriff of the said county commanding him to take charge of and convey such person to the said institution. It is no part of the statutory duty of the probate judge to convey persons to the various state institutions, and I am, therefore, of the opinion that a probate judge is not legally entitled to any fees for conveying persons to the state institutions. The fees for conveying persons to the various benevolent institutions of the state, and particularly to the insane asylums of the state, are to paid to the sheriffs of the respective counties from which such persons are sent by the probate courts of that county, and I am, therefore, of the opinion that any fees received by the probate judge of the respective counties of the state for conveying persons to such benevolent institutions should be refunded to their respective counties, and that the prosecuting attorneys of any such counties should see to it that any funds so paid out should be paid back into the treasury of their respective counties.

I am not able, in my official capacity, to do more than to advise your department as above set forth and to further advise that any fees illegally paid to the probate judges of the respective counties of the state should be recovered for the respective counties by the prosecuting attorneys thereof.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General

391.

DAUGHTER OF SHERIFF MAY NOT BE DEPUTY—WOMAN NOT A "QUALIFIED ELECTOR"—ASSISTANTS AND CLERKS NOT "OFFICERS" AND NEED NOT BE QUALIFIED ELECTORS—CONSTITUTIONAL LAW.

A deputy in the office of the sheriff is required to be a qualified elector, by section 2830, General Code, and as a woman cannot be such, a daughter of the sheriff may not serve in that capacity.

Assistants or clerks in said office are not expressly required to be electors nor are such to be considered officers within the meaning of article XV, section IV of the constitution. Said daughter may, therefore serve in such capacities.

COLUMBUS, OHIO, September 25, 1911.

Bureau of Inspection and Supervision of Public Offices. SAM A. HUDSON, *Deputy, Columbus, Ohio.*

DEAR SIR:—Under favor of June 3, 1911, you ask an opinion of this department upon the following:

> "The sheriff of Union county appointed his daughter deputy in his office. She has been paid three months' salary and one month's time has elapsed since the payment of the last salary. Section 2850 provides that each deputy sheriff shall be a qualified elector of the county. Of whom, if anycne, should recovery of the salary already paid be sought?
>
> "Can a sheriff legally employ a female as a clerk, assistant, bookkeeper or other employe of his office?
>
> "The prosecuting attorney of said county has directed the county auditor to withhold payment of any further salary to such deputy and furthermore that the compensation heretofore paid should be refunded by the sheriff."

First: Can a female be appointed and serve as deputy sheriff?

The qualifications of a deputy sheriff are set forth in section 2830 of the General Code, as follows:

> "The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the subdivision in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon such writing and indorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefor shall be paid by the sheriff. *Each deputy so appointed shall be a qualified elector of such county.* No justice of the peace or mayor shall be appointed such deputy."

The statute specifically provides that each deputy sheriff shall be a qualified elector of the county. A female is not a qualified elector. She has only a limited vote.

A female cannot serve as deputy sheriff. The appointment was illegal. All moneys paid her were paid without authority of law. The finding should

be made against the sheriff who made the appointment and authorized the payment in the first instance.

Second: Can a female fill the positions of clerk, assistant, bookkeeper, or other employe of a sheriff.

Section 2981, General Code, provides as follows:

> "Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commisioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Section 4 of article 15 of the constitution provides:

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

The first syllabus in the case of Theobald vs. State, 20 Cir. Dec. 414, reads as follows:

> "An officer in the constitutional sense is one who is elected or appointed to a state office, and he must possess the qualifications of an elector; he is one who takes the oath of office and is responsible for the official acts of himself and subordinates; hence his deputy assistants and other employes are not 'officers' within the meaning of the constitution, and the act changing the compensation of all officers from the fee system to a fixed salary is not unconstitutional as in violation of article 2, section 20 of the constitution, which provides that the compensation of an officer shall not be changed during his term."

The above case was affirmed without report in 78 O. S., 000.

The second syilabus in the case of Warwick vs. State, 25 O. S., 21, is as follows:

> "Section 4 of article 15 of the state constitution, which provides that 'no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector,' does not apply to the office of deputy clerk of the probate court, and therefore a female is eligible to that office, and may lawfully discharge its duties."

The statute does not provide that the clerks, assistants or other employes of a sheriff shall be a qualified elector. As these positions are not offices within the meaning of section 4, article 15 of the constitution, that section does not control. A female may, therefore, be appointed to fill any of the positions of clerk, assistants or other employe of a sheriff.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

For a full discussion of the principles of this case see the case of the State

of Ohio, ex rel., Burt F. Mills vs. the Board of Elections of the city of Columbus and Ida M. Earnhart, 9. C. C. Reports of Ohio, 134.

Under the principle of that decision you will find that a woman may not be under the constitution of Ohio a qualified elector. She merely has the right to vote at a school election and the control of schools is given exclusively to the general assembly and do not come within the constitutional requirement of the electors.

B 394.

CIVIL SERVICE—"DEPUTY" AUDITOR IN UNCLASSIFIED SERVICE—CLERKS AND ASSISTANTS.

A person authorized to act instead of a city auditor and to perform for and in behalf of the latter, all of his duties, is a "deputy" and in the unclassified service within the meaning of section 4479, General Code.

A person who is now and then deputized to perform one or several of the duties of the auditor is not a "deputy" within the meaning of the act.

COLUMBUS, OHIO, September 26, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 8th, in which you request my opinion upon the following question:

> "Section 4479, G. C., states that the unclassified service of a city shall include deputies in the office of city auditor. The ordinances of a city in its statement of positions established in the city auditor's department provides that there shall be three deputies and twenty-nine clerks and stenographers. Many of the clerks in the office act for and perform certain duties at times for the auditor.
>
> "Under section 4479 what employes of the office are placed in the classified service by law? Does the phraseology of the ordinance denominating the duties as that quoted determine the matter, or do the duties required of the incumbent determine the matter as to whether or not the incumbent is in the classified or unclassified service."

Section 4479, General Code, provides the list of the classified and unclassified service in a municipal corporation, and in reference to your question it provides that:

> "The civil service shall be divided into classified and unclassified service. The unclassified service shall include * * * deputies in the office of the city auditor."

The question you ask arises in Cleveland, Ohio. The deputy auditor has written you a letter, which you enclose to me, with your inquiry, stating that the revised ordinances of the city of Cleveland give the auditor the right to appoint three deputies and twenty-nine clerks and stenographers, and he desires to know whether all deputies and clerks are included in the classified or unclassified list. He states that the clerks suggested that as they are all

deputized at some time to act for the auditor, therefore, all employes of the auditor's office are deputies and come under the unclassified list.

I take the situation at Cleveland as a basis to answer your inquiry, which is general.

Section 4479 of the General Code provides that all *deputies* in the office of the city auditor are in the *unclassified* list and therefore do not come under the civil service. The deputy city auditor states that the clerks are all deputized at some time to act for the auditor, and, as before stated, claim to come under the unclassified service. The legislature in using the term "deputies" no doubt used it in its ordinary legal sense. "Deputy" is defined in the Century dictionary as follows:

> "One who by authority exercises another's office, or some function thereof, in the name or the place of the principal, but has no interest in the office."

Webster's unabridged dictionary defines "deputy" as:

> "One appointed as a substitute for another and empowered to act for him and in his name, or on his behalf."

Bouvier defines "deputy" as:

> "One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter. A deputy should always act in the name of the principal."

Section 9 of the General Code provides that:

> "A deputy when duly qualified may perform all and singular the duties of his principal." * * *

I take it that when a statute or ordinance creates in one act, deputies and clerks, they will have different duties; that persons designated as "deputies" are those who are empowered to exercise the office or right which the officer possesses, for and in his place; that is to say, a person so designated has more authority than mere clerk, who acts entirely in a ministerial capacity; he may perform all the functions of the principal and act in his name and stead and hind him. If any officer in a city auditor's office, regardless of his title, exercises and performs all the functions of his principal and has this authority conferred by ordinance, to act in the name and stead of his principal, he is a deputy within the meaning of the law; but if a person is only deputized by the auditor at times to act for him and he acts by virtue of his orders only he is not a "deputy" within the spirit and meaning of section 4479, General Code.

Answering the inquiry of the deputy auditor of Cleveland specifically, it is my opinion that the general ordinances of the city of Cleveland, having authorized the city auditor to appoint three deputies and twenty-nine clerks and stenographers, the three deputies so named come under the unclassified service and can act for the auditor and in his name and on his behalf in his absence, but the clerks named by the said auditor under said ordinance come under the classified list.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 399.

FEES OF "DISCREET PERSON" FOR SERVICE OF WRIT ISSUED BY CORONER IN EMERGENCY, NOT AUTHORIZED.

Section 2485, General Code, providing a compensation not exceeding one dollar per day to any person summoned to aid any sheriff or constable "or other officer" in the "execution" of any writ or process in favor of the state, presupposes that a writ has already been issued, the "other" officers therein included applies only to such persons, other than sheriff and constable, as the statutes authorize to serve writs and processes.

A discreet person therefore, to whom the coroner issues a writ in emergency, under section 2858, General Code, is not authorized to tax any fees for such service in the cost bill.

COLUMBUS, OHIO, September 29, 1911.

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 May 10th, in which you state:

> "Under section 2858, General Code, the coroner may, if in his opinion the emergency so requires, issue any writ to any discreet person of the county. Section 11504, General Code, provides that, 'if service is not made by a sheriff or constable * * * no costs shall be taxed.'
>
> "If a coroner, in his discretion, appoints a discreet person to execute the writs issued by him in connection with a coroner's inquest, what, if any such fees, is such discreet person entitled to tax in the cost bill to be paid by the county?"

This department, under former Attorney General Denman, held on this question as follows:

> "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 cannot, however, agree with the construction placed upon said section 913, Revised Statutes, now section 2485, General Code, by my distinguished predecessor. Section 919, Revised Statutes, is the so-called *posse comitatus*

statute and does not apply to a situation arising under section 2858, General Code, where the coroner designates a discreet person to *serve* his writs.

You will note that under section 2485, General Code, "the county commissioners shall * * * allow a reasonable compensation to any person who is summoned to *aid* any *sheriff* or *constable*, or *other officer*, in the *execution* of any *writ* or process in favor of the state." * * *

Section 2486 presupposes that a writ or process has already been issued and this section authorizes the sheriff or constable, or other officer, to call upon some one to assist in the serving or carrying out of the writ or process—or, as the statute puts it, "aid * * * in the *execution* of any writ or process."

Section 11504, General Code, authorizes a coroner to serve subpoenas.

Section 2828, General Code, recites that:

> "When the sheriff, by reason of absence, sickness or disability is incapable of serving any process required to be served, or by reason of interest is incompetent to serve it, the court of common pleas * * * may appoint a suitable person to serve such process or to perform the duties of sheriff during the continuance of such disability."

There are, perhaps, other provisions of the General Code authorizing other persons than the sheriff or constable to serve writs or processes, and they are covered by the expression "other officers" in section 2485, General Code; and under authority of that section, if the coroner or *other person* designated by the common pleas court to serve subpoenas or writs needs assistance in the execution of such subpoenas or writs, they may call upon some bystander to assist them; it is my opinion, in this connection, that the term "other officer" as used in section 2485, General Code, means officers whose duties are similar to those of sheriffs or constables, and refers to a "coroner" only when he acts in a capacity similar to that of sheriff, under authority of section 11504, G. C.

There being no other provision of the General Code authorizing fees or compensation for the "discreet person" who serves the writs or processes for the coroner under section 2858, General Code, it is my opinion that such "discreet person" would not be entitled to any fees to be taxed in the cost bill to be paid by the county.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 404.

FEES DUE THE CLERK OF COURTS—COUNTY COMMISSIONERS MAY NOT MAKE CONTRACT FOR COLLECTION OF—DUTY OF PROECTUTOR TO COLLECT—COLLECTION BY CLERK OF COURTS—DISPOSITION OF COLLECTION—FEE FUND.

The county commissioners, prior to the amendment to section 2979, General Code, were not authorized to enter into a contract for collection of costs and fees due the clerk of courts, for a stated per cent. of the amount collected, and all contracts so made are illegal and void.

By provision of section 2917, General Code, the prosecuting attorney is made the legal adviser of the county commissioners and as such it is his official duty to collect such unpaid fees as moneys due the county, and for such services, he cannot be allowed any further compensation than his official salary.

The duty of the prosecuting attorney to collect such fees is simply an additional method of collecting such fees, and the officer who earns such fees or his successor, may collect them even after they have been certified to the commissioners or the prosecuting attorney for collection. All such fees earned prior to May 25, 1911, when collected, should be credited to the fee fund of the officer who earned the same. All fees earned after that date shall be paid into the county treasury, to the credit of the office.

COLUMBUS, OHIO, October 1, 1911.

Bureau of Inspection and Supervision of Public Offices, JOS. T. TRACY, *Deputy, Columbus, Ohio.*

DEAR SIR:—Your favor of August 15, 1911, is received, in which you ask an opinion of the following:

> "We respectfully request your written opinion upon the following questions:
>
> "1. Have the county commissioners the authority under section 2979, previous to the amendment of June 7, 1911, to make a contract at a stated per cent. of the amount collected for collection of costs or fees due to the clerk of courts, which fees have remained unpaid for one year or more prior to January 1, 1911?
>
> "2. Was it the duty of the prosecuting attorney to make such collections under his regular salary, or may he be allowed an additional fee therefor?
>
> "3. Does the amendment of June 7, 1911 (Sec. 2979, G. C.), make any change in regard to the duties of the prosecuting attorney or his compensation for services in connection with the collection of such moneys?
>
> "4. If litigants who have been notified by a collector employed by the county commissioners pay such delinquent fees to the clerk of the court, may he receive the same and make credit to his fee fund at the close of the quarter?"

Section 2979, General Code, prior to the amendment of June 7, 1911, provided:

> "When it appears from the books kept by the probate judge,

auditor, treasurer, sheriff, recorder and clerk of the court of common pleas, that any fees, costs, percentages, penalties, or allowances of whatever kind, remain due the county and unpaid, for more than one year, the county commissioners, in conjunction with the prosecuting attorney shall collect them in any manner provided by law, and pay the amount so collected into the county treasury to the credit of the general fund of the county."

This section as amended, June 7, 1911, 102 Ohio Laws, 290, reads:

"On or before January 15th annually, each of said officers shall file with the prosecuting attorney of his county, a report in writing showing the amount of fees, percentages, penalties, allowances and other perquisites due his office from each person or corporation which has remained due and unpaid for more than one year prior to January 1st, next preceding, and it shall be the duty of the prosecuting attorney to immediately proceed to collect the same by any of the means provided by law, and to pay the amount so collected into the county treasury to the credit of the general county fund. The county auditor shall not issue his warrant to either of said officers for his salary for the month of January in any year, until said report has been filed with the prosecuting attorney as herein required."

Prior to the amendment of June 7, 1911, the county officers were not required to make any report of unpaid fees of their offices. They are now required to file annual reports of such unpaid fees with the prosecuting attorney of the county.

Also prior to the amendment of June 7, 1911, it was made the duty of the "county commissioners in conjunction with the prosecuting attorney," to collect such unpaid fees. It is now the sole duty of the prosecuting attorney to make such collections.

Your first inquiry is as to the right of the county commissioners to enter into a contract for the collection of such unpaid fees and pay a percentage of the amount collected as payment for such services.

Said section 2979, General Code, before amended, stated that the commissioners should collect such fees in any way provided by law. This section does not authorize the commissioners to enter into a special contract for the collection of these fees. They are required to make the collections in any manner as may be provided by law. And no specific authority is found in any other statute authorizing the commissioners to enter into such contract.

Gholson, J., on page 190 of the opinion in case of Treadwell vs. Commissioners, 11 O. S., 183, says:

"The board of commissioners of a county is a quasi corporation, 'a local organization which, for the purposes of civil administration, is invested with a few of the functions characteristic of a corporate existence.' Commissioners of Hamilton County vs. Mighels, 7 Ohio St. 109, 115. A grant of powers to such a corporation must be strictly construed. Ib. When acting under a special power, it must act strictly on the conditions under which it is given. The Queen vs. Ellis, 6. Q. B., 501, 516; Stricker vs. Kelly, 7 Hill, 9-25."

In case of Beebe vs. Scheidt, 13 O. S., 406, Sutliff, C. J., delivering the opinion of the court, says on page 415:

> "But a different rule is generally applicable to inferior jurisdictions, which are governed in their proceedings strictly by statutory provisions. The general rule applicable to such inferior jurisdictions is, that in their proceedings they are to be held to the strict limits of their authority, as conferred and prescribed by the statute. And this rule is doubtless applicable to county commissioners as well as to justices of the peace."

The county commissioners are limited to the authority granted them by statute. As no authority is granted the commissioners, by statute, to enter into a special contract for the collection of unpaid fees of county officers, all such contracts are illegal and void.

Your second and third inquiries are as to the payment of additional fees to the prosecuting attorney for making collection of unpaid fees of county officers.

Neither the original section 2979, General Code, nor the amendment of June 7, 1911, provide any fees for the prosecuting attorney for making such collections.

The general duties of a prosecuting attorney are set forth in section 2917, General Code, which provides:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

There is no provision of statute authorizing the payment of fees to a prosecuting attorney for the services performed by him under section 2979, General Code, in the collection of unpaid fees of a county officer.

The prosecuting attorney is the legal adviser of the county and of the county officers. The unpaid fees of such officers are moneys due the county, which it is made the duty of the prosecuting attorney to collect. It is one of the duties of his office covered by his regular salary, and for which services he cannot draw any fee or pay in addition to the annual salary provided in section 3003, General Code.

Your fourth inquiry is to the right of a clerk of courts to collect delinquent fees and credit them to his fee fund, after the litigants have been notified by a collector employed by the county commissioners.

As any special contract entered into by the county commissioners for the collection of these fees is void, the notice by a collector so employed would be of no avail to alter the rights of the clerk of courts.

Section 2979, General Code, authorizing the collection of such fees, makes it the duty of the prosecuting attorney "to pay the amount so collected into the county treasury to the credit of the general county fund."

Section 2986, General Code, as amended in 101 Ohio Laws, 345, and before its repeal in 102 Ohio Laws, 137, provided:

> "If a probate judge, sheriff, clerk of the court of common pleas, or recorder has not received the full amount of his salary for any year, as provided in this chapter, but, during such year, has 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, assistants, bookkeepers, clerks and other employes, except court constables, he shall be entitled to receive from the proper fee fund, on the allowance of the county commissioners, an amount equal to the difference between his salary for such year paid to him during his incumbency and the salary for that year, as herein fixed, whenever that amount is collected by a successor to him in office from the unpaid fees earned during such years, or, if the entire difference be not collected, he shall receive such part thereof as is so collected."

By this section fees collected by a successor in office are to be used in meeting any deficiency in the salary of the officer earning such fees. Such fees so collected must of necessity be credited to the fee fund of such officer.

Section 2979, supra, does not prohibit the collection of such unpaid fees by the respective officers. The duty therein prescribed is an additional means of collecting such fees. Section 2986, recognized the right of a successor to collect fees earned by a predecessor in such office. This right is not taken away by section 2979, General Code. If a successor in office can collect unpaid fees, certainly the officer who earned the fees can collect them and such collection can be made after such unpaid fees have been certified to the commissioners or, prosecuting attorney for collection.

Can such collections be credited to the fee fund of such officer?

Section 2983, General Code, as amended in 102 Ohio Laws, 136, reads:

> "On the first business day of April, July, October and January, and at the end of his term of office, each such officer shall pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind *collected by his office during the preceding quarter or part thereof for official services*, which money shall be kept in separate funds and credited to the office from which received; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which has been due his office and unpaid for more than one year prior to the date of such statement is required to be made."

Original section 2983, General Code, provided:

> "At the end of each quarter, each such officer shall 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 such quarter, *for his official services*, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received."

The above provisions were retained in the amendment to said section in 101 Ohio Laws, 199

As section 2983 now reads, all moneys collected for official services during the quarter shall be credited to the office. While prior to May 25, 1911, all moneys collected for "his official services," that is, for the services of the officer making the quarterly report, were to be credited to his office.

The purport of this difference is seen when it is considered that prior to the act of May 25, 1911, 102 Ohio Laws, 136, the salary of the county officers was to be paid from the fees collected by such office, and now such salary is paid from the general fund of the county.

The purpose of the salary law was, as existed prior to the act of May 25, 1911, that the salary of said officers should be paid from the fees earned by such office, and that any deficiency should be paid from collections of unpaid fees, however such collections might be made.

In my opinion all fees earned prior to May 25, 1911, whether collected by the officer earning such fees or by his successor, should be credited to the fee fund of the officer earning such fees. This applies also to the fees reported delinquent and collected by such officer or a successor in office.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

405.

NEWSPAPERS—PURCHASE OF BY CITY SOLICITOR FOR PROCURING FORMS OF ORDINANCES, ILLEGAL IN ABSENCE OF AUTHORIZING ORDINANCE.

COLUMBUS, OHIO, September 19, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your inquiry of August 4th, in which you inquire as follows:

> "Is it a legal use of the public funds of a city to be disbursed in payment of subscription to the daily papers of the larger cities for the solicitor's department, it is claimed, for the purpose of obtaining forms of ordinances in those cities which were supposed to be up-to-date and bear the approval of the best legal minds?"

In reply thereto I desire to say that in the absence of an ordinance passed by the council of a city, authorizing the purchase of daily papers for the solicitor's department, it is clearly illegal for the solicitor to supply his own department with the daily papers of the larger cities out of the public funds, even though such papers are purchased for the purpose, as stated in your inquiry, of obtaining forms of ordinances in those cities which are supposed to be up-to-date and bear the approval of the very best legal minds.

I believe that this fully answers your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 405.

AUDITOR'S SALARY LAW — COMPENSATION THEREUNDER FOR EXPENSES INCURRED IN DUTIES PERFORMED BEFORE THE REPEAL OF THE STATUTES PRESCRIBING THEM—"VILLAGE"—STATUTORY CONSTRUCTION.

The statutes prescribing for the county auditor the duty of appraising railroads and his compensation therefor, all of which are now repealed allowed $3.00 per day and five cents a mile for the traveling incidental thereto. For duties performed under this statute while in force the auditor should be allowed his "mileage," i. e., his five cents a mile for traveling expenses as that term is intended in the section of the auditor's salary law stating that his salary shall be instead of all "fees," "costs," "penalties," "percentages," "allowances," or "perquisites." When a statute is susceptible to two constructions the fairest interpretation should be upheld.

COLUMBUS, OHIO, October 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 27th, submitting for my opinion thereon the following question:

> "What, if any, expenses incurred by a county auditor in connection with the appraisement of railroads subsequent to the enactment of the county officers' salary law might such auditor be legally reimbursed for?"

The duties of a county auditor as a member of the board of appraisers and assessors for railroads, or suburban or interurban electric railroads were prescribed by sections 5415 to 5431 inclusive, General Code, now all repealed. I presume, of course, that your question relates to transactions occurring while these sections were in force. The only section of the entire chapter in any way bearing upon compensation of the auditor was section 5430, which provided as follows:

> "Each county auditor shall be paid from the county treasury of his county the sum of $3.00 for each day's attendance as a member of any board under this chapter, and five cents a mile going to and returning from its place of meeting."

Section 2996 of the General Code, one of the sections of the county officers' salary law to which county auditors become subject upon its enactment and going into effect, provides as follows:

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive." * * *

As you are doubtless aware, the courts in applying this section, after giving full meaning and effect to this language, have held that, together with sections 2977 and 3000 of the same act, which it is unnecessary to quote, it takes from each county officer subject to the salary law the right to the personal use and

enjoyment of the fees pertaining to his office, such fees still being chargeable but being payable to his fee fund.

The real question to be determined is whether or not the word "mileage" is embraced in any of the following expressions:

(a) Fees.
(b) Costs.
(c) Percentages.
(d) Allowances.
(e) And all other perquisites.

A fee is defined by Webster to be:

> "A reward or compensation for services rendered or to be rendered.
> "A charge fixed by law for the services of a public officer or for the use of a privilege under the controlling government; as sheriffs' fees, custom house fees, license fee."

By "costs" are unquestionably meant, amounts assessed in favor of the sheriff, by some officer, as due him for services rendered.

"Percentage" means, of course, a certain allowance, duty, rate of interest on a hundred. In plain English, it means an amount due and payable to one, based on a per cent. of some fund handled, or an amount due for services in reference to some fund, based on per cent.

An "allowance" is a sum granted as a reimbursement, or a bounty, or as appropriate for any purpose. Webster says the word means, in law:

> "A sum in addition to the regular taxable costs awarded by court to a party in a difficult case."

"Perquisites" are gains or profits incidentally made from employment in addition to a regular salary or wages.

I do not believe the word "mileage," as used in the Revised Statutes, section 5430, is embraced in any of the foregoing expressions. It will be kept in mind that the auditors were to receive three dollars for each day's attendance as their per diem; this measures their compensation. They were also to receive five cents a mile, going to and returning from the place of meeting. What is this five cents per mile for? Evidently it is the statutory measure of expenses incurred in traveling and for hotel bills, and is not a fee, or a cost, or a penalty, or a percentage, or an allowance. Mileage is defined by Webster as "an allowance for traveling expenses at a certain rate per mile." Mileage is defined in the Century dictionary as "an allowance or compensation for travel, or conveyance, reckoned by the mile; especially payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over; as the mileage of a sheriff, circuit judge or member of congress, or of a legislature."

It may readily be seen that the mileage of a circuit judge would surely not be considered as part of his compensation, nor as a fee, nor as a perquisite, nor as an allowance, nor as a cost, nor as a percentage; in my judgment, it is simply the legislative measure of reasonable expenses of the officer.

I mean this in connection with section 5430, Revised Statutes, and do not intend that the term "mileage" is always applied in that sense. I think this interpretation is equitable and fair. It would hardly be expected that a county auditor should travel over different sections of the state at his own expense. While section 5430 is now repealed it was not repealed until the auditor was relieved from the labor of appraising railroads.

I am, therefore, of the opinion that county auditors may be legally paid through the county treasury for the expenses incurred in the discharge of the duties imposed upon them by Chapter 5, Title I, Volume II, General Code.

It may be said further that the law being repealed there will be no occasion for this question arising in the future, and I think no injury will be done by allowing auditors who rendered this service, reimbursement for their actual expenses, and the statutory measurement thereof seems to be entirely reasonable. When a statute is subject to two interpretations a court will always give it that one which is consonant with just and fair dealing. In a county like Vinton, where the auditor receives a small salary, it would be a great hardship upon him to appraise two railroads, if not three, and meet the expenses of travel and hotel bills from his own pocket. The same is true of a county like Jackson, penetrated by at least four railroads.

My opinion is, therefore, that the auditors, to whom you refer in your inquiry, are legally entitled to be paid their mileage, not under any of the heads stated but as statutory expenses.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 405.

SALARY OF COUNTY COMMISSIONERS—LIMITATION OF 115% OF SALARY OF 1911 DOES NOT COMPRISE DITCH FEES—STATUTORY CONSTRUCTION—"IN THE AGGREGATE."

The limitations placed upon the salary of county commissioners by 102 *O. L.* 514, *amending* 3001 *G. C., stating that the salary shall not exceed* 115% *of the compensation for the year* 1911, *is to be construed as excluding the item of ditch fees notwithstanding the words "in the aggregate" used in this connection.*

This conclusion is necessary in order to allow the application of further provisions to the effect that the salary shall be paid in equal monthly installments, which would be an impossibility were "ditch fees" with their irregularity and uncertainty to be allowed to constitute part of the measure. The construction is further necessary to sustain the rule of uniformity, allowing equal compensation for equal work to all county commissioners.

COLUMBUS, OHIO, October 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 29th, calling attention to the question arising out of my opinion to you under date of August 10th, said opinion relating to the manner of computing the annual salary of county commissioners under House Bill No. 183, amending section 3001, General Code, 102 O. L. 514.

In passing upon one of the questions which you asked in the letter which called for this opinion I used the following language:

> "It provides that the compensation for the year 1912 and each year thereafter 'shall not in the aggregate exceed 115% of the compensation' for the year 1911. The phrase 'in the aggregate' indicates that this limitation is not upon the primary compensation of the commissioners alone, but upon their entire compensation, including that for ditch work."

As an examination of my previous opinion will disclose, this language was employed for the purpose of illustrating an entirely different point, and I confess that my attention was not especially directed to the exact meaning of the phrase "in the aggregate."

Your letter of September 29th points out several practical difficulties, inequalities and inconsistencies which will arise if the maximum compensation of county commissioners be measured by 115% of the entire amount received for the year 1911, including ditch work, and suggests reasons why it should be held that the basis of the computation made necessary by the inclusion of this limitation in the amended section should be the salary of each county commissioner for the year 1911 exclusive of ditch work fees.

As you state the literal and primary meaning of amended section 3001 is that which I defined in my former opinion. Excellent reasons sometimes exist, however, for disregarding the literal language employed in a statute. Directing my attention now for the first time to this particular question which was not raised in the letter which called for the previous opinion, I beg to state that in my judgment the language which I used in said opinion is not justified by a careful examination of the amended section in connection with other related statutes. Said amended section provides in part that:

> "Such compensation (referring primarily to all compensation described in the preceding provisions of the statute, and thus including ditch compensation) shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

I confess that when I first read this provision I was of the impression that it applied, as it seems to apply, to ditch fees, as well as to the salary of the commissioner. Strength is lent to such a conclusion by the fact that the previous sentence of the section is as follows:

> "Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed $4,000 per annum."

This sentence directly follows the sentence in which the compensation for ditch work is provided for, and in reason and logic it imposes a limitation upon the amount which any commissioner may receive, whether from ditch work or otherwise.

This question, so far as I am able to ascertain, has never been judicially determined, and inasmuch as it is not directly before me at the present time I am not disposed to make any holding as to whether or not the limitation of $4,000 per annum includes compensation for ditch services.

There is at least one good reason for holding that the phrase "such compensation" as used in the last sentence of section 3001, as amended, does not include compensation for ditch work, regardless of whether or not the same phrase as used in the preceding sentence does include such compensation. That reason grows out of the fact that ditch fees cannot in the very nature of things be paid in equal monthly installments or be regarded as a part of the salary payable in equal monthly installments. Until the limit of $300 per annum is reached, the compensation of each commissioner for ditch work is in the purest sense of the word a per diem fee. The phrase is "$3.00 for each day of time he is actually engaged in ditch work."

Section 6535, General Code, governs the manner of payment of such compensation as follows:

"Fees under this chapter shall be paid out of the county treasury as soon as the bill of items thereof is examined and allowed by the county commissioners and the auditor shall issue orders therefor on such allowance." * * *

That is to say, itemized bills must be presented by each commissioner to the board of commissioners and allowed by the board before payment. By further examination of the statute, which it will not be necessary here to quote, it appears that ditch services exacted of county commissioners thereby are specific, and it cannot be ascertained in advance what the amount of compensation due to a given commissioner will be for such services. In short, the liability of the county to the commissioner is not fixed until his itemized bills have been filed.

This reason then is a sufficient one for holding that the phrase "such compensation" as used in the last sentence of amended section 3001 could not have been intended to embrace ditch fees. The same phrase is used in the same connection in original section 3001, General Code, and the same construction must be given to that sentence. From the foregoing, then, the following conclusions are to be drawn:

1. Both in original section 3001 and in amended section 3001 the word "compensation" either refers solely to the *salary* of the county commissioners, exclusive of their ditch fees, or is used in a different sense in connection with the limitations of $3,500 and of $4,000 respectively imposed by these two sections from that in which it is used elsewhere in the same section.

2. It is not accurate therefore to suppose that because the word "compensation" as used in the sentence of the section which imposes the $4,000 limitation might be regarded as including ditch fees, therefore, the same word as used earlier in the section must be given this broad meaning even in connection with the phrase "in the aggregate."

It is true that the use of the last mentioned phrase "in the aggregate" lends a great deal of color to the conclusion which I expressed in the former opinion. A close examination of the section, however, will disclose the fact that this phrase does not necessarily indicate that the legislature meant thereby to include ditch fees. The first sentence of section 3001 provides for the measurement of the annual compensation of each county commissioner by the aggregate of the tax duplicate for real estate and personal property on the 20th day of December, 1911. The method is to allow $900 for each five million dollars on the duplicate and $3.00 on each one hundred thousand additional. The result thus obtained might appropriately be referred to as "an aggregate compensation" inasmuch as it is a compensation ascertained by adding together the different products or sums arrived at by making the computations referred to in the first sentence.

In this sense then the ordinary salary of a county commissioner is his "aggregate" compensation. This is certainly a forced and unusual meaning to give to the phrase "in the aggregate," yet I am satisfied that it is the meaning which must prevail for the following reasons:

1. To hold otherwise, as I seem to hold in my previous opinion, renders it impossible to pay the aggregate compensation of each county commissioner "in equal monthly installments from the county treasury," and would render meaningless a part of section 3001 as amended.

2. To hold otherwise would be to produce a law of unequal operation and a result prohibited by the constitution. That is to say, under original section 3001 it was possible and indeed probable in many counties that no two com-

missioners would receive the same compensation if ditch work fees be regarded as a part thereof. Each commissioner was paid what he earned as ditch fees and the results were not equal unless each of the commissioners earned $300 by ditch work. Therefore, the amount "paid to each county commissioner for the year 1911" would not be equal in every case if ditch fees be included therein.

For all of the foregoing reasons then, I am of the opinion that the amount upon which the computation of 115% on which section 3001, General Code, is to be based, is the amount received by each commissioner during the year ending in September, 1911, exclusive of ditch fees. For similar reasons I am likewise of the opinion that the 115% so ascertained is a limitation not upon the amount which each commissioner may receive from all sources including ditch fees, but only upon the amount which he may receive as salary based upon the duplicate of the county in force on the 20th day of December, 1911.

I herewith return copy of opinion of August 10th, which upon careful examination I find to be correct in all respects save only the one particular reviewed and corrected in this opinion. In making this statement, however, I do not wish to be regarded as having held in either opinion that the maximum limitation of $4,000 per annum is upon the amount which may be received by each county commissioner including ditch fees. I regard this question as extremely doubtful especially in view of the express provision that "such compensation shall be in full payment of all services rendered as such commissioner." I would advise, however, that this sentence be construed by your bureau in the same manner as the corresponding sentence of original section 3001, which imposes the $3,500 limitation, has been construed and applied in the past.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

COLUMBUS, OHIO, October 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your inquiry of August 4th, in which you inquire as follows:

> "Is it a legal use of the public funds of a city to be disbursed in payment of subscription to the daily papers of the larger cities for the solicitor's department, it is claimed, for the purpose of obtaining forms of ordinances in those cities which were supposed to be up-to-date and bear the approval of the best legal minds?"

In reply thereto, I desire to say that it is clearly illegal for the solicitor to supply his own department with the daily papers of the larger cities, out of the public funds even though such papers are purchased for the purpose, as stated in your inquiry, of obtaining forms of ordinances in those cities which are supposed to be up-to-date and bear the approval of the best legal minds.

I believe that this fully answers your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General

408.

POOR RELIEF TO INDIGENT FAMILY OF A POLICE OFFICER KILLED ON DUTY—POWERS OF COUNCIL—STATUTORY LIMITATIONS.

As it has not the statutory authorization, a council cannot pass a special ordinance for the payment of money to the bereaved family of a worthy police officer killed in the performance of duty.

Such relief may be had only through the establishment of a police relief fund under 4616, *General Code, or by a general ordinance as provided in* 4383, *General Code.*

COLUMBUS, OHIO, October 4, 1911.

Bureau of Inspection and Supervision of Public Offices, Jos. T. Tracy, Deputy, Columbus, Ohio.

DEAR SIR:—Your favor of July 8, 1911, is received, in which you ask an opinion upon the following:

> "A city has never created a police relief fund, but desires to pay to the family of a deceased policeman a sum of money authorized by ordinance of council as a means of relief to said family. The policeman was a regularly appointed and qualified official of the city and was killed in attempting to make an arrest while in the discharge of duty. Would the provisions of section 4383 authorize the city to make such expenditure?"

Section 4383, General Code, provides as follows:

> "Council may provide by general ordinance for the relief out of the police and fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

Section 4616, General Code, et seq., provide for the establishment of a police relief fund. It appears that the city in question has not taken advantage of these statutes and therefore any relief granted must be by virtue of section 4383, supra.

It is well established that money can be paid from a public fund only for such purposes as are authorized by statute or ordinance, and that council can only exercise those powers conferred upon it by the statutes.

By virtue of section 4383, General Code, council is authorized to grant relief to members of the police or fire departments who become temporarily or permanently disabled in the discharge of their duty. The relief to be provided is "of members" of the department. There is no provision in this section for relief of the family of the member of the department. Council must stay within the authority granted them by statute, and this authority cannot be extended by implication. The case you cite is no doubt worthy of relief, but relief cannot be granted by virtue of this section.

The city would not be authorized under section 4383, General Code, to make an expenditure for the relief of the family of a policeman killed while in the discharge of his duty.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

409.

COUNTY'S LIABILITY FOR EXPENSES OF DEPUTY SUPERVISOR OF ELECTION IN PUBLISHING LIST OF CANDIDATES OF SCHOOL DISTRICTS—NO NECESSITY FOR CLERK OF SCHOOL BOARD TO RECEIVE A LIST OF CANDIDATES.

As the deputy state supervisor of elections is required by section 4998 to publish a list of the names of candidates for all school districts it is legal to pay out of the county treasury the expenses of making such publication.

It is not necessary for the clerk of the board of education to be furnished the names of candidates for members of the board.

COLUMBUS, OHIO, October 4, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of September 18th you submitted for my opinion the following:

> "Section 3897*a*, Revised Statutes, applied only to city school districts. The last clause of said section provides for publishing or posting a list of the names of the candidates by the deputy state supervisors of elections. Said provision of said section is now section 4998, General Code. Section 3970-11, Revised Statutes, now section 4839, General Code, seemed to apply to all districts and both sections as enacted in the Code seem applicable to all school districts. Question: Is it legal to pay out of the county treasury expenses incurred by the deputy state supervisors of election for posting notices under section 4998 outside of city districts? When nominations have been made by petition, there seems to be no way provided by statute by which the clerk of the board of education is to be furnished the names of candidates for members of the board. Is this necessary?

Section 3897*a*, Revised Statutes, provides as follows:

> "Boards of education in city school districts shall organize on the first Monday in January after the election held for members of the board of education by the election of one of their members as 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; they shall fix the time of holding regular meetings. Upon the organization of the first boards of education elected under this act, the previously existing boards of education are thereby abolished and said newly boards shall be their successors in all respects.
>
> "Not less than fifteen days before the election of members of boards of education, nominations of candidates therefor may be made by nomination papers, signed in the aggregate for each candidate by not less than twenty-five qualified electors of either sex of the school district, *except that in city school districts*, such nomination papers shall be signed by petitioners not less in number than one for every one hundred persons who voted at the next preceding general election in such city; *and whenever each of such candidates shall be so nominated and*

his or their names shall be presented to the county board of deputy state supervisors of elections of the county in which such district is situated not less than fifteen days prior to the ensuing election, the said board of deputy state supervisors of elections shall publish on two different days prior to such election the names of such candidates in two newspapers of opposite politics in the school district, if there be such printed and published therein, or, if no newspaper is printed therein, by posting such list of names in at least five public places in the school district."

Section 4997 of the General Code provides as follows:

"Nominations of candidates for the office of member of the board of education may be made by nomination papers, signed in the aggregate for each candidate by not less than twenty-five qualified electors of either sex of the school district, except in city school districts, such nomination papers shall be signed by petitioners not less in number than one for every hundred persons who voted at the next preceding general election in such city."

Section 4998 of the General Code provides as follows:

"When nominations of candidates for member of the board of education have been made by nomination papers filed with the board of deputy state supervisors, as herein provided, such board of deputy state supervisors shall publish on two different days prior to the election a list of the names of such candidates in two newspapers of opposite politics in the school district, if there is such printed and published therein. If no newspaper is printed in such school district, the board shall post such list in at least five public places therein."

Section 4839, General Code (which is, save for minor changes, identical with section 3970-11, Revised Statutes), provides as follows:

"The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, or the nature of the question to be voted upon."

By an examination of section 3897*a*, Revised Statutes, above set forth, it will be noted that while the first paragraph thereof applies solely to city school districts, that the second paragraph thereof is not so restricted in its operation, as it states that nominations for candidates for boards of education generally may be made by nomination papers signed in the aggregate for each candidate by not less than twenty-five qualified electors, but that in *city school districts* such nomination papers shall be signed by not less than one for each one hundred persons who voted at the next preceding general election in such city. This section was codified by the commission as section 4997 of the General Code, and is general in its application.

The remaining part of the second paragraph of said section 3897*a*, Revised Statutes, states that whenever each of such candidates shall be nominated, etc.,

and I construe such provision of said section to likewise be general in its operation. Said portion of said section was codified under section 4998, General Code, supra.

The provisions of said section 4998 of the General Code are general in their operation and apply to township, village and special school districts as well as to city school districts, and as said section provides that the board of deputy state supervisors *shall* publish on two different days prior to the election a list of the names of candidates for members of boards of education I construe the provisions of such section as mandatory upon the board of deputy state supervisors of elections, and that the same applies to *all* school districts.

I am, therefore, of the opinion that it is legal to pay out of the county treasury the expenses incurred by the deputy state supervisor of elections for posting a list of the names of such candidates as required by section 4998, General Code, outside of city districts.

Under section 4839, General Code, supra, it is made the duty of the clerk of each board of education to publish a notice of all school elections as therein provided, which notices shall specify the time and place of the election, the *number* of members of the board of education to be elected, and the term for which they are to be elected.

It is not, however, made the duty of such clerk to publish the names of the candidates to be voted upon, and, therefore, in answer to your second inquiry I am of opinion that it is not necessary that the clerk of the board of education be furnished the names of candidates for members of the board, his duty as defined by section 4839 being limited in that regard to publishing notice of the number of members of the board of education to be elected and the term for which they are to be elected.

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

B 412.

REPORTS AND OPINIONS OF THE BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—PUBLIC RECORDS.

The reports of examinations and all opinions and advices to public officials of the Bureau of Inspection and Supervision of Public Offices are public records and as such should be accessible to the public at any time during reasonable office hours.

COLUMBUS, OHIO, October 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your inquiry of August 1, 1911, in which inquiry you ask as follows:

> "Are the letter copying books of this office, containing instructions to our examiners, opinions and advices to public officials, public records which are accessible to the public at any time during reasonable office hours?
>
> "We might add that we have always considered the same as such and they have been accessible to anyone desiring to consult same, but desire your opinion on the matter."

The department of the Bureau of Inspection and Supervision of Public Offices was created by an act entitled "An act to create a bureau of inspection and supervision of public offices, and to establish a uniform system of public accounting, auditing and reporting, under the administration of the auditor of state." Said act provides in substance that there shall be in the department of the auditor of state a bureau of inspection and supervision of public offices, that the auditor shall be the chief inspector and supervisor with authority to appoint deputies and clerks, and it fixes the salaries and provides for the payment of their expenses.

In the case of the State of Ohio ex rel. vs. Shumate, in 72 O. S., 487, at page 491 of the opinion, the supreme court uses the following language:

> "It also provides upon the installment of the bureau for the appointment of examiners by the auditor with compensation fixed by the statute and for the examination by him or his deputies into the financial affairs of all public offices and that reports of such examinations be made *matters of record in said office.*"

And inasmuch as the department is entirely concerned in looking after public accounts of the state generally and of all of the counties of the state, and inasmuch as the reports of examinations made by the Bureau of Inspection and Supervision of Public Offices are made matters of record in said department, I am of the opinion that such records are public records and as such are open and accessible to the public within reasonable office hours, and I am of the further opinion that all opinions and advices to public officials are likewise public records and as such are accessible to the public any time during reasonable office hours.

I believe I have fully answered your inquiry and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 412.

BOARD OF EDUCATION—RIGHT OF TAXPAYER TO MAINTAIN MANDAMUS TO COMPEL DEPOSIT OF FUNDS AS PER STATUTORY REQUIREMENTS.

The duty of the board of education to deposit the money of the school district on competitive bidding is such an obligation of public interest and right as to permit an individual taxpayer to maintain a mandamus suit for its compulsion.

COLUMBUS, OHIO, October 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith acknowledge receipt of your communication of April 11, 1911, in which you enclose a letter of inquiry received by your department from Horace Holbrook, Esq., of Warren, Ohio.

I wish to say that the delay in answering your request has been due to the large number of matters which have come to this department for our consideration.

In his letter to your department, Mr. Holbrook inquires as follows:

"I wish you would also submit this letter to the attorney general without delay, as it concerns the enforcement of an important law which is practically nullified by the non-feasance of the local school boards. I refer to section 7604, General Code, as amended 101 O. L., 290, requiring school moneys to be deposited in banks at competitive bidding. This statute was passed April 25, 1904, and gave school boards the right to establish depositories and solicit bids from banks for school moneys at competitive bidding. The law was made mandatory May 10, 1910. Not the slightest attention has been paid to the law in this county. July 15, 1907, Examiner J. C. Fowler said in his Warren report: 'We would recommend that the board take advantage of the protection and profits granted under section 3968, Revised Statutes, and select a depository for the funds. Under the present arrangement the treasurer is provided with no protection, and the board is failing to get several hundred dollars annually that properly belongs to this school district.'

"The treasurer tells me that ever since he took the office he had labored in vain to have the board to observe this law. He frankly attributes their non-action to bank influence. You may judge whether he is right. There are three banks in Warren. The president of one is president of the school board; the cashier of another is a member; and the daughter of the president of the third bank is also a member.

"So far as I know not a school board in the county has taken advantage of the law to get interest on the funds. The school moneys of the county amount to about $260,000 a year, and in Warren to about $60,000. The Warren banks at the present time have about $30,000 of the local school money on which they pay not a cent of interest. One bank a few months ago bought $50,000 Warren school bonds, and not a dollar passed in the transaction. The bank simply credited the district with the amount, drew interest on the bonds and also had the use of the money until it was checked out from time to time for building purposes.

"I am informed by the treasurer that Examiner Fowler made an examination last May and again recommended taking advantage of the law. The clerk cannot find the report and thinks it was never filed.

"Now I am going to make an attempt to enforce this law in Trumbull county, and would be pleased to have the advice and assistance of the bureau and the attorney general's office.

"Monday, April 10, I will serve the enclosed demands on the prosecuting attorney and the city solicitor.

"I am not sure that a taxpayer's action in mandamus can be maintained in a district where there is no city or village solicitor. It appears from sections 4313, 4314, General Code, that such action is proper when the solicitor refuses to bring it, but I can find no analogous section applicable to a prosecuting attorney. Section 2921 defines the duties of a prosecuting attorney as to a restraining order, but says nothing about mandamus, and section 2922 does not in tenus confer the right upon a taxpayer to bring mandamus.

"It seems to me that it is an idle thing for your bureau to uncover violations of law unless the prosecuting attorney promptly and vigorously follows it up in the courts. When he refuses to act I presume the duty devolves upon the attorney general, but if he has no authority in these school matters I will bring the actions as a taxpayer if the statutes confer that right."

Mr. Holbrook in his letter inquires with regard to the depository laws of school funds and also as to the enforcement of said depository laws. This department construed sections 7604 and 7605 of the General Code (101 O. L. 290), 7606 and 7607, General Code (101 O. L. 290), in an opinion rendered to Harry D. Smith, city solicitor of the city of Xenia, Ohio, and I herewith enclose a copy of that opinion. This department held in that opinion that a board of education is without legal authority to deposit its funds in any bank without interest, and that no school funds can be deposited in any bank unless interest not less than two per cent. is paid upon such deposits.

Mr. Holbrook further inquires as to his right as a private citizen to institute a suit in mandamus to compel the respective boards of education of his city and county to deposit the school funds in accordance with section 7604, as amended, 101 O. L., 290; section 7605, amended, 101 O. L., 290; section 7606 and section 7607, as amended, 101 O. L. 290. In reply thereto, I desire to say that the supreme court of this state in the case of State ex rel. vs. Henderson, 38 O. S., at page 648, in the opinion thereof state the reasons as follows:

> "As regards the degree of interest on the part of the relator, requisite to make him a proper party on whose information the proceedings may be instituted, a distinction is taken between cases where the extraordinary aid of a mandamus is invoked, merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest, and, while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his rights must clearly appear. On the other hand, where the question is one of public right and the object of mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such, interested in the execution of the laws."

Therefore, I am of the opinion that under the holding of the court in the above cited case that inasmuch as this is a question of public right and that the object of the suit in mandamus would be to procure the enforcement of a public duty that Mr. Holbrook would have the legal right to institute a suit in mandamus for the purpose of compelling the respective boards of education of his city and county to deposit the school funds in accordance with section 7604 to 7607, inclusive, of the General Code, which sections of the General Code are fully set out in the opinion to which I have called your attention and cited above.

Section 12283 of the General Code provides for what purpose a writ of mandamus may be issued, as follows:

> "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

Section 12286 provides generally for the application for a writ of mandamus as follows, to-wit:

> "The application for the writ must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice."

In the case of State ex rel. vs. the Board of Education of Perrysburg township, 27 O. S., 96, the court held that:

> "Mandamus is the proper remedy to compel the board to appropriate moneys already in their treasury for that purpose, toward the payment of such bonds, and to levy such tax as may be necessary to complete such payments."

Therefore, it seems to me that the school boards in question can be compelled by suit in mandamus to deposit their money in banks as required by sections 7604, 7605, 7607 and 7609 of the General Code, as the same were amended by the 1910 session of the Ohio legislature, 101 O. L. 290.

In view of all the foregoing I am clearly of the opinion that a taxpayer can legally maintain a suit in mandamus to require school boards to deposit the money of such school districts on competitive bidding, as provided in sections 7604, 7605, 7607 and 7609 of the General Code, as amended, 101 O. L., page 290.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

E 412.

FEES OF MARSHAL, SPECIAL POLICE OFFICERS—AND REGULAR POLICE OFFICIALS FOR SERVICES IN MAYOR'S COURT—POWERS OF DISCRETION VESTED IN MAGISTRATE.

Where a marshal of a village, accompanied by a regular police officer and a special officer sworn in by a mayor, go to Salem, Ohio, about ten miles distant and are there joined by two special officers sworn in by the mayor of Salem, where they arrest nine men and are brought to Lisbon in charge of three officers who reside there, separate affidavits being filed and warrants issued for each person, seven of whom plead guilty and two of whom are bound over, the fees should be charged as follows:

The marshal under section 4387, General Code, 20 cents only for each person conducted by himself or his deputies or other officers into court and the other officers $1.50 each as assistants.

The total amount of the costs to all officers should be divided pro rata among the several defendants.

The magistrate may, however, allow such additional amount for transporting and sustaining prisoners as in his discretion seems necessary.

COLUMBUS, OHIO, October 6, 1911.

Hon. W. B. Moore, Village Solicitor, Lisbon, Ohio.

DEAR SIR:—I beg to acknowledge receipt of your communication of April 7, 1911, and I wish to apologize for the delay in this matter, which has been due

to the overwhelming volume of business that has been flowing into this department, much of which being of such a nature as to command almost my entire attention.

In reply to your inquiry, which is as follows:

> "The marshal of the village, accompanied by a regular police officer and a special officer sworn in by the mayor, go to Salem, Ohio, a city about ten miles distant, and are there joined by two special officers sworn in by the mayor of Salem. All of the officers then proceed to a room in Salem where they arrest nine men, who are brought to Lisbon in charge of the three officers who reside here. Separate affidavits are filed and warrants issued against each person, seven of whom plead guilty as charged, and the other two waive hearing and are bound over to the grand jury.
>
> "What fees, in your opinion, can be charged for mileage and what fees to cover a compensation paid by the mayor to the special officers employed, and in what cases?"

I beg to say that section 3347 of the General Code provides as follows:

> "For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: For services and return of copies, order of arrest, warrant, attachment, garnishee, writ of replevin, or mittimus, forty cents each, for each person named in the writ; service and return of summons, twenty-five cents for each person named in the writ; service and return of subpoena, twenty-five cents for one person, service on each additional person named in subpoena, ten cents; service of execution on goods or body, forty cents; on all money made on execution, four per cent.; on each day's attendance before justice of the peace, or jury trial, one dollar; each day's attendance before justice of the peace on criminal trial, one dollar; on each day's attendance before justice of the peace in forcible detainer, without jury, one dollar; sumoning jury, one dollar; mileage, twenty cents for the first mile, and five cents per mile for each additional mile; assistance in criminal causes, one dollar and fifty cents per day, each; transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate; serving all other writs or notices not herein named, forty cents, and mileage as in other cases; copies of all writs, notices, orders or affidavits served, twenty-five cents; summoning and swearing appraisers in case of replevin and attachment, one dollar in each case; advertising property for sale on execution, forty cents; taking bond in replevin, and all other cases, fifty cents; each day's attendance on the grand jury, two dollars."

For the fees of marshal section 4387 of the General Code provides as follows:

> "In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and *shall receive the same fees as sheriffs and constables in similar cases*, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, *nor*

shall he receive for guarding, safe keeping 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."

I am of the opinion, and which opinion is based upon section 4387 of the General Code, cited above, that the marshal of the village of Lisbon can only receive twenty cents (20c.) for each person conducted by himself or his deputies or other officers into the mayor's or police court, and that the regular police officer and the special officer sworn in by the mayor of Lisbon, and also the two special officers sworn in by the mayor of Salem are legally entitled to $1.50 each as assistants, which would be a total of $6.00 for the four officers.

It is further my opinion that the total amount of the costs of all the officers should be divided, pro rata, among the several defendants.

However, the magistrate may allow such an additional amount for transporting and sustaining prisoners as in his judgment seems necessary, and whatever amount so allowed is discretionary upon the part of the magistrate. I am,

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

A 417.

CLERKS AND ASSISTANTS IN AUDITOR'S OFFICE—POWERS OF COUNTY COMMISSIONERS TO AUTHORIZE COMPENSATION OF—LIABILITY OF AUDITOR FOR RECOGNITION OF ILLEGAL VOUCHER DRAWN ON EXCESS ALLOWANCES.

When the county commissioners have once resolved upon and fixed the allowance of the county auditor's office for clerk and assistants as provided by sections 2980, 2981 and 2629, a further allowance is beyond their powers. The county auditor is charged with knowledge of these limitations and if he allows vouchers drawn upon our excess allowance so fixed by the commissioners, recovery may be had against him for such amounts as he thus illegally warrants.

COLUMBUS, OHIO, October 10, 1911.

Bureau of Inspection and Supervision of Public Offices, Sam A. Hudson, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of June 3, 1911, you ask an opinion of this department upon the following:

"The following entry appears upon the journal of the proceedings of the commissioners of Preble county under date of July 25, 1910:

"'By reason of the quadrennial appraisement, and owing to the fact that the present force in the auditor's office is insufficient to complete the work within the stated time, we therefore order the auditor to procure the additional help to complete said work and such help be paid from the county fund.'

"The earnings credited to the fee fund, including the 25% additional allowance under section 2629, was at the time of this action exhausted by the payment of the salaries of the auditor and his deputy.

"Who, if any one, is financially responsible for the amount paid for extra clerk hire in the auditor's office under this alleged order and from whom, if any one, may the same be recovered in an action at law?"

Section 2980, General Code, as amended in 101 Ohio Laws, page 348, provides:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the *county commissioners shall fix an aggregate sum to be expended by them for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal.*"

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. *Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor.*"

Section 2629, General Code, provides an additional allowance for clerk hire in the auditor's office, when the real property is to be appraised, as follows:

"The county commissioners of the several counties shall 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."

The above statutes govern the allowance to be made for deputies, clerk hire and other assistants in the office of the county auditor. By virtue of section 2981 the compensation of such assistants shall not exceed the allowance made by the county commissioners.

It appears from your letter that the allowance made by the commissioners for the auditor's office, and also the additional amount allowed by section 2629, have been expended.

The resolution in question had the effect of increasing the allowance for assistants in the office of the auditor. The county commissioners have limited jurisdiction. They must act within the provisions of the statute. There is no provision of the statutes granting the county commissioners power to increase

an allowance for deputies and clerks of a county office after an allowance for the year has once been made. The resolution passed by the commissioners of Preble county set forth in your letter was therefore without authority of law and was void and illegal.

The last legislature has provided a means by which an additional allowance may be secured, but this law cannot affect your question.

The payment of the compensation of deputies and clerks is made by the county treasurer, upon warrant of the county auditor, as provided in section 2981, General Code.

In the case of Jones, Auditor, vs. Commissioners, 57 O. S., 189, the second syllabus finds that the auditor is not entitled to extra compensation for certain services therein enumerated, and the third syllabus reads:

> "The presentation by a county auditor to the commissioners, of a claim for any of such claimed services, and the drawing of money for the same from the county treasury, by means of his own warrant attempted to be authorized by an allowance by the commissioners, is a violation by such auditor of official duty, and a breach of that condition of his bond which provides for the faithful discharge of the duties of such office."

On page 217 of the opinion, Spear, J., says:

> "* * * We have already found that the several claims were all illegal; that is, there was no warrant of law for any claim whatever in either instance. This fact it must be presumed the auditor knew. Whether in fact he knew or not, it was his duty to know. The subject related to his own duties and his own compensation."

In the case in question the extra services were for clerk hire of the auditor. Compensation therefor was paid upon warrant of the auditor and was illegal. The auditor is presumed to know, and should know, the limitations placed upon him by law for clerk hire. And unauthorized resolutions of the commissioners would not protect him in drawing his warrant for payment of clerks employed under such resolution. The act of the auditor in drawing his warrant for such services was a violation of his official duty.

Recovery can be had from the auditor for all moneys paid from the county treasury for compensation of deputies, clerks and other assistants, over and above the annual allowance made by the commissioners and the twenty-five per cent. additional allowed in the years in which the real property is reappraised.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

419.

SHERIFFS—WHAT WRITS OF JUSTICE OF THE PEACE MUST BE SERVED IN CIVIL AND CRIMINAL CASES—STATUTORY PROVISIONS—DISPOSITIONS OF FEES RECEIVED.

A justice of the peace may issue writs to the sheriff and the sheriff is required to serve the same in civil cases only under the conditions provided for in 10242, *General Code, where service cannot be had upon a railroad company within the county in which the justice of the peace holds office. Such fees are earned by the sheriff in his official capacity and must be turned into the fee fund.*

A sheriff may be appointed special constable by a justice of the peace under 3331, *General Code, however, and may retain for his personal benefit the fees so earned.*

In criminal cases by virtue of 13500, *General Code, the sheriff is required to serve all warrants issued to him by a justice of the peace and the fee accruing to him thereby being perquisites adjunctive to his official capacity must be turned into the fee fund.*

COLUMBUS, OHIO, October 12, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter in which you inquire as follows:

> "May a justice of the peace issue writs to the sheriff and is the sheriff required to serve writs issued to him by a justice of the peace? If so, should the fees thereby earned be paid into his fee fund? If a sheriff is appointed special constable for a justice of the peace under section 3331, may the fees earned in such case be retained by the sheriff for his personal use?"

Replying to your inquiry, section 3334 of the General Code provides as follows:

> "All constables shall be ministerial officers in justices' courts, in their respective townships, in civil cases, and in their respective counties in criminal cases, and civil processes may be executed by them throughout the county, under the restriction and provisions of the law."

Section 10242, General Code, provides that, in civil cases before a justice of the peace, when the cause of action is against a railroad company, and the president of such railroad company does not reside in the county, and there is no person having charge of the ticket office or freight depot of such railroad company in said county, then the justice of the peace can issue summons to the sheriff of the county where such railroad company has its principal business office located. Said section reads as follows:

> "When the president of such company does not reside, and there is no such officer or depot in the county, then the justice of the peace shall issue a summons directed to the sheriff of the county where the prin-

cipal business office of the company is located, with an indorsement on the back of the writ, of the name of the postoffice to which it shall be returned. Upon the receipt of the writ, the sheriff shall forthwith serve it personally upon the president, if found, or by leaving a copy at the business office of such company with the person having charge thereof, and immediately return the writ to the justice issuing it, by mail, directed to the postoffice named on its back."

So that, it is my opinion, based upon the provisions of the above quoted section, that a justice of the peace cannot legally issue writs to the sheriff as such officer in civil cases, except as provided in said section 10242; and the sheriff is not required to serve writs issued to him in civil cases by a justice of the peace unless such writ is received by him in accordance with the provisions contained in the above section, to-wit: Section 10242, General Code.

In criminal cases, however, a different rule seems to obtain as to the serving of warrants by a sheriff, when such warrants are issued to him by a justice of the peace. Section 13500 of the General Code provides that:

"The warrant 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, to the marshal or other police officer thereof, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law."

My deduction therefrom is that in criminal cases a justice of the peace may issue warrants to the sheriff of his respective county, and when so issued to him the sheriff is bound to receive and serve such warrants.

Replying to your second question I am of the opinion that fees earned by a sheriff in serving writs issued to him in civil cases by a justice of the peace, by virtue of section 10242, General Code, should be paid by the sheriff into his respective county fee fund. Likewise, any fees earned by the sheriff in serving warrants issued to him in criminal cases by a justice of the peace by virtue of section 13500 of the General Code should be paid into the fee fund of his county.

Answering your third question, section 3331, General Code, and which you cite in your inquiry, provides as follows:

"A justice of the peace may appoint a constable or constables for a special purpose, either in civil or criminal cases:

"1. When there is no constable in the township;

"2. In case of disability of one of the regular constables in the township;

"3. When the constable therein is a party to the suit;

"4. When, from the pressure of official business, the constables therein are not able to perform the duties required by the office.

"The justice making the appointment shall make a memorandum thereof on his docket, and require the person appointed to take an oath, as in other cases."

In my opinion, under the above provisions, the sheriff in his respective

county is a ministerial officer of the justice courts of such county for serving warrants in criminal cases and cannot, therefore, be appointed a special constable in criminal cases by a justice of the peace of his county. As hereinbefore stated the sheriff, by virtue of being such officer, is legally required by the provisions of section 13500, General Code, to serve any warrants in criminal cases which are issued to him by a justice of the peace of his county.

It follows, therefore, that a sheriff may be appointed a special constable by a justice of the peace of his county only for the purpose of serving writs in civil cases, and he can be appointed such special constable in civil cases only when some one or more of the statutory grounds, enumerated in section 3331, General Code, makes it necessary.

Any fees that a sheriff may receive as special constable are no part of the receipts received by him as sheriff. In this connection I desire to quote section 2977, General Code, as follows:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

I am therefore of the opinion, in answer to your last question, that a sheriff who is appointed special constable by a justice of the peace under and by virtue of section 3331, General Code, can legally retain the fees so earned by him in that service for his own personal use, for the reason that such fees are not allowances or perquisites collected or received by him as compensation for his services as sheriff and do not, therefore, come within the provisions of section 2977, above quoted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

421.

EXPENSES OF SHERIFF—PAYMENT BY COUNTY COMMISSIONERS OF A LUMP SUM PER MONTH—NECESSITY FOR SWORN ITEMIZED STATEMENT.

Under the provisions of 2997, *General Code, as amended* 102 *O. L.* 93, *it is made mandatory that only the exact expenses of the sheriff be allowed upon a sworn itemized statement of the same.*

A motion of the county commissioners therefore providing for the reimbursement of the sheriff at the rate of $37.00 *a month for the purpose of covering such expense is invalid.*

COLUMBUS, OHIO, October 13, 1911.

Bureau of Inspection and Supervision of Public Offices, Sam A. Hudson, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of July 6, 1911, you ask an opinion of this department upon the following:

> "The board of county commissioners of Williams county recently adopted the following motion:

"'In conformity to amended section 2997 of the General Code of Ohio as approved May 6th, nineteen hundred and eleven, by the governor of Ohio, it is moved and duly seconded that the sheriff of Williams county, Ohio, be allowed the sum of $37.00 per month to cover all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office and to cover his necessary livery hire for the proper administration of the duties of his office.'

"In your opinion, is this transaction in accordance with said section 2997?"

Section 2997, General Code, as amended, 102 Ohio Laws, page 93, provides:

"In addition to the compensation and salary herein provided, *the county commissioners shall make allowances quarterly to each sheriff for* keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, *and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners* shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and *may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners.*"

This section authorizes the county commissioners to make allowance to a sheriff for "all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office," and they "may allow his necessary livery hire."

The rule as to the limitation placed upon the powers of the commissioners is laid down by Sutliff, C. J., on pages 415-416, of the opinion in the case of Beebe vs. Scheidt, 13 O. S., 406, as follows:

"But a different rule is generally applicable to inferior jurisdictions, which are governed in their proceedings strictly by statutory provisions. The general rule applicable to such inferior jurisdictions is, that in their proceedings they are to be held to the strict limits of their authority, as conferred and prescribed by the statute. And this rule is doubtless applicable to county commissioners as well as to justices of the peace."

In the case of State vs. Ashland County, 14 Ohio Dec. 568, the first syllabus is as follows:

"The office of county commissioner is a creature of statute, and the

incumbent thereof can exercise no power or do any act in his official capacity which will bind the county unless expressly authorized and done in the manner provided by statute; and when the statute conferring power directs what shall be done preliminary to the expenditure of public money, these requirements, if mandatory, must be complied with or the contract is illegal."

The resolution in question purports to make a monthly allowance for maintenance of horses and vehicles and for livery hire, in lieu of the amount actually expended by the sheriff for this purpose. This allowance may be less, or it may be more than is actually expended.

The courts held that the commissioners must act within the powers prescribed by statute, and the expenditure of money must be made in the manner provided by statute.

This section, 2997, General Code, provides what the commissioners shall pay for and what shall be done before it shall be paid. The language is plain and unambiguous. "The county commissioners shall make allowances quarterly to each sheriff for * * * all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office," and "may allow his necessary livery hire." The statutes also provides that "each sheriff shall file under oath * * * a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section * * * before they shall be allowed by the commissioners."

Nowhere in the statute is there an authority to make an allowance instead of the actual expenses. The last sentence of the statute requiring an itemized account of such expenditures before payment shows conclusively that no such authority was intended to be granted. Only the amount actually expended can be paid, and then only upon a sworn itemized statement of such expenditures. The resolution allows for the expenditures before they are made, while the statute makes it mandatory that such allowance cannot be made until the sworn and itemized account is filed.

The above resolution does not comply with the provisions of section 2997, General Code, as amended in 102 Ohio Laws, page 93, and is unauthorized in law.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

422.

PAYMENTS ON UNAUTHORIZED CONTRACTS—NO RIGHT OF RECOVERY BY MUNICIPAL CORPORATION WHERE PAYMENT WAS VOLUNTARY AND WITHOUT FRAUD OR MISTAKE—PUBLICATIONS IN NEWSPAPERS.

Liability for municipal corporation for publication of ordinances, resolutions, etc., in a newspaper must rest on express contract authorized by council and the amounts chargeable for such work specified in section 6251 are intended as designations of the maximum rate.

Where, however, such services have been performed and the maximum rate actually paid therefor, though no contract for the services had been authorized by council, no recovery may be had of the publishing company if the payment to them was voluntary and made without fraud, or mistake of fact, as there is no enabling statute authorizing any officer to make such recovery.

COLUMBUS, OHIO, October 13, 1911.

Bureau of Inspection and Supervision of Public Offices, Jos. T. Tracy, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of June 7, 1911, you ask an opinion of this department upon the following:

> "A contract was entered into with a certain newspaper for the publication of the ordinances of a city, in May, 1901. Such contract has never been superseded, but the newspaper, on and after May 4, 1903, the date of the going into effect of the Municipal Code, has charged the full statutory fee of $1.00 per square. Can recovery be made of the amount paid in excess of the said contract of May, 1901?
>
> "Contract and letter of solicitor enclosed."

The first paragraph of the contract in question provides:

> "Second party hereby agrees to do all the legal printing and advertising of the city of Salem, as provided by statute, and in accordance with the resolution passed by the council of the city of Salem on the 19th day of February, A. D. 1901, *for and during the legal existence of the present council of said city.* Said matter to be published in the Salem Daily News."

The contract does not specify how long it shall be in force, except as stated in the above paragraph. The contract is entered into "for and during the legal existence of the present council of said city." That particular council passed out of existence May 4, 1903, and the new council provided for by the Municipal Code, succeeded it. The limitation in time of this contract was to May 4, 1903. After that date it was binding upon neither party thereto.

The letter of the solicitor enclosed contains the following statement:

> "This contract was complied with until the new Municipal Code became effective and thereafter the publishers began charging the full legal rate, unknown to the various councils, up until about a year ago, when council discovered what was being done, and since then have been paying the full legal rate."

It is evident from this state of facts that there was no express contract with the publishers for public printing during the period after May 4, 1903, and until the discovery was made by council.

In the case of McCormick vs. City, 81 O. S. 246, it is held that no recovery can be had from the city for such publications unless there is an express contract therefor.

The syllabi of this case read as follows:

> "The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services.
>
> "Where the statute has not prescribed the person who shall execute such a contract in behalf of a municipal corporation, it is consistent with section 1536-653, Revised Statutes, for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

In that case the publications were alleged to have been made at the "request of said city, by its auditor and clerk of council, and approved by its city solicitor." The court held this was not sufficient. There must be an express contract authorized by council.

The duty of council in making this contract is set forth in the opinion of Price, J., on page 253, of said case, as follows:

> "* * * To this claim is added another, that section 4366, Revised Statutes (now section 6251, General Code), fixes the rates per square for each publication which left mere clerical duty for the clerk to perform in calculating the cost of publication. But it must be observed that this statute fixes maximum rate, and no minimum rate. Hence it is practicable to contract for a much lower rate than the maximum and thereby make large savings for the city or villages. The printing bills in the larger municipal corporations loom up to large proportions at times, and the legislature has not undertaken to prevent the obtaining the publication or advertising at as low rate as may be agreed upon."

Section 6251, General Code, provides the rates of legal advertising as follows:

> "Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to-wit: For the first insertion, one dollar for each square, and for each additional insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work, fifty per cent. may be charged in addition to the foregoing rates."

This section prescribes the maximum rate for legal advertising. It is permissible and desirable that a better rate be secured by contract. No payment can be made therefor without an express contract. As there was no express contract for the legal advertising done after May 4, 1903, payment therefor could not have been enforced against the city.

But payment has been made and it is now a question of its recovery.

The rule of recovery in such cases is laid down in the case of Vindicator Co. vs. State, 68 O. S. 362, the second and third syllabi of which are as follows:

> "But where a claim for such excessive publications has been presented to the board and allowed, and payment made by the treasurer on the warrant of the auditor prior to April 25, 1898, the prosecuting attorney cannot maintain an action, in the absence of both fraud and mistake of fact, to recover back the money.
>
> "The act of April 25, 1898 (93 O. L. 408), clothes the prosecuting attorney with power to recover back money so illegally drawn from the treasury on and after the date of its passage."

On page 370 of the opinion, Spear, J., says:

> "* * * The situation then was that the company had received moneys of the county, in a way apparently regular but to which it was not in strict law entitled. But an accounting officer, the proper officer, had paid the money voluntarily, upon vouchers issued by another accounting officer, in form duly approved, and it is difficult to see why in these respects, as to a stranger, they did not represent the county, and why the facts do not present a case of voluntary payment with the usual legal result that, in the absence of an enabling statute and where there is no showing of fraud or mistake of fact, there can be no recovery back. The rule recognizes the fact that the money paid was unjustly paid; that the claim itself was illegal, one which the party, had he sought to do so, could have resisted. He chose not to resist but to pay, and he cannot afterwards ask the law to rectify his mistake."

Section 2921, General Code, grants unto prosecuting attorneys power to recover funds of a county that have been misapplied or illegally paid. This authority is not extended to municipal funds. There is no such law authorizing the city solicitor, nor any other city official, nor the city, to recover funds illegally paid or misapplied. Without such authority the rule laid down in 68 O. S. 362, supra, must apply.

Section 4311, General Code, prescribes the duties of a city solicitor as follows:

> "The solicitor shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption."

This statute authorizes the city solicitor to apply for an injunction restraining the misapplication of funds, but grants no authority to recover funds after they are paid out.

Without an authority of statute the rule for the recovery is as follows: If the payment of the money for such publications was voluntary and was made without fraud, or mistake of fact, there can be no recovery from the publishing company, although payment might have been resisted in the first instance.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

427.

MUNICIPAL CORPORATION—NO RIGHT TO INVEST IN PRIVATE ENTERPRISES—WHERE PAYMENT IS MADE ON ILLEGAL CONTRACT NO RECOVERY MAY BE HAD AT LAW—RECOVERY IN EQUITY—TRUST FUND, RIGHT TO FOLLOW—ACTION AGAINST OFFICIALS.

A municipal corporation cannot financially aid or be pecuniarily interested in any joint stock company, corporation or association, or private business enterprise, for the reasons that:

1. *It is constitutionally prohibited in Ohio;*

2. *It is not authorized by statute, therefore a taking of private property without due process of law.*

Under these rules the payment funds raised by an issue and sale of bonds, showing on their face their intended devotion to the purpose of road repair work, which bonds are in turn to be paid for by the levy of taxes, to a manufacturing firm, for the consideration of locating in said village is illegal.

Considering the application of the following rules:

I. *Money paid under mistake of law cannot be recovered.*

II. *Courts will not permit a municipal corporation to take advantage of the wrong of its officers and whilst retaining the benefits of an illegal transaction, to recover a consideration paid by it.*

III. *Courts will not interfere for the purpose of enforcing or protecting any alleged rights growing out of an illegal transaction.*

IV. *No authority is conferred by law upon any officer to institute or cause to be instituted any action for recovery of moneys illegally expended by village officers.*

There can be no recovery of funds so expended at law.

Of the above rules the application of number two must be eliminated by reason of the fact that the village cannot be said to have technically received any benefit.

These circumstances, however, disclose the existence of grounds for procedure in equity. As the money expended was a trust fund devoted to a specific purpose held by the municipal corporation as trustee in behalf of the taxpayers, as cestui que trusts, the village or the taxpayer may by appropriate proceedings in equity compel the repayment of the money thus illegally expended, by the corporation or firm which received it.

As equity will follow a trust fund the plant and all tangible property of the firm may be proceeded against.

Also inasmuch as the officials through whose acts the deal was consummated were guilty of a breach of trust and presumably a fraud, the bureau should also make a finding against them.

COLUMBUS, OHIO, October 17, 1911.

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 October 6th, submitting for my opinion thereon the following question:

> "A village issued $10,000 of street repair bonds. The proceeds, except the premium and accrued interest, were donated and turned over to a manufacturing firm as an inducement for locating in said village

Is such action illegal and should our examiner make a finding for recovery? If so, against whom?"

The constitution of this state, article VIII, section 6, provides as follows:

> "The general assembly shall never authorize any * * * city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association."

Possibly, this section does not apply to the case which you state, as the firm to which the credit of the village has been loaned might not be held to be "a joint stock company, corporation or association" within the meaning of the constitutional provision. Such a distinction, however, is, in my judgment, immaterial for the following reasons:

1. All municipal corporations are governments of delegated powers. Cities and villages as such, as well as the officers of such municipalities, have no powers which are not conferred upon them by express provisions of statute, enacted under article XIII, section 6, of the constitution, or which flow by necessary implication from such express power. The statutes of this state, being carefully examined, will disclose that the general assembly has not sought to delegate to municipal corporations the power to aid by the use of public money or moneys, for the payment of which the public credit is pledged, any private enterprise, excepting, possibly, such private enterprises as assist the municipality in the discharge of its own public functions, as children's homes, hospitals and the like. Therefore, the act of the village officers, described by you, is illegal because it is beyond the corporate powers of the village itself, and, hence, outside of the authority of the officers.

2. Even if there were no such constitutional provision as article VIII, section 6, above quoted, and even if the general assembly had attempted to pass a law authorizing cities and villages to loan money to, or borrow money for and on account of, manufacturing concerns, as an inducement to secure their location in the municipality, such an act would, in my opinion, be unconstitutional and void, on the principle announced in Loan Association vs. Topeka, 20 Wallace, 365. That principle is, of course, that taxation must be for a public purpose and that the attempted exercise of the power of taxation for purposes other than public purposes constitute a taking of private property without due process of law. See also:

Lowell vs. Boston, 111 Mass. 454.
State vs. Osawkee Tp., 14 Kansas, 418.
Allen vs. Inhabitants of Jay, 60 Mo., 124.
Brewer Brick Co. vs. Brewer, 62 Mo., 62.
Bissell vs. Kankee, 64 Ill., 249.
Mather vs. Ottawa, 114 Ill., 659.
Bank vs. Iowa, 20 Wallace, 655.
Weisler vs. Douglas, 64 N. Y., 91.
Feldman vs. Charleston, 23 S. C., 57.
Dillon vs. Municipal Corporations, 5th Ed. Sec., 319.

In connection with these authorities, reference may be made to the interesting line of decisions relating to municipal aid of railroad enterprises, with respect to which judicial opinion has now crystallized on the proposition that

such enterprises are sufficiently public in their nature to permit taxation for their support in the absence of constitutional provisions like section 6 of article VIII. In so holding, however, the courts have very carefully limited their decisions to railway enterprises, and have distinguished the question as to the validity of aid by taxation to purely private enterprises.

It might appear that the infirmity in the transaction described in your letter is less fundamental than suggested by the authorities above cited. The bonds issued by the village, of which you speak, were lawfully issued in the first instance; that is to say, being issued in conformity with the statutes, they recite on their face that they are for the purpose of repairing streets. As against bona fide holders of such bonds, the defense on the part of the village could not have been made, that the real intention of the village authorities was to raise money in aid of a private enterprise. The bonds are therefore a valid debt of the municipality. However, all the principles above referred to apply, inasmuch as there is no real distinction between levying taxes for the express purpose of aiding a private enterprise and borrowing money, ostensibly for other purposes, but really for such prohibited purposes. and discharging the loan out of the proceeds of taxation.

Upon the foregoing elementary principles, there is no doubt whatever that the payment of the funds of a village to a manufacturing firm, as an inducement for locating in said village, is illegal, whether said funds are funds already raised by taxation or funds raised by the issue and sale of bonds, which bonds in turn are to be paid for by the levy of taxes.

This point being established, the further question is raised in your letter as to whether or not the sum so paid may be recovered from the firm which has received the same. As a defense in an action for recovery of any such funds, the recipient of them would probably plead a contract; it would be asserted that the money was paid as a consideration for the agreement of the manufacturer to locate in the village; that said agreement was entered into by and between the manufacturer on the one side, and the officials of the village on the other. It would also be asserted that though this may have been an illegal contract, and the payment may have been illegal, yet the money could not be recovered because of the application of one or all of the following principles:

1. Money paid under mistake of law cannot be recovered back.

2. Courts will not permit a municipal corporation to take advantage of the wrong of its officers and, retaining the benefits of an illegal transaction, to recover a consideration paid by it.

3. Courts will not interfere for the purpose of enforcing or protecting any alleged rights growing out of an illegal transaction.

4. No authority is conferred by law upon any officer to institute or cause to be instituted any action for the recovery of moneys illegally expended by village officers.

Inasmuch as the village has clearly been wronged, and inasmuch as it is to be presumed that for every such wrong the law or equity affords a remedy, and inasmuch also as the manufacturing concern, in the case you state, has received all the benefits of the wrongful transaction, the foregoing three possible defenses ought, in my judgment, to be carefully considered with a view to determining the form of the action which would be appropriate to enforce the rights of the village, if any.

In Cincinnati vs. Gas Light & Coke Company, 53 O. S. 278, the city by its cross petition, in an action against it by the Gas Light & Coke Company, with which it had a contract for gas to be furnished to the city, alleged that because of a misconstruction of the contract its fiscal officers had paid excessive amounts to the Gas Light & Coke Company. All the courts refused to allow the claim

of the city on its cross petition, and with respect to this feature of the case the supreme court used the following language, in the third branch of the syllabus:

> "Payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and if voluntary cannot be recovered back."

The effect of this decision, then, was to apply to a municipal corporation, the principle applicable to individuals, namely, that voluntary payments under a mistake of law are not recoverable.

Again, in Vindicator Printing Company vs. State, 68 O. S. 362, the action was by the prosecuting attorney, on behalf of the county and in the name of the state, against the printing company, to recover sums, paid to it for publishing certain legal notices, in excess of the sums due for lawful publication. The court held the action maintainable solely by virtue of the provisions of what was then section 1277, Revised Statutes, which authorized the prosecuting attorney to "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." There is no question as to the reasoning of the court; not only is it clearly and concisely stated by Judge Spear, on pages 370-371, but the judgment of the court could only have been predicated upon such reasoning. That judgment was that as to payments made prior to the passage of section 1277, Revised Statutes, there could be no recovery on the part of the county, notwithstanding the entire illegality of such payments and the entire lack of authority in the county commissioners to enter into contracts supporting such payments, or to make compromises ratifying them.

In fact, it seems to be the perfectly established rule in this state, if these cases are to be taken as a guide, that a municipal corporation is subject to the rule that money paid voluntarily under mistake of law is not recoverable.

The second principle above referred to was laid down in State vs. Fronizer, 77 O. S. 7. In that case section 1277, Revised Statutes, which was held to authorize recovery, in the Vindicator Printing Company case, supra, was decided to be insufficient to sustain the recovery by a county of money paid by it for a bridge under a contract, void because of failure to comply with the statute regulating the manner of entering into such contract. Recovery was denied on the ground that the county had not offered and could not in reason offer to return the bridge, and that in equity and justice a readiness to put the opposing party in statu quo is a condition precedent to the maintenance of an action under such circumstances. This principle, however, may be dismissed from consideration in the case you present. It applies only where the opposite party has parted with a thing of value to the municipality. At least that is the ground relied upon by the court in distinguishing State vs. Fronizer from Vindicator Printing Company vs. State. The following language of Judge Spear in the former case, on page 17 of the report, establishes this point:

> "Vindicator Printing Company vs. State, 68 Ohio St., 362, * * * is authority for the proposition that there may be a recovery back by the prosecuting attorney where the money has been paid for the publishing of certain notices the publication of which was not authorized by law. The publications were not only without authority of law but they were of no value to either the county or the public. Therefore no property of the company had been obtained by the county."

The learned judge could not have meant that the newspaper in the Vindicator Printing Company case had not parted with a thing of value to it; it devoted its columns to the publication of the notices in question when it might have used them for other profitable purposes. But these publications were of no value to the county, therefore the county was not subject to the equitable rule requiring the return of what it had received, as a prerequisite to recovery of what it had paid. In the bridge case, however, the public had, through the illegal contract, acquired a thing of value to it and the court would not permit it to have both the bridge and the money which it had paid for it.

In the case which you present the manufacturing concern has in a sense parted with a thing of value to it, namely, its right of locating its plant wherever it might choose. The municipality, however, has not received a thing of value, in a technical sense. It might be argued that the location of a manufacturing plant in a given community is a benefit to all the citizens of that community, and to the community itself, considered as a public corporation, because it brings to the community persons and property which would not otherwise be located there, because it gives employment to persons already residents of the community, and because it tends to enhance the tax duplicate of the corporation. These benefits, however, are in my opinion too remote to subject the municipality to the operation of the rule of State vs. Fronizer. I have already pointed out the fact that the law is that the securing of the location of a manufacturing concern in a municipal corporation is not a public purpose for which taxes may be levied and expended. As corollary to this rule it follows, I think, that such location is not a thing of value to the public.

Again, even if by the location of a manufacturing concern in a municipal corporation the municipality could be said to have acquired a thing of value, the thing acquired could be no more than the obligation of the corporation to remain in the municipality. If no such obligation exists, then, there is nothing which the corporation can "return" as required by the rule in State vs. Fronizer.

From all these considerations, then, it appears that the manufacturing concern has been the recipient of a mere gift on the part of the village, in return for which the village has received nothing. Therefore, the case is not only more like that of Vindicator Printing Company vs. State, than like that of State vs. Fronizer, but it is even stronger than the former case. Accordingly, the second of the four principles upon which reliance might be placed to defeat recovery by the village of the money paid by it under the circumstances stated by you does not apply.

The third principle, that courts will not interfere for the purpose of enforcing or protecting alleged rights growing out of an illegal transaction, but will leave the parties thereto as it finds them, is a well settled rule of law. Doubtless, it would be applied to municipal corporations in the same manner in which the first principle, above stated, has been applied to them by the courts, although I know of no decision in this state upon the exact point. Generally, it may be stated of the first and third principles that insofar as the mistaken, fraudulent or illegal acts of the agents and officers of a municipal corporation can bind the municipality or work an estoppel against it, either in law or in equity, these principles must be applied when such agents or officers have misapplied the funds of the corporation, in the absence of a statute specifically authorizing recovery by the municipality of the sums so misapplied.

This general statement leads to the consideration of the fourth principle, above referred to. In Vindicator Printing Company vs. State it was held that where defenses like the first and third, above mentioned, are, upon the facts available, in favor of one from whom a municipal corporation seeks to recover

money wrongfully paid from its treasury, they are valid unless prevented by a statute like section 1277, Revised Statutes. In the case of a village, no such statute exists. As to *city* solicitors it is provided by sections 4311 to 4314, inclusive, that that officer may, in the name of the corporation, enjoin the misapplication of the funds of the corporation; the abuse of its corporate powers; the execution of a contract made in its behalf, where illegal; may apply in the name of the corporation for the forfeiture of a contract or grant of the municipality in a proper case, or may bring mandamus to compel the performance of an official duty; if he fails in the performance of his duty in these respects it is further provided by sections 4314 to 4316, inclusive, General Code, that a taxpayer may, upon demand of the solicitor and refusal by him to bring such suit or proceeding, institute the same in his own name on behalf of the corporation. These sections, however, neither authorize the recovery of money illegally paid from the treasury of a municipal corporation, nor do they apply to villages. There is no corresponding section relating to villages; therefore, a village is, with respect to a suit such as that of which we are speaking, in precisely the same situation as a county was held, in Vindicator Printing Company vs. State to have been prior to the enactment of section 1277, Revised Statutes.

Seemingly, then, from all these considerations, a municipality is precluded from recovering its funds illegally paid out by its officers, regardless of the nature of the illegal payment and regardless also of the benefit or lack of benefit accruing to the municipality by virtue of the transaction.

Examination of the cases cited discloses the fact that all of them are actions of law for the recovery of money had and received. In all of them the court determined the legal rights of the city or county only. The court was not called upon in any of these cases to consider the equitable rights of the citizens and taxpayers of the political subdivision, or those of the government itself, considered as a trustee. In all of these cases the acts of the officers of the city or county were properly deemed and considered as being the acts of the public. In so regarding the official acts of the public officers involved the courts are but following an established principle, particularly applicable to municipal corporations as distinguished, for instance, from counties. Such corporations like private corporations can act only by and through their agents and officers, and in all cases the acts of such agents and officers are conclusively presumed *in law* to be the acts of the corporation.

Equity, however, refuses to be bound by a rule so hard and fast as this. Rather, it recognizes rights which the law does not recognize, and applies its peculiar appropriate remedies for the enforcement of such rights.

Dillon on Municipal Corporations, Fourth Edition, section 914, contains the following lucid statement, made in discussing the right of a taxpayer to maintain a proper action regardless of statute:

> "In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property under circumstances presently to be explained—has, without the aid of statute provision to that effect, been affirmed or recognized in numerous cases in many of the states.
>
> "It is the prevailing, we may now add, almost universal doctrine on

this subject. It can, we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their misuse. It is better that those immediately affected by corporate abuses should be armed with a power to interfere directly in their own names than to compel them to rely upon the action of a distant state officer. The equity jurisdiction may, in such cases, usually rest upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies at law. It is advisable, in view of its importance, briefly to examine the doctrine above mentioned, and the grounds upon which it rests, in the light of some of the leading judgments of the courts, the better to see its scope, limitations and application.

"The doctrine of the preceding section is also supported by an analogy supplied by a settled rule of equity applicable to private corporations. In these the ultimate cestuis que trust are the stockholders. In municipal corporations the cestuis que trust are in a substantial sense the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of a corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant and particularly any taxable inhabitant, be allowed to maintain in behalf of all similarly situated a class suit to prevent or void the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist they are liable to be plundered, and the taxpayers and property owners on whom the loss will eventually fall are without effectual remedy."

That is to say, a municipal corporation itself holds title to the funds in its treasury, raised by taxation, only as trustee, in a sense, for all of its inhabitants and taxpayers. In the discharge of its trust it is limited by the condition that it expend the moneys only in pursuance of enterprises upon which it is permitted by the constitution and laws to embark. The corporation considered as an entity in turn commits the disbursement of its funds to certain officers, legislative and executive. These officers are, in the legal sense, agents of the municipality; but they are also, in the equitable sense, its trustees, and those of the inhabitants and taxpayers of the corporation; the funds in their possession are trust funds upon which the accomplishment of certain trust purposes has been charged.

The above quoted paragraphs from Dillon on Municipal Corporations were relied upon by Cook, J., in delivering the opinion of the circuit court in the

case of Walker vs. Dillonvale, 11 C. C. N. S. 385. That action was one wherein the taxpayers brought suit in the name of the village to recover from certain members of council, fees alleged to have been illegally drawn by them. The action, however, was not in law but in equity. Though the prayer of the petition was for a money judgment, the court treated the case as an appeal to the chancery side and upon the authorities therein cited, which I shall not herein refer to, held that inasmuch as the law, because of the three principles already referred to in this opinion, afforded no remedy and inasmuch also as an equitable right existed and had been invaded equity would assert its jurisdiction and apply a remedy to suit the case, even though that remedy take the form of a decree requiring the payment of a certain sum of money.

This decision, insofar as it related to the right of a taxpayer to sue in equity on behalf of a village to recover money illegally drawn from the village treasury, was affirmed in Walker vs. Dillonvale, 82 O. S. 137. Additional authorities are cited in the opinion by Judge Summers, sustaining the principle that is laid down by Judge Cook in the court below.

By this decision it is settled, then, in this state, that a taxpayer of a village may sue in equity to compel repayment of money illegally drawn from the treasury of a village.

The decision in reality goes further than this; it also establishes the right to trace the funds of a municipality, as trust funds, into the hands of strangers; that is, persons other than officers. It might seem that because the original defendants were officers of the village the case could not necessarily be relied upon to sustain a suit against such a stranger. On page 147 of the report, however, Judge Summers uses the following language:

> "The object of the present suit is to recover from the defendants personally and not as councilmen, money averred to have been illegally paid to them from the village treasury. No judgment or relief against them as officials is asked, and we think they as councilmen are misjoined as defendants."

The court then decided the case upon the theory, not that the defendants were guilty of misappropriating money from the village treasury, but upon the theory that they had received money which some one, not necessarily themselves, had misappropriated from the treasury and paid to them.

I think that the case is also authority for holding that the village itself may, in its own name, maintain a proper equitable action to compel the repayment into its treasury of moneys illegally drawn therefrom. Though the court held that the action should have been brought in the name of the taxpayers, on behalf of the village, yet, it is clear that the rights ought to be enforced were, in a sense, those of the village; that is to say, the decree of the court was that the money should be paid into the treasury of the village, and the village itself is a corporation having the power to sue and be sued. Surely, it may sue in its own name to recover for the use of its own treasury, moneys illegally drawn therefrom. This follows from the elementary provisions of our code of civil procedure, that actions may be brought in the name of the real party in interest.

There is no officer of a village who is authorized to bring such an action. The proper procedure, as you are doubtless aware, is for council to legislate upon the subject, determining to bring the suit and employing counsel to prosecute it.

Upon all the foregoing authorities, then, and for the reasons stated, I am of

the opinion that while no action could be maintained at law by a village or any officer thereof, for the recovery of moneys illegally paid by it to a manufacturing concern as an inducement for the location of its plant within the corporate limits, yet, the village or a taxpayer thereof might, by appropriate proceedings in equity, compel the repayment of the money, thus illegally expended, into the treasury by the corporation or firm receiving it.

I may add that the specific case which you present affords a particularly apt instance of the application of the trust fund doctrine. By section 3804, General Code, it is provided that an unexpended balance remaining in a fund created by an issue of bonds shall be transferred to the sinking fund, to be applied in payment of the bonds. The manifest intention of this section is that money derived from the sale of an issue of bonds shall be used for the declared purpose of the issue, or for the payment of the bonds and for no other purpose whatever. This fact would have, perhaps, been sufficient as a basis upon which to hold the payment of the village's money to the manufacturing concern illegal, although the illegality of such payment is established by other reasons even more fundamental, as heretofore pointed out. But section 3804 seems to establish the conclusion that not only is a general trust for municipal purposes engrafted upon the proceeds of a bond issue, but also a specific trust, to the effect that the money shall be expended for a single definite purpose. For this reason I have not the slightest doubt that a court would have no difficulty in applying the equitable doctrine above referred to and in restoring to the treasury the money drawn from it under the circumstances which you describe.

A complete discussion of the subject would include analysis of the manner in which the remedies of equity are applied in a case like this. The general principle may be thus stated: Equity will follow a trust fund so long as it can be distinguished, until it reaches the hands of an innocent purchaser without notice. Whether in a given case its commingling of such a trust fund with other funds of all into whose hands it has come with notice would defeat the application of the remedy, is a question which it would not be profitable to discuss in this opinion, inasmuch as the plant and other tangible property of the manufacturing firm, described above, may undoubtedly be seized by a court of equity in aid of the enforcement of its decree.

I therefore advise that in the first instance your bureau, upon the facts above stated, make a finding for recovery in favor of the village against the manufacturing firm.

At the same time it is my opinion that the bureau should make a finding for recovery against the officials through whose act the money was drawn from the treasury. All such officers who participated in such action are guilty of a breach of trust and presumably a fraud, and if the city loses thereby, through the failure of the corporation to recover the money from the manufacturing firm, or through the insolvency of the latter, then, in my judgment, the village is entitled to recoup itself for the injury which it has suffered against its guilty officers.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General

A 428.

MUNICIPAL CORPORATIONS — PUBLIC SERVICE DEPARTMENT — CONTRACTS FOR SUPPLY OF WATER TO OUTSIDE MUNICIPALITIES OR INDIVIDUALS—RULE OF UNIFORMITY.

Where the service department of Marietta, Ohio, acting under authority of the council let a contract to furnish water to one Geo. W. Hunter at a place across the Ohio river at a less rate than was charged by the department to consumers of water within the city of Marietta, it not appearing whether Hunter represented a municipal corporation or a private enterprise, held:

I. *If the contract was one to Hunter as a representative of the city of Williamstown, W. Va., it was illegal for the reason,*

(a) *That the latter municipality was not within Ohio, and*

(b) *Being separated from Marietta by the Ohio river it could not be deemed "contiguous" to that city within the meaning of section* 2425, *Revised Statutes, which was in force at the time the contract was made.*

II. *If the contract was one to Hunter as a private individual or as the representative of a private enterprise the same was illegal for the reason that it constituted a violation of the rule requiring that all sales be made by a uniform rule and that the rate be made the same to all persons under similar circumstances.*

COLUMBUS, OHIO, October 18, 1911.

Bureau of Inspection and Supervision of Public Offices, Jos. T. Tracy, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of April 6, 1911, you ask an opinion of this department upon the following:

> "May the service department of a city acting under authority granted by the council make a contract to furnish water through its municipal waterworks to a party or corporation operating a distribution system without the city limits at a less rate per thousand gallons than is allowed to large consumers of water within the city limits as fixed by the regular adopted rates for such service?
>
> "Copy of contract and ordinances enclosed herewith, which you will please return for the use of our examiner.

The contract was entered into on October 6, 1906, by the city of Marietta with one George W. Hunter, to supply him water at the rate of 8 cents per thousand gallons for amounts less than 25,000 per day, 7 cents per thousand gallons for amounts less than 50,000 per day, and 6 cents per thousand gallons for amounts of more than 50,000 per day. The water is to be taken at the intersection of Fourth and Hart streets, and the contract runs for ten years. There is nothing in the contract showing that it was for "surplus water," nor does the contract show for what purpose the water was to be used.

The rules and regulations of the waterworks' department of Marietta show the rates to be 35 cents per thousand gallons for amounts of from 100 to 500 gallons per day, and gradually ranging from this price down to the rate charged the larger consumers to whom the rate is 12 cents per thousand gallons for amounts from 10,000 to 20,000 gallons per day, and 10 cents per thousand for amounts 20,000 gallons per day and above.

The ordinance authorizing the contract does not state the purpose for

which the water was to be used, but the minutes of the meeting of council at which the ordinance was passed, show:

> "Underwood of the special committee on a contract to *furnish water for the town of Williamstown*, reported in favor of an ordinance giving the board of public service to enter into such contract with Geo. W. Hunter and others. Said ordinance was read for the first time. On motion of Underwood seconded by Wharff, etc.
>
> "An ordinance authorizing the board of public service to enter into a contract wtih Geo. W. Hunter and others.
>
> "Be it ordained by the council of the city of Marietta, state of Ohio:
>
> "Section 1. That the board of public service be and they are hereby authorized to enter into a contract with Geo. W. Hunter and others for furnishing of water at the best terms and prices obtainable per thousand gallons meter measurement."

The first steps by the city to secure this contract appear to have been taken by the board of public service and the resolutions of the board in part, read:

> "WHEREAS, Parties representing a company to furnish the town of Williamstown, West Virginia, with water for domestic and manufacturing purposes have applied to the board of public service for water from the waterworks, and
>
> "WHEREAS, The supply of water at our pumping plant is far in excess of any immediate demands that may be made upon the waterworks, and whereas the taking on the business of the company now applying would largely increase our water receipts, with a very small increase in cost of operating the plant; be it
>
> "*Resolved*, That it is the sense of this board that a contract be entered into with the applicants upon an equitable business basis, and be it further resolved that the city council be requested to give the necessary authority for the execution of the contract above referred to for a term of years to be agreed upon."

These are matters of public record and the contract refers to the above ordinance as follows:

> "This agreement is made under authority of the city council of the city of Marietta, Ohio, as shown by an ordinance passed on the 21st day of September, 1906, entitled an ordinance authorizing the board of public service to enter into a contract with George W. Hunter and others."

This contract was presumably authorized and entered into by virtue of section 3973, General Code, which provides:

> "A municipality which has waterworks may contract with any other municipality for the supply of the latter with water upon such terms as are agreed upon by their respective councils. *A municipality which has water may dispose of surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as are agreed upon by the director of public service or trustees and approved by the council thereof.* Moneys received for such surplus water in either case shall be ap-

plied to the payment of the principal and interest of the bonds issued for the construction of such waterworks, or other expenses incident to the maintenance of the waterworks, but no lease shall be made for a longer term than twenty years."

At the time this contract was entered into the first sentence of this statute, then section 2425, Revised Statutes, read:

"Any city or village which has established, or hereafter establishes waterworks, may enter into a contract with any *contiguous* city or village for the supply of the latter with water, upon such terms as shall be mutually agreed upon by the councils of the respective municipal corporations."

The word "contiguous" was stricken out and the words "any other" were inserted by act found in 99 O. L. 249, approved April 30, 1908.

The authority of the director of public service to assess water rents is provided in section 3956, General Code, which reads:

"For the purpose of paying the expenses of conducting and managing the waterworks. such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

The legality of this contract entered into with George W. Hunter is in question. All formalities pertaining thereto appear to have been properly taken and it was authorized by ordinance of council, although it does not appear that the rates were afterwards approved by council.

The question then is, was the making of this contract authorized by section 3973, General Code? The question asked in your letter is as to the effect of the difference in the rates.

The regular rate for from 10,000 to 20,000 gallons per day is 12 cents per thousand gallons, while the contract fixes the rate at 8 cents per thousand gallons for amounts less than 25,000 gallons per day, one-third less than the regular rates. For more than 20,000 gallons per day the regular rate is 10 cents, while the contract provides a rate of 7 cents for amounts less than 50,000 gallons per day and a rate of 6 cents for amounts above 50,000, making a reduction of from 30 to 40 per cent.

Upon the face of the contract, Mr. Hunter stands in no isolated condition, but takes water under the same conditions and circumstances that other large consumers take water.

There are two authorities granted by section 3973, General Code, one to sell to municipalities, the other to sell surplus water for manufacturing or other purposes.

This section has been construed by the circuit court in the case of Wright vs. Kennedy Heights, 15 Cir. Dec., 409, the syllabus of which is as follows:

"The provisions of the second clause of section 2425, Revised Statutes, that, * * * 'any city or village which has waterworks is here-

> by authorized and empowered to dispose of any surplus water for manufacturing or other purposes,' is to be understood as referring to consumption for private enterprise alone, and the phrase, 'or other purpose' as qualified by the preceding word 'manufacturing.' Moreover, as it is provided by the first clause of the section that for one municipal corporation to supply another with water there must be a contract under terms 'mutually agreed upon,' and, consequently, mutually enforceable, and such a contract for more surplus water not being mutually enforceable, it is not authorized by this section."

The contract in question must come under one or the other of the provisions of this statute, but cannot come under both. Upon the face of the contract it must come under the clause for selling surplus water for manufacturing or other purpose. From the records of council and the board of public service the water was for the use of a municipality, although contracted for through a third party.

First, let it be assumed that this contract was entered into by virtue of the first part of this statute, a sale to a municipality. At the time this contract was entered into the statute authorized a contract with such municipalities as were "contiguous" to the municipality furnishing the water.

The town of Williamstown, W. Va., is not contiguous to Marietta, as they are separated by the Ohio river. The city of Marietta could not have entered into such contract in 1906, directly with Williamstown, and if this contract was an attempt to do indirectly what could not have been done directly, it should be held null and void as against public policy.

If this is a contract between two municipalities, it would not be legal for another reason.

In Peck on Municipal Corporations, the following is found in a foot note on page 545 of the fifth edition:

> "Section 2425. The provisions of this section apply only to cities within the state, and do not authorize a municipal corporation within the state to contract to furnish one without the state with water. Nor is such a contract valid under the general power given to contract. The performance of such a contract will be enjoined on the application of a taxpayer, when the solicitor declines to proceed. Kleiner vs. Cincinnati, Hamilton District Court, Ms."

This contract, then, cannot be held legal as one between two municipal corporations. It must be authorized, if it is legal, by the clause of the statute which authorizes the sale of "surplus water for manufacturing or other purposes." This clause has been construed to apply to consumption for private enterprise only. 15 Cir. Dec., 409, supra. It authorizes the sale of surplus water by lease or otherwise upon such terms as are agreed upon.

Does this provision authorize a special contract for furnishing water for private enterprise at a special rate?

Dillon on Municipal Corporations in section 1317, in volume 3 of the fifth edition, says:

> "The principle that the city or the company must supply all impartially and without discrimination does not prevent it from entering into reasonable special arrangements or agreements with consumers growing out of special circumstances and the fact that by reason of such

special circumstances a reduced rate, reasonable under the circumstances, is given to particular individuals does not affect the validity of the arrangement. *But this is delicate ground, and the rates we think must be the same unless the circumstances are substantially dissimilar and reasonably justify a difference.*"

In the case of Bellaire Goblet Co. vs. Findley, 3 Cir. Dec., 205, the second, third and seventh syllabi read as follows:

"The only power conferred, so far as the price of gas is concerned, under section 2489, Revised Statutes, is, that the city council, by ordinance, shall adopt such rules and regulations and the manner of using gas, as to the council shall appear just and equitable, subject to the limitation that the rules and regulations and the manner of using gas, shall be uniform, applying alike to all the inhabitants under similar conditions. That the board of gas trustees following the rules, regulations and manner of using gas adopted by the city council, shall prescribe by by-laws the price to be charged for gas, subject to the limitation that the price thus fixed shall be uniform to all the inhabitants under similar conditions.

"Special contracts entered into by the city council or the board of gas trustees of a municipality which owns and controls gas works or a natural gas plant, in reference to the price of gas furnished, are unauthorized by law, and are void.

"Equity will not interfere with the different boards of a municipality in reference to the price to be charged for gas, unless there has been a discrimination, and that discrimination compels the party to pay more than others similarly situated."

On page 210, of the opinion, Saney, J., says:

"Again, article VIII, section 6, of the constitution of the state, provides:

"The general assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or to loan its credit to or in aid of any such company, corporation or association.

"This section of article VIII, of the constitution, received a construction from our supreme court in Walker vs. Cincinnati, 25 O. S. 54, wherein Scott, J., in delivering the opinion of the court, says:

"It forbids the union of public and private capital or credit in any enterprise whatever; they (meaning cities, towns, etc.) may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. * * * It is but applying an axiom to say that what the general assembly is thus prohibited from doing directly, it has no power to do indirectly.

"So that if the council or board of gas trustees, under section 2489, Revised Statutes, have the power to enter into special contracts for furnishing gas, they could do indirectly what the general assembly, under this article of the constitution, is directly prohibited from doing —conferring such power."

The above decision was construing the law governing the price to be charged

by a municipal owned gas plant and the same principles apply to a city waterworks. The municipality has the right to fix the rate, subject to the constitutional rule that all rates must be uniform to all persons or corporations under similar conditions. Section 3973, General Code, must be construed as granting authority to municipalities to dispose of surplus water upon such terms as may be agreed upon, subject to the rule that the rates must be uniform to all persons under similar conditions.

Is there any substantial difference between the circumstances under which Mr. Hunter, a large consumer, takes water, and the circumstances under which any other large consumer takes water? No such difference is apparent unless we assume that Mr. Hunter was purchasing this water as a representative of the municipality of Williamstown, and if he was acting in such capacity the contract must be held illegal, because Williamstown was not contiguous to Marietta and because it is not within Ohio. The fact that Mr. Hunter purchased this water to resell it from his pipes does not make such a difference. Mr. Hunter buys water to make a profit thereon; a manufacturer or person engaged in any other enterprise buys water to make a profit; Mr. Hunter must have water pipes to successfully carry out his purpose, the manufacturer must have machinery and raw material to carry out his purpose. As far as the purchase and use of water is concerned there is no difference in their circumstances. The rates are made in accordance with the amounts used per day, and all who come within those classes should pay the rates provided.

In conclusion. This contract cannot be held legal as a contract by the city of Marietta to furnish water to the town of Williamstown, W. Va., because such municipalities are not contiguous, and because both are not within Ohio.

Section 3973, General Code, does not authorize a municipality to make a special rate for the sale of water for a private enterprise. All sales must be made by uniform rule and the rate must be the same to all persons under similar circumstances.

In my opinion the contract in question is unauthorized and is illegal.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

I have given considerable thought as to what this department should advise in reference to the matter discussed in the foregoing opinion. The contract referred to, as you are aware, is between a municipality of this state and a municipality in a neighboring state.

Doubtless the citizens of Williamstown, W. Va., are relying upon the city of Marietta fulfilling its contract.

While the citizens of every municipality must know the laws of their own state with reference to the powers conferred on the municipality, and the same rule would apply as to the knowledge imputed to the citizens of municipalities of any other state, yet, in practice, there should be some allowance made for the lack of knowledge on the part of the citizens of a foreign state.

If the facts be that the city of Marietta is benefitted by this contract, if the council, solicitor and the officers of Marietta are satisfied there is no danger from its continuance, I am of the impression that it would be well not to interfere at present but to seek the advice of the governor of the state of Ohio as to what should be done, if anything, in the premises. It might be found otherwise, inasmuch as the contract has been in existence something over five years, to let it continue until the legislature would convene so that it and similar cases, if there be any, might be submitted to the law making body by the gover-

nor with such recommendations as his judgment suggests. At any rate, this department does not recommend that any action be taken at this time except upon the advice of the governor.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 429.

TOWNSHIP TREASURER—NO COMPENSATION AS TREASURER OF THE PARK FUNDS—TOWNSHIP PARK LAW UNCONSTITUTIONAL.

A township treasurer is allowed as compensation, two per cent. on all money paid out by him upon the order of the township trustees. Moneys paid out by that official in his capacity as treasurer of the township park funds, are excluded from this provision by reason of the fact that they are paid out upon the order of the park commissioners. As there are no other legal authorizations for compensation to the treasurer for these services, the services are intended to be voluntary and no reimbursement can be allowed for the same.

The township park law, however, providing for park commissioners, is unconstitutional.

COLUMBUS, OHIO, October 18, 1911.

Bureau of Inspection and Supervision of Public Offices, Sam A. Hudson, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of June 24, 1911, you ask an opinion of this department upon the following:

> "We hand you herewith letter from E. A. Pearce, treasurer of Ashtabula township, Ashtabula county, and request your opinion to this department thereon. The opinion of the attorney general referred to in the second paragraph of said letter may be found on page 191 of the Opinions of Attorney General, 1909-1910. We might add that this department has never made findings against township treasurers for compensation for handling the park funds for the reason that trustees have usually allowed not to exceed the two per cent. provided by law as compensation to township treasurers for handling the township funds.
>
> "The township park law is found in section 3415, et seq., General Code."

The letter enclosed states in part as follows:

> "I am treasurer of Ashtabula township and by virtue of that office am also treasurer of the township park funds for which a levy is made each year on grand duplicate of our township.
>
> "The custody of these funds was awarded me sometime ago as the result of a ruling of your office and also of the attorney general, and the funds are disbursed by orders drawn on the township treasurer by the township clerk and countersigned by the park commissioners of Ashtabula township.
>
> "I contend that I am entitled to compensation of two per cent. on the disbursement of the park funds of our township, but one of the park trustees, who is an attorney, is of the opinion that my compensation is not fixed by law but is discretionary with the park trustees.

"I enclose herewith his letter to me under date of the 20th inst., and you will note he refers to sections 4781 and 3318 of the General Code, in support of his opinion."

Section 4781, General Code, provides in part:

"The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district."

This section applies to school funds and cannot apply to township park funds.

The duties and compensation of a township treasurer may be ascertained from the following section.

Section 2689, General Code, provides:

"Immediately after each semi-annual settlement with the county auditor, on demand, and presentation of the warrant of the county auditor therefor, the county treasurer shall pay to the township treasurer, city treasurer or other proper officer thereof, all moneys in the county treasury belonging to such township, city, village or school district."

Section 3316, General Code, provides:

"No money belonging to the township shall be paid out by the treasurer, except upon an order signed personally by at least two of the township trustees and countersigned personally by the township clerk."

Section 3318, General Code, provides:

"The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

By virtue of section 2689 all moneys belonging to the township shall be paid to the township treasurer. The money raised by a special levy by a township for park purposes is township money and should be paid to the township treasurer.

By virtue of section 3318 the township treasurer receives a compensation of two per cent. upon all moneys paid out upon the order of the township trustees. By virtue of a ruling of Attorney General Denman given March 24, 1909, and found on page 191 of his report of 1909-1910, the funds of the township for park purposes are paid out upon order of the park commissioners, and not upon order of the board of trustees.

The law establishing a township park commission is found in section 3415, et seq., of the General Code. The park commission is now appointed by the court of common pleas or a judge therof. The only authority of the township trustees over the proceedings of the board of park commissioners is found in sections 3417, 3418 and 3419, General Code, which provides that the park commissioners shall make a report of their findings and recommendations for park sites to the township trustees, and directing the trustees to submit the question to the voters at the next general or township election. After such election the trustees have nothing more to do with the park commission.

Section 3121, General Code, provides:

"The township park commissioners shall devise plans for the improvement of the park, and award all contracts therefor, in the manner provided by law governing township trustees in awarding contracts for public improvements. They may appoint a guardian for the park and all other necessary officers and employes, fix their compensation and prescribe their duties, prohibit selling, giving away or using as a beverage any intoxicating liquors therein, pass by-laws, rules and regulations for the government thereof, and protect it from injury and provide for their enforcement by fines and penalties, but such by-laws, rules and regulations shall not conflict with the constitution and laws of the state."

Section 3422-2, General Code, 101 Ohio Laws, 130, provides:

"Money arising from the sale of said land may be expended by said board of park commissioners for the purchase of other land for park purposes or may be applied to the payment of any outstanding bonds unprovided for. Any money not so expended shall be deposited in the particular fund by which said property was acquired, or in the general fund of said township."

Section 3426, General Code, provides:

"Such commissioners shall make 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 appointed by the court of common pleas. Such auditing committee, shall report a summary of its findings to the court for its approval. When approved, the summary shall be entered upon the records of such court. The auditing committee and the costs of records in common pleas court shall be paid by the park board."

From these sections it appears that the park commission shall have control of all expenditures for parks, free from the supervision of the board of trustees.

It is claimed that the park commissioners have the right to fix the compensation of the township treasurer for handling park funds.

The only clause granting such authority, if any, is this found in section 3421, General Code: "They may appoint a guardian for the park and all other necessary officers and employes, fix their compensation and prescribe their duties." The phrase "all other necessary officers and employes is qualified by that which precedes it, to-wit, "a guardian for the park," and has reference to employes and officers necessary to maintain the park. It does not have reference to the township treasurer who handles the funds, nor does it authorize the park commission to appoint a treasurer. Unless such officers and employes are appointed by the commission they cannot fix their compensation.

The statute does not fix the compensation of a township treasurer for handling park funds. To warrant payment of compensation for such services, it must be authorized by statute. Such authority cannot be made to appear by implication.

The syllabi in the case of Debolt vs. Trustee, 7 O. S., 237, are as follows:

"An officer whose fees are regulated by statute can charge fees for those services only to which compensation is by law affixed.

"The office of township treasurer having been abolished in Cincinnati, and the county treasurer of Hamilton county being required to hold all moneys in his hands belonging to the township of Cincinnati, subject to the orders of the trustees of the township, the county treasurer cannot charge the fees allowed by law to the township treasurers for the receipt and disbursement of township funds, in the absence of any law allowing him to do so."

In the case of Clark vs. Commissioners, 58 O. S., 107, the first syllabus is as follows:

"To warrant the payment of fees or compensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute."

The law pertaining to parks does not fix nor does it authorize anyone to fix the compensation of the township treasurer in receiving and paying out the funds of the park commission. Section 3420, General Code, provides that the park commissioners shall serve without compensation, and it is my opinion that no compensation can be allowed a township treasurer for handling park funds distributed upon order of the board of park commissioners.

I have expressed my opinion thus fully upon the question which you asked, because I suspect that the township park law has been in operation in different communities for some time. So far as the future is concerned, however, I feel compelled to advise you that in my opinion this law is absolutely unconstitutional.

I enclose a copy of opinion recently sent to the prosecuting attorney of Ashtabula county, stating my conclusions on this subject.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

432.

CHANGE OF VENUE OF CRIMINAL PROCEEDING—PAYMENT OF COSTS UPON FAILURE TO CONVICT OR INSOLVENCY OF DEFENDANT—SHERIFF'S FEE—LIABILITY OF COUNTIES—"LOST COSTS."

In a criminal case where the venue is changed to an adjoining county, and the state fails to convict or the defendant proves insolvent, the county in which indictment is found, is not liable for the fees of the sheriff, for the reason that section 2846, General Code, provides for an allowance of not exceeding three hundred dollars for fees in such cases. An amount of $130 paid by the county where indictment was found to the county to which venue was changed and remitted by the auditor of the latter county to the sheriff of the former county should be paid into the general fund and considered as lost costs.

COLUMBUS, OHIO, October 23, 1911.

HON. JOSEPH T. TRACY, *Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

DEAR SIR:—Your favor of August 9th received, wherein you request my written opinion upon the following question:

> "The sheriff of Licking county served all the witnesses in the case of the State of Ohio vs. Bolton on change of venue to Knox county. The state failed to convict. The fees of the sheriff in serving said witnesses, amounting to $130.30, were paid by Licking county and remitted by the auditor of Knox county to the sheriff of Licking county.
>
> "Should said fees be considered as lost costs under section 2846 and be paid into the general fund, or should they be considered under section 13636 as earnings of the office and be paid into the sheriff's fee fund of Licking county?"

Section 2846 of the General Code, prior to the amendment thereof (102 O. L., 287) provides:

> "In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided for. Such allowance shall be paid from the county treasury."

This section was, of course, amended, but the Bolton case referred to in your inquiry was tried and the service performed by the sheriff prior to the amendment, consequently the amendment of this section of the General Code does not in any manner have any bearing upon your question.

Section 13636 of the General Code provides:

> "Criminal cases shall be tried in the county where the offense was committed. If it appear to the court thereof by affidavits, that a fair and impartial trial cannot be had therein, such court shall order that the accused be tried in an adjoining county."

Section 13637 defines proceedings on change of venue.

Section 13638 provides for costs as follows:

> "The cost accruing from a change of venue, including the compensation of the attorneys so appointed, the reasonable expense of the prosecuting attorney incurred in consequence of the change of venue, the fees of such clerk and the sheriff, and the fees of the jury sitting in the trial of the case in the court of the county to which the venue is changed, shall be allowed and paid by the commissioners of the county in which such indictment was found."

It is my opinion, in a criminal case where the venue is changed and the state fails to convict or the defendant proves insolvent, that the county in which the indictment is found is not liable for the fees of the sheriff; that sections 13636, 13637 and 13638 of the General Code, prescribing the course of procedure in such cases, does not affect the right of that officer to compensation; and that the only compensation which the sheriff is entitled to receive in cases where the state fails to convict, or the defendant proves insolvent, is that *allowance not exceeding three hundred dollars* provided for by said section 2846 of the General Code, and the fees of the sheriff in serving said witnesses, amounting to $130.30, should be considered as lost costs and be paid into the general fund.

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

433.

CITIES—LEGAL COUNSEL FOR DEPARTMENTS—CITY SOLICITOR'S DUTIES—PAYMENT OF EXTRA COUNSEL FROM GENERAL FUND—POWERS OF COUNCIL—INTEREST OF PUBLIC OFFICERS IN CONTRACTS OF MUNICIPALITY—SUBCONTRACTS—MEMBER OF PUBLIC SERVICE—CITY'S RIGHT TO EXACT WHARFAGE ON GOVERNMENT STREAMS — INTERSTATE COMMERCE — MAYOR'S INTEREST IN NEWSPAPER PUBLISHING FOR MUNICIPALITY.

Moneys appropriated for a specific department of a municipality may not be employed for the purpose of engaging legal counsel. The city solicitor is primarily shouldered with the obligation to act as legal counsel for the various departments, but in extreme cases where it would be impossible for him to so act, as in the case where two departments are engaged in litigation against one another, counsel may appoint legal counsel for one or the other departments and pay for the same from the general fund.

Where impeachment proceedings are brought against an officer, he defends in his individual capacity and must pay for his own counsel.

Section 3808, General Code, comprehends a prohibition against officers of municipality corporation having any "pecuniary" interest whatever in contracts of the municipality. Therefore, a member of the board of public service who is interested in a subcontract connected with a municipal contract is within the prohibition and the principle applies the more forcibly when the interest is attached to material being supplied by the subcontractor to the main contractor, the estimate of which material must be approved by the board of public service.

An ex-mayor retired from office within a year, may freely contract with the city for work let at competitive bidding or otherwise, though he may not act as commissioner, architect, superintendent or engineer in work of the city during the year succeeding his retirement from office.

The control of the federal government over agencies of interstate commerce, is subject to the proper exercise of local police power regulations and a city has the right in the exercise of this power to exact wharfage from boats or vessels plying on government streams.

A contract of a municipality for legal advertising with a newspaper in which the mayor owns stock would be illegal.

COLUMBUS, OHIO, October 23, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 18th, submitting for my opinion thereon the following questions:

"1. A mandamus action was instituted by the council to compel the mayor and city auditor to sign improvement bonds. The council employed attorneys other than the city solicitor, as did the mayor and auditor. No request was made of the solicitor to act for either party. What, if any, finding should be made for moneys paid to said attorneys and against whom?

"2. The mayor of a city filed charges against the members of the board of public service. At the hearing of the impeachment proceedings before council, the city solicitor represented the mayor and

an attorney was employed by the board of public service to serve as their counsel. By order of council, said attorney was paid $250.00 for his services in said hearing, the same being paid from the service fund. Was this a proper charge against the city; if so, should it not have been paid out of the general fund from the appropriation for special counsel, solicitor's department? If not a proper charge against the city, against whom should the finding for recovery be made?

"3. A contract for the construction of a city hall was let at competitive bid to a brother of a member of the board of service having charge of the improvement. Was it legal for the member of the board of public service who was interested in a lumber company to furnish the lumber to the contractor, receiving payment therefor from said contractor upon estimates approved by the board of which he was a member? The question is, is it legal for a member of the board of public service who is interested in business to approve for payment and pass upon the quality of the material used by a contractor in work performed for the city, said material having been purchased by said contractor from the firm in which the official is interested?

"4. Has a corporation of which an ex-mayor of a city is secretary and treasurer, the right to enter into a contract with the city for improvement work let at competitive bid before the expiration of one year from the time of his going out of office as mayor?

"5. Has a city the right to levy and exact wharfage from boats or vessels plying on government streams?

"6. The mayor of a city owns stock in the only newspaper of his political party within the city. The ordinances of said city are published in said paper. Would the payment for the publication of same be legal. We desire an interpretation of the decision of the supreme court in the case of McCormick vs. the City of Niles?"

The first two questions you present are somewhat similar, although not identical. The General Code contains no express authority for the employment, by or on behalf of any department of the city government of legal counsel other than the city solicitor.

It is by section 4305 of the General Code expressly made the duty of the solicitor to "serve the several directors and officers mentioned in this title as legal counsel and attorney."

It is, of course, inherent in the office that the city solicitor shall act as legal counsel for the city itself. If the provisions of law relating to the powers and duties of the city solicitor in such matters are to be deemed exclusive, the conclusion would have to follow that no counsel other than the city solicitor could be employed under authority of council or otherwise to represent the city or any of its officers. I am not prepared, however, to hold that this conclusion is valid. The very facts which you recite in the first two questions disclose the probability of controversies between departments of the city government and suggest the necessity in many instances of counsel other than the city solicitor being employed.

In the case of State ex rel. vs. Noble, decided by the circuit court of Franklin county, March 1, 1911, the question was whether funds appropriated to the use of the safety department could be devoted, under authority of the resolution of council to the payment of counsel employed by the director of public safety in an action brought by a city solicitor for the purpose of testing the validity of the director's tenure of office. Judge Alread in delivering the opinion of the court employed the following language:

"The power of the director of public safety to contract and expend money is fixed by sections 147 and 154 of the act of April 24, 1908, 99 O. L. 562 * * *. When funds are therefore set apart by council under section 1536-203 R. S., from the general funds of the corporation for the department of public safety, such funds are thereby appropriated for the specific use of that department and cannot be diverted to any other purpose. * * *

"The department of public safety is a subordinate agency of the city having limited and express powers. There being no authority granted to the director of public safety to contract for attorney fees, the defense of a test case, even if it involves the existence of the department, devolved upon the city.

"It is urged, however, that the resolution of council authorizing the director of public safety to make the contract and charge the payment therefor against the funds of the department creates an agency and authorizes the contract.

"We do not doubt—in fact the city solicitor does not dispute the proposition—that the city council by proper resolution may provide for the employment of counsel to defend any of its departments * * * especially where the city solicitor declines, and may provide for the payment thereof out of proper funds of the corporation."

It is to be observed that in this case it was held merely that funds appropriated to the use of departments could not be expended for attorney fees. The paragraph last above quoted from the decision is perhaps obiter. I agree, however, with so much of it as indicates the court's opinion that council may in a proper case employ attorneys other than the city solicitor. As the court points out, the furnishing of legal counsel for any of the departments is an obligation of the city, which the city may discharge in any way it sees fit. In the first instance the duty devolves upon the city solicitor, but if he cannot act, as would be the case if the controversy was between the city and one of its officers, or between two departments of the city government, then it would be proper for council itself to employ attorneys other than the solicitor to represent the department or officer other than the one whom the solicitor elected to represent. Inasmuch as section 4305, General Code, provides as follows:

"Section 4305. The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

It would seem to follow that under the law, it is the duty of the several directors and officers mentioned in this title to accept the advice of legal counsel, and only an extraordinary occasion would seem to me to warrant any departure from this principle. In any event, no authority short of the council would be warranted in authorizing the employment of counsel beyond the city solicitor.

Coming now to the first of the two similar questions submitted by you, a difficulty is presented thereby which is not solved in the decision in the case above cited. It appears that council employed attorneys for both parties of a controversy, in fact, if not in name between two branches of the city government, and that no request was made of the solicitor to act for either party. In my opinion the payments in this case were illegal, inasmuch as it was the duty of council

in the first instance to call upon the city solicitor to represent at least one of the two parties. Inasmuch as this was not done, it cannot now be ascertained as to which attorneys, as between those representing council and those representing the mayor and auditor were, so to speak, superfluous. Both must, therefore, be regarded as unauthorized employments. The money having been paid to the attorneys, however, I cannot advise that at this time it may be recovered back. In an action to recover the same the burden would be upon the city to show, not only the illegality of the contract of employment, but also that the services rendered were worthless to the city—unless, of course, the principle embodied in the case of State ex rel. vs. Fronizer, 77 O. S. 7, is not applicable to payments of this sort. Attorneys for both parties have rendered services to the city; council had power to employ counsel for one side, and counsel so employed would be entitled to such compensation as might be allowed by direct appropriation of council. The city then would be unable to allege and prove as to either defendant that the services rendered by him or them, were worthless to the city.

In your first question you do not identify the fund from which the remittances in question were made, and I have assumed in answering the same that council appropriated moneys from the general fund of the city for the purpose mentioned.

Your second question presents a state of facts substantially different from that embodied in the first question. The impeachment proceeding is only brought against an officer in his personal capacity and not as an official. It devolves then upon an officer so accused to defend himself, and the city is in no way liable for the expense of his defense.

For this reason, and because further the payment in question was made from the service fund—a thing expressly condemned in the decision above quoted—I advise that the same was in all respects illegal, and the finding should be made against the attorney to whom it was paid.

Answering your third question I beg to state that the facts set forth therein would seem to afford a strong presumption of an interest in fact on the part of the member of the board of public service in question. I have examined certain opinions of my predecessor relating to the general question of interest of public officials in public contracts and in referring to an "interest in fact," I am following the rules which he has laid down for the guidance of your department. At the risk of repetition, however, permit me to say that the rule appears to be that certain relations on the part of public officials to public contracts, such as those of partner, stockholder, etc., in the firm or corporation with which the contract is made, constitute an interest in law, and however remote or inconsequentional such interest may be it is illegal, both at common law, and under statutes prohibiting such an interest; but if the public official while sustaining no such relation to the contracting party as those described, nevertheless has a pecuniary interest of any sort in the performance of the contract or in the profits therof, such an interest is equally illegal, but the fact of the interest must be proved in order to establish its illegality. In the case at hand, the member of the board of public service was not interested in the principal contract with the city in law. By virtue of the subcontract, however, between the principal contractor and the lumber company with which he was interested, he undoubtedly acquired an indirect interest in fact in the proceeds of the contract. The fact, too, that in his official capacity he was called upon to pass upon the quality of material used, with power to reject same, constitutes an additional element tending to establish the fact of an unlawful interest on his part. The statutes applicable to the case in this respect broaden the common law, but they may with propriety be cited in this connection.

Section 3808 of the General Code provides that:

> "No * * * officer * * * of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed salary."

Inasmuch as a part of the money expended under the contract in question was to be paid for material subject to the approval of the member of the board of public service, I am of the opinion that the facts, as stated by you, constitute a violation of this section. It will be necessary, however, to prove, in an action to recover moneys from the member of the board under this section, the exact amount of profit which the member himself derived from the contract. The principal contract itself was not illegal nor was the subsidiary contract—in which respect the question differs from any in which the interest of the member is an interest in law.

Section 12912 of the General Code provides:

> "Whoever being an officer of a municipal corporation or member of council thereof * * * is interested in the profits of a contract, job, work or services for such corporation * * * shall be fined." * * *

This section and possibly section 12910, General Code, clearly make the act of the member in question unlawful and criminal, but do not invalidate either of the contracts in question or enable the city to recover any sum from him in a civil action.

In conclusion as to the third question I beg to state that while the relation which the member of the board of public service had to the contract seems to have been illegal, the contract itself is not impaired by such relation, and the city can recover civilly such amount only as can be traced as profits of the transaction to the member himself.

Answering your fourth question I beg to state that section 12912, above cited, provides that,

> "Whoever being an officer of a municipal corporation * * * is interested in the profits of a contract * * * for such corporation, or acts as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation * * * during the term for which he was elected or appointed, or for one year thereafter shall be fined." * * *

My predecessor in an opinion addressed to you construed the phrase "for one year thereafter" as used in this section, as modifying the word "undertaken." On examination of his opinion I am satisfied that it is correct. The thing prohibited then by the section is not an interest of an ex-official in a contract acquired during the year succeeding his retirement from office, but this acting as commissioner, architect, superintendent or engineer in work undertaken by the city during such year.

It follows, therefore, that an ex-mayor retired from office within a year may freely contract with the city for work let at competitive bidding or otherwise.

Your fifth question relates to the right of "the city to levy and exact wharfage from boats or vessels plying on government streams."

The federal legislation respecting navigable streams and the protection of

navigation thereon does not in any way assume to regulate wharfage or local police regulations imposed under authority of the several states. The mere fact that the Ohio river is a navigable stream and subject to the federal laws insuring freedom of navigation prohibiting the exaction of tolls, etc., does not preclude the state from authorizing its municipalities to exact wharfage charges, pilot licenses, etc.

Wiggins Ferry vs. St. Louis, 107 U. S. 365.
Chilvers vs. People, 11 Michigan, 43.
Marshall vs. Grimes, 41 Miss. 27.
Glouchester Ferry Co. vs. Pennsylvania, 114 U. S. 196.

Nor under authority of the above cited cases is it material that a boat or other water craft may be plying between ports of different states and may be thus engaged in interstate commerce. The regulation of wharfage and other similar matters is a function exercised under the police power of the state and delegated by it to the various municipalities. The control of the federal government over the agencies of interstate commerce has in many cases been held subject to the proper exercise of such local police regulations.

With respect to your sixth question I beg to state that the statutes above quoted, in express terms, forbid a city officer from being interested in any expenditure of money on the part of the corporation other than his fixed compensation. The authorities are practically unanimous in holding that the interest possessed by a stockholder of a corporation in the contracts of the corporation is such an interest as that inhibited by statutes such as this and by the common law rules of which they are sometimes said to be declaratory. Whether or not then the relation of the city and the newspaper in which its legal publications are made is contractual, the payment to such newspaper of money would certainly be an expenditure of money on the part of the corporation. But it is not necessary to consider the effect of an interest in an expenditure not contractual in its nature.

In the case of McCormick vs. City of Niles, 81 O. S. 246, it was held that,

> "The liability of municipal corporations to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

Under this decision every payment made by a city to a newspaper for legal advertising inserted therein must be deemed to have been made under a contract between the city and the newspaper. If then an officer of the city own stock in a newspaper, a contract between such newspaper and the city would be illegal and the newspaper would be precluded, so long as the officer retained the ownership of his stock, from publishing the legal notices required to be published even though the law requires publication in two newspapers of opposite politics, and the disqualified newspaper is the only one of its politics in the city.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 434.

TAX MAP DRAFTSMAN—LEGAL COMPENSATION—CONTRACT BETWEEN COUNTY COMMISSIONERS AND COUNTY SURVEYOR—RECOVERY OF EXCESS OVER LEGAL RATE.

Inasmuch as section 2789, General Code, provides that the salary of the tax map draftsmen shall not exceed the rate of $2,000 per year, contract of the county commissioners with the county surveyor to make the tax maps of the county within seven and one-half months for a compensation of $2,000 is illegal as to the excess compensation represented by the difference between a rate of $3,000 per year as the contract actually allowed and the rate of $2,000 a year as allowed by law.

COLUMBUS, OHIO, October 23, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 6th, enclosing transcript of the journal of the board of county commissioners of Marion county, which shows that such commissioners entered into a contract appointing the county surveyor of that county to make a complete set of tax maps for the county under section 2789a, Revised Statutes, at a salary of $2,000.00, and specifying that all services under the appointment should be performed in seven and one-half months, and that the salary should be payable in monthly installments of $266.66, at which rate said $2,000 would be exhausted in the period of seven and one-half months. It is further stipulated by said agreement that the county surveyor was to do the work himself without assistance, or in the event that assistants were employed by him that he should be responsible for their payment.

You inquire whether or not the commissioners were within their statutory authority in entering into this contract, and whether, further, in the event that the contract should be held illegal there may not be a recovery from the county surveyor.

Said section 2789a, R. S., provides in general for a contract similar to that entered into by the commissioners of Marion county. It will not be necessary to quote the entire section, but the following language is significant:

> "The board of county commissioners may appoint the county surveyor * * * 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 or parcels, etc." * * *

Section 2789b provides that:

> "The board of county commissioners shall fix the salary of the draftsman at not to exceed $2,000 per year."

It seems to me that the contract which you have submitted to me is clearly in violation of law. The authority of the county commissioners with respect to employing the county surveyor does not extend to fixing the time within which his work shall be completed except by inference. It is probable, however, that a grant of power to appoint carries with it the power to fix the term for which the appointment is made. So that the limitation of time which appears

in the contract is probably not in contravention of law. However, the authority of the commissioners in the matter of compensation is strictly limited to a certain maximum amount, to wit, $2,000 per year. This does not mean that the commissioners may expend the sum of $2,000 in any one year for the purpose of hiring a draftsman. The sum fixed by statute is in the nature of a salary, and the position of tax map draftsman is in the nature of an office rather than an employment.

In the case submitted the surveyor was paid at a rate equal to $3,000.00 a year—at a rate of of $266.66 a month. It is expressly provided by section 2789b that the salaries of the draftsman and assistants shall be paid out of the county treasury in the same manner as the salaries of other county officers are paid.

It is a familiar fact that salaries of other county officers were, at the time this law was enacted, paid out of the county treasury in equal monthly installments. It is clear, I think, that if the county commissioners choose to appoint the county surveyor for a limited period of less than a year under these sections, they must fix his compensation for such services at such proportion of $2,000 as is represented by the portion of the year for which he is appointed and no more.

From all the foregoing I am of the opinion that the contract in question is illegal as to the amount of compensation therein provided for. I am further of the opinion that its illegality does not affect the entire contract or rather the entire appointment, so to speak, but only applies to the excess over and above the amount of compensation which the county commissioners were actually entitled to fix and allow. As I have hereinbefore pointed out the position of tax map draftsman is an office, and the draftsman's relation to the county is not purely contractual. The case is, therefore, one of excessive compensation drawn by a public officer, and the rule of law applicable to a recovery in such cases is that on the one hand the officer must pay back into the treasury the excessive amount which he has drawn, while on the other he is entitled to retain the amount which he ought to have been allowed.

In my opinion, therefore, recovery may be had from the county surveyor for the difference between the amount of $2,000 drawn by him under this appointment, and the amount represented by seven and one-half months' salary at the rate of $2,000 per annum.

I have reached the above conclusion with some reluctance in view of the fact that the contract of appointment in question was undoubtedly an economical one for the county, but the law in the matter seems plain to me.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

447.

DEPUTY STATE SUPERVISORS OF ELECTIONS — SALARY INCLUDES TRAVELING EXPENSES OF MEMBERS — EXPENSES OF BOARD AS A WHOLE.

The salary provided for the members of the board of deputy state supervisors of elections is in full for all services and the personal expenses of the individual members of the board in traveling from their homes to the place of meeting of the board is covered by such salary.

Section 4821 of the General Code refers only to certain expenses incurred by the board as a whole.

COLUMBUS, OHIO, November 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your favor of September 22d received. You inquire whether the actual personal expenses of the members of the board of deputy state supervisors of elections for attendance at the meetings of the board can be paid from the county treasury.

Section 4821 of the General Code provides that:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

It is my opinion that "all proper and necessary expenses of the board of deputy state supervisors" applies only to the expenses of the *board as a whole*, and cannot be made to apply to the personal expenses or mileage of the members of the board in their attendance upon meetings.

This conclusion is strengthened by the fact that section 4821, General Code, which was formerly section 2966-4, Revised Statutes, as originally passed, 89 O. L., 455, provided for mileage of the members at the rate of five cents a mile, going to and returning from the county seat, and a salary or compensation of two dollars a day, not to exceed twenty days in any year. The salary or compensation of members of the board is now increased, as provided in sections 4822 and 4990, General Code, which are as follows:

Section 4822:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars

each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

Section 4990:

"For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

The provision in reference to mileage is repealed and the compensation is increased. I therefore hold that the compensation provided for in sections 4828 and 4990, General Code, is in full for all services rendered, including the personal expenses of the individual members of the board in traveling from their homes to the place of meeting of the board, or otherwise incurred in attending meetings of such board.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

449.

GUARDIAN AND WARD—FILING OF SEPARATE ACCOUNT BY GUARDIAN OF SEVERAL WARDS—PROBATE JUDGE—POWERS OF DISCRETION —STATUTORY CONSTRUCTION.

When a person is appointed guardian of several minor children of the same parentage and inheriting from the same estate, there is no provision of the laws of Ohio which requires him to file a separate account for each ward and if the account filed by him meets all the requirements of subdivision three of section 10933, *General Code, as applied to each ward, such account should be allowed.*

If, however, the probate judge considers that the safety and best interests of any estate in the hands of a guardian, require the filing of separate accounts that official in the exercise of the wide discretion vested in him may compel the submission of such accounts separately.

COLUMBUS, OHIO, November 2, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am, in receipt of your letters of July 6th and 11th, asking my opinion as to whether a guardian of more than one ward is required to file separate accounts for each ward, for which the probate judge shall receive a separate fee; or may the accounts of all the wards be combined in one account, for which the probate judge shall charge one fee.

Section 10492, General Code, provides in part as follows:

"Except as hereinafter provided, the probate court shall have exclusive jurisdiction; * * *

"4. To appoint and remove guardians, direct and control their conduct and settle their accounts;" * * *

Section 10933, General Code, provides as follows:

"The following are the duties of every guardian appointed to have the custody and take charge of the estate of a minor:

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

"2. To manage the estate for the best interest of his ward;

"3. On oath, to render to the proper court an account of his receipts and expenditures, verified by vouchers or proof, and as part of the account, a full, itemized statement of the funds of his ward's estate, the date and nature of their investment, the security thereof, and the rate of interest or income accruing thereon, once in every two years, or oftener, upon the order of the court, made on motion of any person interested in such ward or his or her property, for good cause shown by affidavit. Failure so to do for thirty days after he has been notified of the expiration of the time by the probate judge, no allowance shall be made for his services, unless the court enters upon its journal that such delay was necessary and reasonable. But when the whole estate of such ward, or of several wards jointly, under the same guardianship, does not exceed two hundred dollars, in value, the guardian shall only be required to render such account upon the termination of his guardianship, or upon the order of the court made upon its own motion, or the motion of a person interested in the ward or wards, or in his, her, or their property, for good cause shown and set forth upon the journal of the court;

"4. At the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward in his hands;" * * *

The above are the only provisions of the General Code as to the accounts of guardians.

Section 10927, General Code, is as follows:

"When a person is appointed guardian of several minors, children of the same parentage and inheriting from the same estate, separate bonds shall not be required. In such cases only one application is necessary, and the letters of guardianship issued to such guardian shall be in one copy, and not one for each minor. The court approving and recording such bond, and issuing such letters, shall charge the fees allowed by law for such services, to be charged but once and not once for each ward."

It has been suggested that this section indirectly sustains the contention that a guardian should file a separate account for each ward, for the reason that it expressly provides that only a single fee shall be charged for letters of guardianship and the guardian's bond, in case one person is appointed as guardian of several minors, children of the same parentage, etc., and that therefore separate proceedings must be had and separate fees charged for each ward,

for all requirements of a guardianship not exempted by this section; but it seems to me that if this section has any bearing at all upon the question under consideration it sustains the opposite view that, where a person is appointed guardian of several minors, children of the same parentage and inheriting from the same estate, the matter, or estate, in the probate court shall be treated as joint, rather than several, as the authority under which the guardian acts for the several minors is given by one document, and only one bond is required, which bond covers the liability of the guardian for the estates of each and all of the wards; that is, for the entire estate left by the decedent. The matter is thus only docketed once upon the appearance docket of the court and all the proceedings of a guardian are docketed under this one head. This statute, section 10927, does not specify that in such cases only one inventory shall be required of a guardian, yet, if it be held that separate proceedings are required unless otherwise specified, in a case of this kind, a guardian would have to file as many inventories as there were wards. Such a requirement, to the best of my knowledge, has never been enforced or required by any probate court in Ohio, and, unless it be for the purpose of augmenting the fee fund of the probate court, there can be no reason for such a requirement.

It seems to me, in the matter of a guardian's accounts, the last sentence of section 10933, General Code, above quoted, amounts practically to a statutory expression that, where the estate belongs to several wards jointly, under the same guardianship, the accounts of all the wards may be placed in one account, to be filed in the probate court. This sentence is as follows:

> "But when the whole estate of such ward, *or of several wards jointly*, under the same guardianship, does not exceed two hundred dollars, in value, the guardian shall only be required to render such *account* upon the termination of his guardianship," * * *

This sentence may be read in connection with the other portions of said section 10933, above quoted, as follows:

> "It is the duty of the guardian, on oath, to render to the proper court, on account of his receipts and expenditures * * * once in every two years; * * * but when the whole estate * * * of several wards jointly, under the same guardianship, does not exceed two hundred dollars, in value, the guardian shall only be required to render such *account* upon the termination of his guardianship." * * *

It seems to me that this is a plain expression by the legislature that a single account may be rendered to the probate court, combining the accounts of several wards jointly under the same guardianship; at any rate, it may be given this construction, and there is every reason of right and justice for giving such construction to it.

The probate court, as will be seen from a portion of section 10942, quoted in the first part of this opinion, has exclusive jurisdiction to appoint and remove guardians and direct and control their conduct, and to settle their accounts; this jurisdiction is very broad and practically covers everything that a guardian may be required to do; all of his conduct is under the direction and control of the court, and the court, through the guardian, has entire and complete management and control of the trust estate. The purpose of the account, of course, is to show at regular periods the exact situation of the estate belonging to each ward, so that the court, or any person interested in the ward's estate, may file

exceptions in case the same is not being managed properly; provided the account filed by the guardian shows the exact situation of the estate, the amount received for each ward and the amount expended in his behalf, the items of expenditure being verified by vouchers, as per the requirement of the statute, and the account shows the other details required by law to be shown in a guardian's account, all the requirements of the law have been complied with and I cannot see that it makes any difference whether these facts are shown by one document, which includes the accounts of each ward, or by separate documents for each ward; the result reached is the same.

In this state, and I presume in most of the states of the Union, when the necessity for the appointment of a guardian arises, it is usually the case that the estate is small, while the family is large; and in a great number of instances, perhaps the majority, a mother is left with a family consisting of several children, all of them so young that she must necessarily file a large number of accounts before the guardianship can be terminated. In these cases, the matter of court costs is important; the estate is generally so small that if the guardian be compelled to file separate accounts for each ward, to pay the probate court a separate fee for filing each account and to pay an attorney for preparing the different accounts, the costs of so doing will amount to as much or more than the income from the whole estate, for the period covered by the account filed.

If the provisions of the General Code as to this matter of a guardian's accounts, while silent, yet, necessarily implied that a separate account should be filed for each ward in estates of this kind, I would feel bound by the implication, though I failed to see the wisdom of such a requirement; but when, as I have above pointed out, the implication to be drawn from the statute is that separate accounts are not required in such an instance, I take pleasure in expressing the opinion that when a person is appointed guardian of several minors, children of the same parentage and inheriting from the same estate, there is no provision by the laws of Ohio which requires him to file a separate account for each ward, and that if the account filed by him meets all of the requirements of subdivision three of section 10933, as applied to each ward, then that such account should be allowed as to form.

My personal experience as a practicing attorney strengthens me in the above conclusion. In my practice I have always combined the accounts of several wards, children of the same parentage and inheriting from the same estate, under one account; and I am informed that this practice prevails generally throughout Ohio. Of course, custom does not make the law, but in this instance, in the absence of express statutory requirement to the contrary, and in view of what is right and just, custom should have a very large place in interpreting the law.

I wish it understood, however, that it is further my opinion that the probate court is vested with a very wide discretion in guardianship matters, and the probate judge, in the exercise of this discretion, whenever in his view the safety or the best interests of any estate, in the hands of a guardian, requires the filing of a separate account for each ward inheriting from the said estate, has full authority to compel the filing of separate accounts by such guardian.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

454.

COUNCIL—POWER TO AUTHORIZE SOLICITOR TO EMPLOY LEGAL COUNSEL FOR THE BOARD OF PUBLIC SERVICE—RIGHT OF COUNSEL TO FEES WITHOUT FURTHER CONTRACT OR AGREEMENT.

A city council authorizes and directs the city solicitor to employ specific attorneys to defend the board of public service in injunction proceedings and the city auditor certified that there was $1,350.00 *in the treasury for such purposes. Under these circumstances where the solicitor advised the designated attorneys to perform the services without any further contract or agreement, and such services were performed, the attorneys may be compensated at the rate of* $250.00 *each when such a bill is presented by them.*

COLUMBUS, OHIO, November 4, 1911.

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 October 17th, submitting for my opinion thereon the following:

> "A city solicitor asked for an order to restrain the board of public service from entering into a contract for the construction of a mechanical filtration plant. No application was made to the solicitor by the members of the board of public service for counsel to represent the board in the case, but the city council by resolution authorized and directed the city solicitor to employ certain attorneys to represent said board, and the city auditor certified that there was $1,350.00 in the treasury standing to the credit of the fund for special counsel. The solicitor notified the attorneys designated in the resolution of council, but entered into no contract of employment nor agreed upon any terms for compensation for their services. The litigation resulted in the dismissal of the application for an order of injunction and the attorneys were each (three) paid $250.00 for their services out of said appropriation upon vouchers approved by the city solicitor, members of the board of service and by the chairman of the finance committee of council, that, if any, finding should be returned by this department."

In my opinion, the bureau should make no finding for recovery in the premises. It is quite an ordinary form of contract, employing legal counsel, simply to retain counsel, leaving the amount of their fees to be determined after the services are rendered. The effect of the arrangement described by you was virtually a contract on the part of the city solicitor to pay special counsel the amount of their fees, up to $1,350.00. The services exacted from counsel under said arrangement were rendered on behalf of the whole city, the proceeding being one to determine a question affecting the city's interest, and the board of public service being made defendants in their official capacity as distinguished from their personal capacity.

I am, therefore, of the opinion that the transaction referred to by you is in all respects regular and lawful.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 455.

VILLAGE COUNCILMEN—SALARY—LEGISLATIVE FIXTURE—NO RIGHT OF COUNCIL TO CHANGE.

Ever since the passage of the act of 1905, the salaries of village councilmen have been fixed by law at the rate of $2.00 per meeting and the members are entitled to said sum regardless of any ordinance fixing a lesser rate.

COLUMBUS, OHIO, November 6, 1911.

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 October 17th, requesting my opinion upon the following question:

> "A village council in 1905 fixed the salaries of members of council at $1.00 per meeting, not to exceed 24 meetings in any one year. On January 14, 1910, the council which had assumed their offices on January 1, 1910, passed a resolution fixing their compensation at $2.00 per meeting, not to exceed 24 meetings in any one year and have drawn compensation in accordance with said resolution. What is the legal compensation of said members of council, and what finding, if any, should be made by this department?"

The second branch of the syllabus in the case of Walker vs. Dillonvale, 82 O. S. 137, is as follows:

> "Section 197, Municipal Code, as amended in 1904 (97 O. L. 118), fixes the compensation of a member of council of a village at two dollars for each meeting, not to exceed twenty-four meetings in any one year, and it is not necessary that it should have been fixed by an ordinance, passed before the commencement of his term of office, but the council may authorize its payment by a resolution passed after the services have been rendered."

In the opinion the court, per Summers, J., on page 149, uses the following language:

> "The right of a councilman of a village to compensation for his services as such, when it has not been fixed by ordinance, depends upon whether it is fixed by statute, and upon this depends also the answer to the question whether the petition states a cause of action. The Municipal Code of 1902 (section 126) provides that the compensation of members of council in cities, 'if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties,' and is limited not to exceed a stated sum per year. It is further provided that the salaries shall be paid semi-monthly and that a proportionate reduction shall be made for non-attendance upon any regular or special meeting; and that code twice provides (sections 194 and 197) that no compensation shall be allowed to the members of the council of a village; but in 1904 (97 O. L., 118) these prohibitions were repealed and section 197 was amended as follows: '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.' The amended section does not provide, as does section 126, respecting members of council in cities, that the compensation of members of council, 'if any is fixed,' shall not exceed a stated sum per year, but that they may receive two dollars for each meeting. The statute itself fixes the compensation and we do not think the legislature intended that an ordinance should be necessary to fix it. The statute does not fix it at $48.00 per year, but authorizes the payment of that amount if twenty-four meetings are held in one year, and the petition does not aver that a less number were held."

It is clear to me, from the foregoing, that the court held, in the case cited, that the salaries of members of a village council are fixed by law, so far as the rate per meeting of council is concerned. This being the case, the provision of that which was section 197, Municipal Code, to the effect that "the compensation so fixed shall not be increased or diminished during the term for which any officer * * * shall have been elected," does not apply to the salary of members of council, it not being "compensation so fixed" by the council itself.

The somewhat similar provision of the constitution as to the changes in the salaries of state officers has been repeatedly held, as you are doubtless aware, to apply only to officers of the state.

There is, therefore, no reason why the genral assembly may not at any time change the salary of members of village councils, fixed by it, subject to be effective during the term of any council member.

In the case you submit neither the ordinance of 1905 nor the resolution of 1910 were of any effect whatever. I am, therefore, of the opinion that the legal compensation of the members of a village council, at all times since 1904, has been and now is two dollars for each meeting. Whether or not members who have accepted less, prior to the decision in Walker vs. Dillonvale, are entitled to the difference between the amounts accepted by them and the amounts determined by the application of the principles of that decision, it is clear that those who have been paid in accordance therewith cannot be compelled to return any part of the sums received by them.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 467.

COMPROMISE OF CLAIMS IN FAVOR OF STATE OR COUNTY BY COUNTY COMMISSIONERS — STATUTORY RESTRICTIONS — APPROVAL OF ATTORNEY GENERAL.

County commissioners may not compromise findings of claims due the state. They may compromise claims due the county but the same shall first be submitted to the attorney general, and a statement of the facts together with the reasons for the release or compromise entered on the journal.

Attorney general's recommendations as to specific findings.

COLUMBUS, OHIO, November 16, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

DEAR SIRS:—I herewith desire to acknowledge receipt of your communication of November 10, 1911, as follows, to-wit:

> "The writer recently visited Ross county and took up the matter of the proposed compromises with the several officers of that county on account of findings made by this department, the same being thoroughly canvassed with the prosecuting attorney and with some of the officials. After due consideration of the nature of the several findings and matters in which the finding was a matter of estimate or judgment, we believe that the interests of the county would be well subserved by compromises as follows: With F. L. Gibbs, ex-coroner, for $125.00; John C. Staggs, clerk of courts, $60.00; the Chillicothe News Advertiser, $150.00; Scioto Gazette Company, $175.00; the Fromm Printing Company, $175.00; ex-Sheriff Latta Morrison, $400.00."

The letter of Mr. Boulger to which you refer and which you enclose in your communication raises the question as to whether or not such compromises or settlements can be made and entered into by the county commissioners, as follows, to-wit:

> "I herewith enclose proposed settlement of findings of the state examiners against ex-County Clerk Staggs and ex-Coroner Gibbs and also findings against the Scioto Gazette, News Advertiser and Unsere Leit Publishing Companies. In regard to this settlement I have already talked the matter over with Mr. B. S. Johnson of your office, the understanding being that after a settlement proposition had been made which would be approved by the county commissioners of this county, that the same should then be submitted to you.
>
> "The findings against the ex-coroner and the ex-county clerk involve certain questions of fact, and for that reason the compromise herewith submitted, was tentatively agreed upon subject to your approval.
>
> "In regard to the findings against the newspapers the proposed settlement should possibly be submitted to the state auditor as it is in part upon the statement of Examiner John A. Bliss, who recently made an examination of certain offices in this county, that this settlement is being agreed upon. The findings against the newspapers all cover a period prior to September, 1909, and are made up mostly of charges for what is termed excessive measurement, and in view of the fact that there had

been great variation in setting up advertisements by various newspapers throughout the state and as there were great differences of opinion as to the number of insertions required by law, a pamphlet was gotten out by the auditor of state and bureau of inspection and supervision of public offices, which was approved by the attorney general in August, 1909, and the newspapers claim that there were to be no findings made against them for any charges made prior to that time arising out of the differences of opinion just stated, and that after such pamphlet had been uniformly distributed throughout the state they were to be governed by the forms and instructions therein approved. It is on the theory just stated that the settlements with the newspapers are submitted to you and any further information you might desire in regard to the claims of the publishers could be obtained in the department of auditor of state.

"It has occurred to me that there is some question under the statutes of this state as to the right to compromise claims of this character. In the reports of the attorney general of year 1906 to 1907, I find that an opinion has been rendered by the assistant attorney general to the effect that under section 855, Revised Statutes, the county commissioners have the power to compromise claims wherein the money is due the county and not the state, but there seems to be no statutory authority for settlement wherein any part of the claim is due the state. In the recent amendment of section 286 of the General Code of Ohio, as found in 101 O. L., page 384, simply forbids any settlement or compromise without notice being given to the attorney general and allowing him to be heard in the matter, but does not in any way authorize a compromise.

"Hon. J. M. Sheets, formerly attorney general, on November 30, 1901, rendered an opinion in which he held that section 856, Revised Statutes, does not authorize the compromise of the claims of this character. So far as I can learn this matter has not been directly decided in this state and I would like to have your opinion as to our right to make the compromise herein suggested."

I concur with the opinion of this department which was rendered August 9, 1906, by one of my predecessors to the effect that the county commissioners have the power to compromise and settle claims wherein the money is due the county, and that they do not have such authority to compromise claims due the state. The county commissioners are given authority to compromise claims due the county by section 3416 of the General Code, as follows, to-wit:

> "The board may compound or release, in whole or in part, a debt, judgment, fine or amercement due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition."

Section 286 of the General Code, as amended 101 O. L. 384, provides in substance that such compromise shall not be made until after the same is submitted to the attorney general and he is allowed to be heard in the matter, where such compromise is made before or after suit for recovery is started by the proper legal officer.

I take it that the amounts enumerated in your communication are all of

them due the county and not to the state, and in that event the county commissioners have authority to make said compromise, subject to the limitation in section 286 of the General Code as aforesaid.

I am advised by Mr. Boulger regarding the claim against F. L. Gibbs, ex-coroner, and John C. Staggs, ex-county clerk, that it is very doubtful under the facts in those cases, whether or not the full amounts could be recovered, and on that hypothesis I advise and approve the compromises in their cases.

I understand that there were to be no findings made against the newspapers and the printing company for any claim existing prior to August, 1909, as per an understanding between the said newspapers and printing company, and the department of auditor of state. For that reason I approve the compromise so made with the said newspapers and said printing company.

I reserve passing on the compromise made with ex-Sheriff Latta Morrison until a later date, for the reason that I am not familiar with the facts involved in that case and meantime, I would deem it a favor if a full statement of the facts in the Morrison case could be furnished to this department.

I have assumed the liberty to combine the opinion in response to Mr. Boulger's inquiry and my reply to your communication, for the reason that both involve the same subject matter and the same set of circumstances and could be more readily answered together than separately. I am,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

E 468.

SHERIFF—ALLOWANCE BY COUNTY COMMISSIONERS FOR EXPENSE OF KEEPING UP OR HIRING AN AUTOMOBILE—STATUTORY PROVISIONS.

By section 2997, General Code, as amended May 6, 1911, the county commissioners are authorized to pay out of the county treasury the expenses of maintaining an automobile owned by the sheriff if in the exercise of the discretion vested in them they deem such expense necessary to the proper administration of the sheriff's duties.

Under the same act, 102 O. L., 93, the commissioners with the same limitation are authorized to rent an automobile under the power granted to allow expenses for "livery hire."

COLUMBUS, OHIO, November 17, 1911.

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 October 20th, in which you submit the following questions:

> "1. Are the county commissioners authorized by section 2997, General Code, as amended May 6, 1911, to pay out of the county treasury the expenses of maintaining an automobile owned by the sheriff, the same being used, at least in part, in the discharge of the official duties of the sheriff?
>
> "2. Are the commissioners authorized to rent an automobile for the use of the sheriff? We understand that there has been a court

decision on the latter question, and we would appreciate your referring us to the same or giving us the gist of the decision if the same is available."

Answering the first question, section 2997, General Code, provides as follows:

"* * * In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office." * * *

It will be noted that the above statute embraces the following expression: "expenses of maintaining horses and vehicles necessary, etc.," and the question necessarily arises as to whether or not an automobile is a vehicle. I am of the opinion that it is, and the following authorities hold that an automobile is a vehicle:

"The automobile is a vehicle of quite recent times, carrying its motive power within itself."
77 N. Y. Supp., 276.

In the case of Christy vs. Elling, 216 Ill., 31, at page 40 of the opinion, the automobile is referred to by the court as being a vehicle.

In the case of Diocese of Trenton vs. Toman, 70 Atl. Dep. 606, the court held:

"An automobile is a carriage within the meaning of a covenant in a deed reserving a strip of land for a carriageway forever."

See also:

Simon vs. Lindsay, 65 Atl., 778.
House vs. Kramer, 134 Iowa, 374.

An automobile being a vehicle, it follows that the county commissioners shall make allowance to the sheriff for all expenses in maintaining the same, subject to the sole limitation that such expense must be necessary to the proper administration of the duties of the sheriff's office; and I take it that some discretion is therefore left to the county commissioners, by the legislature, to decide whether or not the expense of maintaining horses and vehicles (which includes automobiles) is necessary to the proper administration of the duties of the sheriff's office. In other words, if such expense of maintaining an automobile is not necessary, then, in my judgment, it is the duty of the county commissioners to refuse such allowance to the sheriff.

I am, therefore, of the opinion that the county commissioners are authorized by section 2997, General Code, to repair and maintain an automobile owned by the sheriff, provided it is necessary to the proper administration of the sheriff's office.

Answering your second question, section 2997 of the General Code provides as follows:

* * * "The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil pro-

cesses and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office." * * *

This question was recently decided by the Franklin county common pleas court, Judge Rathmell delivering the opinion, in the case of State of Ohio, ex rel., Sartain, Plaintiff, vs. Sayre, Auditor of Franklin County, et al., Defendants. I herewith quote from the opinion of the court:

"The question arises on demurrer to the petition praying that a writ of mandamus issue commanding Auditor Sayre to issue and deliver a warrant in favor of relator on the treasurer of Franklin county, covering automobile livery hire alleged to have been incurred and necessary for the proper administration of the duties of his said office in serving such writs and processes as were directed to him as such sheriff.

"It appears from the petition that relator filed a full, accurate, itemized and verified account of said livery with the board of county commissioners as a part of his last quarterly report; that the same was approved and allowed by said board and that a voucher was issued to him for the payment of said livery bill in the sum of four hundred and twenty dollars ($420); that same was presented to defendant, Sayre, auditor, with request for a warrant on the treasurer for its payment and same was refused.

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

"It is provided in section 2997, General Code, as amended April 26, 1911, 103 O. L., 93, that in addition to his compensation and salary, the commissioners shall make an allowance to the sheriff quarterly (among other things) for all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office. And may allow his necessary *livery hire* for the proper administration of the duties of his office.

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

"An automobile is a vehicle; but to insist that 'vehicle' in the definition of 'livery' is limited in meaning to horse-drawn vehicles, seems hardly warranted in modern usage of the word.

"I am of the opinion that the expense account claimed, and incurred or alleged, comes fairly within the spirit provision and intendment of the statutes mentioned as 'livery hire,' and the rounder, within the commissioners' discretion for allowance.

"The demurrer is therefore overruled."

I am, therefore, of the opinion that the commissioners are authorized to hire or rent an automobile for the use of the sheriff.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

473.

BOARD OF EDUCATION — POWERS TO PAY PREMIUM ON CLERK OR TREASURER'S BOND—TRAVELING EXPENSES OF MEMBERS, TEACHERS, PRINCIPAL OR SUPERINTENDENT FOR ATTENDANCE AT CONFERENCE OR ASSOCIATION MEETINGS.

As there is no statutory authorization for the payment by the board of education of the premium on the clerk's or treasurer's bond that expense may not be borne by it.

As there is no duty imposed upon the superintendent of schools or the teachers to attend a national education association, nor upon the members of the board of education or its clerk to attend a meeting of the state association of school boards, and as there is no statutory authorization for the payment of such expenses, the board may not pay the same out of the school funds.

COLUMBUS, OHIO, November 22, 1911.

Bureau of Inspection and Supervision of Public Offices, Sam A. Hudson, Deputy, Columbus, Ohio.

DEAR SIR:—Your favor of November 14, 1911, is received, in which you submit the following questions:

> "May a board of education legally pay the premium on a surety bond of its clerk or treasurer?
>
> "May such board legally pay the expenses of its superintendent or principals or teachers in attending a national education association?
>
> "May such board legally pay the expenses of any of its members or of its clerk in attending a meeting of the state association of school boards?

Section 4774, General Code, provides that the clerk of the board of education shall give a bond as follows:

> "Before entering upon the duties of his office, the clerk of each board of education shall execute a bond, in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him. Such bond must be deposited with the president of the board, and a copy thereof, certified by him, shall be filed with the county auditor."

Section 4764, General Code, 101 Ohio Laws, 264, provides for the bond of the treasurer as follows:

> "Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school monies have been deposited under the provisions of sections 7604-7608, inclusive, the bond shall be in such amount as the board of education may require."

"In each case the bond is required before the person shall enter upon the

duties of his office. In order to qualify for the office the bond must be given. It is not an expense of the office, for the person furnishing the bond through a surety company is not yet an officer.

There is no statute authorizing the board of education to pay the premiums upon the bonds of its clerk or treasurer, and in the absence of statutory authority such premium cannot be paid from the funds of the school district.

The same principle applies to the other inquiries.

There is no statutory duty placed upon superintendents, principals or teachers to attend the meetings of a national educational association, nor is there any statutory authority to pay the expense of any such attendance out of the school funds.

Neither is there any statutory authority for paying the expense of a member of the board of education or its clerk to a meeting of the state association of school boards, nor is such attendance required by statute.

In conclusion:

The board of education cannot legally pay the premiums on a surety bond of its clerk or treasurer.

A board of education cannot legally pay the expense of its superintendent, principal or teachers in attending a meeting of national education association.

A board of education cannot legally pay the expenses of any of its members, or of its clerk in attending a meeting of the state association of school boards.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

476.

MAYOR'S VETO—TEN DAYS' TIME ALLOWED FOR APPROVAL—DATE OF PASSAGE AND DATE OF PRESENTATION.

If the mayor does not sign an ordinance or resolution within ten days after its passage or adoption without regard to the time of its presentation to him by the clerk, such ordinance or resolution shall take effect as if he had signed it.

COLUMBUS, OHIO, November 23, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—On October 31, 1911, you submitted the following request for opinion, to-wit:

> "Is the mayor of a city limited to ten days after the passage or adoption of an ordinance of the city council for consideration as to whether or not he shall veto same and making return to council of his veto message in case he desires to make veto of any provision of the ordinances or is he granted ten days from the *presentation* of the ordinance to him by the clerk of council?"

Section 4234, General Code, provides in part as follows:

> "Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its *passage or adoption* return

it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. * * * If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevents its return."

It is my opinion that the clear reading of the statute will not permit the words "passage or adoption" as above italicized to be interpreted as *presentation.*

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

495.

JUSTICE OF THE PEACE—ELECTION AND APPOINTMENT—QUALIFICATION—ELECTION OF SUCCESSOR.

Justice of the peace after his appointment must take oath, forthwith, i. e., within a reasonable time.

A vacancy caused by the failure of the justice of the peace-elect to take oath or furnish bonds within required time, should be filed by appointment by the township trustees and a successor elected at the next regular election for justice of peace.

COLUMBUS, OHIO, December 20, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of December 5, 1911, is received, in which you ask an opinion of this department upon the following:

"If a justice of the peace fail to file a bond as required by section 1721, General Code, how many days must elapse after his election before his office becomes vacant because of his refusal or neglect to file such bond?

"In case of a vacancy in the office of justice of the peace caused by the failure to file the required bond, how shall such vacancy be filled; shall the trustees give notice of a new election to fill the vacancy as provided in section 1721, or shall the trustees fill the vacancy by appointment under section 1714?

Section 1721, General Code, provides that a justice of the peace shall within ten days after taking the oath of office give bond, as follows:

"*Within ten days after taking the oath, each justice of the peace so qualified, before he is authorized to discharge the duties of his office and within ten days after taking the oath, shall give a bond to the state* of not less than one thousand dollars nor more than five thousand dollars, at the discretion of the trustees, with at least two sufficient sureties. Such bond shall be approved by the trustees of the township and be deposited with the township treasurer or with the township clerk if the township treasurer is the justice-elect. Such bond shall be conditioned that the justice shall well and truly pay over according to law all money which may come into his hands by virtue of his commission, and faith-

fully perform every ministerial act enjoined upon him by law. *On refusal or neglect to give such bond, the office shall be vacant and the trustees shall give notice of a new election to fill the vacancy.*"

Section 7, General Code, provides:

"A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, *who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law*, and in all respects to qualify himself for the performance of such duties, *shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.*"

By virtue of the provisions of these sections the office of justice of the peace becomes vacant upon refusal or neglect of the person elected or appointed to give bond with the time required.

Section 1720, General Code, provides when a justice of the peace shall take the oath of office, as follows:

"When a person elected justice of the peace receives a commission from the governor, *he shall forthwith take and subscribe the oath of office* before the clerk of the court of common pleas or before a justice of the peace of his county. Such officer is authorized to administer such oath and shall file and make a record thereof in a book provided for that purpose. Such justice of the peace within ten days shall transmit such oath to the clerk of the court."

The word "forthwith" as herein used, means within a reasonable time, that time which is required when due diligence is used by the person, who has been elected. The time required will depend upon the circumstances in each particular case.

This term "forthwith" has been variously defined. These definitions are set forth in 10 Cyc, at page 1413 and 1444, some of which are as follows:

"Forthwith. In its ordinary signification, immediately as soon as by reasonable exertion, confined to the object, it may be accomplished; as soon as is reasonably convenient, as soon as reasonably can be; * * * with all reasonable diligence and dispatch; with diligence, with due diligence; with reasonable diligence; * * *

In case of Kirk and Co. vs. Ohio Valley Insurance Co., the first syllabus reads:

"A policy of insurance provided that proof of loss must be presented forthwith; that the loss should be payable within sixty days; and all claims should be barred unless prosecuted within one year from the date of loss. Held: First, that forthwith meant within a reasonable time under all the circumstances after the loss, and the question of reasonable time was one for the jury to determine."

The justice of the peace-elect must use due diligence and take the oath of office as soon as possible after receiving his commission from the governor.

He is required by section 1721, General Code, to give bond within ten days after taking the oath of office. Failure to file such bond within such time will cause a vacancy in the office. The time within which a bond is required, is not based upon the date of the election, but upon the time at which he receives his commission from the governor.

In State vs. County Commissioners, 61 O. S., 506, the syllabus reads:

> "If one elected to the office of sheriff fails, without justification, to give an official bond before the first Monday of January next after his election there occurs on that day a vacancy in the office which the county commissioners should fill by appointment."

In this case the bond was presented the day after the first Monday in January, and the office was held to be vacant. The rule is strictly applied. An officer must qualify within the time prescribed or his office is vacant. No days of grace are given.

In answering your first inquiry: A justice of the peace-elect must take the oath of office as soon as possible after receiving his commission from the governor, and must give bond within ten days after taking such oath of office. Upon failure to give bond wthin ten days thereafter, the office becomes vacant.

Your second inquiry is as to the manner of filling such vacancy.

Section 1714, General Code, provides for filling a vacancy in the office of justice of the peace, as follows:

> "If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, *refusal to serve, or otherwise*, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

In this connection it will be observed that section 1721, General Code, supra, says that upon a vacancy caused by refusal to give bond "the trustees shall give notice of a new election to fill the vacancy."

Section 1715, General Code, provides:

> "At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

The failure to qualify by giving a bond is in effect a refusal to accept the office, in fact, section 7, General Code, provides that upon failure to qualify the officer-elect "shall be deemed to have refused to accept the office." Section 1714, General Code, specifies that if a vacancy occurs by reason of "refusal to serve, or otherwise," the trustees shall appoint a person to fill the vacancy. This clause includes a vacancy caused by failure to give bond within the required time.

The clause in section 1721, General Code, requiring notice of a new election, in my opinion, refers to the following regular election in the odd numbered years. It is then that notice of new election for justice of the peace shall be given and a successor elected as prescribed in section 1715, General Code. Sec-

tion 1721, General Code, does not authorize the township trustees to call a special election for that purpose.

A vacancy in the office of justice of the peace, caused by failure of the officer-elect to furnish a bond within the required time, should be filled by appointment by the township trustees and a successor elected at the next regular election for office of justice of the peace.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

(To the Treasurer of State)

141.

APPROPRIATIONS FOR STATE FIRE MARSHAL—RULES FOR DISBURSEMENT—CONSTITUTIONAL RESTRICTIONS.

Under article II, section 22 of the constitution of Ohio, an appropriation specifically made for expenses of the state fire marshal incurred between Feb. 15, 1910, and Feb. 15, 1911, remains available for two years from date of passage, for the payment of all expenses incurred during that period.

Expenses incurred after that period, however, may not be paid therefrom.

COLUMBUS, OHIO, February 28, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for opinion, thereon, the following question:

> "The partial appropriation bill passed by the last session of the general assembly, 101 O. L., 18, contains the following item:
>
> "'STATE FIRE MARSHAL
> Receipts and balances.....'
>
> "At the present date there remains in the fund thus appropriated and derived from receipts and balances paid into the state treasury by the department of the state fire marshal between February 15, 1910 and February 15, 1911, a considerable sum. Warrants are presented to me against this fund on account of expenditures made and liabilities incurred since February 15, 1911. May I lawfully pay these warrants?"

Article II, section 22 of the constitution provides in part that:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation, made by law, * * *"

The act cited in your question is in part as follows:

> "An act to make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1910, and the first quarter of the fiscal year ending February 15, 1911.
>
> "Be it enacted by the general assembly of the state of Ohio:
>
> "Section 1. That the following sums, for the purposes hereinafter specified, be, and the same are hereby, appropriated out of any moneys in the state treasury to the credit of the general revenue fund, not otherwise appropriated, to wit:
>
> * * * * * * * * * * * * * * *
>
> "'STATE FIRE MARSHAL
> Receipts and balances.....'
>
> * * * * * * * * * * * * * * *

"Section 2. The moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 15, 1910, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid.

"Section 3. * * * * * * * * * * * *

"No money herein appropriated shall be drawn except upon a requisition upon the auditor of state, approved by the head of each department, * * * which shall set forth in itemized form the services rendered * * * or expenses incurred, and the date of purchase, and the time of service * * *; and it shall be the duty of the auditor of state to see that these provisions are complied with. * * *"

It is clear from a consideration of the above quoted provisions, that the amount appropriated by the act of 1910 is the amount of receipts and balances deposited in the state treasury by the department of the state fire marshal, between February 15, 1910 and February 15, 1911. The balance that remains on hand in this fund therefore, is appropriated; and in accordance with the uniform interpretation of the constitution and statutes of the state, remains so for a period of two years from the date of the passage of the act. That is to say, the balance of which you speak would not lapse into the general revenue fund of the state on February 15, 1911, but remains appropriated for the purpose for which it was originally appropriated, and may be lawfully used to discharge liabilities within that purpose until it is exhausted.

On the other hand, however, it is clear from a reading of the whole act, and especially the title thereof, that the purpose for which the appropriation is made is definite. The act is "an act to make partial appropriations *for* the last three-quarters of the fiscal year ending November 15, 1910, and the first quarter of the fiscal year ending February 15, 1911." This can mean but one thing, viz: the appropriations made by the act are for the purpose of conducting the business of the several departments for which they are made, during the fiscal year defined in the title. Acordingly, the amounts appropriated by the act may lawfully be used to discharge liabilities incurred within that period, but not to discharge liabilities incurred either before the commencement of that period, or after its expiration. Section 2 of the act makes clear the conclusion that liabilities existing prior to February 15, 1910, may not be discharged out of the appropriation; but all of the provisions construed together lead just as clearly to the conclusion that the appropriation may not lawfully be used to discharge liabilities created after the expiration of the period, to wit: after February 15, 1911.

I therefore advise you, that while the balance remaining in the fund of which you speak may lawfully be expended to discharge liabilities created prior to February 15, 1911, it may not be used to discharge liabilities created since that date.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

159.

APPROPRIATIONS—PAYMENT OF EXPENDITURES MADE AFTER PERIOD PROVIDED FOR—ADMINISTRATIVE OFFICERS' CUSTOM AS JUSTIFYING DEPARTURE FROM STRICT LEGAL CUSTOM.

As a principle of law, the ruling of the opinion rendered to the treasurer of state to the effect that expenditures made by the state fire marshal after Feb. 15, 1911, cannot be made from appropriations specifically providing for the period prior to that date, must be adhered to.

However, there is authority for the rule that a contemporaneous construction of doubtful statutes by the administrative officers having duties under them, is entitled to weight. In view of the fact therefore, that the auditors have for a long period been observing a custom contrary to law, it may be advised that the balance of the fund in dispute may be applied, as customary, to expenditures make subject to Feb. 15, 1911.

COLUMBUS, OHIO, March 7, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—A few days ago you submitted to me the question as to whether the appropriation made by the general assembly of 1910 for the use of the state fire marshal's office, and being the receipts and balances of that office for the fiscal year ending February 15, 1911, could be lawfully used to discharge liabilities incurred after that date.

In conformity to your request I prepared an opinion in which I held that such liabilities could not lawfully be discharged out of the appropriation in question. That opinion was based upon the consideration of the body of the appropriation, the title of the act and the provisions of article II, section 22 of the constitution of the state.

I have been asked to reconsider this opinion by the chairman of the finance committee of the house of representatives. Upon such reconsideration I have become more firmly of the opinion that the conclusion which I reached upon the legal facts considered by me was correct. Several considerations have served to confirm me in this opinion. Among them I may mention the fact that general and partial appropriation acts, so-called, have been passed in practically the same form for more than fifty years, and that the language found in the title of the acts of 1910, which language was relied upon by me, not because it was a part of the act but, because it disclosed an intent, imperfectly disclosed by the act itself, has not always been in the titles of the several acts. That is to say, I find that in the earliest form of such appropriation bills, the statement that the appropriation was for the last three-quarters of one fiscal year and the first quarter of the succeeding fiscal year, was customarily included in the body of the act, and that by process of evolution so to speak, it became transferred to the title.

This and other facts have, as above indicated, served only to make me more confident of the correctness of my construction of the act of 1910 in its strictly legal aspect. Each one of the appropriation acts passed during the period of time over which my investigation extends, has contained the sentence quoted from the appropriation act of 1910, which in effect makes it the duty of the auditor of state to enforce the remaining provisions of the act. It has always been the duty of the auditor of state, under the statutes relating to his official powers and duties, to scrutinize all vouchers presented to him for the purpose of

ascertaining whether they are legally due, and whether there is money in the treasury duly appropriated to pay them. (See section 243, General Code, section 154, Revised Statutes).

It is therefore clear, that each auditor of state has had the very question which you raise presented to him under each of the succeeding appropriation laws. At some period, not ascertained by my investigation, some auditor of state has adopted a ruling contrary to that of my former opinion. This ruling has always been followed by successive auditors of state; it must be deemed to have been in the minds of the general assembly, in determining the amounts to be appropriated for the use of the several departments and institutions of the state from session to session.

I have ascertained, however, that it has always been the practice of the auditor of state to regard balances in all appropriations made under such general and partial acts, as that of 1910, as available for the discharge of liabilities incurred after the end of the appropriation period and until the lapse of the appropriation by force of article II, section 22 of the constitution.

The question which you submitted is, in the first instance, an administrative one which must be determined by the department of the auditor of state. The ruling of the auditor of state having been acted upon and accepted practically, it is clear that great inconvenience would result from reversing it at this time, and applying the new rule to the appropriations made by the general assembly of 1910. There is much authority for the rule that the contemporaneous construction of statutes, doubtful as to their meaning, by the administrative officers whose duty it is to carry them into effect, is entitled to weight in resolving the doubt which exists. I am unable to hold, as a matter of law, that this principle applies in the present instance, because the title of the act is, in my judgment, better evidence of the intention of the general assembly than this extraneous fact. Practically, however, it would seem that, to avoid endless confusion and to conform to the established practice, it would be proper to disregard the technical aspect of the case and to pay warrants presented against funds appropriated in the general and partial appropriation acts of 1910, regardless of whether or not the liability was incurred prior to February 15, 1911.

The general assembly is now in session, and the validity of its acts has today been upheld by the supreme court in the case of State ex rel. the C. C. C. & St. L. Railway Company vs. Creamer, Treasurer. I trust that in view of what seems to be the clear principles of law applicable to the question originally asked by you, as stated in my former opinion, the general assembly will see fit to remove all doubt by reappropriating the balances in the funds created by the appropriation acts of 1910 and that, in the future, the general assembly will not limit to the fiscal year appropriations which in practice are really required to extend over a greater period.

In view of the peculiar situation that has given rise to your inquiry, and in view also of the favorable decision of the supreme court above referred to, I advise that the balance in the fund referred to in your original inquiry, and in all other funds created by the partial or general appropriation acts of 1910 be regarded as available for the discharge of liabilities created since February 15, 1911. In so holding, however, I do not, as above indicated, wish to be understood as departing from the principle of law upon which my former opinion was based.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

C 326.

"PEDDLERS" AND "ITINERANT VENDERS"—LICENSE PROVISIONS—EXCEPTIONS OF SOLDIERS, SAILORS AND MANUFACTURERS.

Within the meaning of the state license statutes, an "itinerant vender" is one who conducts a business while moving from place to place and retaining in each place for a period of less than ninety days, a store room or building for the purposes of said business.

A "peddler," within the same provisions, is one who "travels" from place to place and sells his goods generally from house to house, or to passersby. A person who sells from a stand upon a street corner may come within the meaning of either "peddler" or "itinerant vender" according to circumstances.

Soldiers or sailors who served during the Civil or Spanish war, and were honorably discharged, are excepted from the license provisions. So also are persons who manufacture within the state, the goods they intend to sell.

COLUMBUS, OHIO, August 19, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 28, 1911, you ask an opinion of this department in reference to peddler's license, as follows:

> "The enclosed letter from Chas. Murray, 1722 Euclid Ave., Cleveland, asking for information with reference to peddler's license is herewith submitted for reply."

The letter enclosed states in part as follows:

> "I have been informed that there is a state law requiring a state license from individuals going from town to town selling goods on streets.
>
> "I make a living selling specialties on streets of cities and towns incorporated and have been in Michigan for last nine months. Wherever I operated I was required to pay a license for selling, which license ranged from $1.00 to $5.00 per day."

The legislature has provided for the licensing by the state of peddlers, and also of itinerant venders. It has also empowered councils of municipalities to regulate and license these occupations. This power granted to council is found in sections 3669, et seq., General Code, and does not apply to the question asked.

Sections 6317 to 6356, General Code, apply to peddlers and sections 6357 to 6369, General Code, to itinerant venders.

The provisions as to securing a peddler's license are as follows:

> "Section 6347. When a person files with the auditor of a county, under oath, which may be administered by such auditor, a statement of his stock in trade in conformity with the law requiring the listing of such stock for taxation by merchants or others, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with law, and complies with the terms set forth in section sixty-three hundred and forty-nine, such auditor shall issue to him a license to peddle such stock anywhere in this state.

"Section 6348. A merchant or his agent desiring such license shall not be required to make the statement provided for in the next preceding section if such stock has been otherwise listed for taxation.

"Section 6349. Before receiving such license the applicant, *if intending to travel on foot, shall file* with the county auditor the county treasurer's receipt for twelve dollars; if intending to travel on horseback or in a one horse vehicle, he shall file such receipt for twenty dollars; if intending to travel in a two horse vehicle, he shall file the receipt for twenty-eight dollars; or, if intending to travel in a boat, watercraft or on a railroad car, he shall file it for sixty dollars. He shall also pay to the auditor the sum of fifty cents as the auditor's fee for granting the license.

"Section 6351. An applicant for the license, provided in section sixty-three hundred and forty-seven, proving to the auditor to whom such application is made that he has served as a soldier or sailor in the service of the United States during the late rebellion or the Spanish-American war and has been honorably discharged therefrom, shall pay to such auditor as his fee for such license the sum of fifty cents, and shall not be required to make any other or further payment. He shall be exempted from paying any fee for a municipal or other license, as required by law or ordinance, during the period covered by the license issued to him by such auditor.

"Section 6353. A license granted in conformity with this chapter shall authorize the person named therein to sell goods, wares and merchandise for one year from the date of the receipt of the treasurer, as *a peddler or traveling merchant.* Such person may take out a license to peddle for three or six months, and pay for it proportionately in accordance with the provisions of section sixty-three hundred and forty-nine.

"Section 6354. A license to peddle shall not authorize the person named therein to sell goods, wares or merchandise at auction, vendue or public outcry, *nor to sell them by the agency of another person.*

"Section 6355. If a peddler or traveling merchant sells goods, wares or merchandise, *except such as are manufactured within this state by himself or employer,* without having obtained a peddler's license so to do, he shall forfeit and pay for each offense the sum of fifty dollars to be recovered in a civil action before any justice of the peace of the county where the offender is found. Such sum shall be paid into the treasury of the township in which the judgment is rendered, for the use of the township school fund, except ten per cent. thereof, which shall be paid to the informer."

Provisions as to itinerant venders are as follows:

"Section 6358. An itinerant vender, whether principal or agent, before beginning business, shall take out state and local licenses in the manner hereinafter set forth, but the right of a municipal corporation to pass such additional ordinances relative to itinerant venders, as may be permissible under the general law or under its charter, shall not be affected.

"Section 6359. An itinerant vender desiring to do business in this state shall deposit with the secretary of state the sum of five hundred dollars as a special deposit, and thereafter, upon application in proper

form and the payment of a further sum of twenty-five dollars as a state license fee, such secretary shall issue to him an itinerant vender's license, authorizing him to do business in this state in conformity with the provisions of this chapter for one year from the date thereof. Such license shall set forth a copy of the application upon which it is granted. The license shall not be transferable nor permit more than one person to sell goods as an itinerant vender, either by agent or clerk, or in any other way than in person.

"Section 6360. A licensee, described in the next preceding section, may have the assistance of one or more persons who may aid him in conducting his business, but not act for or without him.

"Section 6361. The words 'wearing apparel,' for the purpose of this chapter, shall mean and include clothing, underwear, hats and shoes. *The words 'itinerant vender,' for the purposes of this chapter, shall mean and include persons, both principals and agents, engaging in a temporary or transient business of selling goods, wares and merchandise in this state and remaining in one place for less than ninety days.*

"Section 6362. This subdivision of this chapter shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery.

"Section 6363. Applications for licenses shall be sworn to, shall disclose the names and residences of the owners or persons in whose interest such business is conducted, and be kept on file by the secretary of state, with a record of all licenses issued upon such applications. All files and records of the secretary of state and the respective clerks of municipal corporations shall be in convenient form and open for public inspection."

In construing these statutes the first proposition to be determined is, who is a peddler, and who is an itinerant vender.

The following definitions of these terms are found:

"Strictly speaking a hawker is a peddler who cries out his goods, although for all practical purposes the terms are considered synonymous."

21 Cyc., page 367.

"* * * In the absence of a definition by statute or municipal ordinance, a peddler, or hawker, within the generally accepted meaning of the word, is a small retail dealer who carries his merchandise with him, traveling from place to place, or from house to house, exposing his or his principal's goods for sale and selling them."

21 Cyc., 367-8.

"The term 'itinerant vender,' or its equivalent, is often used as synonymous with 'peddler,' although usually the former is defined by statute or ordinance as one who hires, leases or occupies a building for a limited time, that is, a merchant who goes from town to town but not from house to house."

21 Cyc., 370.

Spiegel, J., in the case of United Cigar Stores Co. vs. Von Bargen, Auditor, 7 N. P. N. S., page 420, on page 423 of opinion, says:

"The word peddler has a well defined meaning. It means an ambulatory person, not a merchant with a fixed location, and council has no authority to add to or widen this meaning, unless directly authorized by the state so to do."

It is sometimes difficult to determine whether a person is a peddler or an itinerant vender. That there is a difference between them is recognized by the legislature when it provides different laws governing them.

The difficulty in distinguishing them is also recognized in 21 Cyc., page 370, in foot note 37:

"There is a difference between an itinerant 'merchant' and a peddler, although it is not always easy to determine who is a merchant. Carrollton vs. Bazette, 159 Ill., 284."

In our statutes governing peddlers, the word "travel" and "traveling" seem to be emphasized. As in section 6359, "travel on foot," "travel on horseback," etc. In the statutes governing "itinerant venders," the word "business" seems to be emphasized. As in section 6358, "before beginning business;" section 6359, "authorizing him to do business;" in section 6361, defining an itinerant vender, "temporary or transient business."

One who goes from town to town, or from locality to locality, and sells goods, wares or merchandise from a room, or building, or from a fixed stand in the street, and who remains in the same place for less than 90 days, is an itinerant vender. He is engaging in a business of a temporary or transient nature, renting a room for a week, month or two months, then moving on another locality.

One who goes from house to house, soliciting the sale of goods or wares which he carries with him for immediate delivery is a peddler. By virtue of section 6349 he may travel on foot, on horseback or in a one or two horse vehicle, or in a boat, watercraft, or in a railroad car. The idea of travel is prevalent. He is an ambulatory person and has no fixed stand or room from which he makes his sales.

The difficulty arises in determining the status of one who goes upon a street corner and sells his goods by outcry, or otherwise, from a temporary stand, or table, which is moved to different corners, or places in the street, at the will of the seller. Such a person has some of the characteristics of a peddler and hawker, and also some features of an itinerant vender. He does not have a fixed stand, neither does he travel about in either of the modes specified in section 6349. There is no provision of the statute exempting such persons from securing a license. He must secure either a peddler's or an itinerant vender's license. Which one will depend upon the particular circumstances of each issue.

I am of the opinion that a person who puts a table or stand in a hallway, building entrace, or on a street corner, from which he sells his wares is an itinerant vender. If he passes along the street carrying his goods, selling them to passersby, I am of the opinion that such a person is a peddler.

There are two exceptions to the law requiring a person to take out a peddler's license.

By virtue of section 6351, General Code, a sailor or soldier of the United States during the late rebellion of the Spanish-American war, who has been honorably discharged, can secure a license upon payment of 50 cents to the county auditor.

Section 6255, General Code, authorizes a person to sell as a peddler, goods

or wares manufactured within the state by himself or employer, without securing a state license.

Which license Mr. Murray must secure will depend upon the manner in which he makes his sales, and whether or not he comes within either of the above exceptions.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

345.

APPROPRIATIONS—OHIO BOARD OF ADMINISTRATIONS—MERGER OF FUNDS—"MAINTENANCE," "ORDINARY REPAIRS AND IMPROVEMENTS" AND "SPECIFIC PURPOSES"—DUTY OF STATE TREASURER AND STATE AUDITOR.

The auditor of state and the treasurer of state may merge the appropriations made for the period prior to Feb. 15, 1912, under the three classes, "maintenance," "ordinary repairs and improvements" and "specific purposes" and may pay warrants issued by the board of administration through its proper offices against said funds as merged, although the appropriations for the aforesaid period were for specific purposes and for specific institutions. So too, the auditor of state may issue warrants on the treasurer against these three classifications in payment of accounts which were otherwise specifically appropriate.

Such a change is merely a change in methods of bookkeeping and not a diversion of funds, and it is within a necessary interpretation of the board's powers in order to carry out the spirit of the act creating the board with the object of entirely superseding the former trustees and providing a simple, uniform and economic system of administration.

It would be well, however, to adopt a system which would apprise the state treasurer and the state auditor of the fact that the voucher drawn for a certain purpose, does not exceed in amount the specific appropriation made by the legislature for its stated purpose.

COLUMBUS, OHIO, September 6, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to own receipt of your favor of September 1, 1911, wherein you advise me as follows:

> "Under section 31, paragraph 2 of an act to create a board of administration for the institution of the state passed May 17, 1911, reads as follows:
>
> > "'Hereafter the appropriation for said institutions shall be of three classes: Maintenance, ordinary repairs and improvements and specific purposes.'
>
> "I would like your opinion upon the following questions:
>
> "(A). The appropriation bill appropriating the several amounts for the several institutions for the year ending Feb. 15, 1912, having specifically appropriated certain sums for certain specific institutions and purposes without classifying said funds, can the auditor of state and treasurer of state merge the said appropriations for said year aforesaid under three classes, namely: Maintenance, ordinary repairs and improvements, specific purposes, and pay warrants issued by the

board of administration through its proper officers against said funds as merged where the same was by the act of the general assembly specifically appropriated for specific purposes and for specific institutions.

"(B) Are the auditor of state and treasurer of state legally authorized to merge or classify their several appropriations so made as above stated and carry them as stated in my first question, or in other words, is the auditor of state legally authorized to issue his warrant on the treasurer of state against an account or for money which was not specifically appropriated by the legislature, and is the treasurer of state legally authorized to pay such warrants when presented?"

In reply thereto permit me to say that section 7 of the act approved May 17, 1911, found in year book 102, at page 211, provides as follows:

"The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

Section 31 of the said act provides:

"Each managing officer shall before each session of the general assembly present to said fiscal supervisor an itemized list of appropriations desired for maintenance, repairs and improvements, and specific purposes, as he considers necessary for the period of time to be covered by appropriations. The fiscal supervisor shall tabulate such statements and present them to the board of administration with his recommendations. It shall then be the duty of the board to present the needs of the institutions to the general assembly. For this purpose a per capita allowance for the inmates, patients and pupils of each of the institutions shall be arrived at and a total allowance for maintenance asked for on the basis of actual number and estimated increase. The fiscal supervisor and the board shall furnish to the governor and to the general assembly such information as may be required regarding appropriations requested. It is the intent and meaning of this section that all requests for appropriations for said institutions shall be placed under sole control of the board, and that appropriations for the maintenance and ordinary repairs and improvements thereof shall be made to the board in single sums to be used for the several institutions according to their varying needs.

Hereafter the appropriations for said institutions shall be of three classes:

"(1) Maintenance.

"(2) Ordinary repairs and improvements.

"(3) Specific purposes.

"Appropriations for specific purposes shall cover all items for construction, extraordinary repairs and purchase of land, and shall be used only for the institutions and purposes specified therein."

Section 30 of the said act provides as follows:

"The state treasurer shall have charge of all funds under the jurisdiction of the board and shall pay out the same only in accordance

with the provisions of this act; provided, that the moneys designated and approved by the board and the state auditor as salary and contingent funds in the monthly estimates shall be placed, not later than the first day of each month, in the hands of the managing officer of each institution, who shall act as treasurer thereof. Moneys in the hands of the officials of the several institutions at the organization of the board shall be transferred forthwith to the state treasurer. Moneys collected from various sources such as the sale of goods, farm products and all miscellaneous articles, shall be transmitted on or before Monday of each week to the state treasurer and a detailed statement of such collections made to the fiscal supervisor by each managing officer; but the receipts from manufacturing industries shall be used and accounted for as provided in section 32 hereof."

Section 29 of the said act provides as follows:

"For the purpose of proper regulation, recording and auditing the various expenditures of the said institutions the managing officers thereof shall prepare and present to the fiscal supervisor in triplicate, not less than fifteen days before the first day of each month, and on forms furnished by the board, a detailed estimate of all supplies, materials, improvements and money needed during each month. The fiscal supervisor shall review such estimates, and in writing advise changes, if any, giving his reasons therefor, and present them to the board. The officer making the estimate may appeal to the board on any change so advised, due notice of which shall be given him. Estimates for periods longer than one month may be made in the same manner by the managing officer for staple articles designated by the board or for other supplies. Each estimate may include a contingent fund of not to exceed three per cent. of the total amount for maintenance for the period of the estimate, for which no detailed account need be given in the estimate, but such fund shall be drawn upon only in due form as herein provided and under the rules of the board. The fiscal supervisor shall return to the managing officer one copy of every estimate with the board's approval or alterations in writing, furnish one copy to the state auditor, and file the third in the office of the board. The state auditor shall ascertain that the estimates so received do not exceed the respective appropriations, and shall draw warrants on the state treasurer monthly for the salary and contingent funds for each institution, which shall be placed in the hands of the managing officer thereof. Itemized payrolls or vouchers for all payments shall be drawn in triplicate. One copy shall be kept on file by the managing officer, one be given to the fiscal supervisor, and one to the state auditor who shall issue a warrant on the state treasurer thereon. Each voucher shall contain a statement of the managing officer, or of some other bonded officer designated by him, certifying that the supplies and materials purchased conform to the contract and samples, and that the improvements or repairs made or special services rendered were fully satisfactory; that the approving officer was in no way financially interested in the transaction to which the same relates, and that he has full knowledge of the value of the purchase or work or services in question; such statement to be made according to the forms provided by the board; provided, that payrolls for temporary

employments in cases of emergency may be made at any time after the services are performed, but all such payrolls shall be certifid by the managing officers in the same manner as other vouchers, who shall also certify that each person named in the payroll actually rendered the services for the time and at the rate charged therein."

In connection with your inquiry I have one from the Ohio board of administrations, a copy of which is as follows:

"Section 31, paragraph 2, of an act 'to create a board of administrations for the institutions of the state * * *' passed May 17, 1911, reads as follows:

"Hereafter the appropriations for said institutions shall be of three classes:

"(1) Maintenance.

"(2) Ordinary repairs and improvements.

"(3) Specific purposes.

"It is the desire of this department to merge the several appropriations made by the legislature to the institutions into the funds above named, for example:

Boys' Industrial School:	Partial.	General.	Total.
Current expenses	$50,000 00	$65,000 00	$115,000 00
Salaries of officers, teachers and trustees' expenses	20,000 00	23,000 00	43,000 00
Ordinary repairs and improvements including gas wells		7,000 00	7,000 00
Rewards		700 00	700 00
Necessary additions and improvements in power plant		2,500 00	2,500 00
	$70,000 00	$98,200 00	$168,200 00

"The board desires to merge the above appropriations as follows:

MAINTENANCE.

Current expenses	$115,000 00
Salaries of officers, teachers and trustees' expenses	43,000 00
	$158,000 00

ORDINARY REPAIRS AND IMPROVEMENTS.

Ordinary repairs and improvements	$7,000 00
	$7,000 00

SPECIFIC PURPOSES.

Rewards	$700 00
Necessary additions and improvements in the power plant	2,500 00
	$3,200 00
Total	$168,200 00

"You will observe that the above merger is no diversion of funds, but is simply a change in the manner of bookkeeping. The appropriations made by the legislature for the institution for the year ending February 15, 1913, is made in the same manner as outlined in the above statement, and it is the intention of this department, providing the auditor and treasurer are satisfied that this matter of merging the funds is not a violation of the law, to request them to classify their several appropriations as they now carry them and merge them in this way.

"I attach hereto a full statement showing the manner in which it is desired that these funds should be merged for the several institutions, and you will note, for instance, the appropriations for the salaries of managers at the penitentiary; inasmuch as these officers no longer exist, such appropriations should be turned back into the general revenue fund.

"I trust you will take this matter under immediate consideration and advise the state auditor and state treasurer and, also, this department of your opinion as to the legality of the merger outlined above."

From the foregoing you will observe that by the provisions of section 7 of the act, the board is given all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions.

You will observe that section 30, aforesaid, provides that the state treasurer shall have charge of all funds under the jurisdiction of the board and shall pay out the same only in accordance with the provisions of the act referred to before, to wit: the act of May 17, 1911.

You will further observe that by provision of section 31, it is provided hereafter the appropriations for the said institutions shall be of three classes: 1. Maintenance, 2. Ordinary repairs and improvements, 3. Specific purposes.

Section 12 of the aforesaid act provides as follows:

"The board shall cause to be kept in its office a proper and complete set of books and accounts with each institution, which shall clearly show the nature and amount of every expenditure authorized and made thereat, and contain an account of all appropriations made by the general assembly and of all other funds, with the disposition thereof. It shall prescribe the form of vouchers, records and methods of keeping accounts at each of the institutions which shall be as nearly uniform as possible. The board or any member or officer thereof shall have the power to examine the records of each institution at any time. It shall also have the power to authorize its bookkeeper, accountant, or any other employe to examine and check the records, accounts and vouchers or to take an inventory of the property of any institution, or to do whatever may be deemed necessary, and to pay the actual and reasonable expenses incurred in such service upon an itemized account thereof being filed and approved."

You will further observe that the appropriation act providing money available to pay liabilities incurred on and after February 16, 1912, so far as relates to the Ohio board of administration, is to be found in year book 102, page 407, and the same is divided under the heads of *maintenance, ordinary repairs and improvements*, and *specific purposes*, so that as to any period after February 16, 1912, there can be no question, and the only matter of concern is as to the

power of the state board of administration to merge the appropriations made for the year prior to February 16, 1912, and group them under the three heads of maintenance, ordinary repairs and improvements, and specific purposes.

Without going into detail in this opinion, it is sufficient to say that the act establishing the state board of administration for state institutions sets forth in the beginning its intents and purposes as follows, to wit:

> "Section 1. The intent and purpose of this act are to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state;
>
> "To provide for the delinquent such wise conditions of modern education and training as will restore the largest possible portion of them to useful citizenship;
>
> "To promote the study of the causes of dependency and delinquency, and of mental, moral and physical defects, with a view to cure and ultimate prevention;
>
> "To secure by uniform and systematic management, the highest attainable degree of economy in the administration of the state institutions consistent with the objects in view;
>
> "This act shall be liberally construed to these ends."

Section 8 of said act provides:

> "The board on its organization shall succeed to and be vested with the title and all rights of the present boards of trustees, boards of managers, and commissions of and for said several institutions in and to land, money or other property, real and personal, held for the benefit of their respective institutions, or for other public use, without further process of law, but in trust for the state of Ohio. Said several boards of trustees, boards of managers, and commissions now charged with duties respecting the institutions above named shall on and after August 15, 1911, have no further legal existence and the board is hereby authorized and directed to assume and continue, as successor thereof, the construction, control and management of said institutions, subject to the provisions of this act."

From the foregoing it is perfectly apparent that the object of the act is that the board of administration shall succeed to and be vested with the title and all the rights of the present board of trustees, boards of managers and commissioners of the aforesaid several institutions in and to the lands, moneys, and other property, real and personal, held for the benefit of the respective institutions or for any other public use.

You will also notice that the said "several boards of trustees, boards of managers and commissions" now chargeable with the duties respecting the institutions above named, *shall on and after August 15, 1911 have no further legal existence* and the board by the said act is authorized and directed to assume and continue as successor thereof in the construction, control and management of the said institutions.

In short, it is unreasonable to assume that the legislature would provide for an entirely new method of managing state institutions and abolish the old method of management and relieve the former managers and trustees and at the same time deprive the new board of all the fiscal necessities and advantages of the old.

The appropriations for the year ending February 12, 1912, were made agreeably to the old order of things, but the board of administration, together with the state treasurer, are required under the statutes to conform to the new order of things. It is not reasonable to assume that the new board is to institute two systems of bookkeeping. On the other hand, it is only fair to believe that the new board will start out with its new system of bookkeeping as a permanent one in conformity with the new order of things as made by the act aforesaid and not in respect to any other.

I wish to state that the board of administration has a perfect right to merge the funds appropriated by the legislature so as to conform to the act of May 17, 1911. By so doing the said board is not making any appropriation—it is simply merging the funds already appropriated so as an account of same may be kept in accordance with the act aforesaid.

My holding is, therefore, that the state board of administration is empowered to merge the said funds and certify its action to the state auditor and to the state treasurer, and the state auditor and the state treasurer are fully authorized to open a new set of accounts, so far as the appropriations are concerned, agreeably to the order of the board of administration and the act of May 17, 1911 aforesaid.

In order to avoid the possibility of exceeding the amount appropriated for specific purposes after the funds have been merged in accordance with the act creating the state board of administration, it would be well to adopt some system which would apprise the state treasurer and the state auditor of the fact that the voucher drawn for a certain purpose under the three general heads does not exceed in amount the specific amount appropriated by the legislature for any specific purpose.

Answering your questions specifically I have to advise as follows in reference to "(A)," "That the auditor of state and the treasurer of state may merge the said appropriations for said year aforesaid under the three classes, viz:

Maintenance,

Ordinary repairs and improvements,

Specific purposes,

and may pay warrants issued by the board of administration through its proper officers against said funds as merged, upon your receiving a properly certified copy of such merger of the auditor of state and the board of administration merging said funds." While said funds were specifically appropriated by the act of the general assembly for specific purposes and for specific institutions, yet for the reasons aforesaid, the subsequent act of the legislature in passing the board administration law is superior to, and in my judgment authorizes the merger aforesaid.

Coming now to your second question "(B)," "Are the auditor of state and treasurer of state legally authorized to merge or classify their several appropriations so made as above stated and carry them as stated in my first question, or in other words, is the auditor of state legally authorized to issue his warrant on the treasurer of state against an account or for money which was not specifically appropriated by the legislature, and is the treasurer of state legally authorized to pay such warrants when presented," I beg to advise that the auditor of state and the treasurer of state are legally authorized to merge or classify the several appropriations so made as stated in your question, and carry them as stated in your first question, provided the merger be made according to the foregoing opinion by the state board of administration under the three heads:

Maintenance,
Ordinary repairs and improvements,
Specific purposes.

In short, it is my holding that you and the auditor of state are entirely warranted in recognizing the certificate of the board of administration merging the funds under the three heads aforesaid.

This opinion refers only to the subject matter of the right of the board of administration to use all of the funds appropriated for the institutions within its jurisdiction.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

It is my judgment that the auditor of state has the right, and it is his duty to issue the warrants after said appropriations have been merged; and the treasurer of state is authorized, and it is his legal duty to honor the warrants of the auditor of state in accordance with the said merger.

357.

TAX COMMISSION—CERTIFICATION OF CORRECTED FINDINGS TO STATE AUDITOR AS "PROPER OFFICIAL"—NOTIFICATION TO STATE TREASURER BY STATE AUDITOR.

When the tax commission has reviewed and corrected its findings in a given particular, the auditor of state is the "proper official" to whom they should certify their correction within the meaning of the Hollinger bill.

The auditor in turn should notify the treasurer of state of the change.

COLUMBUS, OHIO, September 13, 1911.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 27th, submitting for my opinion thereon the following question:

> "Section 128 of the Hollinger law says that 'the tax commission upon application may make such correction in its determination, finding or order, as it may deem proper and its decision in the matter shall be final. Such correction shall be *certified to the proper official* who shall correct his records and duplicate in accordance therewith.'
>
> "The tax commission has been notifying the auditor of state as *the proper official*, and this department gets no certification or official authority to change its records in accordance with the findings of the tax commission, although the treasurer of state has the original duplicate.
>
> "I would therefore ask your opinion as to who is the *proper official* mentioned in section 128 of the Hollinger law and how the treasurer of state should receive official notice to change the duplicate in accordance with the findings of the tax commission?"

Said section 128, which is sufficiently quoted in your letter, is to be read in connection with section 99 of the Hollinger law, which provides that:

> "After determining the amount of taxes or fees payable to the state * * * the auditor of state shall thereupon prepare proper duplicates and reports, and certify them to the treasurer of state for collection. * * *"

and with section 100 of said act, which provides that:

> "The treasurer of state shall * * * render a daily itemized statement to the auditor of state of the amount of taxes or fees collected and the name of the company from whom collected, under all provisions of this act."

The question which you present is perhaps as much a question of administrative management as of law, but inasmuch as three separate departments are concerned, and inasmuch also as no one department has authority to prescribe rules for the government of the others, I have no hesitancy in submitting to you my views as to the proper procedure.

Under the above cited and quoted sections it is my opinion that the auditor of state is the "proper officer" within the meaning of section 128 to whom the tax commission should certify any correction made by it of its findings. This is true because the auditor of state must in all cases compute the tax due. Again, the auditor of state is himself required to keep a record of the sums charged for collection as well as a record of payments thereon. On the other hand, the treasurer of state, who is the custodian of the duplicates, must have some authority to make a change therein. This authority ought properly to emanate from the auditor.

In my judgment, therefore, when the tax commission has reviewed and corrected its findings in a given particular it should notify the auditor of state who should correct his own records in accordance therewith and thereupon by letter or upon such blank forms as may be prepared notify the treasurer of state of the amount due under such corrected finding from the company affected thereby. Thereupon, the treasurer would be authorized to correct all his own records and duplicates in the matter.

By following the above suggested procedure and by formulating blanks if necessary, in accordance therewith, it seems to me that any difficulty which may not be present in the administration of the law in question would be obviated.

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

(To the Board of Public Works)

203.

POWER TO APPOINT AND GOVERN A COLLECTOR OF TOLLS AND RENTALS.

Under the sections of the act conferring its powers, the board of public works may appoint a collector of tolls, or rentals with an office at Columbus, and may authorize him to collect whatever rentals and tolls the board may prescribe and may govern such appointee by such rules and regulations as are deemed advisable.

March 28, 1911.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 2d, 1911, which is as follows:

"The state board of public works having dismissed the collectors of tolls on the canal system of the state, desires to appoint a collector of rentals with his office in Columbus, authorizing him to collect rentals on water leases, pipe leases, land leases and boat licenses. Can the board, by resolution, legally make such an appointment and govern said appointee by such rules as they may prescribe?"

Section 415, 416, 417 and 418 of the General Code are as follows:

"*Section 415*: Members of the board of public works shall be the 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. The board of public works shall appoint such superintendents of repairs, lock tenders, and other employes as it deems necessary, and assign them to duty under the rules and regulations as the board prescribes.

"*Section 416*: The board of public works shall regulate the rate of tolls to be collected on the public works of the state, and appoint collectors of tolls, water rents and fines, at such places within the state as the board directs. Collectors of tolls so appointed shall be governed by such rules and regulations as the board prescribes.

"*Section 417*: Each superintendent of repairs and collector of tolls shall serve for a term of one year, and all other employes of the board of public works shall serve during the pleasure of the board. The salaries of such officers and the compensation of such employes shall be fixed by the board, and paid from the canal fund of the state upon the order of the board and the warrant of the auditor of state. A vacancy occuring in the office of an appointee shall be filled by the board.

"*Section 418*: Before entering upon the discharge of the duties of his office, each superintendent of repairs and each collector of tolls shall give a bond to the state in such sum as the board of public works may require, with two or more sureties approved by the board, conditioned for the faithful discharge of the duties of his office. Such

bond, with the oath of office and the approval of the board indorsed thereon, shall be deposited with the treasurer of state and kept in his office."

These sections give the board the power not only to appoint collectors of tolls, water rents and fines, but such other employes as the board deems necessary.

Section 433 of the General Code is as follows:

"Collectors of tolls shall collect water rents as they become due under the lease of water power, and such tolls on canals or other improvements of the state as the board of public works prescribes. Rent from lease of water power or other property of the state, made by the board or other state officer, shall be a first lien upon the estate created by such lease. Whenever such estate is sold or disposed of by judicial process the court shall order rent due thereon to be paid from the proceeds. Moneys received from water rents, tolls, fines, leases, sales of canal lands and other sources, shall be paid into the state treasury to the credit of the canal fund."

This section provides that the collectors of tolls shall collect water rents as they become due under the lease of water power, and such tolls as the board of public works prescribes.

Under the section above quoted I think that the board has the authority to appoint a collector of tolls, of rentals, with his office at Columbus, and to authorize him to collect rentals under water leases, pipe leases, land leases and boat licenses, or any other rentals or tolls the board may prescribe, and govern such appointees by such rules as they may establish.

This authority is further indicated by section 218-123 Bates' Revised Statutes, which is as follows:

"The board of public works, until otherwise provided by law, shall appoint so many collectors of canal tolls on each of the canals of this state, as they shall deem necessary for the punctual collection of tolls on such canals; shall require each collector to give bond, with sufficient security for the faithful performance of his duties, in such sum as the board shall prescribe; and shall designate the place where the office of such collector shall be kept: and shall determine what reasonable salary or other allowance shall be received by each collector for his services."

This section does not appear in the present General Code, but it was not repealed thereby and is still in effect.

Section 218-12 Bates' Revised Statutes, which is as follows:

"Collectors' offices on the Ohio canal, are hereby established at Cleveland, Akron, Massillon, Dover, Roscoe, Dresden, Newark, Carroll, Columbus, Circleville, Chillicothe, Waverly and Portsmouth; on the Miami and Erie canal, at Cincinnati, Lockland, Middletown, Dayton, Piqua, St. Marys, Delphos, Defiance, Maumee City and Toledo; on the Hocking canal, at Carroll and Logan; on the Walhonding canal, at Roscoe; on the Muskingum improvement, at Marrietta, McConnellsville, Zanesville and Dresden; provided, that if, in the opinion of the

board of public works, any one or more of said offices can be dispensed with without detriment to the public interest, said board may abolish the same; and, provided, further, that said board may establish additional offices if the public interest will, in its judgment, be promoted thereby,"

was considered obsolete by the codifying commission and not carried into the General Code, but in my opinion this section simply provides for the establishment of offices for collectors of tolls; and whether or not it is still in force is not material for your present request as in my opinion the sections of the General Code first quoted in this opinion give your board the authority to which you referred.

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

228.

POWER TO EMPLOY CANAL COLLECTOR WITH DUTY OF KEEPING BOOKS—SECRETARY AS DUPLICATE BOOKKEEPER.

When a canal collector is appointed by the board of public works, the board has the power to accord him the duties of keeping the complete books of his office and is not required to employ a secretary to keep a duplicate set of books.

April 21, 1911.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 31st, which is as follows:

"On February 15th, 1911, this board discharged all canal collectors and ordered them to close up their accounts and send in their books to this office.

"On March 14th, 1911, a collector was appointed by the board to make all collections whose office is to be in our main office, in the state house, Columbus, Ohio.

"As the new collector will run a complete set of books, consisting of a journal, cash book and ledger, will the secretary of our board be required to keep the above named books, which would be an exact duplicate of the collector's?"

I find no explicit provision in the statutes as to what officer or employe shall keep the books you refer to, namely, the journal, cash book and ledger for collection of rentals.

As both the secretary and collector are subject to the order of your board and as your board has full control and authority over all the books and records of your department, I am of opinion that if you require the collector to keep a certain set of books, that it would be entirely unnecessary, and in fact a needless expense and waste of time, to have the secretary keep an exact duplicate of the same books.

I believe your board can designate the secretary or collector to keep said books.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

C 228.

SALE OF LAND BY STATE—CORRECTION OF DEFECTIVE DESCRIPTION BY DEED FROM GOVERNOR.

Land was sold to O. S. Applegate by the canal commission and a certificate of purchase issued to the purchaser with the understanding that when an unpaid balance had been paid by him, the deed would be executed to him. Mr. Applegate died before payment of the balance and it was then discovered that the certificate contained a defective description.

Held: Under sections 8527 and 8528, General Code, the heirs now entitled to the deed might make application for a deed from the governor who might give a deed with the properly intended and corrected description.

COLUMBUS, OHIO, April 22, 1911.

HON. E. E. BOOTON, *Engineer Canal Land Department, Board of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 18th, 1911, which reads as follows:

"On November 23, 1888, the canal commission sold at public sale in Paulding county, Ohio, a tract of land containing 35 acres, described as 'the central part of the northeast quarter of section 31, town three north, range two east, Paulding county, Ohio,' One-third of the purchase money was paid and a certificate of purchase was issued to O. S. Applegate, the purchaser, receipting for the cash payment, and reciting that upon the payment of the balance of the purchase price with the accrued interest theron, he would be entitled to a deed for said land upon presenting his certificate of purchase. For some reason the deferred payments were never made during the lifetime of Mr. Applegate.

"Messrs. Snook and Savage, of Paulding, Ohio, attorneys for the heirs of Mr. Applegate, find that the description in the certificate of purchase is defective, for the reason that it does not describe the land which the state had to sell. I enclose a pencil sketch of the northeast quarter of section 31, 3 N. R. 2 E., which includes the property in question. Our records show that 60 acres were sold out of the south part of the west half of this quarter, leaving 20 acres, more or less, in the north end of the west half of the quarter unsold. The records also show that 65 acres were sold off the south end of the east half of this quarter, leaving 15 acres, more or less, in the north end of the west half of the quarter unsold.

"In volume No. 2, page 7½, of the plats of the Miami and Erie canal survey, there is a plat on which the 60 and 65 acre tracts are platted in lead pencil as shown on the enclosed sketch. I have shown the 35 acres in two tracts of fifteen and twenty acres, respectively, on the plat enclosed.

"The heirs are anxious to pay the deferred payments and accrued interest, but desire to have the description corrected. There is no doubt in my mind as to what was intended, viz: 15 acres, more or less, off of the north end of the east half of the northeast quarter of section 31, town 3 north, range 2 east, Paulding county, Ohio, lying immediately north of a 65 acre tract of land, deeded by the state of Ohio to Frances

B. DeWitt, March 12, 1892. Also 20 acres, more or less, off of the north end of the west half of said quarter section, lying immediately north of a 60 acre tract of land conveyed by the state of Ohio to O. S. Applegate by deed dated July 21st, 1892.

'The finding of the canal commission in case No. 283 of the canal commission records states that Applegate was in possession of the land at the time that the sale was made.

"We respectfully ask you to direct us as to the best method of correcting the description so that the deed will convey the land intended and as occupied by Mr. Applegate during his lifetime.

"A solution of this legal question will be greatly appreciated."

From your letter I take it that the difficulty in this situation is that, the certificate issued to O. S. Applegate did not correctly describe the land which was sold to him, that he never received a deed for the land and that he is now dead. I wish to call your attention to sections 8527 and 8528 of the General Code which are as follows:

"Section 8527. When the purchaser has died before deed made, and the lands have passed to another, by descent or devise, and the title still remains in him, or when the person to whom the lands have so passed, has conveyed them, or his interest therein, to another person, by deed of general warranty or quit claim, upon the proof of such facts being made to him and the attorney general, the governor shall execute the deed directly to the person entitled to the lands, according to the true intent and meaning of this chapter, although he derives his title thereto through one or more successive conveyances from the person to whom the lands passed by descent or devise.

"Section 8528. When, by the satisfactory evidence, it appears to the governor and attorney general, that an error has occurred in a deed executed and delivered in the name of the state, under the laws thereof, *or in the certificate of any public officer*, upon which, if correct, a conveyance would be properly required from the state, the governor shall correct such error by the execution of a correct and proper title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to it, his heirs, or legal assigns, as the case may require, and take from such party a release in due form, to the state, of the property erroneously conveyed."

These two sections, in my opinion, cover all the difficulties suggested in your letter. The proper course would be for the persons now owning this land, or the persons entitled to a deed, to make application for a deed from the governor. To this application should be attached an abstract, and affidavits showing that the claimants are the only heirs of O. S. Applegate, that they are now in possession of the land and entitled to a deed, and any other facts that may bear upon the case.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 251.

ACT CREATING A STATE BOARD OF PUBLIC WORKS—CONSTITUTIONALITY—ESSENCE OF BOARD'S DUTIES—SUPERINTENDENCE.

Sections 12 and 13 of article VIII of the constitution of Ohio, conferring upon the legislature the power to create a board of public works, intended that such board should have the powers of superintendence of public works. Therefore, those sections of the amended House Bill No. 336, which takes these powers of superintendence from the board whose members are elective officers, and places them upon the engineer whose office is an appointive one, would probably make the bill constitutional.

Recommended changes in the bill.

COLUMBUS, OHIO, May 12, 1911.

HON. JAMES R. MARKER, *Chief Engineer, Board of Public Works, Columbus, Ohio.*

DEAR SIR:—With your letter of May 10th, receipt whereof is acknowledged, you enclosed a copy of House Bill No. 336, Mr. Gebhart, entitled " a bill to amend sections 407, etc., * * * of the General Code, and to repeal sections 411, etc., * * * of the General Code, relating to the board of public works." You stated in your letter that a question had been raised as to the constitutionality of that bill and requested me to consider the same and render an opinion upon this point.

Upon examining said original House Bill No. 336 I came to the conclusion that the same was clearly unconstitutional, and was about to advise you to that effect when you informed me that you had been in error in handing me original House Bill No. 336; that said bill had been amended in the house of representatives, and that the bill with regard to which my opinion was intended to be invited is amended House Bill No. 336.

I have carefully read over the entire amended House Bill No. 336 and have compared it with the General Code in its present form. I find that all of the sections of chapter 9, division 1, title 3, part first, General Code, being the chapter at present relating to the board of public works, are repealed or amended by the bill with the following exceptions:

> "Section 408. The board of public works shall organize by the election of a member as president, and the appointment of a secretary and a clerk. The secretary shall receive a salary not to exceed fifteen hundred dollars per annum. The clerk shall receive such compensation as the board directs, not to exceed seven hundred dollars each year, to be paid upon the order of the board from moneys appropriated for that purpose.
>
> "Section 409. Before entering upon the discharge of the duties of his office, the secretary of the * * * public works shall give a bond to the state in the sum of five hundred dollars, with two or more sureties approved by the board, conditioned to the faithful discharge of the duties of his office. Such bond with the oath of office and the approval of the board indorsed thereon, shall be deposited with the treasurer of state and kept in his office. (This section is slightly but not materially changed.)
>
> "Section 410. The board of public works shall keep a journal of its proceedings which shall be open to the inspection of a committee of

either house of the general assembly, or to an officer or person interested therein.

"Section 413. The board of public works may maintain an action in the name of the state for violation of the law relating to the public works of the state, for an injury to property appertaining to the public works or for other causes necessary to the performance of its duties.

"Section 414. Each member of the board of public works and the secretary may administer oaths to persons required by law to file affidavits or statements with the board of public works, and to witnesses examined before the board of public works in matters relating to the discharge of its duties.

"Section 416. The board of public works shall regulate the rate of tolls to be collected on the public works of the state. * * * (The original section is amended in other particulars.)

"Section 419. The governor, with the advice and consent of the senate, shall appoint a chief engineer of public works, who shall be a practical engineer, and hold his office for a term of two years from the date of his appointment.

"Section 423. In addition to the general duties imposed upon him by the preceding section, the chief engineer of public works shall prepare plans and specifications of all contracts, leases and other work in connection with the improvement, maintenance and operation of the public works. If in the opinion of the board of public works and of the chief engineer of public works it is possible and practicable all such work shall be let by contract in the manner provided by law.

"Section 432. Within thirty days from the making of the new lease of water power, or the renewal or modification of an old lease, the board of public works shall furnish the auditor of state an attested copy thereof. * * * (This section is amended in immaterial respects by the bill.)

"Section 438. A copy of such certificate (in condemnation proceedings) shall be deliverd to each owner of the property taken, or left at his usual place of residence within this state. * * * The original certificate with the date and proof of service of a copy thereof shall be filed in the office of the *board.*

"Section 441. (Relates to the issue of a venire for jury in condemnation proceedings.)

"Section 446. (Relates to drawing jury in such proceedings.)

"Section 447. (Relates to service of notice in such cases.)

"Sections 448, 449, 452, 453, 454 and 456. (Relate to service of notice in such cases.)

"Section 457. Upon the filing of such application, the board of public works may appoint three disinterested persons as commissioners to consider the claim. If the board fails to agree in the selection of commissioners, it may apply to the governor, who shall appoint them. * * *

"Section 458. Such commissioners shall meet at a time and place to be fixed by the board of public works and give each applicant for damages reasonable notice thereof by letter. * * *

"Section 459. * * * The commissioners shall make their decision in writing, subscribe and deliver it to the board of public works together with the subpoenas by it issued, their records and a

statement of the number of days they were engaged in the discharge of their duties.

"Section 460. * * * The costs incurred by the commissioners shall be paid after the presentation of their award and report, upon the approval of the board of public works from moneys appropriated for that purpose, but if the damages awarded do not exceed the costs of the hearing, no payment of such damages shall be made. If no damages are awarded, the complainant shall pay the costs of the hearing. At any time before the decision of the commissioners, the board of public works may tender a claimant such sum of money as it deems him entitled to, and if he accepts it, his claim shall be discharged. If he refuses to accept the tender, the applicant shall pay the costs incurred thereafter unless a larger sum is awarded him by the commissioners as damages.

"Section 461. The board of public works shall cause each decision of commissioners upon an application for damages to be recorded in a book kept for that purpose. The award of the commissioners together with all records pertaining thereto, shall be submitted to the general assembly at their next regular session. Payments of compensation for damages so awarded shall be made from moneys specifically appropriated for that purpose.

"Section 469. (Defines and describes state parks.)

"Section 471. (Relating to the leasing of land adjacent to Buckeye Lake, etc., has been amended in immaterial respects.)

"Section 485. (Relates to the protection of birds, fish and game in state parks.)

The powers conferred by the amended bill upon the board of public works, as such, are such only as are set forth in the sections above quoted. They are as follows:

1. The power to elect a secretary.
2. The power to purchase property on behalf of the state.
3. The power to maintain an action in the name of the state in certain cases.
4. The power of each member of the board to administer oaths.
5. The power to regulate the rate of tolls to be collected on the public works of the state.
6. The power to appoint commissioners to consider damage claims, to fix the place of hearing of such claims, and to approve the award of such commissioners.

The board of public works under the amended bill will be denied all independent powers except those above enumerated.

Further analyzing the amended bill, the following powers are under its provisions, not above quoted, to be exercised jointly by the board of public works and by the chief engineer of the public works, the presumption being that in the exercise of such powers the board on the one hand and the chief engineer on the other would have equal voice in the determination of a given policy:

1. The power to determine the possibility and practicability of letting work in connection with the improvement, maintenance and operation of the public works by contract.
2. The power to enter into such contracts.
3. The power to lease surplus water power; but in this instance the rules

and regulations under which the leases are to be entered into are to be prescribed by the chief engineer, while the amount of rent due at a given time is to be fixed by the board and leases are to be cancelled or forfeited by the board.

4. The power to determine the amount of money which the state will offer to the owner in condemnation proceedings in case of public exigency.

5. The power to act in all essential respects for the state in condemnation proceedings in cases other than where a public exigency exists.

The following powers, at present vested in the board of public works, are under the amended bill taken from that board and vested in the chief engineer of the public works:

1. The power to divide the public works of the state into grand divisions and to designate them by name and to change the boundaries thereof. (See section 411, General Code, repealed by the bill, and section 424, General Code, as amended by the bill.)

2. The power to have the care and control of the public works of the state; to protect, maintain and keep them in repair; to remove obstructions therein or thereto; to make alterations and amendments thereon; and to determine the necessity of constructing feeders, dikes, reservoirs, dams, locks or other works, devices or improvements as the board deems proper. (See section 412, General Code, as it now exists, and as amended in the bill.)

3. The power to be the superintendent of the canals of the state. (See section 415, General Code, repealed by the bill, and section 422, General Code, as amended in the bill.)

4. The power to appoint superintendents of repairs, lock tenders, and other employes than field engineers and other employes of the engineering corps. (See section 415 and section 420, General Code, repealed by the bill, and sections 424 and 426, General Code, as amended in the bill.)

5. The power to appoint an assistant engineer of public works. (See section 420, General Code, repealed in the bill. This power is really abolished entirely rather than conferred upon the chief engineer.)

6. The power to prescribe the rules and regulations under which the chief engineer shall perform his duties, and to prescribe the duties of the chief engineer, other than those prescribed by statute. (See section 422, General Code, and same section as amended in the bill.)

7. The power, now possessed jointly by the board and the engineer, to allow and pay claims against the state for superintendence of canals or improvements. (See section 427, General Code, as it now is and as amended in the bill.)

8. The power to approve the time rolls, bills of materials and other contingent expenses. (Section 430, General Code, repealed by the bill, and section 427 as amended in the bill.)

9. The power to appropriate easements to guard against damages from possible overflow. See section 462, General Code, and same section as amended in the bill.)

10. The power to take and use materials excavated from a canal or feeder. (See section 463, General Code, and same section as amended in the bill.)

11. The power to execute powers and duties heretofore conferred upon the Ohio canal commission. (See section 464, General Code, and the same section as amended in the bill.)

12. The power to have the custody and control of the books, records, documents, etc., heretofore under the possession and control of the canal commission. (See section 465, General Code, and the same section as amended in the bill.)

13. The power to exercise control and management of lakes, reservoirs and state lands dedicated and set apart for the use of the public, and to make and enforce police rules and regulations with respect to the same. (See sections 472 to 486, inclusive, General Code, and the same sections as amended in the bill.)

Of the powers above prescribed as being under the bill jointly vested in the board and the engineer, the following are under the existing law vested solely in the board:

1. The power to determine the necessity of contracts.
2. The power to make and enter into such contracts.
3. The power to lease surplus water power and to prescribe the rules and regulations for such leases.
4. The power to proceed to appropriate property in cases other than where a public exigency exists.

The constitutional question involved in this bill arises from a consideration of sections 12 and 13 of article VIII of the constitution, which are in part as follows:

> "Section 12. So long as this state shall have public works which require superintendents there shall be a board of public works to consist of three members who shall be elected by the people. * * *
>
> "Section 13. The powers and duties of said board of public works and its several members, and their compensation, shall be such as *now are* or may be prescribed by law."

It will be noted that section 13 confers upon the general assembly the authority to prescribe in detail the powers and duties of the board of public works, and refers to the duties as they existed at the time of the adoption of the constitution. That the board of public works existed as a distinct agency of the state, having powers and duties fairly defined, prior to the adoption of the constitution of 1851, is clear by an examination of the session laws.

The board was first created on March 4, 1836, 34 O. L. 13, section 1 of which provides in part:

> "For the purpose of promoting and maintaining a general system of internal improvements within this state, and of uniting all of its various branches under the same supervision and direction there shall be created a board of public works. * * *"

This act consists of some nine sections, some of the provisions of which remain in the statute law to the present day.

It is very clear that what may be termed the general scope of the powers and duties of the board of public works as they existed at the time of the adoption of the constitution of 1851 must have been in the minds of the electors in adopting sections 12 and 13 above quoted. The board of public works did not spring into being as a department of the state government in 1851, nor were its powers and duties such, and only such, as have been prescribed by law passed under the constitution of 1851. That constitution raised the board of public works to the dignity of a constitutional department. The instrument does not specifically enumerate the powers and duties of the board. On its face, however, it indicated their nature. Section 12 provides that the board itself shall exist only "so long as this state shall have public works which shall have superintendence." Manifestly, therefore, the constitution recognized and established the board of public works for the purpose of *superintending the*

public works of the state. Furthermore, the powers and duties of the board as then prescribed were in part at least adopted by section 13. Nevertheless, the general assembly was given the power also by section 13 to change such powers and duties.

What, then, is the extent of the power of the general assembly under the constitution to change the powers and duties of the board of public works as they existed at the time of the adoption of the constitution in 1851? More specifically, do any changes in the powers and duties of the board of public works, proposed to be effected by amended House Bill No. 336, exceed the power of the general assembly in the premises?

At the outset, permit me to call attention particularly to the provisions of the first sentence of section 412, and those of section 422, as amended in the bill, in connection with the repeal of section 415, General Code, by the bill. The language employed in these various provisions is very broad and general. That of the existing law vests in the board of public works the general care, supervision and superintendence of the public works of the state; that of the amended bill simply transfers these general powers to the chief engineer of the public works.

In my opinion these general powers are of the essence of the constitutional powers of the board of public works and cannot be taken from that board by the general assembly and conferred upon an appointive officer.

Authorities are not lacking to support this view. In State ex rel. vs. Brunst, 26 Wis. 412, an act of the general assembly of the state of Wisconsin, taking from the sheriff and conferring upon the inspector of the house of correction of Milwaukee county, powers and duties relating to the care of the county jail, and of the prisoners therein, was held unconstitutional. In reaching this decision the court relied upon the fact that the office of sheriff was recognized in the constitution, it being provided therein that the sheriff with other county officers therein enumerated should be elected by vote of the people. The office of sheriff was of ancient origin and the powers and duties pertaining to it had become well understood at the time of the adoption of the constitution of Wisconsin. Among those powers and duties were those pertaining to the officer in his capacity of jailer. These powers and duties, though not expressly conferred upon the sheriff by the constitution, were impliedly vested in the office, and the office having been mentioned in the constitution, could not be taken from the office and vested in another. Furthermore, the office of sheriff was an elective office and that of the inspector of the house of correction was an appointive one. In this fact the court found additional reason for holding that powers conferred upon the former could not be taken from it and devolved upon the latter.

A similar case is that of Warren vs. People, et al, 2 Denio, 272. The constitution of the state of New York recognized and provided for the elective office of the clerk of the city and county of New York. The duties of this office as they existed at the time of the adoption of the constitution of New York were fixed by law. An act of the legislature of New York attempted to take from this office a part of such duties, and to confer them upon a newly created appointive office known as clerk of the court of common pleas. The act was held unconstitutional on precisely the same grounds embodied in the decision of State ex rel. vs. Brunst, supra. It is to be noted, however, that in this case the powers and duties of the first office were defined by statute, rather than by common law, at the time of the adoption of the constitution—a case more nearly like the one which you submit than that embodied in the decision of State ex rel. vs. Brunst, supra.

To the same general effect are the following cases:

King vs. Hunter 65 N. C. 603.
Dankhe vs. People, 168 Ill. 102, 39 L. R. A. 197.
State ex rel. vs. Fox, 56 L. R. A. 893 (Ind.).

In all of the cases above cited, acts were held unconstitutional which attempted to take from a constitutional office powers and duties recognized as inherent therein at the time of the adoption of the constitution and to vest the same in other offices. In most of them, too, the fact that the constitutional office was elective, while the other office in question was appointive, was relied upon as supporting the decision reached by the court.

I do not think there can be any serious doubt as to the proposition that sections 12 and 13 of article VIII of the constitution recognize a certain class of powers and duties as those properly and necessarily pertaining to the department of the board of public works. These powers and duties are those that were in existence at the time of the adoption of the constitution. They were very broad and included the entire superintendence of the public works of the state. These facts being established, the rule of law embodied in the decisions above cited applies immediately, and the conclusion which I have reached necessarily follows.

For the reasons above suggested I have entertained some doubt as to the validity of those provisions of the bill which take from the board of public works and vest in the chief engineer the power to appoint all of the subordinate employes of the department. I have, however, come to the conclusion that these provisions of the amended bill are valid. The power which may not be taken away from the board of public works is its constitutional power of *superintendence*. The word "superintendence," even in its broadest significance, does not necessarily include the appointment of subordinates. The verb, of which the noun is a derivative, is defined as follows in the Century dictionary:

> "To have charge and direction of, as of a school; direct the course and oversee the details of, * * *; synonymous with 'supervise!'"

I take it that it is well know that in practice, officers designated as "superintendents," having general supervisory powers over a given department or undertaking, are nevertheless not given the power to appoint subordinates. Thus, a superintendent of schools does not have the power to employ the teachers under his supervision.

I apprehend no constitutional objection to requiring the approval of the chief engineer to the contracts necessary to be made in the department; nor to making the chief engineer the disbursing officer of the board, with power to pass upon the validity of a claim; nor to making him the collector of all moneys due the board; nor to giving him joint power with the board in condemnation proceedings, and exclusive power in the case of the appropriation of an easement; nor to giving to the engineer instead of to the board power to use materials excavated from a canal or feeder; nor conferring upon the engineer instead of the board the powers and duties heretofore conferred by law upon the Ohio canal commission, which said powers and duties more appropriately belong in any event to the engineer. All these changes in the existing law, proposed to be made by the bill, are proper in my judgment under the constitution.

Whether or not it is proper to make the chief engineer the superintendent

and manager of the state lands and reservoirs set apart as public parks depends upon whether or not such public parks are to be regarded as "public works" within the meaning of the constitution in its express and implied provisions. Inasmuch as these reservoirs are necessary parts of the canal system of the state I am inclined to the view that they are to be regarded as a portion of the public works and that the board may not constitutionally be deprived of all of its managerial and supervisory control over them. Possibly, as division of functions as between the board and the chief engineer with respect to such public parks might be made; otherwise, it would be in my judgment best to make the chief engineer's proposed power with respect to such parks subject to the general supervision of the board.

I believe I have referred to all of the principal changes proposed to be made by the amended bill in the existing law. As to any which I have not mentioned, I may say, that I do not regard them as of any importance in connection with the question submitted.

For the foregoing reasons, then, I am of the opinion that the provisions of the amended bill which undertake to deprive the board of public works of its general power of superintendence and management of the public works of the state are unconstitutional and invalid; but that the remaining provisions of the bill are not so repugnant to the constitution as in my judgment to render them void. I am aware that there is some doubt as to the validity of some of these remaining provisions; in view, however, of the undoubted authority of the general assembly under section 13 of article VIII of the constitution to prescribe in detail the powers and duties of the board of public works, and in view further of the presumption in favor of the constitutionality of every law duly passed by the general assembly I have reached the above conclusions.

In conclusion, then, I recommend that the first sentence of section 415, General Code, be retained in the law instead of repealed; that in section 412 as amended by the amended bill, the phrase "under the direction of the board of public works" be prefixed; that the same or a similar clause be prefixed to section 422 as amended by the bill, and the words "he" and "such" in line 55, and "as he may deem necessary" in line 57 be stricken from said amended section; that section 472, General Code, as amended in the bill be so amended to provide either for the joint control of state parks, which exists under the present law, or for immediate control and management of such parks by the chief engineer under the general direction and supervision of the board of public works; and that a similar amendment be made in sections 474 and 484 as set forth in the amended bill. With these changes the bill as an entirety would probably be unconstitutional.

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

292.

VOID LEASE OF STATE BANK LANDS—NO RECOVERY BY LESSEES WHEN FUNDS HAVE BEEN DISPOSED OF—LEGISLATIVE ASSISTANCE.

When the state has received funds from the lease of certain bank lands which leases were subsequently held by the court to be void, and the funds received from said leases have been exhausted in accordance with statutory direction for their specific purpose of improving a reservoir, there can be no recovery by the lessees without the aid of special legislative action.

COLUMBUS, OHIO, July 10, 1911.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Through Mr. E. E. Booton, engineer of the canal land department, on July 7th, 1911, you request my opinion upon the following state of facts:

> "Nearly four years ago the board of public works and the chief engineer of the public works granted about twenty-two leases known as berme bank lots along the water front at Buckeye Lake. This bank was a natural embankment, and several of the owners of abutting lands either commenced injunction proceedings against the state's lessees or threatened such proceedings.
>
> "The case of the Ohio Electric Railway Co. vs. Lena Nelson and John Nelson was made a test case, the state defending its lessees, and both before the common pleas and circuit courts of Licking county, the state's title was upheld, and the circuit court held that the berme bank should not have been included in the lease and that it should have been reserved as a means of ingress and egress for the use of the public.
>
> "This has rendered the leases useless for the purposes for which they were leased, viz, cottage sites and landings.
>
> "The state has collected something more than five hundred ($500.00) dollars, in rentals from these leases and has expended the same on the improvement of the lake. The law dedicating this and other reservoirs as public parks and pleasure resorts specifically provides that the earnings from leases and special privileges shall be credited the reservoir producing the same and be expended in maintaining and beautifying the same. Thus a special fund is created for each reservoir and can only be expended upon that particular reservoir.
>
> "What the board desires to know is whether or not they can refund to these lessees the amount of rentals paid upon these leases out of the earnings accredited to Buckeye Lake. As a matter of justice this should be done if there are no legal obstacles."

I take it that these leases were all duly entered into between the board of public works on behalf of the state and the different lessees; the state actually owned the land leased, and a certain amount was paid in on the respective leases, such payments being made until the decision in what is known as the "Nelson" case (to which you refer) held the board was without authority to lease the berme bank: this being so the leases were practically valueless to the lessees, for without the berme bank they were without access to the lake front, and that thereupon the leases were abandoned or forfeited by the lessees. This

entire transaction having been in good faith and the money paid in, on account of these leases having been expended by your board on the improvement of the lake, there is no provision of law that will authorize your refunding the same or any part thereof to the lessees.

It may be that as a matter of right refunders should be made in this case, but without express provision of law authorizing you to do so, you are without power to make such refunder. The only way in which relief could be given would be through the legislature.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

341.

POWER OF BOARD OF PUBLIC WORKS TO GRANT DAMAGES TO PROPERTY HOLDERS—OVERFLOW OF STATE WATER FACILITIES—PURCHASE OF EASEMENT OR FEE DAMAGED BY REPAIR OF CANAL LOCKS.

To compensate a damaged property holder. The board of public works, under section 462, General Code, has the power to appropriate easements in lands subjected to a permanent or continuous damage by reason of the operation, change or creation of state water facilities, or if deemed necessary, said board may purchase such lands outright, under section 412, General Code.

COLUMBUS, OHIO, September 5, 1911.

HON. JOHN I. MILLER, *Chief Engineer Public Works, Columbus, Ohio.*

DEAR SIR:—In your communication of September 2, 1911, you ask for my opinion upon the following matter:

> "Lock No. 4 in the Ohio canal is nine miles north of the city of Massillon. Lock No. 5 of original construction was situated in the south part of that city. Lock No. 5, becoming dilapidated and weakened by age, was removed and this level merged into the level immediately below where a new lock was built.
>
> "The new lock thus built was made higher than such structures usually are built owing to the fact that the two different levels were thrown into one.
>
> "As a result certain adjacent low-lying lands are partially submerged along the lower part of the above named level next to the new lock.
>
> "The parties controlling the said lands have petitioned for damages on account of the back water that is held, in the manner above stated, on this land.
>
> "Query: Does this case come under section 455 or 462 of the General Code?"

Section 455 of the General Code provides for damage caused by a break, leakage or overflow of a canal, etc., and is meant to cover particular cases and not cases of continuous injury, or damages of a continuing or permanent nature. The situation to which you refer might very properly come under section 462 of the General Code, which is as follows:

> "When the board of public works is of the opinion that an overflow of a canal, slack water, pool or reservoir under its control, will be of frequent occurrence, and that injury to property will result thereby, it may appropriate an easement in such property to the extent to which it deems it liable to overflow or injury."

I understand from your letter that certain lands are practically submerged on account of the building of new locks. You do not state, but I presume, that these lands are practically submerged all the time, and therefore it would be quite proper for you to acquire an easement to the extent to which the lands are or may be submerged.

It also seems to me that by building these locks and overflowing these lands, the board of public works have appropriated the lands already as provided by section 8 of the act of 1825 (23 O. L., pages 56, 57), and that compensation could be made to the land owners, as provided in that act, and that the state has thus obtained the fee simple title to the lands submerged.

I wish further to call your attention to section 412 of the General Code, which is as follows:

> "The board of public works shall have the care and control of the public works of the state, and shall protect, maintain and keep them in repair. It shall have power to remove obstructions therein or thereto, and shall make such alterations or amendments thereof, and construct such feeders, dikes, reservoirs, dams, locks, or other works, devices or improvements as the board may deem proper. It may purchase on behalf of the state such real or personal property, rights or privileges as it deems necessary to accomplish such purposes."

Under this section the board of public works would have the right to purchase the land which is submerged. Therefore, you may act either under section 412 of the General Code, section 8 of the act of 1825, or under section 462 of the General Code, whichever may seem to you to be the most applicable to this particular situation.

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

342.

CONSISTENCY OF TWO LEGISLATIVE ACTS PROVIDING FOR SALE BY BOARD OF PUBLIC WORKS OF BERME BANK CANAL LANDS, (A) GENERALLY, AND (B) TO THE NORFOLK RAILWAY COMPANY—SPECIAL SALE PERMISSIVE, NOT MANDATORY—APPROVAL OF SALE BY GOVERNOR AND ATTORNEY GENERAL.

Two legislative acts were passed on the same day, one (102 O. L. 293) *giving a general right to the board of public works to sell certain designated lands and the other* (102 O. L. 305) *providing for a sale of the same lands to the Norfolk and Western Railway Company.*

Held: The act providing for the sale, generally, being passed later in the day than the act providing for the special sale, and provision being made in the first act for the approval of the governor and the attorney general as a condition precedent to the special sale, that the act with reference to the special sale, was a permissive rather than a mandatory provision, made necessary by reason of an existing doubt as to the right of the board to sell the lands in question (berme banks of a canal) to a railway company.

Though the board has the right, therefore, to sell the land as it sees fit, it is recommended that in conjunction with the governor and attorney general, the feasibility of the special sale be carefully considered before resorting to the general sale.

COLUMBUS, OHIO, September 5, 1911.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of a letter under date of August 24th from M. E. E. Booton, engineer of the canal land department, in which he submits for my opinion thereon the following question:

> "Must the board of public works sell the real property described in the act found in 102 O. L. 305, as provided in said act; or may the board of public works and the chief engineer of public works proceed under authority of the act found in 102 O. L. 293, to sell this land which is a part of the land authorized to be sold by the latter act?"

The first of the two acts referred to by you provides in part as follows:

> "Section 1. * * * The state board of public works by and with the approval of the governor and attorney general, be and it is hereby empowered to sell at private sale to Norfolk & Western Railway Company, its successors and assigns, the following real estate, to wit:
>
> "Situated in Pickaway county, Ohio, commencing at a point in the east water line of the Ohio and Erie canal, * * * containing four and two-tenths (4.2) acres, more or less, comprising what is known as the berme bank of said canal.
>
> "Section 2. There is hereby reserved to the state of Ohio an easement in said * * * strip for a berme embankment for the purpose of restraining the waters of the Ohio canal within its proper channel, but for no other purpose.
>
> "Section 3. Said conveyance is to be made upon the condition that said Norfolk & Western Railway Company pay into the state treasury ot the credit of the general revenue fund the sum of five thousand dollars ($5,000.)."

The other act to which you refer provides in part as follows:

"Section 1. * * * that portion of said Ohio canal commencing at the flume that connects Buckeye Lake with said Ohio canal at the west end of said reservoir * * * and extending thence southwesterly and southerly with the line of said Ohio canal to the junction with the Ohio river, near Portsmouth in Scioto county, Ohio, be and the same is hereby abandoned for canal purposes.

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

"Section 3. As soon as * * * surveys and plats have been completed, the state board of public works, and the chief engineer of public works, acting as a joint board, shall proceed to appraise and lease or sell, as they may deem for the best interests of the state, subject to the approval of the governor and attorney general, said canal lands, except as hereinafter noted, in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that * * * the bed and banks of said abandoned canal property may be included in any lease of such canal lands.

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

"Section 8. Nothing in this act shall interfere with any leases, rights or privileges heretofore granted by the state of Ohio and in force at the date of approval of this act."

The two acts in question were passed on the same day and approved in the order in which they are above quoted. So that what may be termed the general act is of the more recent date.

I do not believe that the board of public works is obliged to sell the land in question under what may be termed the special act, to the Norfolk & Western Railway Company. The exact language is that "the board with the approval of the governor and attorney general is hereby empowered to sell" the land in question. In form then, the act is permissive, not mandatory, and the Norfolk & Western Railway Company has acquired no right thereunder to compel the state board of public works to sell the land to it. That the act is permissive in effect as well as in form is further apparent from a consideration of the fact that the power of the board of public works, therein provided for, is to be exercised with the approval of the governor and attorney general. The approval of other officers is not a proper incident to the exercise of mandatory duty.

I think it is clear, therefore, that the act of June 6, 1911, being the special act above quoted, vests in the state board of public works, with the approval of the governor and attorney general, the discretionary power to sell to the Norfolk & Western Railway Company the land therein described, or not to sell at all at private sale.

I have reached this conclusion in spite of the reservation made in section 2 and the express disposition of funds made in section 3 of the first act. Although the general assembly has in these two sections dealt expressly with the subject matter of the whole act, yet the sections themselves must be construed as contingent upon the determination of the board of public works with the approval of the governor and attorney general to sell the land to the Norfolk & Western Railway Company.

The reference in section three of the second act, wherein said section speaks

of the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, is to sections 218-221 to 218-231 of the Revised Statutes, for which sections there are no corresponding sections of the General Code, the subject matter of the whole section having been reserved for the appendix. (See General Table, volume 3, General Code, page v.) These sections provide in part as follows:

> "Section 218-225. * * * each and every tract of land, and any part of the berme bank of any canal * * * which said commission shall find to be the property of the state of Ohio, the use of which, in the opinion of said commission, the board of public works and the chief engineer of the public works, if leased, would not materially injure or interfere with the maintenance and navigation of any of the canals of this state, shall be valued by said commission (now the board of public works) at its true value in money, and * * * may be leased for any purpose or purposes other than for railroads operated by steam, but said commission, the board of public works and the chief engineer of the public works shall have power to make leases, * * * for the necessary use, for railroad purposes, of any part of the berme banks of the canal * * * for a distance not exceeding two miles. * * *
>
> "Section 218-231. Any land or lands belonging to the state of Ohio, near or remote from the line of any canal in this state, that cannot be leased so as to allow six per cent. on the valuation thereof, * * * may be sold * * * at not less than three-fourths of such valuation, upon such terms of payment as may be fixed by the commissioners of the sinking fund, and such land shall be offered for sale at public vendue, at the court house in the county where the same is situated, after at least thirty days' notice * * *; provided * * * that such land or lands shall not be sold or offered for sale, unless the said commission, board of public works and the chief engineer of the board of public works shall have, by a majority vote in joint session, determined that such land or lands are not necessary or required for the use, maintenance or operation of any of the canals of the state."

By reading these statutory provisions in connection with those of the more general act, above quoted, I think it will clearly apepar that the board of public works and the chief engineer of the public works, acting jointly, have power under the latter to sell the land in question to a railway company. The only question which is presented by the above statutory provisions is as to whether or not the board of public works and the chief engineer of the board of public works have power to sell to a railway company any part of the berme bank of a canal, exceeding two miles in length. Such a strip could not under section 218-225, above quoted, be leased to a *railway company*. In my judgment, however, the limitation of that section is not applicable to section 218-231; and if any portion of the berme bank of the canal is not necessary for navigation purposes the same may be sold to a railway company, although the strip so sold may exceed two miles in length. The general act above quoted abandons the portion of the Ohio canal which includes all land under consideration for canal purposes, and the chief engineer and the board of public works need not therefore make the determination required by section 218-231, that the berme band is not necessary for canal purposes.

For the foregoing reasons I am of the opinion that the board of public works and the chief engineer of the board of public works with the approval of

the governor and the attorney general may proceed under what I have designated, for convenience, the general act, above quoted, and under the provisions of section 218-231, Revised Statutes, therein incorporated by reference, to sell the land described in what I have designated as the special act.

As a matter of practice I beg to advise that it is the duty of the board of public works and the governor and attorney general to determine first what action, if any, they will take under the act found in 102 O. L. 105. Only in the event that it is determined not to proceed under this act will it be the duty of the board of public works to have the land described therein appraised and leased or sold under the second act. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

B 431.

LEASE OF SURPLUS CANAL WATERS—RIGHT TO ABANDON OR LEASE CANALS TO CITIES OR OTHERS—EFFECT OF ABANDONMENT OF CONTRACTS.

The state board of public works is given, by statute, the power to abandon its canals or any part of them and such abandonment will give no right of action to lessees of surplus water rights by reason of the consequent discontinuance of their contracts. Therefore, when the board grants to a city the right to execute a lease of a certain portion of a canal which lease may be entered into at any future time, there is no abandonment of the canal until the lease has been executed and pending such execution, the board may enter into contracts for the lease of the surplus water rights.

COLUMBUS, OHIO, October 21, 1911.

HON. CHAS. W. DIEHL, *Secretary, Board of Public Works, Columbus, Ohio.*

DEAR SIR:—Your favor of August 10, 1911, is received in which you ask an opinion of this department upon the following:

> "At the request of the state board of public works, I enclose herewith copy of letter of Walter M. Schoenle, acting city solicitor of the city of Cincinnati to Hon. J. H. Sundmaker, director of public service of said city, which letter is self explanatory.
>
> "The board, on July 11th, 1911, as you will note from the letter, granted to the Split Keg Manufacturing Company, of Cincinnati, permission to insert into the level of the Miami and Erie canal in said city a three-inch pipe, at the usual rate per annum, viz: $106.00.
>
> "The board would like an opinion as to its authority to grant such a permit, since the passage of the act by the recent general assembly, turning over to the city of Cincinnati about seven miles in length of said canal for boulevard and other purposes."

The act granting the city of Cincinnati the right to lease part of the Miami and Erie canal for boulevard purposes is found in 102 Ohio Laws, page 168, and provides in part as follows:

> "Section 1. Permission shall be given to the city of Cincinnati, in the manner hereinafter provided, to enter upon, improve and occupy

forever, as a public street or boulevard, and for sewerage, conduit and if desired for subway purposes, all of that part of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in said city, including the width thereof, as owned or held by the state, *but such permission shall be granted subject to all outstanding rights or claims, if any, with which it may conflict*, and upon the further terms and conditions of this act.

"Section 2. Such permission shall be granted upon the further condition that said city, in the uses aforesaid of all or any portion herein mentioned of such canal, shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes. Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general for the faithful performance of the work.

"And such permission shall be granted upon the further *condition that said council shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts*, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except in so far as such cessation or diminution of such supply of water may be absolutely necessary.

"Section 3. Upon the passage of this act the governor shall appoint three (3) arbitrators, none of whom shall be residents of Hamilton county, *who shall, whenever the council of said city decided that such canal be used for all the purposes mentioned in section one* (1) *hereof, proceed to act* as provided in section four (4) of this act."

Section four prescribes the duties of the arbitrators and the rental to be paid by Cincinnati.

Section 5 provides in part:

"*Upon approval by resolution of the council of said city of the amount of such valuation as fixed by such board of arbitration or a majority of them, and upon the governor being satisfied that the interests of the state* are fully protected and that the valuation placed upon such property is adequate, which fact shall be endorsed upon such lease by the governor, he shall execute and deliver to the city of Cincinnati a lease for ninety-nine years, renewal forever, which lease shall not be assign-

able, of such canal so to be taken by the said city of Cincinnati for the uses and purposes before mentioned, and upon the terms and conditions specified in this act;"

The remainder of section five has reference to the covenants of the lease and section six prescribes certain regulations.

This act grants to Cincinnati the privilege of leasing the part of the canal therein specified. It does not state any time in which this privilege must be exercised. Section three provides that the arbitrators shall act whenever the council of Cincinnati decides that such canal shall be so used. After the valuation has been fixed by the arbitrators, it must be approved by council of Cincinnati and by the governor of Ohio before the lease can be formally executed and the grant consummated. This lease may be entered into within a year or it may be several years before it is finally executed.

The city of Cincinnati is to pay the state an annual rental for this property. This rental will not begin until the lease has been entered into. In the mean time should the state be denied the privilege of granting leases for surplus water to be taken from this part of the canal?

The power of the board of public works to grant such leases is found in section 431, General Code, which provides:

"The board of public works may lease surplus water power on any of the public works, under such rules and regulations as it prescribes. From time to time it shall examine such leases, adjust and fix the amount of rent due and unpaid as it deems just, and cancel existing leases with the consent of the lessees, or when they have become forfeited. If rents are in arrears for thirty days or more, or if the lessee fails to put in guages as required by lease, the board may shut off the water until such rent is paid or guages are furnished, or cancel the lease."

The first syllabus in the case of Hubbard vs. Toledo, 21 O. S., 379, is as follows:

"The execution of the grant, pursuant to the act of March 20, 1864, ' to authorize the city of Toledo to enter and occupy a part of the Miami and Erie canal as a public highway and for sewerage and water purposes," was an abandonment by the state of that part of her public canals known as the Manhattan branch."

The passage of the act granting permission to the city of Cincinnati to lease part of the canal is not of itself an abandonment of this part of the canal. It is necessary that the lease provided for therein shall be excuted before it shall constitute an abandonment.

The rights of lessees of water upon the abandonment of the canal is set forth in the following decisions:

In the case of Hubbard vs. Toledo, 21 O. S. 379, supra, the fourth syllabus reads:

"The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the act of March 23, 1840, 'to provide for the protection of the canals of the state of Ohio, the regulation of the navigation thereof, and the collection of tolls.' "

The lease under consideration in the above case, and also the statute under which it was made, contained a reservation that the state, "may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it was deemed necessary." There was no clause or reservation as to the abandonment of the canal.

The fourth syllabus in the case of Vought vs. Columbus, etc., R. R. Co., 58 O. S. 123, reads:

> "Contracts made with the board of public works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

On page 161 of the opinion Minshall, J., says:

> "* * * It is certainly settled by the decisions just cited, that a contract made by the state through its board of public works with an individual for the use of the water of any of its canals for a period of years, terminates with the use of the canal, and that it is under no obligation to keep up the canal for such purpose, after the canal has become useless for the purpose of navigation and has been abandoned. The agents of the state have no power to make such a contract in the name of the state or to bind it thereby."

The board of public works is authorized by section 421, supra, to lease surplus water power. And from the decisions above cited the rule is found to be, that the state has the right of abandon its canals and that the rights of all lessees of water terminate with such abandonment, even though they are granted for a term of years.

In the letter of Walter M. Schoenle, acting city solicitor, to the director of public service of Cincinnati, directing him to refuse a permit to the Split Fiber Keg Manufacturing Co., to lay a pipe in Plum street for connection with the canal, he states:

> "It is evident that the state board of public works can by such repeated action prevent the realization of the boulevard and subway and make it practically impossible for the city to comply with additional burdens thus imposed."

The burdens to which he refers are evidently found in the latter paragraph of section two of the act in question. This section requires the city to construct appropriate works "for the purpose of supplying water to lessee users of said water along that portion of the canal to be abandoned, in order and for the purpose of enabling the state fully to carry out and discharge the obligations *now* resting upon it by virtue of certain contracts *now* subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts." This provision has reference to "obligations now resting" upon the state by virtue of "contracts now subsisting and in force." The word "now" has reference to and is of the date of the approval of said act, to wit: May 15, 1911. It places no such obligations or burdens upon the city for future contracts nor for contracts entered into after the passage of the act.

As the state has the right to abandon the canal and thereby terminate all

leases, it was under no obligation to preserve the rights of water users. However, the legislature has seen fit to preserve their rights and has placed this burden upon Cincinnati if it accepts the grant.

There is nothing in the act to show that the power of the board of public works to lease water has been withdrawn as to this part of the canal. And I am of the opinion that the board still has the power to enter into leases for this water. The city of Cincinnati may never execute the lease provided in this act. It would be unfair to the state to deny it the privilege of securing rental for water during the time it is awaiting the action of the council of Cincinnati.

It is my opinion that all leases entered into after May 15, 1911, will terminate upon the abandonment of the canal by virtue of this act, without any reservation therefor in such leases. It would be better policy, however, that all such leases or permits contain a condition that such lease or permit shall terminate upon the abandonment of the canal, or upon the execution of the lease to the city of Cincinnati provided for in the act of May 15, 1911, 102 Ohio Laws, 168.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

438.

CONTRACTS FOR PUBLIC IMPROVEMENTS BY STATE NOT WITHIN MECHANIC'S LIEN LAW—MATERIAL MEN AND SUBCONTRACTORS HAVE NO RIGHTS AGAINST THE STATE.

The mechanic's lien law has no application to contracts for public improvements made by the state.

A fortiori—when the board of public works enters into a contract with a contractor, the board can, under no consideration, recognize demands of subcontractors or material men who have not been paid by the main contractor.

COLUMBUS, OHIO, October 25, 1911.

HON. W. KIRTLEY, JR., *President Board of Public Works, Columbus, Ohio.*

DEAR SIR:—Your favor of September 13, 1911, is received in which you ask an opinion of this department upon the following:

> "During the year 1909, the board of public works entered into a contract with T. H. Watson & Sons to construct a revetment wall along the south embankment of the Lewistown reservoir; said contractor purchased certain reinforcing steel of the Bostwick-Braun Co., of Toledo, Ohio. This material was used in the wall above mentioned, and was not paid for.
>
> "Under date of October 4, 1910, Mr. T. R. Wickenden, former assistant engineer in charge of the work, called the attention of Jas. R. Marker, who was then chief engineer of this department, to several unpaid accounts of said contractors, including that of the Bostwick-Braun Co.
>
> "The final estimate in payment for the work was approved by the board of public works, and a warrant drawn to Mr. Marker, who on Oct. 17, 1910, paid to T. H. Watson & Sons $1,079.91. Mr. Marker paid

certain unpaid accounts to which his attention had been called by Mr. Wickenden, but ignored the claim to the Bostwick-Braun Co., which company now presents its bill to this department for payment.

"I herewith attach the papers and correspondence in the matter, and respectfully ask your opinion as to who is responsible for the non-payment of this claim, and to whom the Bostwick-Braun Co. should look for payment."

The contract was entered into between the state of Ohio by the board of public works and T. H. Watson and Sons. Said T. H. Watson and Sons were to "furnish all necessary tools and implements also all necessary material, except cement," and were to "furnish and perform all necessary labor." In order to carry out their part of the contract, T. H. Watson and Sons purchased from the Bostwick-Braun Co. certain material. There was no contract between the state of Ohio and the Bostwick-Braun Co. for this material. The material was purchased by T. H. Watson and Sons from said Bostwick-Braun Co., to be used in fulfilling their contract with the state.

The Bostwick-Braun Co. was in the situation of a subcontractor or material man to the head contractor, T. H. Watson and Sons, as defined in section 8324, General Code, which section grants the right to such subcontractor or material man to take a lien upon the fund due the head contractor under his contract.

There is no claim that the Bostwick-Braun Co. did take advantage of this statute, and even if they had it would have availed them nothing. The claim was merely called to the attention of the agent of the state. Any payment that the agent of the state might have made to the subcontractors, material men, or laborers of T. H. Watson and Sons from the sums to be paid them under their contract with the state, could have been made only with the consent of said T. H. Watson and Sons.

The right of a subcontractor, material men, or labor of a contractor making public improvements for the state of Ohio, to secure a lien upon the fund is adversely decided in the case of State ex rel. vs. Morrow, 10 N. P. N. S., 279, the third syllabus of which reads:

"The mechanic lien law, although general in its nature, and the language in the code broad enough to include public improvements of the state, does not apply to any public improvement made by the state. And any steps taken pursuant to the mechanic lien act to establish a lien or claim against the funds in the hands of the state set apart for any public improvements have no effect in law and afford no ground for action either in law or equity against the state."

This decision was affirmed by the circuit court on October 21, 1910, in the following memorandum opinion, set forth in a note to the above report of this case:

"We think that the judgment of the lower court should be affirmed for the reasons given by Judge Kyle in his opinion, and in addition this reason:"

The additional reason does not cover the question in hand.
On page 285 of the opinion, Kyle, J., says:

"* * * * The trustees know no one in the transaction save the principal contractor, and under the law it was the duty of them to have

an estimate made to such principal contractor, and having certified such estimate to the auditor it was the duty of the auditor to pay the same to such principal contractor, there being no provision for the determination of any other person's rights to such fund by them. Hence it is my opinion that the state of Ohio is not subject or bound by the provisions of the lien law, and no person can acquire any interest in any money by any steps taken under such lien law against any fund in the hands of the board of trustees or the auditor of state, and that, therefore, the relator is not entitled to a peremptory writ of mandamus, and the writ will be quashed and the petition dismissed at the costs of the plaintiff."

In the above case all the steps necessary to secure a subcontractor's lien had been taken, and after the filing of such claim, money was paid to the head contractor. If no lien of a subcontractor can attach to the funds of a head contractor in the hands of the officers of the state by virtue of the mechanic's lien law, certainly no lien could attach thereto merely upon presentation of the claim to the agent of the state. The only person known to the state in this contract was T. H. Watson and Sons.

The contract to furnish material by the Bostwick-Braun Co. was made with T. H. Watson and Sons, and it is to them that the Bostwick-Braun Co. must look for payment. The state is not liable to them.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

440.

RIPARIAN RIGHTS ON LAKE ERIE—NAVIGATION RIGHTS OF STATE AND NATIONAL GOVERNMENT—ESTABLISHMENT OF DOCK LINE—RECLAMATION—INTERSTATE COMMERCE.

The ownership of submerged lands of Lake Erie within the boundaries of Ohio is in the state in trust for public interest and benefits and subject only to the right of the United States to regulate interstate commerce.

The title of the riparian owner in the shore land, extends to the line where the water usually stands when free from disturbing causes.

Riparian rights on navigable rivers are property rights in Ohio which cannot be taken by the state without compensation. The riparian rights of property holders on the shore of Lake Erie are also property rights but are subject to the right of the national or state government to take for their respective authorized public uses without compensation as the owner takes his title subject to the burdens of navigation.

As a general rule, the riparian owner has the right to build piers, docks or wharves out from his land to the point of navigability but no further.

When a dock line has been established by the state or national government, the point of navigability is thereby established and furthermore by the weight of authority, gives to the riparian owner, the implied right to reclaim the submerged land between the shore and the dock line by improving or filling in. This right, however, may be revoked by the legislature at any time before it has been taken advantage of.

COLUMBUS, OHIO, November 1, 1911.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Under date of April 14, 1911, the following communication was received by this department from your honorable board:

"A communication was received from Col. John Millis, U. S. engineer's office, Cleveland, Ohio, stating that in connection with the harbor improvement work on Lake Erie within the limits of the state of Ohio, the question of ownership of the lake bottom and rights of ownership of lands bordering the lake has been one of interest and importance and asked what the attitude of the state or the board was on the subject.

"On action of Mr. States, the communication was referred to the attorney general, and the secretary directed to write Mr. Millis stating that his communication had been referred to the attorney general.

The communication of Col. John Millis, enclosed states as follows:

"In connection with harbor improvement work on Lake Erie within the limits of the state of Ohio, the question of the ownership of the lake bottom and rights of owners of lands bordering the lake has been one of much interest and importance, particularly in case of the harbor improvements at Cleveland. The department appears to take the view that ownership of submerged areas in the lake is in the state. Will you kindly advise me as early as practicable what is the attitude of the state or of your board on this question. I shall be very glad to receive references to any instances where the state ownership in submerged areas under the lake may have been asserted, and to cases where such questions may have been decided in the courts, or to authoritative opinions on the subject. We also have similar questions affecting the Maumee river at Toledo, and Sandusky bay at and near Sandusky. Any advice or assistance you may be able to give relative to the present status of these questions from the state's point of view or otherwise will be greatly appreciated."

Under date of June 27, 1911, this department received the following communication from R. Y. McCray, city clerk of Cleveland, Ohio:

"I am requested by the chairman of the council committee on harbors and wharves to ask you for all data that you may have pertaining to the rights of this city, state of Ohio or individuals in lake front lands beyond the low water mark and any data as to riparian rights where dock lines have been established by the United States government. Of course I refer to the south shore of Lake Erie within the boundaries of this state. In enclose herewith a copy of resolution which prompts the writing of this letter and which resolution will probably more fully explain just what is wanted."

The resolution of council referred to provides:

"Whereas the city of Cleveland is contemplating important harbor improvements, involving the expenditure of large sums of money; and, whereas, the city, the state and the national government have now under consideration questions relating to the ownership of lands bordering on Lake Erie, and especially the submerged areas of lands in Lake Erie adjacent to the shore line of the city of Cleveland; and, whereas, it is important that the various claims as to such ownership should be ascertained at this time, resolved that the committee on

harbors and wharves be instructed to confer personally or by mail with the proper city, state and national officers, and such other persons as the committee may deem best as to the various claims relating to the ownership of such lands in and adjacent to the harbor of Cleveland, together with the reasons for such claims, and to report back to the city council within one month, all data and information that they are able to procure upon this subject."

These several inquiries ask opinion upon the following:

First: The ownership of the submerged lands of Lake Erie within the boundary of Ohio.

Second: The rights of the owners of land bordering upon the lake.

Third: The riparian rights where dock lines have been established.

These questions are so broad and cover such an extensive filed of inquiry and such a diversity of property rights that it will not be possible to treat of them fully in this opinion. However, if this opinion does not cover the questions involved, other inquiry should be made stating the facts and specifying the particular rights to be determined.

First, as to the ownership of the submerged lands of Lake Erie.

The supreme court of the United States has decided that the ownership of submerged lands in navigable waters is to be determined by the respective states.

In Packer vs. Bird, 137 U. S. 661, the second syllabus reads:

"Whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, will be determined by the states in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee.

The ownership of the state and the nature of its title to submerged land is set forth in the case Illinois Central Railroad vs. Illinois, 146 U. S., 387, the first and second syllabi of which are as follows:

"The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

"The same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations."

On page 452, Justice Field in delivering the opinion of the court says:

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that

the state holds title to soils under tide waters, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States held in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of land under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative powers consistently with the trust to the public upon which such lands are held by the state."

In the case of United States vs. Mission Rock Co., 189 U. S., 391, Justice McKenna on page 404 of the opinion says:

"* * * And Mr. Justice Gray said, delivering the opinion of the court in Shively vs. Bowlby 'each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining uplands or not, as it considered for the best interest of the public.'

"This right is an attribute of the sovereignty of the state, and it follows that in the exercise of the right, as said by Mr. Justice Gray, the state may 'dispose of its tide lands from any easement of the upland proprietor.'"

The rule of ownership of submerged lands is set forth by Pomeroy in his work on Water Rights, at section 238, (Black 1893), as follows:

"It is well settled that the state is the owner in fee of the seashore, and of the shores of all tidal rivers, estuaries, inlets and bays within its territorial jurisdiction, except in so far as portions of the same may have been already granted to private owners, and subject to the paramount right of congress to regulate commerce and navigation."

The rule of ownership of submerged lands in navigable streams is established in the case of Gavit vs. Chambers, 6 Ohio 496, the syllabus of which reads:

"In Ohio, owners of lands situate on the banks of navigable streams

running through the state, are also owners of the beds of the rivers to the middle of the stream, as at common law."

That this rule of ownership is not applicable to Lake Erie in Ohio is established by the case of Sloan vs. Biemiller 34 O. S., 492, the first and fourth syllabi of which read as follows:

"The rule of the English common law that the owners of land situate on the banks of non-tidal streams, though navigable in fact, are owners of the beds of the rivers to the middle of the stream, is not applicable to the owners of lands bounding on Lake Erie and Sandusky bay.

"Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes."

On page 512, White, J., in delivering the opinion says:

"We are not called upon in this case to review the doctrine laid down in Cavit vs. Chambers. The question before us is, whether the rule there laid down, as applicable to navigable rivers, applies to the owners of land bounding on Lake Erie and Sandusky bay. In our opinion, it clearly does not. In the Canal Commissioners vs. the People, 5 Wend. 423, Chancellor Walworth said: 'Our large fresh water lakes or inland seas are wholly unprovided for by the law of England. As to these there is neither flow of the tide nor thread of the stream; and our local law appears to have assigned the shores down to ordinary low water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public.' And in Kent's commentaries it is laid down that, 'in this country our great navigable lakes are properly regarded as public property, and not susceptible of private property any more than the sea.'" 3 Kent's Com 429, note a.

The above decision is decisive of these propositions:

a. That the fee of the riparian owner on Lake Erie "extends to the line at which the water usually stands when free from disturbing causes."

b. That the fee to the submerged lands of Lake Erie and its bays from the line at which the water usually stands outward to the boundary line of the state, is in the state of Ohio.

The nature of the title of the state of Ohio to the submerged lands of Lake Erie, has recently been passed upon in the common pleas court of Cuyahoga county, in the case of White vs. Cleveland, 21 Lower Decisions 311 (Ohio Law Bulletin of July 31, 1911), the seventh syllabus of which case reads as follows:

"The title of the state to land under the water of Lake Erie is not that of a proprietor, but it is held in trust by it for public purposes of navigation and fishery. Riparian ownership embraces all such facilities and instrumentalities as will further navigation and fishery purposes, and includes access to navigable water and the right to

wharf out to it. The fact that a municipality has used public funds for piling, and for filling in submerged land for park purposes, does not defeat the right of reversionary riparian owners in such lands."

On page 329, Chapman, J., delivering the opinion says:

"* * * * Neither the city nor the state had any proprietary title in the submerged lands, and therefore neither could fill in front of these lands and claim a proprietary right, any more than it could, by filling in front of lands of other riparian owners on the lake, acquire a proprietary right."

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

"Confusion has arisen by reasons of the fact that some of the courts have failed to discriminate between decisions made in respect to waters in which the Crown held the underlying title as a proprietary right, and waters in which the Crown held title to the underlying soil in trust for public purposes only. In this country the states have succeeded to the right of the Crown under the common law. In those casses where the title to the underlying soil has been held to be in trust for public purposes of navigation and fishery, the riparian owner has generally been held to have the right of access to navigable waters, and the right to wharf out so long as he did not interfere with the public right of navigation and fishery. Where title to the underlying soil has been held to be proprietary, the right of access and to wharf out has been denied. I do not say that this rule has always been followed, but it serves to distinguish most of the cases."

This decision limits the rights of the state in the submerged lands to a narrower sphere than is done in a great majority of the cases, and I believe it be too restrictive of the rights of the state, especially as to the submerged land between the shore line and the harbor line, the point of navigability. It makes the rights of the state very little, if any, more than the state possesses in its sovereign capacity.

That the state of Ohio may grant submerged lands to private individuals I believe to be established by the case of Hogg vs. Beerman. 41 O. S., 81, the first syllabus of which case is as follows:

"Land covered by the water of a navigable land locked bay, or harbor, connected with Lake Erie, may be held by private ownership, subject to the public rights of navigation and of fishery, provided the holder derives his title from an express grant made, or sanctioned, by the United States."

On page 95, Granger, C. J., delivering the opinion says:

"Is east harbor capable of private ownership? An absolute sovereign, holding both ownership and jurisdiction of land and water, may vest in a private grantee such portions of either, as the grantor may designate. A sovereign whose powers are limited by constitutional provisions may do the like, so far as the grant does not contravene any constitutional provision or limitation. So long as navigable waters are left free to the public, for unembarrassed passages to and fro, we know of no reason why the United States, or any state, holding owner-

ship and jurisdiction of land and water, may not vest in a private grantee such a body of land, marsh and water as 'east harbor.' History is full of instances of the exercise of such power by governments, and instances in which the courts have protected such a grantee against intrusion are not rare."

On page 98, he also says:

"* * * * The private grantee of the land cannot do anything that will interfere with the channel, or hamper the passage of watercraft through it. But he may, without the limits of the channel, erect fishing house or such other structures as his means and the depth of water will permit; he may convert shallow portions into cranberry patches; he may fill up other parts and make solid ground. Although such action by him may lessen the water surface available for the fishing boats the fisherman cannot complain. Such public right to fish always yields to any permanent improvement by the owner of the land on which the water rests.

On page 427 of the case of Home for Aged Women vs. Commonwealth, 202 Mass., 422, Knowlton, C. J., says:

"The waters and the land under them beyond the line of private ownership are held by the state, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the government of the United States to act in the interest of interstate or foreign commerce. All rights granted to individuals by general laws are made subject to this paramount right of the legislature to do what is deemed necessary for the promotion of navigation."

Sections 239 and 240 of Pomeroy on Water Rights, (Black 1893) read in part as follows:

"While the state is thus the proprietor of its sea coast and of the areas of tidal rivers and bays, it does not follow that it holds such property in quite the same manner as a private person may hold the fee simple of an estate in land. 'It has been very common,' says the learned court in Rhode Island, 'to speak of the right of the state in the shores as a fee. This is proper only by analogy. To hold that the state owns the shores in fee in the same sense in which it owns a court house or a prison, or in which the United States owns public lands, or a citizen may hold land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right.' The true doctrine is that such property of the state 'is a trust for the public, a power to control and regulate, to subserve the good of the public, and not a private property.' And this view has the support of unimpeachable authority, as well as of sound reason.

"Some few cases are to be found in the books which seem to assert an absolute and unqualified right in the state to grant away the tide

lands as it may see fit, without reference to the rights of the public of which it is the conservator. But these cases, if their particular facts require them to go this far, are inconsistent with the generally accepted doctrine stated in the preceding section, that the title of the state to such lands is only a trust for the preservation and improvement of these public rights. As a necessary consequence of this doctrine it follows that the power of disposal vested in the state is limited to the sale or lease of the usufruct of the shore or waters, as by granting exclusive rights of fishery or the like, or the sale or grant of definite portions of its shore lands, not so great in amount as materially to impair the public rights, and made with the special intention that such grants shall be used for the building of wharves or other structures designed to be in aid of the public rights of navigation and commerce."

The eighth, ninth and tenth syllabi in case of Shively vs. Bowlby, 152 U. S., 1, read:

"The title and rights of riparian or littoral proprietors in the soil below high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

"The United States while they hold country as a territory, have all the powers both of national and of municipal government, and may grant for appropriate purposes, titles or rights in the soil below high water mark of tide waters.

"Congress has not undertaken, by general laws, to dispose of lands below high water mark of tide waters in a territory; but, unless in case of some international duty or public exigency, has left the administration and disposition of the sovereign rights in such waters and lands to the control of the states, respectively, when admitted into the union."

In the case of Illinois Central Railroad vs. Illinois, 146 U. S., 387, supra, it is determined that congress has the paramount right to control navigation in navigable streams and waters, so far as may be necessary for the regulation of interstate and foreign commerce.

This right to regulate interstate and foreign commerce may be exercised to such an extent as to take away the riparian rights of the owner of the bank without compensation for his loss.

In case of Gibson vs. United States, 269, the syllabus is as follows:

"Riparian ownership on navigable waters is subject to the obligation to suffer the consequences of an improvement of the navigation, under an act of congress, passed in the exercise of the dominant right of the government in that regard; and damages resulting from the prosecution of such an improvement cannot be recovered in the court of claims."

In Scranton vs. Wheeler, 179 U. S., 141, the supreme court of the United States held:

"The prohibition in the constitution of the United States of the taking of private property for public use without just compensation has no application to the case of an owner of land bordering on a

public navigable river whose access from his land to navigability is permanently lost by reason of the construction, under authority of congress, of a pier resting on submerged lands away from, but in front of his upland, and which pier was erected by the United States, not with any intent to impair the right of riparian owners but for the purpose only of improving the navigation of such river.

"It was not intended, by that provision in the constitution, that the paramount authority of congress to improve the navigation of the public waters of the United States should be crippled by compelling the government to make compensation for an injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by congress."

On page 163, Justice Harlan, delivering the opinion of the court, says:

"Whatever the nature of the interest or a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

The same principle has been applied in Ohio by the superior and common pleas courts of Hamilton county.

In case of Covington Harbor Co. vs. Phoenix Bridge Co., 23 Bull, 34, the syllabus reads:

"Plaintiff's harbor for anchoring coal boats upon the Ohio river on the Kentucky side was injured by the change in the currents and flow of the stream caused by the V-shaped breakwater placed some distance above the harbor in the stream to protect false work used in the construction of a railway bridge from Covington to Cincinnati. The bridge was authorized by act of congress, and was built as therein directed in accordance with plans approved by the secretary of war. The breakwater and the false work were necessary in completing the bridge. Held, That the loss sustained by plaintiffs, was a remote or consequential damage arising from the exercise of the paramount right of congress to regulate navigation, and was therefore damnum absque injuria."

The syllabi in case of Winifrede Coal Co. vs. Central Railway and Bridge Co., 24 Bull. 173, are as follows:

"The right of access to navigable water of a riparian proprietor on the Ohio river is subordinate to the power of congress over subjects of interstate commerce.

"Congressional authority to erect a bridge between Kentucky and Ohio is an exercise of power over interstate commerce.

"Hence, a riparian proprietor on the Ohio river cannot enjoin the erection of a pier for such bridge opposite his front but below low water mark authorized by congress and the two states."

In Massachusetts it has been held that the state has the right, in the exercise of its powers to regulate and improve navigation, to diminish or take away the rights of the riparian owner without compensation therefor.

In the case of Home for Aged Women vs. Commonwealth, 202 Mass., 422, the first and second syllabi, read:

> "The right of a riparian owner upon navigable tide waters of direct access from his land to navigable waters, which is a special and peculiar right different from the public right of passage over the water, is subject to the right of the commonwealth for the public good, to take and fill the land lying below low water mark between his land and the tidewater, so as to cut off direct access from his land to the navigable water.
>
> "The change in the Charles river authorized by St. 1903, c. 465, as amended by St. 1906, c. 402, was for the improvement of navigation as well as for other useful purposes and the fact that this was one of the purposes of the legislature was enough to warrant the legislation and the action under it even if such a change in the river could not have been authorized for the other useful purposes alone without providing compensation for riparian proprietors."

On page 429 of the opinion, Knowlton, C. J., says:

> "In a sense there is a valuable right of access to the waterway or to the street, so long as the waterway or street is there. But it does not follow that the abutter on the waterway can insist that the government shall make no change in the waterway on its own land, in the interest of more convenient and valuable navigation, which shall leave him with a less convenient passageway to the channel, or perhaps with no passageway at all. The government has this paramount right to do what is necessary for the public good, in promoting better navigation. The benefits enjoyed by the abutting land owner are held subject to the possibility of diminution or less by the exercise of this right."

The right of the state to establish dock lines is set forth in 29 Cyc., page 302, as follows:

> "The state has the power by legislation to prescribe the lines in a harbor beyond which piers, docks, wharves, and other structures—other than those erected under the authority of the general government—cannot be built by riparian owners in the waters of the harbor which are navigable in fact."

The same is set forth in Pomeroy on Water Rights (Black 1893), at section 251, as follows:

> "It is undoubtedly within the power of the state legislature to prescribe the lines in its harbors, beyond which wharves, piers, docks, and other structures (other than those erected under express or implied authority of the general government) may not be built by riparian owners in the navigable waters of such harbors."

From these authorities the following conclusions can be drawn:

The state of Ohio is the owner in fee of the submerged lands of Lake Erie, subject to the para mount right of congress to improve navigation in the exercise of its power to regulate interstate and foreign commerce.

The title of the state to the submerged lands is not an absolute fee, but it holds the title in trust for public navigation, fishing and other public uses.

The riparian rights of the owners of land to the shore line can be diminished or entirely taken away without compensation therefor, by congress in the exercise of its power to regulate navigation between the states and with foreign nations.

The state also has the right to take away or diminish the rights of the riparian owner without compensation therefor in the exercise of its power to regulate and improve navigation.

The riparian rights of the owners of banks of navigable waters are to be determined by the state in which such land is situated.

The state may grant or lease the submerged lands for purposes of improving and promoting navigation.

Whether the state can grant the submerged lands for private purposes or for public purposes other than navigation is not here determined as no such question appears to be involved.

In the exercise of its paramount right to regulate interstate and foreign commerce the United States may establish dock lines and improve harbors in such manner as it sees fit.

The state may also establish dock and harbor lines, improve harbors and regulate wharves and piers, subject to the paramount right of congress.

RIPARIAN RIGHTS.

The next inquiry is as to the rights of the riparian owners.

This subject may include any one of the following, with many divergent rights under each subdivision: Use of water: access to the water; use of shore and banks; reclamation and improvement of submerged lands; wharves, piers and docks; accretion, etc.

The riparian rights on navigable streams have been held by the supreme court of Ohio, to be property rights which cannot be taken or materially interfered with without compensation.

In case of Mansfield vs. Balliett, 65 O. S., 451, the first and second syllabi read:

> "Riparian rights are property within the purview of section 19 of the bill of rights, of which the owner cannot be deprived without just compensation, though taken for, or subjected to a public use.
>
> "Any actual and material interference with such rights, which causes special and substantial injury to the owner, is a taking of his property."

In case of White vs. Cleveland, 21 Low. Dec. 311, supra, Chapman, J., on page 331, says:

> "Even if the right of access of a riparian owner is not such property right as to require compensation if taken by the United States or the state, in furtherance of the paramount right of navigation as held in Scranton vs. Wheeler, 179 U. S. 141, the state or the United

States are the only agencies that can rightfully deprive the owner of such right, and then only in furtherance of the public right of navigation and commerce."

The extreme right of a state to submerged lands is set forth in Stevens vs. Paterson, etc., 34 N. J. L. 532, as follows:

"The state is the absolute owner of the land in all navigable waters within its territorial limits, and such land can be granted to any one, either public or private, without making compensation to the owner of the shore."

Even in this case the right of reclamation is recognized in the second syllabus, which is as follows:

"By the local custom of this state, the shore owner can reclaim the land between high and low water marks, but such privilege is a mere license, which the legislature may revoke at any time before execution."

The absolute fee of the state is recognized in Hoboken vs. Pennsylvania Railroad Co., 124 U. S. 656, the third syllabus of which case reads.

"By the laws of New Jersey lands below high water mark on navigable waters are the absolute property of the state, subject only to the power conferred upon congress to regulate foreign commerce and commerce among the states, and they may be granted by the state, either to the riparian proprietor, or to a stranger, as the state sees fit."

In Ohio the riparian rights on navigable rivers are property rights, which cannot be taken without compensation. The same rule will no doubt extend to the riparian rights on Lake Erie, but subject to the right of the United States and the state of Ohio to take those rights in the improvement of navigation, as the riparian owner takes his title subject to the burden of navigation.

As there is no specific inquiry concerning any particular riparian right, it will be possible to set forth only a few of them.

It is a general rule that the riparian owner has the right to build piers, docks or wharves out from his land to the point of navigability, but no further. Where dock lines have been established by the United States or by the state, that determines the point of navigability.

This principle is established in the case of Dutton vs. Strong, 1 Black (66 U. S.) 23, the syllabus of which reads:

"Riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays and arms of the sea, if they conform to the regulations of the state and do not obstruct the paramount right of navigation.

"The right to make such erections terminates at the point of navigability."

This right to build docks and wharves attaches to land owned by private individuals and corporations as well as to land owned by municipal corporations. In fact riparian rights to attach to the owners of the bank whoever such owners might be.

The establishment of dock lines does not materially alter the rights of a riparian owner. The purpose of dock lines is to establish the point of navigability and to prohibit the building of obstructions beyond that line.

The establishment of dock or harbor lines also fixes the point to which submerged lands may be reclaimed if that right is inherent to the title of the shore owner.

The only other question which shall be considered in this opinion is the right of a riparian owner to fill up and reclaim submerged lands from his boundary to the dock line or point of navigability, or any part thereof.

The right to fill up land by the owner of the fee is stated in Hogg vs. Beerman, 41 O. S. 81, supra, by Granger, C. J., on page 98, as follows:

> "The private grantee of the land cannot do anything that will interfere with the channel, or hamper the passage of watercraft through it. But he may, without the limits of the channel, erect fishing houses or such other structures as his means and the depth of water will permit; he may convert shallow portions into cranberry patches; he may fill up other parts and make solid ground. Although such action by him may lessen the water surface available for the fishing boats, the fisherman cannot complain. Such public right to fish always yields to any permanent improvement by the owner of the land on which the water rests."

In this case the fee to the submerged lands in question was in the riparian owner by grant. In Lake Erie the fee is in the state. The riparian owner cannot interfere with the channel; that must be free to navigation. So on Lake Erie no interference can be made outside the dock lines. As inside the dock lines there is no navigability, except for small watercraft, the filling up of such lands would not interfere with navigation. It would, however, lessen the available fishing space, but it is seen that this right to fish must yield to permanent improvements.

The right of reclamation of submerged lands is set forth in 29 Cyc., page 339, as follows:

> "In many of the states, by statute or custom, the private owner of lands to high water marks has the privilege of reclaiming the lands of the state lying under water in front of his land up to the line of navigability. The establishment by legislative authority of a harbor or dock line in navigable waters is an implied grant to the owners of the adjacent upland of the right to build on or fill up the land under water up to such line. The right to reclaim has been held a mere franchise, or license, which may be revoked by the legislature at any time before such reclamation actually takes place; but when the license is executed, it becomes irrevocable. In some states, however, the right of a riparian owner is a vested property right which cannot be taken away even by the state for a public use without compensation."

Pomeroy on Water Rights (Black 1893) at page 511 of section 240, says:

> "It is also held that the title to the shore will not pass by implication. That is, a grant by the state of the upland will not carry the adjacent tide land without express words. But it seems that title to tide lands may be acquired by the littoral owner making improvements

upon them or reclaiming them, under an implied license from the state, or by force of a local custom, and perhaps also by disclaimer by the paramount owner and the recognition of title in the claimant."

In Aborn vs. Smith, 12 R. I., 370, the fifth syllabus reads:

"The establishment of a harbor line does not itself divert the title of the state in the tide flowed land; it, however, permits the riparian owner to take and occupy it by filling. This permission accrues to the ownership of the upland, however such ownership has been gained."

In the case of Bailey, Trustee vs. Burger, 11 R. I. 330, the syllabi are as follows:

"Land bordering on tide waters was platted into house lots, some of which extended below low water mark, all the lots being defined shoreward by a fixed line, outside of which no lots were platted. Conveyance of these lots was made, and subsequently a harbor line was fixed by the state, running in front of the lots:

"Held, on a trustee's bill for instruction:

"a. That the fee of the soil below high water mark was in the state.

"b. That the establishment of a harbor line was permission given by the state to fill out to it.

"c. That the grantee of a lot touching tide water who fills out to the harbor line, holds the filled land not under his grantor, but directly from the state."

In Miller vs. Mendenhall, 43 Minn. 95, it is held:

"The riparian owner is entitled to fill and make improvements in the shallow waters in front of his land to the line of navigability, and such improvements in aid of navigation are recognized as a public as well as private benefit. These rights pertain to the use and occupancy of the soil below low water mark and are valuable property rights, and the exercise thereof, though subject to state regulation, can only be interfered with by the state for public purposes.

"The establishment of a dock or harbor line in pursuance of legislative authority, is to be considered as giving to the owners of the upland the privilege of filling and building out to such line."

In case of Lockwood vs. New York, etc., Railroad, 37 Conn. 387, the syllabi read:

"In this state the owners of land bounded on a harbor own only to high water mark, and whatever rights such owners have of reclaiming the shore are mere franchises.

"When, however, such reclamations are made, the reclaimed portions in general become integral parts of the owner's adjoining lands."

While authorities and text writers do not agree upon the right of the riparian owner to reclaim the submerged lands, the weight of authority is

that the riparian owner has a right to fill in and reclaim the submerged lands, so long as he does not interfere with the rights of the public to use the waters for navigation; that this right is a license or franchise, revocable at the will of the legislature, but when the license has been exercised by filling in the right is irrevocable.

The title to the made or reclaimed land attaches to the owner of the uplands.

In many states this is a subject of legislative control and the rights of the riparian owners are governed by statute.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(To the Dairy and Food Commission)

172.

COLORING OF TEA—MISBRANDING—ADULTERATION.

The determination of whether or not the artificial coloring of tea would be an adulteration under section 5778, General Code, hangs on the question of fact whether or not such coloring effects a concealment of damage or inferiority, or gives a false impression as to the quality or adds a substance or ingredient which is poisonous or injurious to health.

COLUMBUS, OHIO, March 9, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of February 25, 1911, received, in which you request my opinion as follows:

> "I would like to have an opinion from you whether or not artificial coloring of tea would be considered misbranding of foods under section 5778 of the Ohio Statutes."

Section 5778 of the General Code provides:

> "Food, drink, confectionery or condiments are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly, or in part, for it; (3) if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it; (4) if it is an imitation of, or is sold under the name of another article; (5) if it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not or, in the case of milk, if it is the product of a diseased animal; (6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, if by any means it is made to appear better or of greater value than it really is; (7) if it contains any added substance or ingredient which is poisonous or injurious to health; (8) if, when sold under or by a name recognized in the eighth decennial revision of the United States pharmacopœia, or the third edition of the National Formulary, it differs from the standard of strength, quality or purity laid down therein; (9) if, when sold under or by a name not recognized in the eighth decennial revision of the United States pharmacopœia, or the third edition of the National Formulary, but is found in some other pharmacopœia, or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work; (10) if the strength, quality or purity falls below the professed standard under which it is sold; (11) if it contains any methyl or wood alcohol."

The section just quoted refers to adulteration instead of misbranding of foods, and I presume that you desire to know whether or not artificial coloring of tea would be considered an "adulteration" within the meaning of chapter 1,

title II, of the police regulations, instead of "misbranding" of foods under said chapter.

In answering your question as to whether artificial coloring of tea would be considered an adulteration within the meaning of section 5778, I would say it would come under clauses six and seven of said section which are as follows:

> "(6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is;
>
> "(7) if it contains any added substance or ingredient which is poisonous or injurious to health;"

If the tea is colored, coated, polished or powdered for the purpose of covering damage or inferiority, or for the purpose of making it appear better or of greater value than it really is, or if the coloring matter is poisonous or injurious to health, then, under section 5778 it would be considered adulterated.

To determine whether artificial coloring of tea would come under this section is a question of facts for you to decide under the law as set forth in clauses six and seven of section 5778.

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

173.

DAIRY AND FOOD COMMISSION—TRAVELING EXPENSES OF INSPECTORS AS WITNESSES IN JUSTICE OF PEACE CASES.

For traveling expenses incurred by inspectors acting as witnesses in cases prosecuted by the dairy and food commission before justices of the peace, the commission may make allowances under sections 375 and 379, General Code.

COLUMBUS, OHIO, March 9, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 25th, in which you inquire as follows:

> "There are quite a number of cases pending in the courts throughout the state, based upon samples taken by inspectors under the administration of Mr. Dunlap and these inspectors are, of course, needed as witnesses.
>
> "When the cases come on for trial, as it involves considerable traveling expenses the question has been raised whether this department can pay the inspectors on the basis of their former work while with the department.
>
> "We would be very glad to have a ruling on this question as it is one that will recur frequently."

Section 375 of the General Code provides as follows:

> "The state dairy and food commissioner shall enforce the laws against fraud, adulteration or impurities in food, drinks or drugs, and

unlawful labeling within the state. The state commissioner, each assistant commissioner and each inspector shall inspect drugs, butter, cheese, lard, syrup and other articles of food or drink, made or offered for sale in the state, and prosecute or cause to be prosecuted each person, firm or corporation engaged in the manufacture or sale of an adulterated drug or article of food or drink, in violation of law."

Section 13495, General Code, provides in part as follows:

"Justices of the peace, police judges and mayors may issue subpoenas and other process to bring witnesses before them. In complaints to keep the peace and cases of misdemeanor, the subpoena must be served within the county, and in other cases, it may be issued to or served in any county."

There is no express provision of the General Code authorizing the payment of mileage or fees for witnesses, other than section 13495, and similar sections relating to cases in the common pleas and probate courts. And there is no express statutory authority permitting your department to allow traveling expenses and compensation to inspectors formerly employed in the dairy and food commissioner's office, who are necessary witnesses for the state, in prosecutions for that office. However, section 379 of the General Code provides as follows:

"All charges, accounts and expenses, authorized by the provisions of this chapter shall be paid by the state on the warrant of the auditor of state, upon vouchers certified by the state dairy and food commissioner."

I am of the opinion that under the authority of section 375 which makes it the duty of the dairy and food commissioner's department to enforce the laws as provided in said section, and section 379 which authorizes the dairy and food commissioner to pay all charges, accounts and expenses authorized by the provisions of chapter 7, title III, division I of the General Code, that the dairy and food commissioner has the implied authority to pay the traveling expenses and allow mileage, and provide compensation for witnesses for the state for time necessarily taken in attendance upon trials brought by your department; however, if these witnesses live in the county where the affidavit is filed they can be compelled to attend by process issued under authority of section 13495, General Code. To hold otherwise would retard the administration of justice, as these inspectors cannot be compelled to attend by process in these cases outside of the county in which they live.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

215.

DAIRY AND FOOD COMMISSION—JUSTICE'S AND CONSTABLE'S BILL OF COSTS—NO LIABILITY OF COMMISSION.

The dairy and food commission is not authorized to pay the justice's and constable's bill for costs where the defendant is convicted or recognized.

COLUMBUS, OHIO, April 8, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I wish to herewith acknowledge receipt of your communication of February 27th, and to say in explanation of the delay in answering the same that this department has been very busy with a large volume of inquiries similar to yours and this is the first opportunity I have had to give your inquiry consideration. Your communication encloses a civil cost bill of a justice of the peace in and for Ashtabula township, Ashtabula county, Ohio, and reads as follows:

> "The enclosure relates to a prosecution for a violation of the turpentine statute.
>
> "On investigation, I find that it is not the custom of the dairy and food department to pay the fees in the justice's court, in these prosecutions. As this is the first bill that has been rendered to the department, we desire to get the opinion of the attorney general as to whether this department should pay the justice's and constable's bills. The department feels that these costs should follow the cases and that we are in no case liable for fees such as are indicated by the bill enclosed.
>
> "We desire to make your opinion in this case a precedent for our future guidance."

Section 3016 of the General Code provides as follows:

> "In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Section 3017 of the General Code provides as follows:

> "In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police or constable."

After a careful examination of the above sections I am of the opinion that you are not authorized by the statute to pay the justice's and constable's bills for costs. The state, particularly in view of the provisions of section 3017, is not liable for the payment of such costs. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

D 296.

SEALERS, STATE, COUNTY, CITY OR VILLAGE—FEES AND SALARY—JURISDICTION—TRAVELING EXPENSES—DUTIES—BOND—SEALERS' CONVENTION.

The copies of original standards, under section 7965 for sealers of weights and measures, must be paid for by the state sealer under sections 7698 and 7699, General Code.

City sealers and county sealers have concurrent jurisdiction in municipalities.

The county sealer may charge the fees specified in section 2633 of the General Code, but must pay the same into the county fee fund.

A single person may serve in dual capacities of county sealer and city sealer and may receive the salary provided for both positions.

Section 4322 provides alone for services of city sealers and does not authorize the county sealer or his deputy to perform the services therein specified.

There is no provision requiring a deputy county sealer to give bond.

When there is no village or city sealer provided for, the deputy sealer can act as usual in that territory as county sealer but not in the capacity of city or village sealer.

County commissioners may reimburse county sealers for necessary traveling expenses within their counties. The question of whether or not such expenses are justified is one of fact governed by custom and the exercise of a reasonable discretion.

A convention of sealers is not made necessary by law, nor are traveling expenses to and from such, authorized by law, and therefore such expenses may not be paid out of public funds.

COLUMBUS, OHIO, July 10, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I have the honor to reply to your communications of June 28th, and July 5th and 7th, wherein you request opinions upon the following questions:

"1. Who pays for the copies of the original standards required to be procured under section 7965?

"2. Do the city sealer and the county sealer and his deputy have concurrent jurisdiction in municipalities?

"3. Does section 2623 authorize the county sealer to collect the fees therein specified, and if so, is he entitled to the fees or must they be turned into the county fee fund? Or, does section 2622 as amended wipe out the fees provided for in section 2623?

"4. Is there anything to prevent a mayor from appointing a deputy county sealer as city or village sealer, or a county sealer from appointing a city or village sealer as deputy county sealer? If one person can serve in this dual capacity, can the county and municipality each contribute to his salary? (Sections 2622 and 4318.)

"5. Does section 4322 authorize the state sealer and his deputies and the county sealer and his deputy to perform the service therein

required, or is the work under that section restricted to the city sealer?

"6. Is there any provision for requiring a deputy county sealer to give bond? If so, to whom?

"7. If a mayor of a municipality neglects or refuses to appoint a city or village sealer can the deputy county sealer exercise jurisdiction the same as if he were city or village sealer?

"8. Can county commissioners pay deputy county sealers their necessary traveling expenses within their counties?

"9. A convention of the state sealers, city sealers, county sealers and their deputies, has been called by this department to be held at Cedar Point, July 11th and 12th, for the purpose of instructing the local sealers in their duties under the weights and measures laws, and to promote uniformity in the work of the sealers throughout the state. The question has been raised whether the city can allow the necessary traveling and hotel expenses of the city sealers and whether the county commissioners can allow the necessary traveling and hotel expenses of the county sealers and their deputies, to attend this convention."

I will answer the questions according to their numerical order as above.

With respect to your first question, the provisions of law for the payment for copies of the original standards of weights and measures required by the statute are found in sections 7968 and 7969 of the General Code. Section 7966 of the General Code provides that copies of said standards for the use of the various counties of the state shall be procured by the state sealer, and section 7969 provides that:

"The state sealer shall render accounts to the auditor of state of all moneys by him paid or liabilities incurred in procuring and delivering copies of the standards to the counties; and the auditor shall audit such accounts and draw his warrants on the state treasurer for the amounts he finds due, which must be paid by the treasurer out of any moneys to the credit of the general revenue fund."

So it is evident from the section last quoted that the auditor will draw his warrants on the state treasurer for such amount as is due the state sealer for providing such copies for the counties. It is different with the copies provided for cities and villages, as the state sealer is only required to furnish such copies upon application made therefor and payment of the cost of said copies. This is apparent from the provisions of section 7968, which are as follows:

"The state sealer shall furnish like copies of the original standards to the sealer of any city or village upon application therefor, and payment of the cost thereof, by such city or village."

Replying to your second question, the duties of the county sealer and his deputy are found in the General Code, chapter 3, division 2 of title 10. Section 2616 of the General Code provides that:

"The county sealer shall compare all weights and measures, brought to him for that purpose, with the copies of standards in his possession. When they are made to conform to the legal standards, the officer comparing them shall seal and mark such weights and measures."

Section 2622 of the General Code, as amended May 31, 1911, provides as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer, for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

So it is seen that the duties of the county auditor, ex-officio county sealer of weights and measures, as also the duties of his deputy when so appointed under amended section 2622, are co-extensive with the county, which would include such municipalities as are situated in said county. The statutes applicable to the appointment and duties of the city sealer are found in chapter 7 of subdivision 2, division 5, title 12, sections 4318 to 4322 of the General Code, from a reading of which sections it is readily apparent that the sealer of weights and measures for the municipality is confined in his duties to the municipality of which he has been appointed the sealer of weights and measures. While the jurisdiction of the municipal officer is confined to his respective municipality, the duties of the county sealer or his deputy are co-extensive with the confines of the county and include the municipalities therein. I am therefore of the opinion that the city sealer and the county sealer, as also his deputy, have concurrent jurisdiction in municipalities.

With respect to your third question, section 2623 of the General Code provides as follows:

> "Each sealer may receive for his services, the following fees: For sealing and marking every beam, ten cents; for sealing and marking measures of extension, at the rate of ten cents per yard, not exceeding twenty-five cents for any one measure; for sealing and marking each weight, five cents; for sealing and marking liquid or dry measures, if of one gallon or more, ten cents, and if less than one gallon, five cents; and a reasonable compensation for marking such weights and measures, so as to conform to the standards."

Section 2622, General Code, before amendment provided as follows:

> "Each county sealer of weights and measures may appoint by writing under his head and seal a deputy, who shall compare weights and measures brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, and who shall receive for the performance of that duty, the compensation in each case provided by law."

The amendment of section 2622, supra, provides further duties for the deputy, and for the fixing of a salary for said deputy instead of the fees or charges otherwise allowed by law. Under the old section the deputy was not authorized to compare weights and measures unless they were brought to the

office of the county sealer for that purpose, and under the amended section it becomes his duty under the direction of the county sealer to make comparisons of weights and measures wherever the same are used or maintained for use within his county. I do not think that the fees provided for under section 2623, General Code, are abolished, but believe that whenever weights and measures are brought to the office of the county sealer for comparison, the county sealer or his deputy may charge the fees provided in section 2623, which said fees shall be paid into the county fee fund. He of course can make no charge for such comparisons as he goes out of the office and makes of his own volition.

The fourth question presents the proposition as to whether or not a deputy county sealer can be appointed city or village sealer, or whether a city or village sealer can be appointed deputy county sealer. You are aware of the rules laid down by the authorities as to whether or not two offices are compatible. From an examination of the statutes I can find no provision of law prohibiting a person from filling the two respective positions at the same time, and there is no constitutional inhibition. The only question would be whether or not the duties of the respective offices would so conflict and so interfere one with the other as to make a proper discharge of the respective duties practically impossible. I am of the opinion that the duties would not be so conflicting as to interfere one with the other; in fact, the duties are of a similar character and I can see no reason, nor would it be against public policy to have the duties of the respective offices referred to in your question performed by one person.

As to the question of salary, while the county and municipality could not contribute to make up the entire amount of salary, the county commissioners under the law could fix the salary for the county sealer (Sec. 2622 as amended) and the municipality could fix by ordinance the salary of such person as municipal sealer of weights and measures. (Sec. 4319, G. C.)

Answering your fifth inquiry, it will be found upon examination of the General Code, as stated in a former answer herein, that section 4322, General Code, is a part of title 12, referring to municipal corporations, and comes under chapter 7, subdivision 2, division 5 of that title. The chapter refers to the appointment, compensation and duties of sealers of weights and measures for cities and villages, and I cannot see how the provisions of section 4322 as amended can have application to any other sealer of weights and measures than the sealer of weights and measures of cities and villages. The work referred to in that section, in my opinion, is restricted to the city sealer. Of course, it may happen that under the general duties of the general authority conferred upon the county sealer and his deputy he might be permitted in his comparison of weights and measures to take action along similar lines as those provided for the city sealer, but the additional authority given in the section referred to only applies to the municipal officer.

With regard to your sixth question, I find no provision of law requiring a deputy county sealer to give bond.

Answering your seventh question, in the event a mayor of a municipality refuses to appoint a city or village sealer, the deputy county sealer having jurisdiction co-extensive with his county can perform the duties required of him within the confines of said municipality, but he does not act "the same as if he were city or village sealer," nor is he by reason of the fact that there is no such officer invested with any additional powers or functions. His position is the same as though the law did not provide for the appointment of any such municipal sealer.

With respect to your eighth question, if by "necessary traveling expenses"

is meant any of the personal expenses of the officer, then the law is well settled that no such allowance can be made. But if in the performance of his duties as a county official it became necessary to incur an expense, which expense would be for the county rather than for himself personally, I am inclined to the belief that the county commissioners could reimburse him for such expense. It is difficult to lay down a rule which would be applicable to all cases; every particular case would have to be considered individually, and while there is no provision of law fixing the exact expense for which reimbursement may be made, when ancient custom which has become the law allows reimbursement for what is really the expense of the political division.

In your ninth question you inquire whether it is the right of a city or county to allow necessary traveling and hotel expenses to sealers of weights and measures or their deputies to attend a convention called by the dairy and food commissioner for the purpose of instructing the sealers in their duties. It has been repeatedly held and the law is so well settled that there is no need of quoting authority that to warrant the payment of expenses to a public official two things are necessary; first, the services rendered for which compensation or reimbursement is sought, or in the performance of which the expenses have been incurred, must be enjoined upon the officer by law; second, there must be express warrant for the payment of such expenses out of the public treasury. Now, while it is most commendable that the various officers should confer to give and receive instructions in their respective duties, as well as to promote the uniformity of their work throughout the state, still I can find no authority of law for the calling of any conference or convention. In the event that a sealer did not care to attend such conference he could not be compelled so to do and the gathering not being provided for by law it is wholly voluntary. Likewise, an examination of the statutes reveals no provision, express or implied, for the allowing of such expenses.

I am therefore of the opinion that the respective municipalities and county commissioners would not be authorized to make any allowance to the respective sealers for expenses of any kind incurred in an attendance upon such conference or convention.

I will reserve the first inquiry in your communication of July 7th for separate answer.

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

344.

INTOXICATING LIQUORS—DOW-AIKEN TAX—SEVERAL PERSONS BUYING BEER BY KEG—INCORPORATED SOCIETY'S BEER PICNIC—MEMBERSHIP FEE.

When several persons go in together, each putting up a dollar to buy beer by the keg, a "trafficking in intoxicating liquors" is consummated and such transactions are liable for the Dow-Aiken tax.

So too, when an incorporated society holds a picnic, charges a dollar a membership and permits members for that fee to drink all the beer they desire, a liability for the tax results.

COLUMBUS, OHIO, September 5, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 8th, enclosing a letter from a Mr. Peters of Cincinnati, Ohio, and asking my opinion upon the questions he propounds, to wit:

> "1. Many of my friends desire to know the law in regard to the Dow or Aiken state law tax. In case, say one or two dozen persons go in together, each puts up a dollar, and buy beer by the keg, do they require a state liquor license for that day?
>
> "2. If an incorporated society—say of about thirty members—holds a picnic and offers to any a membership ticket good for that picnic, for say a dollar, then he or she will have the privilege of drinking as much beer as they want, passing no money, the society having no government license; is a this club required to take out the Dow or Aiken liquor tax?"

Answering your first question I would say the law regarding the Dow or Aiken liquor state tax is found in volume two, chapter fifteen of the General Code of Ohio. Section 6071 provides as follows:

> "Upon the business of trafficking in spiritous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

Section 6065 provides as follows:

> "The phrase 'trafficking in intoxicating liquor' as used in this chapter and in the penal statutes of this state, means the buying or procuring and selling of intoxicating liquor otherwise than upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes. Such phrase does not include the manufacture of intoxicating liquor from the raw material, and the sale thereof at the manufactory, by the manufacturer thereof in quantities of one gallon or more at one time."

The question does not state whether the parties *sell* or *drink* the beer. If they sell it, either directly or indirectly, they are amenable to the tax, and it makes no differnce how many furnish the capital with which to buy it; but if they drink it, they are not trafficking in intoxicating liquor and, therefore, are not liable to the Aiken tax.

Replying to your second inquiry it strikes me the procedure outlined is a very feeble way to attempt to circumvent the law and to seek to make it appear that the beer is not sold directly. Our courts have repeatedly declared in the language of almost every enactment on the subject that the object of all tax laws on the business of trafficking in intoxicating liquors was and is to provide against the evils resulting therefrom.

In the case of Ratterman vs. University Club, 3 C. C. 18, it was held that the furnishing of wines and other liquors by a social club to its members, if they paid for the same when received, such sums as were necessary to defray their cost, is a sale to such members and renders it liable to a tax under the Dow law.

I am unable to see any material difference between a person receiving payment in advance for a dollar ticket entitling the holder to "as much beer as he wants," and a person receiving payment on delivery from a person drinking as much as his capacity and pocketbook can stand; the person furnishing the beer in either instance is selling it and is engaging in the business of trafficking in intoxicating liquors and is liable for the payment of the Dow-Aiken tax.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

D 394.

DAIRY AND FOOD COMMISSION—TRAVELING EXPENSES OF INSPECTORS IN HOME CITY.

The dairy and food commission has ample power to allow traveling expenses to inspectors, etc., and the question of the allowance of such claims is generally one of fact to be determined on common sense principles. Under this principle, it is easily possible to allow an inspector, under proper circumstances, such traveling expenses for meals, car fare, etc., while working in his home city.

COLUMBUS, OHIO, September 26, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of recent date wherein you request my opinion as follows:

> "If the report in the newspapers of your opinion on the legality of employes of the state in charging for meals in their home cities is correct, this department is much interested in your ruling and desires to submit to you the following, which applies to the work of inspectors of this department in their home cities:
>
> "For instance, in Cleveland and Cincinnati, and no doubt other cities in the state, an inspector in the line of his duty may be working anywhere from five to fifteen miles from his home. Heretofore under former administrations of this department and down to the present

time, it has been the custom to allow inspectors for meals in their home towns in such cases as those referred to above, for the reason that the expense to the state for car fare and loss of time would be far greater than the small amount spent for a noon-day lunch. We would be glad to have a prompt ruling from you as to whether this department should continue or discontinue the custom referred to, as expense accounts will have to be passed upon the fifteenth of this month."

I did make some rulings in relation to the legality of certain state employes of the departments of building and loan and public service commission charging for meals in their home towns, and these holdings apply to your inspectors under like conditions. The fact of the specific appropriation for traveling expenses of inspectors in your department, made by the general assembly, coupled with the powers given the dairy and food commissioner by section 371, General Code, to appoint inspectors and other subordinates, and further, the provisions of section 374 authorizing such inspectors, etc., to "be allowed such compensation as may be fixed by the commissioners" confer ample power on the commissioner to reimburse his inspectors, etc., for all "necessary traveling expense" incurred by them in the performance of their duties.

The duties of such inspectors, etc., are fixed by section 375 of the General Code, and these officers are under orders of the commissioners.

So it follows that the inspector goes to such particular post of duty as his superior officer assigns him. If that post of duty happens to be the city of the inspector's domicile, then, what may be his "traveling expenses" is a question of fact which must be determined by the peculiar circumstances of each case. If he is within easy reach of his home he certainly is not entitled to reimbursement for a meal taken down town, even though it should be convenient or time saving; likewise, he could not claim reimbursement in any event for lodging in the city of his domicile; but if his duty calls him to a distant part of his home city, or, as stated in your question "five to fifteen miles from his home," then, it is my opinion that he is entitled to reimbursement for meals taken at that point; his itemized expense account showing the place being sufficient evidence that it was while enroute and in the line of duty.

The question of "traveling expenses" must be determined by the application of common sense rules. No hard and fast regulation can be laid down; close fine spun distinctions need not be drawn, either for the purpose of defeating a claim for reimbursement or for charging to the state an expense not contemplated by the term "traveling expenses."

The commissioner, in the exercise of his judgment, can soon determine from an inspection of an itemized expense account what would or would not be a proper charge of such an item as "traveling expense." The interest of the state should be closely safeguarded, yet, it should be remembered that since the laborer is worthy of his hire he is entitled to all that would reasonably come under the term "traveling expenses."

I enclose copies of opinions to the building and loan department and the public service department, which may be of assistance to you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

477.

TAXES AND TAXATION—DOW-AIKEN TAX—ALLOWANCE OF REFUNDER WHEN PROCEEDING AGAINST THE REALTY AFTER DISCONTINUANCE OF BUSINESS.

In proceedings for the satisfaction of the Dow-Aiken tax against the realty upon which intoxicating liquors have been sold by a tenant of the owner thereof, but which traffic has been discontinued, the auditor is obliged to allow the same refunder which section 6074 allows to a party who has paid his tax and discontinues the business.

COLUMBUS, OHIO, November 29, 1911.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of Nov. 20th, wherein you state:

> "The auditor of Clark county has submitted to this department a question relating to the collection of the Aiken tax in the case as follows:
>
> "On evidence furnished by an inspector of this department one was certified to the county auditor for the collection of the Aiken tax. When the treasurer went to the street number, where the trafficking in intoxicating liquors was supposed to be conducted, he found that the woman was running a boarding house and had discontinued the selling of intoxicants. The treasurer found no chattel property against which to levy, therefore he certified the collection of the Aiken tax against the realty. Now, the question is (the trafficking in intoxicants having been discontinued) is the realty owner entitled to a refunder as if he occupied the same position as a dealer or trafficking in intoxicants? Of course, it must be established to the satisfaction of the treasurer that the trafficking has been discontinued."

While section 6074, General Code, provides that:

> "When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained shall not be less than two hundred dollars unless such discontinuance of business has been caused by an election under a local option law or a lawful finding of a mayor or judge on a petition filed in a residence district as provided in this chapter, in which case the appropriate amount of such tax shall be refunded in full."

and while a strict reading of the section provides only for refunders to a person, corporation or co-partnership which has been assessed and has paid the full amount of the assessment, still since under section 6071 the tax is upon the business of trafficking in intoxicating liquors, it is only proper, just and right that the tax be retained for that time only which a business was continued.

In the case of Simpson vs. Service, Auditor, et al, reported in the 3d circuit court reports at page 433, the auditor had placed upon the assessment duplicate the amount of the tax against a landlord, the tenant having been engaged in the business of trafficking in intoxicating liquors. The tenant satisfied the auditor of the time when the business was discontinued and the landlord was seeking to take advantage of the right to a refunder for the proportionate part of the unused tax. The court at page 440 said:

> "The dealer having discontinued the business on December 2, 1887 was, *and therefore plaintiff was*, entitled to a refunder of so much of said sum of $300 as the period between December 2, 1887, and the fourth Monday of May, 1888, bears to the period between November 1st, 1887 and the fourth Monday of May. The auditor having refused this, and threatening to enforce the payment of the whole assessment with penalty, the plaintiff was entitled to relief."

This is a direct holding that the landlord, who was the plaintiff in error, stepped into the shoes of his tenant who had been engaged in the business of trafficking in intoxicating liquors and on account of whose failure to pay the tax the property of the landlord was rendered liable. This view of the law finds support in the great principle of natural justice and common honesty by which the conduct of the state as well as the conduct of individuals should be guided.

I am, therefore, of the opinion that when the authorities are satisfied that the business has been discontinued, a refunder can be granted to the owner of the property against which the tax is levied in the same manner as a refunder would lie to the party who, having paid his tax, discontinues the business.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Commissioner of Common Schools)

21.

SCHOOL ELECTIONS—BOND ELECTION—RETURNS TO CLERK OF BOARD OF EDUCATION—FIRST CANVASS OF RETURNS BY BOARD.

From the language of relative statutory sections, and from the fact that the subject is treated under the head of schools, and from the further fact that the question is a purely local one, affecting only the voters of the school district in which it is held, a special election held upon the question of issuing bonds for school purposes is to be considered a school election under section 5120, *and returns thereof should be made to the clerk of the board of education of the district, and such board is the authority that shall first canvass said returns.*

January 14, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 11, 1911, in which you ask the following question:

> "In the case of special elections, held for the purpose of voting on the question of issuing bonds for school purposes, what authority should first canvass the returns from the different wards or precincts?"

Section 8120 of the General Code provides:

> "In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

Therefore the sole question to be determined in order to answer your inquiry is, whether a special election, held for the purpose of voting on the question of issuing bonds for school purposes, is a *school election.*

Section 7688 of the General Code is as follows:

> "When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall make as 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, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

This section is the authority for submitting the question as to issuing bonds at a general election or a special election called for that purpose.

Now, the last clause of the above section, number 7688, provides that notices of the election shall be given in the manner provided by law for school elections.

The section of the General Code which provides for the notice to be given for school elections is section 4832 and reads as follows:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, or the nature of the question to be voted upon."

Especial attention is called to the last paragraph of this section and the last clause of said paragraph, to wit:

> "Such notices shall specify the time and place of the election, the number of the members of the board of education to be elected, and the term for which they are to be elected, *or the nature of the question to be voted upon.*"

From the foregoing sections and the fact that the authority for an election of this character is found only in the school acts, and the further fact that the question is a purely local one affecting only the voters of the school district in which it is held, and that such elections are for school purposes only; I am of opinion that such an election is a school election, and therefore, under section 5120 and returns should be made to the clerk of the board of education of the district, and such board of education is the authority that shall first canvass said returns.

In support of the view given above I further call your attention to the opinion of Hon. L. C. Laylin, as secretary of the state of Ohio, rendered June 18th, 1903, which is as follows:

> "The election laws provide that all public elections shall be conducted in accordance with the provisions of the ballot laws. I am of the opinion that, where a board of education of a city has ordered a special election at which a proposition for the construction of a new building or the issue of bonds is submitted to the voters of the school district, such election should be conducted under the supervision of the deputy state supervisors of elections and should be held at the regular voting precincts of the school district; that the returns of such election should be made by the judges and clerks of the several precincts to the clerk of the school district, and that the expenses of the conduct of such election should be borne by the school district."

This opinion bears date June 18, 1903, and is upon the same question.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

30.

FRATERNITIES IN PUBLIC SCHOOLS—CRIMINAL PROVISION—ENFORCEMENT OF PENALTY—CRIMINAL PROCEDURE.

Section 12906, General Code, is a criminal statute and must be strictly construed, and unless a pupil of the public schools joins a "fraternity, sorority or like society, which is composed or made up of pupils of the public schools," the section does not apply.

The penalty provided for can be enforced only by proper prosecution and conviction through criminal procedure and may not be assessed by the board of education.

COLUMBUS, OHIO, January 17, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 11th, 1911, in which you ask, first:

> "Do 'fraternities' that admit to membership pupils from the high school as well as those who have not attended the high school, or even the public school, come within the provisions and penalties of sections 12906, 12907, 12908, 12909 (pp. 95 and 96) of the Ohio School Laws?"

Section 12906 of the General Code is as follows:

> "Whoever, being a pupil of the public schools, organizes, joins or belongs to a fraternity, sorority or other like society composed of or made up of pupils of the public schools, shall be fined not less than ten dollars nor more than twenty-five dollars for each offense."

It will be observed that this section applies to a pupil in the public schools who "organizes, joins or belongs to a fraternity * * * *composed of or made up of pupils of the public schools.*" The sections following contain the same language as to the character of the fraternity, and in each of them the words are "composed of and made up of pupils of the public schools."

These provisions do not apply to the fraternities themselves, but to the pupils in the public schools and, therefore, as these statutes are criminal in their nature they must be strictly construed, and it would follow that unless the fraternity, sorority or like society is composed or made up of pupils of the public schools, the sections would not apply; that is, if the fraternities, sororities or societies are composed of or made up of, in whole or in part, of persons other than pupils of the public schools, a pupil joining such a fraternity or society would not be liable for so doing.

Your second question is:

> "Can the penalty provided in said law for illegal membership in the fraternity mentioned in said section, be assessed by the board of education?"

The penalty or penalties provided for by said sections, to wit: 12906, etc., are criminal in their character, and a fine for an offense cannot, therefore, be assessed by the board of education.

Your third question is:

"How may such fines be assessed?"

The only way in which the penalty provided by said sections can be assessed is by proper prosecution and conviction under the acts relating to criminal procedure.

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

76.

BOARD OF EDUCATION—BOND ELECTION FOR ERECTION OF SCHOOL BUILDING AND PURCHASE OF SITE.

The intention of 7625, General Code, is clearly expressed therein, to comprise within its terms the authority to call for an election upon the question of issuing bonds for the erection of a school house as well as for the purpose of a site for such purpose.

January 27, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of January 26th, 1911, requesting my construction of section 7625 of the General Code on the question of the power of the board of education under said section to call for an election for the purpose of voting on a bond issue to erect a school house on a site which the board of education already owns. The particular point to which you call attention is that it has been claimed to you that this section only gives the power for purchasing a site or sites upon which to erect a school house or houses, and gives no power to erect a school house or houses.

Section 7625 reads as follows:

> "When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair, or furnish a school house, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the 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, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

I suppose the contention has arisen solely as to the construction of the first clause of said section to wit: "When the board of education of any school district determines * * * that it is necessary to purchase *a site or sites to erect a school house or houses*" it being claimed that because there is no comma after the word "sites" the clause shall be taken to give authority only for the purchase of a site or sites.

It seems to me that any such construction is doing great violence to the plain and unambiguous meaning of this statute and to the words used.

The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the legislature. If the provisions are ambiguous or the meaning is doubtful punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and manifestly intended, inserted. But this intent is to be sought first of all in the language employed; if the words are free from ambiguity and express clearly and distinctly the sense of the law making body there is no occasion to resort to other means of interpretation. The statute should be held to mean what it plainly expresses, and there is no room left for construction. See 66 O. S. 621.

To construe section 7625 of the General Code as meaning that a board of education has the power, under it, to purchase a site or sites, but not to erect a school house or houses, would require that the words "upon which" be inserted after the word "sites." As the statute reads there is no necessity whatever for inserting these words, and their insertion would defeat the intention of the legislature as expressed. The meaning is clear: it might possibly be made clearer by inserting a comma after the word "sites," but I doubt, even if the comma were inserted, that the meaning would be any clearer. The statute reads "to purchase a site or sites to erect a school house or houses * * * *or to do any or all of such things.*" Now, what are any or all of such things provided for in the statute? Certainly there can be no doubt as to this. One is to purchase a site, one is to erect a school house, another is to complete a partially built school house, etc.

Therefore, it seems to me that this statute is so clear and unambiguous that it requires no construction, and it would be both contrary to the language of the statute itself and to the intention of the legislature, clearly expressed, to construe it in any other manner than above indicated.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

83.

TRUSTEES OF ORPHANS' HOME AND BOARD OF EDUCATION — NO AUTHORITY TO JOINTLY BUILD A SCHOOL BUILDING.

There is no statutory authority for the joint building of a school by the board of education of a school district and the trustees of an orphans' home in the same district for the accommodation of the pupils of the school district and those of the orphans' home.

COLUMBUS, OHIO, January 30, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of January 21st, which is as follows:

> "Whether in a certain school district where a new school building is needed, and near which the orphans' home of the same county is located, and said orphans' home is crowded beyond its capacity for admitting its children, the directors of the home and the board of education of the school district can jointly erect a building to accommodate both the pupils of the orphans' home and the school district, and whether such building can be erected upon the grounds of the

school district and the charge and management of the same be vested in the board of education of the school district?"

The sections of the General Code which provide for schools for children who are inmates of children's or orphans' homes are as follows:

"Section 7676. The board of any district in which a children's home or orphans' asylum is established by law or in which a county infirmary is established, when requested by the board of trustees of such children's home, orphans' asylum or the directors of such infirmary, shall establish a separate school in such home, asylum or infirmary, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education. Such schools at infirmaries must be continued in operation each year until the share of all the school funds of the district belonging to such children, on the basis of the enumeration, is expended, and at such homes and asylums not less than forty-four weeks. If the distributive share of school funds to which the school as such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution.

"Section 7677. All schools so established in any such home, asylum or infirmary, shall be under the control and management of the respective board of trustees or directors of such institutions, which boards in such control and management so far as practicable shall 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.

"Section 7678. In the establishment of such schools the commissioners of the county in which such children's home, orphans' asylum or county infirmary is established, shall provide the necessary school room or rooms, furniture, fuel, apparatus and books, the cost of which for such schools must be paid out of the funds provided for such institution. The board of education shall incur no expense in supporting such schools."

These sections all plainly indicate that such schools shall be established *in* such children's home or orphans' asylum. Therefore, as these are the only sections that provide for such books I find no authority in the statutes for the trustees of the home and the board of education of the school district or township entering into any such an arrangement as above specified. Such an arrangement or undertaking, if undoubtedly for the benefit of the public and of the pupils of the township and the children in the home, might possibly be upheld, if actually carried into effect, but upon this point I express no opinion.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

126.

MONROE HIGH SCHOOL—CREATION BY SPECIAL ACT UNCONSTITUTIONAL—DE FACTO HIGH SCHOOL.

Inasmuch as the legislature is without power to pass special acts with reference to matters which may be covered by general laws and as the act re-establishing special school districts has on this ground been adjudicated unconstitutional, the Monroe high school having been created by such a special act is not a legal high school but a de facto high school only.

COLUMBUS, OHIO, February 21, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—You have recently referred to me an inquiry from residents and taxpayers who reside in Monroe high school district. These gentlemen make the following statement and inquiry:

> "In 1880, April 5th, the general assembly passed a special act, creating a special high school district composed of parts of Lemon township, Butler county, Ohio, and Liberty township said county, together with a part of Turtle Creek township, Warren county, Ohio, to be known as the Monroe high school. This act is found in vol. 77 of Ohio laws, page 399.
>
> "Now we wish you would call the attention of the attorney general to this act, and the decisions upon this subject, especially to State vs. Spellmire, 67 O. S. 77, and the decisions therein cited.
>
> "Noting that in this act in (95 O.L. 743) upon which the Spellmire case is decided, make no provisions, for an election to create the special district; while in the act creating the Monroe high school it has a provision in the first section in language as follows:
>
> " 'Provided however that a majority of the electors within said territory shall vote in favor of said special school district, at an election to be held in manner following'—then details the plains and conditions of the election.
>
> "*Query*: Is said Monroe high school a *legal* high school?"

The above case of State vs. Spellmire, 67 O. S. 77 lays down the rule that:

> "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."

Subsequent to this decision, the legislature on April 25, 1904 (97 O. L. 334) passed "an act to provide for the organization of the common schools of the state of Ohio, and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio herein named," which was embodied in the Revised Statutes, and one of which sections sought to re-establish the special school districts then existing. (Sec. 3928.)

Barton vs. State, 73 O. S. 51, declared this provision unconstitutional "in so far as they declare to be legal and valid special school districts, all special

school districts which have been created under the provisions of special acts of the general assembly." This section is now section 4734 of the General Code.

It is my opinion therefore, that the Monroe high schoal is not a *legal* high school. It is a *de facto* high school only.

Yours very truly,

Attorney General.

TIMOTHY S. HOGAN,

128.

COUNTY BOARD OF TEACHERS' EXAMINERS—EXAMINATION ON SATURDAY CONSTITUTIONAL—MANDATORY PROVISION OF STATUTE.

Section 7817, General Code, providing that examination of applicants for teachers' certificates shall be held on the first Saturday of every month, does not interfere with rights of conscience and therefore, is not inconsistent with article 1, section 7 of the constitution.

The provisions of the aforesaid statute are mandatory and a departure therefrom by holding examinations on other days will not be permitted.

February 23, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of February 17th you state:

> "Section 7817, G. C., provides that each county board of examiners shall hold an examination of applicants for county teachers' certificates on the first Saturday of every month of the year. Section 7834, G. C., provides for the remuneration of said board of county examiners.
>
> "Query: Would it be legal for any county board of school examiners to hold one or more extra examinations, and if so may the examiners be paid legally for their services in conducting extra examination or examinations? If they may receive pay for same, will their fee be the same as described in said section 7834?"

Inclosed in your communication of the above date is a letter as follows:

> "ROCKFORD, OHIO, Feb. 7th, 1911.
>
> "HON. JOHN W. ZELLER, *Columbus, Ohio.*
>
> "DEAR SIR:—Enclosed you will find request of Miss Watts. She objects to taking the examination on a Saturday because of religious convictions. We held a special examination last year, some time in June. Will her request be granted?
>
> "Yours truly,
>
> "S. Cotterman, Clk."

Section 7817 of the General Code provides for meetings before the county board of examiners and is as follows:

> "Each board shall hold public meetings for the examination of applicants for county teachers' certificates on the first Saturday of every month of the year, unless Saturday falls on a legal holiday, in

which case, it must be held on the succeeding Saturday, at such place or places within the county as, in the opinion of the board, best will accommodate the greatest number of applicants. Notice thereof shall be published in two weekly newspapers of different politics printed in the county, if two papers thus are published, if not, then a publication in one only is required. In no case shall the board hold any private examination or antedate any certificate."

Section 7819 of the General Code provides for a uniform system of examination as follows:

"The questions for all county teachers' examination, shall be prepared and printed under the direction of the state commissioner of common schools. A sufficient number of lists must be sent, under seal, to the clerks of such board of examiners not less than five days before each examination, such seal to be broken at the time of the examination at which they are to be used, in the presence of the applicants and a majority of the members of the examining board."

Section 7834 of the General Code provides for the compensation of the board and is as follows:

"Each member of the county board of school examiners is entitled to receive ten dollars for each examination of fifty applicants or less, fourteen dollars for each examination of more than fifty applicants and less than one hundred, eighteen dollars for each examination of one hundred applicants and less than one hundred and fifty, twenty-two dollars for each examination of one hundred and fifty applicants and less than two hundred, and four dollars for each additional fifty applicants, or fraction thereof, to be paid out of the county treasury on the order of the county auditor. Books, blanks, and stationery required by the board shall be furnished by the county auditor."

Article 1, section 7, of the constitution of Ohio contains the following provision:

"And no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted."

There are no statutory provisions granting power to the county board of examiners to hold any special examinations, and the statute itself (section 7817, G. C., above set forth) expressly prohibits private examinations.

In my view of the law the above statute, section 7817, General Code, in no way interferes with the right of conscience, but simply prescribes the day on which applicants for county teachers' certificates shall be examined and the manner of giving notice thereof.

It is my opinion, therefore, that the provisions of section 7817 are mandatory on the board of county examiners, and that it has no power or authority of law to hold any meeting for examinations for applicants for county teachers' certificates at any other time or times than is specified in said section; and that any relief from the situation in which the teacher in question finds herself lies with the legislature.

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

142.

VILLAGE SCHOOL DISTRICT ADVANCING TO CITY SCHOOL DISTRICT BY FEDERAL CENSUS—ELECTION OF SUCCESSORS—FIXING OF MEMBERSHIP—TERM OF TEACHERS AND SUPERINTENDENT CONTINUES.

When a village school district, by reason of the last federal census, advances to a city school district, the members of the board of education of the old village district, under sections 4686 and 4700, General Code, shall decide the number of members which shall compose the city board of education.

The successors of the members of the board of education in such instance, shall be elected at the next annual election for school board members.

A superintendent or teacher who had been elected for a legal term of years by said village board, may hold for said term under the city school district regime.

COLUMBUS, OHIO, March 1, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of January 20, 1911, you have submitted to me several questions in regard to boards of education in municipalities which have been advanced from villages to cities, as follows:

> "When a village, which under the last federal census has been advanced to a city, becomes a city school district, what power decides the number of members which shall compose said city board of education?"

Section 4686 provides:

> "When a village is advanced to a city, the village school district shall thereby become a city school district. * * * The members of the board of education in village school districts that are advanced to city school districts. * * * shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

Section 4698, General Code, is as follows:

> "In city school districts which at the last federal census contained a population of less than fifty thousand persons, 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 districts."

Section 4700, General Code, is in part as follows:

> "The board of education in each city school district, by resolution, shall fix within the limits so prescribed the number of members of the board of education, to be elected at large, and the number of members of the board to be elected by city districts."

It is my opinion that under the above sections the board of education of the village school district, which by reason of said village being advanced to a

city, continues to act as the board of education in the city school district, shall decide the number of members which shall compose the city board of education.

"2. When shall the successors of the members of the village board of education be elected?"

It is my opinion that under the provisions of section 4686, supra, the successors of the members of the village board of education are to be elected at the next annual election for school board members.

"3. Can a superintendent or teacher who had been elected for a term of years by said village board of education before it was advanced to a city, hold said position for the term for which he was elected by said village board of education?"

Section 7705, General Code, provides:

"The board of education of each village, township and special school district may appoint a suitable person to act as superintendent, and to employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. But nothing herein shall prevent two or more districts uniting and appointing the same person as superintendent."

It is my opinion that a superintendent or teacher who has been appointed under the provisions of the above section can hold said position for the term for which he was appointed by the village board of education.

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

147.

BOARD OF EDUCATION, TOWNSHIP—FAILURE TO ORGANIZE—LEGALITY OF OFFICIAL ACTS OF BOARD HOLDING OVER—DUTIES OF BOARD.

When a township board of education did not organize as required on the first Monday in January, and under the board which held over an election to issue bonds was carried, the election is valid as is every action of said board up to the time of the organization as required by section 4747, General Code.

The board may and should, nevertheless, organize as soon as possible, despite their failure to do so within the stipulated time.

March 4, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of February 17th you state:

"A township board of education did not organize on the first Monday in January, 1911, as provided in section 4747, General Code. All the officers, including the clerk, are 'holding over' from the organization the first Monday in January, 1910. Under the direction of this board

an election was held February 11, 1911, on the proposition to issue bonds to build additional rooms to the school building. The bond issue carried.

"Query: (1) Is the above described election legal and are the bonds issued as the result of said election of any value?

"(2) Should the above described officers of the board of education continue to serve in their several capacities or should the board at this time proceed with the reorganization?"

Section 4747, General Code, provides:

"The board of education of each school district shall organize on the first Monday of January after the election of member of such board. One member of the board shall be elected president, one as vice president and in township school districts the clerk of the township shall be clerk of the board. The president and vice president shall serve for a term of one year and the clerk for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

Section 8, General Code, provides:

"A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

In answer to the first inquiry above set forth would state that under the facts above given a township board of education having failed to organize under section 4747, General Code, the officers thereof, under section 8, General Code, hold over until their successors are elected and qualified.

Therefore, my opinion is, that the above described election of February 11, 1911, on the proposition to issue bonds is legal, and that the bonds issued as a result thereof are valid bonds.

In answer to your second question would state that said board of education not having organized as provided under section 4747, General Code, should proceed to do so at once.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

152.

DISMISSAL OF TREASURER OF SCHOOL BOARD UPON ESTABLISHMENT OF A DEPOSITORY—NO FURTHER LIABILITY TO TREASURER FOR COMPENSATION—INDEFINITE TERM OF OFFICE.

Though the office of the township treasurer is of definite duration, the office of the same individual as treasurer of the school board is of indefinite duration and may be terminated at any time by the school board through the establishment of a depository.

COLUMBUS, OHIO, March 7, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of February 17th you state:

> "A township board of education has provided a depository for the school funds, as provided in section 7604, G. C. By resolution they dispensed with their treasurer and required the clerk of the board to perform said treasurer's duties as provided in section 4782, G. C."

and you ask:

> "Query: Does section 4782, G. C., conflict with section 4763, G. C., to the extent that a board of education may not dispense with their treasurer? If it does not, may the treasurer who was acting under authority of section 4763, compel said board of education to pay him for services from the time since the clerk assumed the office, as provided under section 4782?"

Section 4763 provides in part as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds."

Section 4781 provides as follows:

> "The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment on their salaries previous to August thirty-first, must not be made until all reports required by law have been filed with the county auditor and his certificate presented to the board of education as required herein."

Section 4782 provides as follows:

> "When a depository has been provided for the school moneys of a

district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, may dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

Section 4782, General Code, is the code revision of section 4042a, Revised Statutes, passed and approved April 27, 1908.

When the township treasurer was elected he became by virtue of his election to said office the treasurer of the school funds. His office as township treasurer was for a fixed duration, but his duties as treasurer of the school funds was of indefinite duration, to wit: until dispensed with by the board of education upon the establishment of a depository.

It is my opinion that section 4782, General Code, does not conflict with section 4763, General Code, to the extent that such board of education may not dispense with their treasurer. When the towship treasurer was elected he was, or should have been, aware that his duties as treasurer of the school fund were of indefinite duration, and that his services could be dispensed with at any time by a majority vote of the board of education upon a depository for the school funds moneys being provided for.

I am, therefore, of opinion that although section 4781 providing for the compensation of the treasurer of the school funds provides for either annual, semi-annual, quarterly or monthly payments, that upon the board of education dispensing with the services of such treasurer that he cannot compel said board of education to pay him for services after the time that his services are so dispensed with.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

177.

COMMON SCHOOL FUND—IRREDUCIBLE DEBT OF STATE—DISPOSITION OF FUND DEVISED.

When a devisor leaves a certain fund for the use of the common school fund, such fund must be paid over to the state, and become vested in the "common school fund." Through section 7580, General Code, such moneys then become a part of the "irreducible debt" of the state upon which shall be paid 6% interest per annum to be applied under section 7581, General Code, according to the intention of the devisor.

March 13, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent favor wherein your state:

"In Mt. Pleasant township, Jefferson county, a Mr. Rex. Patterson about sixty years ago made a will, one item of which read as follows: '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 therein;

the principal of which I hereby authorize my executors hereinafter named to place in some permanent fund and the interest thereof to be paid annually into the common school fund of the said township of Mt. Pleasant forever, the principal to remain forever as a permanent fund for the purposes above specified.'

"Upon the settlement of the estate the Mt. Pleasant special fund was about $5,200.00, which amount has been held by different individuals since that time, and upon which interest ranging from three to five per cent. has been paid to school officials.

"The provisions of said will have never been carried out, because the fund has never been placed in any permanent form. The prosecuting attorney purposes to have an executor de bonus non appointed immediately, and desires him to carry into effect the intent of said will."

and you ask:

"Query: Does section 7581, G. C., apply to this case, and is the state under obligation to take this money and pay the six per cent. income therefrom, to the Mt. Pleasant district according to the intent of the grantor?"

Section 7580 of the General Code provides:

"The common school fund shall constitute an irreducible debt of that state, on which it shall pay interest annually, at the rate of six per cent. per annum, to be computed for the calendar year, the first computation on any payment of principal hereafter made to be from the time of payment to and including the thirty-first day of December next succeeding. The auditor of state shall keep an account of the fund, and of the interest which accrues thereon, in a book or books to be provided for the purpose, with each original surveyed township and other district of country to which any part of the fund belongs, crediting each with its share of the fund, and showing the amount of interest thereon which accrues and the amount which is disbursed annually to each."

Section 7581 of the General Code provides:

"When any grant or devise of land, or donation or bequest of money or other personal property, is made to the state, or to any person, or otherwise, in trust for the common school fund, it shall become vested in such fund. When the money arising therefrom is paid into the state treasury, proper accounts thereof must be kept by the auditor of state, *and the interest accruing therefrom shall be applied according to the intent of the grantor, donor, or devisor.*"

Section 7581 of the General Code was in force as far back as March 2d, 1831, and is to be found in 29 Ohio Laws 425, section 5, and is in the following language:

"That whenever any donation or devise shall be made, by gift, grant, last will and testament, or in any other manner whatever, of

any estate, either real, personal or mixed, to the state of Ohio, or to any person, or otherwise, in trust for the said common school fund, by any individual, body politic or corporate, the same shall be vested in said common school fund; and whenever the moneys arising from such gift, grant or devise, shall be paid into the state treasury, the proper accounts thereof, shall be kept, and the interest therefrom shall be appropriated according to the intent and design of such donor, grantor, or devisor."

You state that Mr. Patterson made the will in question about sixty years ago. So that the above section in the 29th Ohio Laws applies.

It is my opinion that the fund left by Mr. Patterson "for the use of the common school fund" became vested in the common school fund and that said money should be paid over to the state under section 7581, and becomes, under section 7580, a part of the irreducible debt of the state and receive interest at the rate of 6% per annum. Section 7581 provides that the interest accruing from this fund shall be applied according to the intent of the devisor.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

294.

BOARD OF EDUCATION—POWER TO BORROW MONEY BY FUNDING EXISTING DEBTS—SALARY OF TEACHER.

The board of education under sections 5656 *and* 5658, *G. C., may fund valid existing and binding indebtedness to meet current binding obligations which they are unable to pay by reason of the limits of taxation.*

The salary of a teacher is such a binding obligation as to be within this rule.

March 30, 1911.

HON. J. W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under recent date you submitted to me a letter addressed to your department as follows:

"The board of education of Jefferson township, Scioto county, has applied to me for a loan of $453.00 for the purpose of making final payment to the school teachers of that county. It seems that the board will require that much to pay all the teachers. They have maintained an eight months school, pay the teachers $40.00 per month, and levied 9 mills. I presume they will get state aid in August from which they will pay the amount of the proposed loan. Will you be kind enough to advise me whether the board can legally make this loan or not. It seems quite clear to me that we ought to aid them if possible.

"I would appreciate an early reply as I am expecting the clerk in every day.

"Yours truly,
"Henry Bannon."

and you ask the following:

> "If we find this board is entitled to state aid, may they legally borrow this money?"

The employment of a teacher constitutes a contract between the board of education and the teacher, and the teacher having performed his part of said contract is entitled to his compensation for such services and the sum so due is an indebtedness of the board of education.

Section 5656, General Code, provides in part as follows:

> "* * * * the board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money * * * so as to change, but not increase the indebtedness in the amounts, for the length of time, and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

Section 5658, General Code, provides in part as follows:

> "No indebtedness of a * * * school district * * * shall be funded * * * unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * *. Such resolution shall state the amount of the existing indebtedness to be funded, * * * the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

In the case of Bower vs. Board of Education, 18 Ohio Circuit Court Reports 624 (18th Circuit Decisions 624) the second syllabus is as follows:

> "Money borrowed by a board of education on its note as such, used for the purpose of meeting accruing obligations to teachers, janitors, etc., must be repaid, and its repayment may not be enjoined on the ground that the statutory requirements respecting resolutions and certificates have not been complied with, because of the latter part of Rev. Stat. 2834b (Lan. 4286), commencing with the words, 'provided that' and the principles declared in State vs. Van Buren Tp. (Bd. of Ed.) 5 Circ. Dec. 477 (11 R. 41)."

As the payment of salaries of teachers is an obligation binding upon the board of education and if not paid when due the amount due on such salaries is entitled to legal interest until paid, and as the purpose of borrowing the money as set forth in the above letter is *solely* for the purpose of paying such salaries I am of opinion that such board of education can fund said indebtedness under section 5656, General Code, by borrowing such money. The language of Hitchcock, J., in the case of Bank of Chillicothe vs. Mayor, 7 Ohio Reports, (part 11) page 35, decided in 1836 is especially applicable here. In that case the judge said:

> "I cannot see the great difference whether a corporation shall be

indebted to A. for labor in repairing streets or buildings; or to B. for money borrowed to pay A. for this same labor. The moral obligation to pay would be the same in either case."

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

A 229.

CITY SCHOOL DISTRICTS—FEDERAL CENSUS—DISTRICTING AND REDISTRICTING—EFFECT UPON TERM OF MEMBERS OF BOARD OF EDUCATION.

When the federal census shows a city to have passed the 50,000 population mark and the city school district consequently passes from the first to the second class, it is necessary, under section 4703, General Code, to elect all the members of the board of the second class and the term of the members of the board under the first class regime shall be cut off, upon the induction into office of said board of the second class.

The contrary rule prevails under section 4707, General Code, when a city school district of the second class is redistricted, and the terms of members shall not be affected thereby.

COLUMBUS, OHIO, April 24, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—You have submitted to use a letter as follows:

"The city of Akron has, by the last census report, passed the 50,000 mark in population, and will, therefore, be governed by sections 4699 and 4705 of the General Code in the matter of the membership and the election of the next board of education.

"The present board contains 7 members elected at large. The terms of three of them expire this year and the other four in two years. Now in complying with the law the question of what to do with the four members who hold over for two years naturally arises. The law seems to imply that in fixing the number of members at large and by subdistricts, all members will have to be elected this fall and that none will hold over, unless they hold over as extra members for two years. To put the case a little plainer, perhaps, suppose it should be decided to have seven members, four elected by subdistricts and three at large or vice versa, would seven new members have to be elected and the four present members hold over for two years, making eleven members for that time and seven thereafter, or would the readjustment of the matter compel an election of all members and a termination of the present board with this year?"

Section 4698 of the General Code provides as follows:

"In city school districts which at the last federal census contained a population of less than fifty thousand persons, 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 district."

Section 4699 of the General Code provides as follows:

"In city school districts which at the last federal census contained a population of fifty thousand persons or over, the board of education shall consist of not less than two members nor more than seven members, elected at large by the qualified electors of the school district and of not less than two members nor more than thirty members elected from subdistricts by the qualified electors of their respective subdistricts."

Section 4700, General Code, provides in part as follows:

"The board of education of each city school district, by resolution shall fix within the limits so prescribed the number of members of the board of education, to be elected at large, and the number of members of the board to be elected by city districts. At the same time, the board shall subdivide such city school district into subdivisions equal in number to the number of members of the board of education in the district, who are to be elected from subdistricts therein so established. * * *"

Section 4701, General Code, provides as follows:

"Within three months after the official announcement of the result of each succeeding federal census, the board of education of each such city school district shall redistrict such district into subdistricts in accordance with the provisions of this chapter. If the board of education of any such district fails to district or redistrict, as herein required, then upon application of the president of the board of education, the state commissioner of common schools shall forthwith district or redistrict such city school district, subject to the requirements of this chapter."

Section 4703 of the General Code provides as follows:

"In city school districts, at the first election, all members of the board of education at large shall be elected for terms as follows: If there are but two members of the board of education elected at large, one shall be elected for two years and one for four years. If there are more than two, and the number thereof is divisible by two, the one-half of such board shall be elected for two years and one half for four years, but, if the whole number of members elected at large is not divisible by two, the number to be elected for two years shall be the quotient obtained by dividing the whole number to be elected at large less one by two, and the remaining members shall be elected for four years. At the expiration of their respective terms, their successors shall be elected for four years."

It is apparent from a reading of sections 4698 and 4699, *supra*, that it is the intention of the general assembly to provide under the head of "city school districts" for two distinct classes of city school districts, first, those having a population of less than 50,000, hereinafter called the first class, and, second, those having a population of 50,000 persons or over, hereinafter called the second class.

Section 4700, *supra*, provides what shall be done when a city school district passes from the first to the second class; and section 4701, *supra*, provides that if the provisions of section 4700, *supra*, are not carried out within the time limited the state commissioner of schools shall proceed to carry such provisions into effect.

While it may be noticed that the first sentence of section 4701 only uses the word "redistrict," yet in order to give effect to the succeeding sentence of such section, it is believed that the word "redistrict" should be read "district or redistrict."

Section 4703, *supra*, provides that at the *first election* after a school district has been redistricted *all* of the members of the board of education at large shall be elected.

I am, therefore, of the opinion that the clear meaning of the general assembly is that when a city school district passes from the first class to the second class it is necessary at the next succeeding election for members of the board of education to elect *all* the members of the board of such second class, and that the term of the members of the first class shall cease upon the induction into office of said board of the second class.

Section 4745 of the General Code reads as follows:

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

But as this is a general provision of law it must yield to the special provisions of section 4703, *supra*, which declares that *all* of the members must be elected at the first election next succeeding each federal census.

Section 4707 of the General Code provides:

> "The redistricting of a city school district shall not affect the membership of the then existing board of education in such district. All members thereof shall continue to serve for the full term for which they were elected. After the expiration of such terms, the election of members of the board of education from subdistricts shall be by the subdistricts as redistricted."

This provision of law relates solely to the redistricting of city school districts and not to the original districting of a city school district. In fact by providing that a redistricting of a city school district shall not affect the membership of the then existing board of education of such district, the intention of the general assembly is clear, that when a city school district passes from the first class to the second class, the membership of the then existing board shall cease.

It is my opinion, therefore, that as the city of Akron has passed into a city school district of the second class, a readjustment of the matter compels an election of all members, and the termination of the present board with the election and qualification of the members of the new board to be elected.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

237.

HIGH SCHOOL—VOTE OF ELECTORS AUTHORIZING—TIME LIMIT FOR ISSUE AND SALE OF BONDS BY THE BOARD OF EDUCATION.

When the electors of a school district have voted favorably upon the necessity of erecting a high school, there is no statutory limit as to the time when the board shall issue the bonds. The fact of the necessity which exists, however, and its recognition by the voters, imposes upon the board the obligation to proceed within a reasonable time.

May 3, 1911.

HON. JOHN W. ZELLER, *State Commisisoner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date, in which you state:

> "A township school district voted on a bond issue for $25,000.00, for the building of a centralized high school. The proposition carried by a large majority. Some of the members of the board deem it advisable not to build this year.
>
> "Query: Is there a limit on the time as to when a board of education, under the above named conditions, must issue and sell the bonds for the erection of said building?"

Section 7625 of the General Code provides that when the board of education of a school district determines that for the proper accommodation of the schools of such district *it is necessary* to purchase a site or sites to erect a school house or houses the board shall make an estimate of the probable amount of money required for such purpose, and submit to the electors of the district the question of bonds for the amount so estimated. Section 7626 provides that if a majority of the electors voting on the proposition vote in favor thereof the board shall be authorized to issue bonds for the amount indicated by the vote. There is no limit placed on the board of education as to the time within which such board must issue and sell the bonds for the erection of said building, but as the board is not authorized to submit the question of erecting a building until it has determined that it is necessary, I am of opinion, that as the necessity for such building is presumed to exist it is the duty of the board to proceed within a reasonable time to sell the bonds and erect a school building. What is a reasonable time must depend upon the circumstances. As the electors of the school district have voted in favor of the bonds because they deemed the erection of the school house in question to be necessary, it would seem to me that the board of education is required to proceed with due diligence in the erection thereof, and if there is no serious reason why such building should not be erected this year it is the duty of the board to proceed so to do.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 257.

BOARD OF EDUCATION—POWERS AND DUTIES AS TO PAYMENT OF TRANSPORTATION ON TEXT BOOKS.

Section 7714, General Code, merely gives the board of education, the power to pay for transportation on text books and is not a mandatory direction to the effect that it must always do so.

May 23, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the following query:

> "Has a board of education the right to require by contract, that the publishers of text books in use in the schools under control of said board, prepay the freight on text books, which they order from the publishers of same?"

As the law authorizes the board of education to secure text books at less than the maximum price and as the prepaying of freight on text books results in a lower price to be paid on such books, I am of opinion that the board can require by contract that the publishers prepay the freight.

Section 7714, General Code, reads in part as follows:

> "The board of education must pay all charges for the transportation of the books, out of the school contingent fund. But if such boards of education at any time can secure of the publishers books at less than such maximum price, they shall do so, and without unnecessary delay may make effort to secure such lower price before adopting any particular text book."

The first sentence of section 7714 of the General Code above quoted, as I view it, is simply a direction to the board of education in case it has to pay charges for the transportation of books to pay the same out of the school contingent fund, and is not a requirement that the board of education must under all circumstances pay for the transportation of such books.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

258.

BOARDS OF EDUCATION--STATE AID TO SCHOOL DISTRICTS—POWER TO FUND INDEBTEDNESS—TEACHERS' SALARIES.

State aid to board of education under section 7595, General Code, is to be granted only when the maximum legal levy is insufficient to pay its teachers a minimum salary of $40 per month for eight months of the year, and then only when the numbers of persons of school age in the district is twenty times the number of teachers therein employed.

Where the shortage arises without these limitations as by reason of inability to comply with contract to pay teachers $50 per month, such indebtedness is a "valid, existing and binding one" and if the board is unable to meet the same by reason of taxation limitations, bonds may be issued and the debts funded under authority of sections 5656, 5658 and 5659, General Code.

COLUMBUS, OHIO, May 24, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—On recent date you submitted to me a statement of facts as follows:

> "The village of Byesville, Guernsey county, Ohio, pays its superintendent $1,100.00 per year, the high school principal $90.00 per month, the assistant principal $50.00 per month, one elementary school principal $50.00 per month, one elementary teacher $50.00 per month. The entire number of teachers employed by the board is twenty-three. The board of education maintains school thirty-two weeks each year. The maximum levy for school purposes has been made.
>
> "With these conditions, the board finds itself confronted with a shortage in the tuition fund of $1,600.00, or perhaps more. The board is of the opinion that even the past year too many pupils have been assigned to each teacher."

On the above statement of facts you submit two inquiries for my opinion. You first inquire whether:

> "Under section 7595, G. C., is the Byesville village school district entitled to state aid?"

Section 7595 of the General Code reads as follows:

> "* * * When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

Section 7597 of the General Code reads as follows:

> "No district shall be entitled to state aid as provided in the next

two preceding sections, unless the number of persons of school age in such district is at least twenty times the number of teachers employed therein."

State aid, under section 7595, General Code, supra, is to be granted to a school district only when the money raised by the maximum legal school levy is insufficient to pay its teachers the minimum salary of forty dollars per month for eight months of the year, and then only when the number of persons of school age in such school district is at least twenty times the number of teachers employed therein as provided in section 7597, supra.

In other words, the purpose of section 7595, supra, is to aid a school district which cannot by levying the maximum legal school levy raise money enough to pay the *necessary* teachers the sum of forty dollars per month for eight months of the year, and does not contemplate the payment of salary of superintendent, which, under section 7690 of the General Code, a board of education may appoint.

I am, therefore, of the opinion that Byesville village school district is not entitled to state aid under the facts set forth by you.

Coming now to your second inquiry as follows:

"If the foregoing question is answered in the negative, what course would you suggest that the board of education pursue?"

Section 5656 of the General Code provides in part as follows:

"* * * the board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money or issue bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time, and at the rate of interest that said * * * board * * * deems proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

Section 5658 of the General Code provides in part:

"No indebtedness of a * * * school district * * * shall be funded * * * unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * *. Such resolution shall state the amount of the existing indebtedness to be funded, * * * the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

Section 5659 of the General Code provides in part:

"For the payment of the bonds issued under the next three preceding sections, the * * * board of education * * * shall levy a tax, in addition to the amount otherwise authorized, each year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature."

The unpaid portion of the salaries of the various persons mentioned in your statement of facts is an indebtedness which is an existing, valid and binding obligation of such school district, and by virtue of sections 5656, 5658 and 5659, supra, the board of education, being unable from its limit of taxation to pay the same at maturity, is authorized to fund said indebtedness and issue its bonds in payment thereof.

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

D 267.

BOXWELL-PATTERSON GRADUATE—RIGHTS TO ENTER HIGH SCHOOL—LIABILITY OF VILLAGE TO OUTSIDE HIGH SCHOOL FOR TUITION OF RESIDENT.

The holder of a Boxwell-Patterson diploma moved to a city and entered a high school, completed two years therein and received credit therefor and then moved to a village which maintained only a high school of the third grade, by reason of which he was forced to attend the nearest high school of a higher grade.

Held, as there is no statutory provision therefor, the village cannot be charged for the tuition of such student for attendance at the last high school.

A Boxwell-Patterson graduate, under section 7744, General Code, is entitled to enter any high school in the state.

June 10, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of April 25th you presented for my opinion two requests:

First: You ask my opinion on the following:

> "The holder of a Boxwell-Patterson diploma moved to a city and entered the high school. After completing two years' work in said high school and receiving credit therefor, he moved to a village which maintains a high school of the third grade. Not being able to get the desired studies in said village high school, he attended the nearest high school of a higher grade.
>
> "Query: Is said village in which the pupil has legal school residence liable for the tuition of said pupil?"

Section 7748 of the General Code, as amended 101 O. L. 296, provides:

> "A board of education providing a third grade high school as defined by law shall be required to, pay the tuition of *graduates from such 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. Such a board providing a second grade high school as defined by law shall pay the tuition of *graduates residing in the district* at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds

so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years: except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. *A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate.*"

On reading the above section it will be noted that there is no provision therein which is applicable to the facts stated by you, and consequently is not covered by the law.

I am, therefore, of the opinion that the board of education in this instance is not liable for the tuition of the pupil in question.

Second: Your next inquiry is as follows:

"A seventh grade pupil in a village district receives a Boxwell-Patterson diploma.

"Query: Is said pupil entitled to enter the village high school the following September, or may he be required to complete the eighth grade work before being admitted to the high school? Shall section 7744 or 7667, G. C., control?"

Section 7665, General Code, provides:

"When a township board of education establishes and maintains a high school or high schools within the district under its control, it shall have the management and control thereof, and may employ and dismiss teachers, and give certificates of such employment, and for services rendered, directed to the township clerk."

Section 7666, General Code, provides:

"Such board of education shall build, repair, add to and furnish the necessary school houses, purchase or lease sites therefor, or rent suitable rooms, and make all other provisions relative to such schools as may be deemed proper."

Section 7667, General Code, provides:

"*Such* board of education may regulate and control the admission of pupils from the elementary schools under its charge to such high school or high schools, according to age and attainments, may admit adults over twenty-one years of age, and pupils from other districts

on such terms and under such rules as it adopts. It shall maintain such high school or high schools not less than twenty-eight nor more than forty weeks in any school year."

Section 7744, General Code, provides:

"The board of county school examiners shall provide for the holding of a county commencement not later than August fifteenth, at such place as it determines. At this commencement an annual address must be delivered, at the conclusion of which a diploma shall be presented to each successful applicant who has complied with the provisions hereof. *Such diploma shall entitle its holder to enter any high school in the state.*"

From a reading of section 7667, supra, it will be seen that such section applies solely to township boards of education. Therefore, section 7744, supra, would control and is general in its nature allowing the holder upon receipt of such diploma to enter any high school in the state.

It is my opinion, therefore, that the pupil is entitled on receiving a Boxwell-Patterson diploma to enter the village high school.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

287.

STATE SCHOOL COMMISSIONER—TERM OF OFFICE—DATE OF ASSUMPTION OF DUTIES.

When the law requires that the state school commissioner will commence his term on Monday, July 10, the term of his predecessor expires on Sunday, July 9, at midnight, and Monday, July 10, belongs to the administration of the elected commissioner.

COLUMBUS, OHIO, July 6, 1911.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Elect, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the date of July 5th, 1911, and in which communication you inquire as follows:

"The law says that the state commissioner of common schools shall be elected for a term of two years, commencing on the second Monday of July following his election. I will assume the duties of that office next Monday, July 10, and what I wish to know is whether Monday, July 10, will belong to my administration or to that of my predecessor, Mr. Zeller? We are not agreed on this point and I would like to know the exact condition."

In reply to your inquiry beg to say section 352 of the General Code provides as follows:

"There shall be elected biennially a state commissioner of common schools who shall hold his office for a term of two years, commencing

on the second Monday of July following his election. He shall have an office in the state house, in which the books and papers pertaining to his office shall be kept."

In view of the fact that said section 352 of the General Code specifically says that the state commissioner of common schools shall hold his office for a term of two years commencing on the second Monday of July following his election, I am of the opinion that the term of your predecessor expires on Sunday, July 9, 1911, at midnight, and that your term commences immediately upon the expiration of his term, that is July 10, 1911, and that, therefore, Monday, July 10th, belongs to the term of your administration rather than to that of your predecessor, Mr. Zeller.

I trust that I have fully answered your inquiry.

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

C 290.

BOARD OF EDUCATION OF VILLAGE—BONDS—EXTRA TAX LEVY—AUTHORIZATION OF ELECTORS—PROCEDURE OF BOARD.

When a village board of education was authorized by electors under section 7592, General Code, to levy an additional tax of five mills for five years, such board may proceed to issue bonds without further authorization of the electors provided that the conditions of 7626 and 7679, General Code, with reference to the quality and nature of the bonds and the provisions of section 7629 with reference to the amount of the bonds and the procedure of the board be complied with.

COLUMBUS, OHIO, July 8, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of June 28th you have submitted to me for opinion the following:

"A village board of education was authorized under section 7592, G. C., to levy an additional tax of five mills for five consecutive years. Said board then proceeded to offer for sale $5,000.00 in bonds, according to sections 7629 and 7630.

"Are the bonds so issued legal without a further vote of the people to sell said bonds?"

Section 7591 of the General Code reads:

"Except as hereinafter provided, the local tax levy for all school purposes shall not exceed twelve mills on the dollar of valuation of taxable property in any school district, and in city school districts shall not be less than six mills. Such levy shall not include any special levy for a specified purpose, provided for by a vote of the people."

Section 7592 of the General Code reads:

"A greater or less tax than is authorized above may be levied for any or all school purposes. Any board of education may make an

additional annual levy of not more than five mills for any number of consecutive years not exceeding five, if the proposition to make such levy or levies has been submitted by the board, to a vote of the electors of the school district, under a resolution prescribing the time, place and nature of the proposition to be submitted, and approved by a majority of those voting on the proposition."

Section 7625 of the General Code, amended 102 Ohio Laws, page —, reads:

"When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to purchase real estate for playground for children, or to do any or all of such things, *that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty*, are not sufficient to accomplish the 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, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

Section 7626 of the General Code reads:

"If a majority of the electors, voting on the proposition to issue bonds, vote in favor thereof, the board thereby shall be authorized to, issue bonds for the amount indicated by the vote. The issue and sale thereof shall 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 compeitive bidding at the discretion of the board."

Section 7627 of the General Code reads:

"Such bonds shall bear a rate of interest not to exceed six per cent. per annum payable semi-annually, 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 must keep a record of the number, date, amount, and the rate of interest of each bond sold, the amount received for it, 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. Bonds so issued shall in no case be sold for less than their par value, nor bear interest until the purchase money for them has been paid."

Section 7629 of the General Code reads:

"The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from

taxes, for such purposes, levied or to be levied, from time to time as occasion requires; may issue and sell bonds, *under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven.* The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

Section 7630 of the General Code reads:

"In no case shall a board of education issue bonds under the provisions of the next preceding section in a greater amount than can be provided for and paid with the tax levy authorized by sections seventy-five hundred and ninety-one and seventy-five hundred and ninety-two, and paid within forty years after the issue on the basis of the tax valuation at the time of the issue."

I am of the opinion that as the board of education has been authorized under section 7592, supra, to levy an additional tax, and as section 7629, supra, authorizes the board of education to issue and sell bonds in anticipation of the income from taxes under the restrictions and bearing the rate of interest specified in sections 7626 and 7627, supra, that the first sentence in section 7626, supra, applies only to bonds issued under section 7625, supra, and that the restrictions mentioned in said section 7629, supra, refer to the issuing and sale of bonds by resolution fixing the amount of the bond, the length of time, the rate of interest, and time of sale which may be by competitive bidding at the discretion of the board, and consequently, the electors of such district having authorized an additional annual levy of five mills for five consecutive years, that the bonds so issued are legal without a further vote of the people to authorize the issuing of such bonds, provided that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue, and provided further, that the order to issue such bonds be made at a regular meeting of the board and and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal, and further provided that the provisions of section 7630, supra, are complied with.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

D 290.

VILLAGE SCHOOL DISTRICT—VALUATION NECESSARY—ATTACHMENT OF TERRITORY.

An incorporated village which forms part of a township school district, becomes ipso facto a village school district upon the attainment of a tax valuation of one hundred thousand dollars.

Said village may attach territory for school purposes under section 4092, *General Code, et seq.*

COLUMBUS, OHIO, July 8, 1911.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your favor of April 25th has remained unanswered until the present moment because of further information which I have but lately received from you.

You desire my opinion upon the following facts:

> "An incorporated village forms part of a township school district. It is now desired to form a village district with certain attached territory.
>
> "What is the method of procedure?"

From later information furnished me on June 10th, I ascertain that such incorporated village has a total tax valuation of more than one hundred thousand dollars.

Section 4681 of the General Code reads as follows:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district."

Section 4682, General Code, amended 102 Ohio Laws, reads as follows:

> "A village, 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 one hundred thousand dollars, shall not constitute a village school district, but the proposition to dissolve or organize such village school district shall be submitted by the board of education to the electors of such village at any general *or a special election called for that purpose*, and be so determined by a majority vote of such electors."

Said section 4682 as above amended is the same as original section 4682 except for the words above underscored.

Section 4681 and section 4682, supra, are a codification of section 3888, Revised Statutes, and are in substance identical with said section 3888, Revised Statutes.

The principle question submitted by you has been judicially determined in the case of Buckman, Auditor vs. the State, ex rel., Board of Education, 81 O. S. 171, the syllabus of which is as follows:

"Village school district—Vote of electors not necessary to create, when. Section 3888, Revised Statutes, amended—Act of April 2, 1906.

"By force of the provisions of section 3888, Revised Statutes, as amended April 2, 1906, and in effect April 16, 1906 (98 O. L. 217) each incorporated village then existing—April 16, 1906, or since created, 'together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars,' constitutes and is a village school district, no vote of the electors of such village being necessary to the creation or establishment of such district."

Your attention is respectfully called to the opinion in said case which fully sets out the reasoning of the court in regard to section 3888, Revised Statutes.

I am, therefore, of the opinion that such village on attaining a total tax valuation of not less than one hundred thousand dollars ipso facto constitutes a village school district.

If said village desires to attach thereto certain territory for school purposes it may be done by virtue of sections 4902, et seq. of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

300.

BOARD OF EDUCATION—PROVISION FOR ADOPTION OF TEXT BOOKS DIRECTORY AS TO TIME—CHANGE OF TEXT BOOKS WITHIN FIVE YEARS AND AFTER.

The stipulation of section 7713, General Code, to the effect that the adoption of text boks shall be made at a regular meeting between "the first Monday in February and the first Monday in August" is directory and not mandatory in accordance with the general principle of construction and in view of the further fact that the duty is a positive one enjoined by law.

Text books shal not be changed within five years except by a vote of five-sixths of the members of the board. After the lapse of five years, however, a majority vote shall be sufficient to make such change.

COLUMBUS, OHIO, July 19, 1911.

MR. FRANK W. MILLER, *State Commissioner of Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date is duly received, wherein you ask, first, "Can a board of education adopt text books by a majority vote after the first Monday in August provided it has not previously done so?" and, second, "An adoption was made in August, 1906. In June, 1911, the board of education of that township adopted another list of books. Four of the five members voting in favor of said adoption, * * * Is this last adoption legal?"

Section 7713, General Code, provides:

"At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected the studies to be pursued

and which of such text books so filed shall be used in the schools under its control. But no text books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so substituted shall be adopted for the full term of five years. (99 v. 460 par. 5.)"

Answering your first question, I am of the opinion that the provision of the statute referring to the regular meeting "held between the first Monday in February and the first Monday in August" is directory and not mandatory. It is a well settled principle of law that provisions regarding the duties of public officers, and specifying the time for their performance, are, in that regard, generally directory "though a statute directs a thing to be done at a particular time, it does not necessarily follow that it cannot be done afterwards."

Southerland on Statutory Construction, Sec. 612.

As stated by the author just named, the designation of the time in this instance is not a limitation on the power of the board, and since the duty is enjoined by law, even though it be delayed beyond the particular time designated in the statute, it can be legally performed at a later date, so, it is my opinion, that the board of education in question, at a meeting subsequent to the first Monday in August, may adopt text books by a majority vote in the event that it had not previously done so.

Answering your second question: A reading of section 7713, G. C., supra, shows that the text books in use at a particular time cannot be changed and other text books substituted for five years after the date of the selection and adoption thereof, except by the consent, at a regular meeting, of five-sixths of all members elected thereto, but, as I read your question, in this instance the former adoption of the list of books was made in August, 1906, consequently the five years would be up in August, 1911.

I take it, there can be no question that the board of education, which will be composed of the same membership in August, can hold a regular meeting in June, 1911, and at said meeting adopt another list of books to be substituted for the list adopted at the meeting of August, 1906, which substitution shall become effective in August, 1911.

For this change, all that is required is a majority vote of all members elected, and, since you state that four of the five members elected voted in favor or said adoption, it is my opinion that the adoption of the substituted list was regular and legal.

Trusting that this answers your inquiries, I am,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

304.

TEXT BOOKS—RIGHT OF PUBLISHER TO CONTRACT WITH SCHOOL BOARDS AT RATE FIXED BY COMMISSIONER—FIVE YEAR LIMITATION—REFILING, CONDITION PRECEDENT TO RIGHT OF COMMISSIONERS TO CHANGE LISTING PRICE.

The object of section 7709, General Code, is to fix certain conditions, compliance with which shall entitle publishers of text books to contract with boards of education for the sale of their books.

After fixing the price which the books of a certain publisher may be sold at, 75% of the wholesale price, the state school commissioner cannot within five years reduce such price unless the publisher refiles such book for listing with the commission.

Where a text book company has made a contract for 75% of the wholesale price as fixed by the commission, but which contract extends beyond the five years' time for which such price was listed, and such company refuses to refile such book with the commission after such period has expired, the contract may be treated as terminated for the reason that said company's rights to so contract is limited to the five year period for which the price was fixed.

COLUMBUS, OHIO. July 26, 1911.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of July 21st, in which you inquire as follows:

> "The state school book commission in previous years fixed the maximum price at which books may be listed to be sold to our public schools at 75% of the publishers' wholesale list price.
>
> "The commission a few weeks ago fixed the maximum price at 60% of the wholesale list price. Many publishers say they will not list their books at this price. Many books were listed in 1910 and since they were listed for a period of five years their time would not expire until 1915. Other books were listed in 1909 and their time will not expire until 1914.
>
> "We should be glad to have your interpretation on this question. If a book was listed at 75% of the list price as required at the time by the book commission, and the time covered by the listing has not yet expired, will it be legal to sell the books thus listed at 75% of the list price during the entire time for which they were listed even though the time extend beyond the time at which the maximum was placed at 60%.
>
> "To illustrate: A book was listed at 75% of list price in 1910, must that book be sold at 60% of list in 1912, or may it be sold at 75% of list as per contract?
>
> "May we also have your interpretation on this question: A book was listed in 1906. The time has just expired and the company refuses to relist the book. They made a contract in 1909 with a board of education for a period of five years to sell them the book at 75% of the list price. The five-year contract between the publisher and board of education has not yet terminated, but the book is not listed. What is to be done next year?"

In reply to your inquiry, section 7709 of the General Code provides as follows:

"Any publisher or publishers of school books in the United States desiring to offer school books for use by pupils in the common schools of Ohio as hereinafter provided, before such books may be lawfully adopted and purchased by any school board, must file in the office of the state commissioner of common schools, a copy of each book proposed to be so offered, together with the published list wholesale price thereof. No revised edition of any such book shall be used in the common schools until a copy of such edition has been filed in the office of the commissioner together with the published list wholesale price thereof. The commissioner must carefully preserve in his office all such copies of books and the prices thereof."

Section 7710 of the General Code provides:

"When and so often as any book and the price thereof is filed in the commissioner's office as provided in the next preceding section, a commission consisting of the governor, secretary of state and state commissioner of common schools immediately shall fix the maximum price at which such books may be sold or published by boards of education, as hereinafter provided, which price must not exceed seventy-five per cent. of the published list wholesale price thereof. The state commissioner of common schools immediately shall notify the publisher of such book so filed, of the maximum price fixed. If the publisher so notified, notifies the commissioner in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of five years at that price, such written acceptance and agreement shall entitle the publisher to offer the books so filed for sale to such boards of education."

Section 7711 of the General Code provides:

"Such commissioner, during the first half of the month of June, in each year, must furnish to each board of education the names and addresses of all publishers who during the year ending on the first day of the month of June in each year, agreed in writing to furnish their publications upon the terms above provided. A board of education shall not adopt or cause to be used in the common schools any book whose publisher has not complied, as to such book, with the provisions of law relating thereto."

Section 7712 of the General Code provides:

"If a publisher who agreed in writing to furnish books as above provided, fails or refuses to furnish books as above provided to any board of education or its authorized agent upon the terms herein provided, such board at once must notify such commission of such failure or refusal, and it at once shall cause an investigation of such charges to be made. If it is found to be true the commission at once shall notify such publisher and each board of education in the state that such book shall not thereafter be adopted or purchased by boards of

education. Such publisher shall forfeit and pay to the state of Ohio five hundred dollars for each failure, to be recovered in the name of the state, in an action to be brought by the attorney general, in the court of common pleas of Franklin county, or in any other proper court or in any other place where service can be made. The amount, when collected, must be paid into the state treasury to the credit of the common school fund of the state."

Coming now to respond to your inquiry you say:

"We should be glad to have your interpretation on this question. If a book was listed at 75% of the list price as required at the time by the book commission, and the time covered by the listing has not yet expired, will it be legal to sell the books thus listed at 75% of the list price during the entire time for which they were listed even though the time extend beyond the time at which the maximum was placed at 60%."

I think some difficulty arises from the fact that your question may not be in conformity with what might be regarded as an interpretation of the statute. The statute to my mind is plain, and really requires no interpretation and is not susceptible of one. It speaks clearly for itself.

The general purpose and effect of section 7709 of the General Code is to prescribe conditions which must be complied with before any publisher or publishers of school books in the United States may have a legal right to offer books for sale for use by pupils in the common schools. This section of the General Code, to wit: Section 7709 provides what such publisher or publishers must do in order to have a privilege. Section 7710, General Code, provides that the commission shall fix the maximum price at which school books may be sold or purchased by boards of education. Under this section it is not intended that the board of education shall pay the maximum price. They have the right of contract, and should purchase books under the most favorable prices for the benefit of the public. The object of the statute is evidently to prevent impositions upon the public by school book publishing companies. If a publisher or publishers of school books desires to file a book in the office of the state commissioner of common schools that has been filed within five years and listed, I think such publisher or publishers have the privilege of so doing, but unquestionably only with the understanding that the price should be lower and not higher; while the statute does not seem to provide for the filing of any book oftener than once in five years, unless revised, yet, as the object of the law is the reduction of price and not the increase, I am of opinion that if a publisher or publishers desires to file the same book the second time, or oftener, within the five year period, with a reduction in list price, the same may be lawfully done.

Coming now to the power of the commission to fix the maximum price at 60% of the wholesale list price, I beg to advise that I am not able to see how this may be done lawfully unless the publisher or publishers of the book in question file certain book anew that was previously filed within five years. In case such publisher or publishers do this, I think they waived their rights and will be held to the maximum fixed by the commission under such circumstances. But in case a publisher or publishers do not file such book a second or third time, as the case may be, and the five years have not expired, it is my opinion that such publisher or publishers may lawfully sell such book at

the maximum to boards of education during the five years provided for, subject to the discretion of the boards of education in making the contract. Such boards of education should, of course, purchase text books at the least possible price, but the privileges given to the publisher or publishers under the statute seem to be plain.

The attention of boards of education should be especially called to the following section of the General Code, to wit: Section 7713:

> "At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected the studies to be pursued and which of such text books so filed shall be used in the schools under its control. But no text books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text book be substituted therefor for five years after the date of the selection and adoption therof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so substituted shall be adopted for the full term of five years."

It will be seen from the foregoing that the statute gives the right to a publisher or publishers of text books to offer for sale their books to boards of education in Ohio; that when such publisher or publishers comply with the conditions precedent they have the right to offer their text books for sale; that when these text books are adopted there shall be no change in their use and there shall be no alteration or revision of them, or shall any other text book be substituted therefor for five years after the date of the selection and adoption thereof as shown by the official records of such board, except by the consent at a regular meeting of five-sixths of the members elected thereto. It is further provided that books so substituted shall be adopted for the full term of five years.

The object of the law in preventing a change during the period of five years is undoubtedly to correct abuses that were existing compelling the parents of children to buy one set of text books one year, and another set within perhaps another year or two.

Unfortunately, these statutes, to wit: Sections 7709, et seq., operate in favor of the publisher of text books, but the protection to the public is with the board of education in that they have the full power of contract to purchase at the lowest possible price, and this they should do.

You further say:

> "May we also have your interpretation on this question: A book was listed in 1906. The time has just expired and the company refuses to relist the book. They made a contract in 1909 with a board of education for a period of five years to sell them the book at 75% of the list price. The five-year contract between the publisher and the board of education has not yet terminated, but the book is not listed. What is to be done next year?"

In answer thereto I beg to advise that section 7710 of the General Code, I think, effectually settles this question.

Inter alia, it provides as follows:

> "The state commissioner of common schools immediately shall

notify the publisher of such book so filed, of the maximum price fixed. If the publisher so notified, notifies the commissioner in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of five years at that price, such written acceptance and agreement shall entitle the publisher to offer the books so filed for sale to such boards of education."

Under the foregoing cited section the privilege of the publishing company to sell in this state ends in five years. After notification by the state school commissioner to publishers that said commissioner accepts the price fixed by such publisher or publishers school boards in making their contracts must be governed thereby.

It is not conceivable that a publisher would be compelled to do business in a state beyond the time within which the state licenses him so to do, by virtue of its own statutes. My conclusion is, therefore, that the publishing company is not compelled under the law to relist its books. There is no statute so to compel it, and boards of education must proceed just as it would if the full five years' time has expired.

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

307.

NATIONAL EDUCATION ASSOCIATION—DUTIES OF STATE SCHOOL COMMISSIONER—EXPENSES.

The statutes do not recognize the National Education Association and therefore, a bill presented by the state school commissioner for attendance at such association, cannot be allowed by the state.

COLUMBUS, OHIO, July 29, 1911.

HON. JOHN W. ZELLER, *Ex-State School Commissioner, and* HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

GENTLEMEN:—You inquired verbally of me as to whether or not a certain bill of $40.30, presented by Mr. Zeller on account of his expenses in attendance upon the convention of the National Educational Association at San Francisco for the year 1911, is one properly to be allowed. You state the following facts:

"The association convened on July 8, 1911, and lasted until July 14, 1911. Mr. Zeller's term of office expired on July 10th and it appears therefore that Mr. Zeller's term of office expired and Mr. Miller's term of office began about two days after the association convened.

With this state of facts you ask this department as to whether or not the bill presented by Mr. Zeller is a valid claim against the state.

I take it from the form of your question that you both have assumed that the only question to be considered is that arising from the expiration of the term of office of one and the coming into office of the other during the time of the meeting of the association.

Responding to your inquiry permit me to say that I am of opinion that the question as to the validity of the claim does not depend upon the state of

facts in this case which you have presented. The claim is invalid without any reference to the term of office. It seems that heretofore allowances of this kind were made under favor of section 354 of the General Code of Ohio, formerly Revised Statutes, sections 356 and 357. Said section 354 of the General Code provides as follows:

> "The state commissioner of common schools shall give attendance at his office not less than ten months each year, except when absent on official duty. While holding such office he shall not perform the duties of teacher or superintendent of a public or private school, or be employed as teacher in a college or hold any other office or position of employment. Each year he shall visit each judicial district of the state, superintend and encourage teachers' institutes, confer with boards of education and other school officers, visit schools and deliver lectures on topics calculated to subserve the interests of popular education."

You will observe that so far as the payment of expenses is concerned the following would control:

Each year he (the state school commissioner) shall visit each judicial district of the state, superintend and encourage teachers' institutes, confer with boards of education and other school officers, visit schools and deliver lectures on topics calculated to subserve the interest of popular education.

I am not able to say under which of the foregoing heads the claim could be based. First, the state school commissioner is required to visit each judicial district of the state. This evidently means to visit schools or educational institutions under the control of the state. Second, it is the duty of the state commissioner to superintend and encourage teachers' institutes. Teachers' institutes are under the control of the state. Third, he should confer with boards of education and other school officers. Such boards and school officers are creations of the state in respect to the schools. Fourth, he shall visit schools. This evidently means public schools. Fifth, he shall deliver lectures on topics calculated to subserve the interests of popular education. This unquestionably means, deliver lectures before bodies in connection with the public school or colleges or institutions within the control of the state, doing educational work.

The National Educational Association does not seem to be recognized by the Ohio statutes, and however worthy its purposes may be, it is a voluntary association and the state school commissioner is not permitted to select voluntarily any association that might be of his choice for attendance by himself, and charge the state therefor. Sometimes, unfortunately, when an opinion is rendered affecting expenses in relation to the public schools and expense bills are ruled against the friends of education entertain the erroneous notion that the attorney general's department has control of the subject-matter. This is not true. If bills of the kind in question are proper to be allowed the remedy is with the legislature; but in this connection I might say that the legislature itself is without constitutional authority to authorize the payment of any bills for school purposes except those within the control of the state.

For the foregoing reasons this department is constrained to hold that the bill is invalid.

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

326.

EXAMINER OF TEACHERS—SINGLE DAY FOR ALL SUBJECTS—SINGLE FEE—LISTING ACCORDING TO APPLICANTS.

It is the intention of the statutes that each applicant for teacher's examination shall be examined on all subjects at one examination held on a single day and that the examiners shall receive but a single statutory fee therefor.

It is illegal, therefore, to divide the examination, to distribute the subjects over a period of two days, to charge a fee for each day and to list the examinations according to applications instead of according to applicants.

COLUMBUS, OHIO, August 18, 1911.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 16th, wherein you advise:

> "The custom for years among county boards of school examiners has been to give teachers who apply for certificates, the privilege of two days' examination if they take this examination in consecutive months. The county examiners in most cases have required the applicants to pay a fee at each examination; or, in other words, each month. The county board of examiners in making up their report count the name of the applicant in making up their report for each month and in that way the applications are double the number of applicants.
>
> "The bureau of uniform accounting that examined the books of the county examiners have found against the board of examiners for making up their list from the number of applications instead of the number of applicants. They also object to the county examiners charging a fee for each application, which means two fees for each applicant before the applicant finishes the examination."

and you ask the following question:

> "Can a county board of school examiners divide the examination in two parts, and can they charge a fee for each part? And can they count the name of the applicant in both months when the board of examiners make up their list on which list depends the pay of such examiners?"

In reply thereto I beg to advise that the provisions of the General Code relating to county boards of examiners commences with section 7811 and continues to and includes section 7837, G. C. It is only necessary to quote a few of these sections to determine the questions which you ask.

Section 7817 of the General Code, under the heading of "Meetings for Examinations; notice" provides as follows:

> "Each board shall hold public meetings for the examination of applicants for county teachers' certificates on the first Saturday of every month of the year, unless Saturday falls on a legal holiday, in which case, it must be held on the succeeding Saturday, at such place or places within the county as, in the opinion of the board, best will

accommodate the greatest number of applicants. Notice thereof shall be published in two weekly newspapers of different politics printed in the county, if two papers thus are published, if not, then a publication in one only is required. In no case shall the board hold any private examination or antedate any certificate."

You will notice from the above that the date fixed for holding meetings for examinations of applicants for county teachers' certificates is the first Saturday of every month of the year with the exceptions contained in the section quoted. This means, of course, that the applicants shall be examined for the teachers' certificate and *not partially examined.*

I appreciate the fact that in recent years numerous branches have been added to the list to be submitted to the teachers who are applicants for certificates; however, for a great many years within my own personal knowledge, and when there were comparatively few branches in which the teachers were examined, the law fixed a given day for the meeting of the board of school examiners. If one day be not sufficient, the correction should be made by the legislature.

Section 7834 of the General Code provides for the "Compensation of Board" and is as follows:

"Each member of the county board of school examiners is entitled to receive ten dollars for each examination of fifty applicants or less, fourteen dollars for each examination of more than fifty applicants and less than one hundred, eighteen dollars for each examination of one hundred applicants and less than one hundred and fifty, twenty-two dollars for each examination of one hundred and fifty applicants and less than two hundred, and four dollars for each additional fifty applicants or fraction thereof, to be paid out of the county treasury on the order of the county auditor. Books, blanks and stationery required by the board shall be furnished by the county auditor."

Under this section you will notice that each member of the county board of school examiners is entitled to *receive ten dollars for each examination of fifty applicants or less; fourteen dollars for each examination of more than fifty applicants and less than one hundred.* * * * The theory of the law unquestionably and unanswerably is that the board *must have examined the applicant upon* all the branches required for teachers' certificates for each examination. When the school examiners divide the time and charge additional fees, it is a subversion of the purpose of the legislature in fixing a fee based upon the applicants for an entire examination. If it were intended that the fee should be for a partial examination, the statute would say so.

Section 7837 of the General Code, under the head of "Compensation of Clerk," provides as follows:

"The clerk shall receive for his services as clerk four dollars for each examination of sixty applicants or less, six dollars for each examination of more than sixty applicants and less than one hundred, eight dollars for each examination of one hundred applicants or more, to be paid out of the county treasury on the order of the county auditor. But no order shall be drawn for the month of August until the clerk produces a receipt from the state commissioner of common schools that he has filed all the reports for the year required by him."

I do not see how the work of the clerk could be increased because the applicant appeared twice. My mind in this matter is perfectly clear to the effect that examiners have no right whatever to require the applicant to pay a fee for each examination. I do not think it is the purpose of the law to divide the examinations irrespective of the fees. However it is the fee question which makes the matter criticisable.

I do not wish in this opinion to be understood as making any reflection upon any official who sanctioned this practice. Honest men are liable to be mistaken, but I certainly trust that the school authorities will show a disposition, after the law is explained to them, to conform to the opinion of their legal advisers, especially in matters so clear as not to be reasonably disputable.

With my best wishes personally and officially, believe me to remain,

Very sincerely yours,

TIMOTHY S. HOGAN,
Attorney General.

E 326.

WATER RENT OF SCHOOL BUILDINGS—LIABILITY TO CITY OF SCHOOL DISTRICTS PARTLY WITHIN AND WITHOUT PARTLY WITHOUT A CITY.

Under the language of section 3963, *General Code, the water furnished to school buildings which are located in cities whose school district is partly in the city and partly comprises territory outside of the city, must be paid for by the director of such district to the city.*

COLUMBUS, OHIO, August 19, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of July 31st you state in reference to the board of education of Newark, Ohio, as follows:

> "The board of public service proposes to compel the board of education of the city to install meters and pay for all water consumed in the fifteen school buildings located within the limits of the city. They base their position in this matter upon an amendment of May 6, 1911, of section 3963 of the General Code, which without limitation exempted school buildings from payment of water rate or rather denied to the director the right to charge therefor. The amendment still exempts public school buildings, but contains the following provision taken from 56 bulletin 219:
>
> "'But in any case where the said school building or buildings are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building or buildings are located, then the director of such school district shall pay the village or cities for the water furnished for said building or buildings.'

The question the school commissioner wishes to submit is as follows:

> "Under the amendment quoted above would a board of education

having control of buildings situated within the city limits having territory of the school district without the city limits be compelled by the board of public service to install meters and pay for the water used?"

Section 3963 of the General Code, as amended 102 Ohio Laws 94, reads in part as follows:

"No charge shall be made by the director of public service in cities * * * for supplying water * * * for the use of public school buildings; *but, in any case where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building or buildings, are located, then the director of such school district shall pay the village or cities for water furnished for said building or buildings.*"

While the intention of the legislature may have been different from its expression of such intent in the wording of the provision of the statute, as amended, above underscored, in my view the language so used in susceptible of but one meaning, to wit: that where the school building is situated within a city, the school district of which, includes territory attached to it for school purposes, the director of such district shall pay the city for the water furnished to the school building.

While this may work a hardship and an unjust discrimination between city school districts which are composed solely of territory within the city limits, and such school districts that have attached territory for school purposes, yet the language of the statute, as I view it, is plain, and the remedy is with the legislature.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

A-360.

WAIVER OF STATUTORY PROVISION—TEACHER'S CONTRACTS FOR SERVICES AT LESS THAN $40.00 PER MONTH.

The provision of section 7595, General Code, stipulating that no teacher shall be employed at less than $40.00 per month may be waived and a contract by a teacher for service for a less sum would be legal.

COLUMBUS, OHIO, September 15, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of July 13th you wrote me as follows:

"Section 7595 of the General Code designates the minimum salary for school teachers. Many boards of education have contracted with teachers to teach for less than the minimum allowed by law under this section. We understand that the supreme court has decided that such a contract is binding to both parties concerned.

"Question: Is it legal for boards of education to employ teachers at a salary less than $40.00 per month for the full school year of eight months?"

Section 7595 of the General Code provides:

> "No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

The case to which you refer as having been decided by the supreme court is the case of Layne, Administrator of the Estate of Irwin Vermillion, deceased vs. the Board of Education, No. 11428 in the supreme court.

I have examined the records and brief in the said case, and find the facts to be as follows:

The case was originally brought in the common pleas court of Lawrence county, Ohio, by one Irwin Vermillion on two causes of action: *First.* To recover the sum of thirty dollars, being the difference in amount between thirty-five dollars a month—the amount for which he signed to teach for the board of education of Aid township, Lawrence county, and which amount he duly received—and forty dollars a month, the minimum amount to be paid a teacher, as fixed by what is now section 7595 of the General Code, supra, on the ground that he was entitled thereto by virtue of the said section.

Second. To recover from the said board of education the sum of ten dollars for attending the Lawrence county teachers' institute for the term of one week, "It being the amount of money that the plaintiff would have earned had he taught school for the said week at the lawful price of forty dollars."

A demurrer was sustained to the said first cause of action; the said common pleas court holding, *as stated in the brief for plaintiff in error in the supreme court, that the legislature did not have the power or authority to fix the minimum wages for public school teachers and that the board of education was not bound by such law.*

A demurrer was overruled to the said second cause of action and the defendant, not desiring to plead further, a judgment for the plaintiff against the defendant was rendered for $7.75 (it is suggested that the amount should have been $8.75 and which, as I figure it, was based on the contract price of $35.00 a month.

Said judgment of the court of common pleas was affirmed by the circuit court and again by the supreme court without report on December 13, 1910, the latter court in the journal entry ordering "that judgment of the said circuit court be and the same is hereby affirmed."

The contentions of the plaintiff in error in the supreme court were that:

1. The legislature had authority to pass section 7595 of the General Code, supra, and,

2. Irwin Vermillion did not waive such statutory provisions nor was he stopped from claiming under such statutes.

The defendant in error contended:

1. That the said Vermillion had waived by agreement the benefits of the provisions of section 7595 of the General Code, supra, and

2. That the contract being illegal and void and of no effect, the plaintiff in error could not recover and the courts would leave the parties where it found them.

The supreme court in affirming the judgment of the circut court in the first cause of action might have done so on either of the two grounds con-

tended for by the defendant in error, but the said court affirmed the judgment of the circuit in toto, i. e., as to the second cause of action as well. Had the said court affirmed the judgment of the circuit court as to the first cause of action on the ground that the contract was illegal and void and of no force and effect, it is submitted that said court could not then have affirmed the judgment of the circuit court on the second cause of action for which judgment was given for the plaintiff in the common pleas court for $8.75, being the amount due for one week's attendance at the institute as based on the contract price of $35.00 per month for the reason that if the contract was illegal and void and of no effect, it could not be used as a basis for computing the attendance at the institute, and the court would leave the parties as it found them.

It is to be noted that the petition in error filed in the supreme court complained of error only as to the first cause of action set forth in the plaintiff's petition in the common pleas court and judgment of the common pleas and circuit courts thereon, but the supreme court in its journal entry stated that "the judgment of the said circuit court be and the same is hereby affirmed." My conclusion, therefore, is that in so doing the supreme court affirmed the judgment of the circuit court in its entirety and not simply as to the first cause of action.

Therefore, the supreme court having sustained the judgment of the circuit and common pleas courts in toto, I am forced to the conclusion that it was on the grounds that the provisions of section 7595, G. C., supra, might be waived by agreement.

In view of the decision of the supreme court above referred to, and feeling it my duty to follow such decision, I am of the opinion that the provisions of section 7595 of the General Code, supra, may be waived by agreement and that, therefore, it is legal for the board of education to employ teachers at a salary less than forty dollars per month for the full school year of eight months, provided such teachers agree to serve at a salary less than forty dollars per month.

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

418.

BOARDS OF EDUCATION—POWER TO FUND INDEBTEDNESS—LIMITATIONS—"RUNNING EXPENSES"—AUDITOR'S CERTIFICATE.

Section 5656, General Code, empowers the board of education when pressed by reason of taxation limitations, to issue bonds or borrow money for the purpose of meeting such valid existing and binding indebtedness among its running expenses as are excepted under section 5661, General Code, from the necessity of the auditor's certificate to the effect that funds are in the treasury.

The power is extended alone to these enumerated expenses namely, "contracts authorized to be made by other provisions of law for the employment of teachers, officers and other school employes of boards of education."

COLUMBUS, OHIO, October 11, 1911.

HON. FRANK W. MILLER, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 29th, requesting my opinion upon the following questions:

"1. Does section 5656, Ohio School Laws, give boards of education power to borrow money to meet the usual running expenses of the schools under their control?

"2. If this section does not grant them the power, under what section may they be able to do this?"

Section 5656, General Code, to which you refer, provides as follows:

> "* * * the board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

This section applies as well to indebtedness not funded as to bonded or funded indebtedness. This is made quite clear, not only by the provisions of sections 5657 and 5658, but also because of the construction given to said sections in the case of Commissioners vs. State, 78 O. S. 287. I am, therefore, clearly of the opinion that under section 5656 a board of education may borrow money and issue bonds for the purpose of meeting an indebtedness not funded. Section 5658, however, which is in pari materia with section 5656, provides that before the action authorized by section 5656 shall be taken the board shall, by resolution, determine the indebtedness sought to be funded to be an "existing, valid and binding obligation of such * * * school district."

Now, section 5660, General Code, provides that:

> "The board of education of a school district shall not enter into any contract, agreement or obligation involving the expenditure of money * * * unless the * * * clerk * * * first certifies that the money required for the payment of such obligation * * * 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. * * *"

Section 5661 provides that:

> "All contracts, agreements or obligations * * * entered into * * * contrary to the provisions of the next preceding section shall be void, but *such section* shall not apply to contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of the boards of education."

All of the above quoted sections must be considered together. Upon such consideration it appears that contracts for employment of teachers, officers and other school employes of boards of education are excepted from the general rule requiring the presence of money in the fund at the time of entering into the contract, as a condition precedent to the validity of such contract. That being the case, it would be possible for such a contract to be a subsisting and valid obligation of the district, for which, in a given year, it would not have money, either in the treasury or levied and in process of collection. Being a

valid obligation of the district the board of education might lawfully pass the resolution referred to in section 5658. Therefore, such obligations, which, I suppose, are within the purview of your question, being "the usual running expenses of the schools" may be met by borrowing money under section 5656.

As to other "usual running expenses" I find it difficult to imagine any debts that, in the face of sections 5660 and 5661, as above quoted, could be lawfully created by the board of education without the board first having in the treasury and unappropriated for any other purpose, or in process of collection, money sufficient to discharge such obligations.

I am of the opinion, therefore, that except as to contracts of employment, and obligations arising therefrom, a board of education may not borrow money to meet the usual running expenses of the schools; but as to such contracts of employment the board has ample power under the sections cited to borrow money to meet any deficiency which may be created in their funds by the existence of such contract.

In passing, permit me to remark that none of these sections authorize a prospective borrowing of money. That is to say, under none of them may the board of education first borrow the money and then enter into contracts to spend the money borrowed. The contract must have been made and must have been valid when made, and the board of education must find itself unable to pay its obliagtion under the contract, before money may be borrowed under section 5656.

Upon careful examination of the statutes I fail to find any other provision of which a board of education may avail itself in order to meet an existing or anticipated deficiency in its funds for running expenses. The other statutory provisions relating to the powers of such boards to borrow money have reference only to the construction, repair or improvement of school houses, or the acquisition of sites therefor.

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

420.

TRAVELING EXPENSE OF STATE COMMISSIONER OF SCHOOLS, ON TRIP TO CONFERENCE OF STATE SUPERINTENDENTS OF PUBLIC INSTRUCTION NOT ALLOWED.

As there is no law ordering or authorizing the state commissioner of common schools to attend a conference of state superintendents of instruction, the traveling expenses incurred on such trip may not be allowed from the traveling expense fund appropriated for that official.

COLUMBUS, OHIO, October 13, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of October 11th, you submitted for my opinion the following:

> "A conference of state superintendents of public instruction will be held in Topeka, Kansas, October 18, 19 and 20, to consider questions which are of mutual interest to the different states, and one question especially which is of interstate significance. While in Columbus a

few weeks ago the U. S. commissioner of education urged me to attend this meeting, stating that it was important that all state superintendents attend.

"The question I ask is: Will my necessary expenses connected with this trip be paid from the traveling expense fund of the state school commissioner, or must I pay it out of my own pocket?"

Section 354 of the General Code provides in part as follows:

> "The state commissioner of common schools shall give attendance at his office not less than ten months each year, except when absent on official duty. * * * Each year he shall visit each judicial district of the state, superintend and encourage teachers' institutes, confer with boards of education and other school officers, visit schools and deliver lectures on topics calculated to subserve the interests of popular education."

Under the appropriation bill found in 102 Ohio Laws 18, there was appropriated for the expenses of the state school commissioner the sum of $800.00.

The question of which you inquire is whether or not such money or any part thereof can be used to pay your expenses to a conference of the state superintendents of public instruction to be held at Topeka, Kansas.

As I view the matter, said appropriation mentioned is to be used by you exclusively for traveling expenses in pursuance of your duty under section 354, above quoted, and, consequently, cannot be used for the purpose desired.

In a well considered case decided by the circuit court of the eighth circuit, the case of State ex rel. Marani vs. Wright, Auditor, Henry, J., in reference to the payment of traveling expenses of the building inspetcor of the city of Cleveland incurred by him on a trip to Columbus to attend a convention of building inspectors of the various municipalities, says:

> "We hold that in the absence of any specific statutory provision for such cases, the test of the city's liability must be deemed to be, is the trip or journey in which the expenses were incurred necessarily implied in or reasonably and directly incident to the prescribed duties of the municipal officer who undertakes such journey."

I am of the opinion that the same rule would apply to state officers, and as I consider the matter the trip that you propose taking is not governed by any specific statutory provision, nor is it necessarily implied in or reasonably incident to the duties devolving upon you as set forth in sections 352-367 of the General Code, being the provisions relative to the state commissioners of common schools.

I am, therefore, of the opinion that your necessary expenses connected with this trip cannot be paid from the traveling expense fund of the state school commissioner.

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

440.

TEACHERS' EXAMINATIONS — LICENSE — CERTIFICATES — RENEWALS EFFECT OF AMENDMENT REQUIRING "ELEMENTARY AGRICULTURE"—IMPAIRMENT OF CONTRACT—ELEMENTARY, SPECIAL AND TEMPORARY CERTIFICATES.

A teacher's license is not a contract and is subject to existing and reasonable future restrictions.

Renewal certificates are provided by statute for persons holding a provisional certificate of two or three years, who have been continuously engaged in practice for the past five years, upon examination in theory and practice only.

Professional certificates may re renewed without examination if the holder has been teaching continuously for four years prior thereto. Renewals may be granted however, only at the termination of the original certificate.

Since section 7830, General Code, was amended so as to require after September 1, 1912, "elementary agriculture" in addition to the subjects formerly required, a certificate issued under the former law as an "elementary school certificate" and valid for "all" branches of study required at that time, can now be considered only as a "special certificate" valid as to certain specific studies but not for "all" subjects now required.

The holder of a teachers' elementary certificate which was issued prior to the amendment above stated and which certificate extends beyond Sept. 1, 1912, will be required to take an examination in elementary agriculture, in order to teach after Sept. 1, 1912, unless already under contract to teach for a period extending beyond such date in which case the law cannot be allowed to affect an impairment of such contract.

It would not be legal to place "elementary agriculture" upon a teacher's elementary certificate issued prior to the amendment aforesaid, after the holder had passed an examination in this subject. A special certificate for the added branch may in such case be issued however,

After the amendment and prior to Sept. 1, 1912, elementary agriculture should be added as a required branch.

Former elementary certificates may be renewed only as "special certificates."

A renewal certificate issued after passage of the amendment may have "elementary agriculture" included therein provided, both the applicant's special certificates which are of the same class, including one for "elementary agriculture" and one for all subjects formerly required, run out at date of contemplated renewal.

As section 7821, General Code, has been amended so as to make all certificates ineffective until the first of September following, holders of certificates which terminate prior to that date, may under section 7826, General Code, be granted temporary certificates extending from said date of termination to the first of September following.

COLUMBUS, OHIO, October 30, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of September 13, 1911, you call my attention to section 7830 of the General Code as amended 102 Ohio Laws 129-130, and likewise to section 7821 of the General Code as amended 102 Ohio Laws 419.

Section 7830 as amended was so amended in order to include "elementary

agriculture" as a required branch of study, an examination on which a teacher applying for a certificate is required to pass.

Section 7821 of the General Code as amended was so amended in order to establish a *date* on which the certificate should begin.

In your letter you state that teachers' elementary certificates have been issued by the county board of examiners prior to the passage of the amendment of section 7830, which will continue in force for one, two, three or more years after September 1, 1912, and that such certificates do not have "elementary agriculture" thereon.

Under the above state of facts you have submitted for my opinion the following questions:

First: Whether it will be necessary for the holder of a teacher's elementary certificate, which was issued prior to the amendment of section 7830, General Code, and which continues beyond September 1, 1912, to take an examination in "elementary agriculture" in order to teach after September 1, 1912.

Second: Whether it would be legal to place "elementary agriculture" on a teachers's elementary certificate which was issued prior to the amendment of section 7830, General Code, and which certificate continues beyond September 1, 1912, on the holder passing an examination in "elementary agriculture."

Third: Whether "elementary agriculture" could be added as a required branch in examinations held after the passage of the amendment of section 7830, General Code, and before September 1, 1912.

Fourth: Whether the holder of a teacher's elementary certificate which was issued prior to the amendment of section 7830, General Code, on making application for a *renewal* of said certificate after the passage of such amendment, should be required to pass an examination in "elementary agriculture."

Fifth: Whether on renewing a teacher's elementary certificate the renewal certificate issued after the passage of the amendment of section 7830, General Code, should have "elementary agriculture" included in such certificate, the applicant having passed an examination in such subject.

Sixth: In view of the amendment of section 7821, General Code, at what time may a teacher's certificate be renewed?

Section 7821, General Code, (referred to in your letter of inquiry) was amended June 8, 1911, (102 Ohio Laws 419) to read in part as follows:

> "County board of school examiners may grant teachers' certificates for one, two, three, five and eight years which shall be valid in all village, township and special school districts of the county wherein they are issued. * * *
>
> "*Such certificate shall be valid for one, two, three, five and eight years from the first day of September following the day of the examination.*"

The language of such section is the same as the section previous to the amendment thereof with the exception of the language above underscored.

Section 7830, General Code, (referred to in your letter of inquiry) was amended May 18, 1911, (102 Ohio Laws 129) to read as follows:

> "No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, township or special school district, who has not obtained from a board of school examiners having legal

jurisdiction a certificate of good moral character; that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, including civil government, physiology, including narcotics, literature, *and on and after September first, 1912, elementary agriculture*, and that he or she possesses an adequate knowledge of the theory and practice of teaching."

The language of the above section is the same as that of such section before amendment with the exception of the words above underscored.

Section 7691 of the General Code provides in part:

"No person shall be appointed as a teacher for a term longer than four school years, nor for less than one year, except to fill an unexpired term, the term to begin with four months of the date of the appointment."

By virtue of the provisions of section 7691, General Code, supra, all contracts with teachers made prior to the amendment of section 7830, General Code, would have to begin within four months from the date of their appointment, and, consequently, each school teacher appointed prior to the amendment of section 7830, G. C., supra, would have to enter into the performance of his duties not later than September 19, 1911, or in other words, during the present school year, and therefore, such teachers would have entered upon and be in the performance of their duties at the present time.

A teacher's certificate is in no sense a contract, but is simply a license to teach, and evidences that such teacher has the necessary qualifications in order to teach.

"A license or certificate of qualification which under some statutes a teacher must possess before he is eligible to teach in the public schools has none of the elements of a contract, and does not confer upon the holder thereof an absolute right but only gives him a personal privilege to be exercised under existing restrictions, *and under such as may thereafter be reasonably imposed.*"

35 Cyc. 1066, paragraph C.

Section 7830, General Code, (as amended) supra, provides that no person shall be employed or enter upon the performance of his duties as a teacher in any elementary school in a township, village or special school district, unless such person is the holder of a certificate to teach.

In the case of school district No. 2, Oxford township vs. Dilman, 22 O. S. 194, which was a suit based on a provision of the school law of 1864 that no person shall be "employed" as a teacher unless he first obtain a certificate required by law, it was decided that a contract for employment made with a teacher before he obtains a requisite certificate is valid provided he obtains it before entering upon the duties of his employment.

In view of such decision, I am of the opinion that a similar rule would apply to the present statute (section 7830, supra) and that the words "employed" and "entered upon the performance of his duties as teacher" as used in such statute, are to be construed as synonymous.

Any teacher who has a legal teacher's certificate issued prior to the amendment of section 7830, supra, who was under contract to teach *prior* to the

passage of such amendment, and whose contract of employment extends beyond September 1, 1912, may under such contract continue so to teach without having a certificate of qualification to teach "elementary agriculture." At the time of entering into the contract he was the holder of a legally recognized certificate, and the contract so entered into was in every way valid. To require him to pass an examination in "elementary agriculture," because since the contract was entered into the law had been changed in reference to the requirements of teachers' certificates, would, should he fail to pass such an examination, annul his contract, and would, therefore, be an impairment of the obligation of such contract.

Any teacher employed *after* the passage of the amendment of section 7830, supra, the term of whose employment will extend beyond September 1, 1912, must before performing such service under such contract after September 1, 1912, be the holder of a teacher's certificate that he is duly qualified to teach "elementary agriculture," as such contract was entered into under the provisions of law then in force, which requires that after September 1, 1912, a teacher shall have a certificate that he is qualified to teach "elementary agriculture."

Section 7822 of the General Code provides:

> "All teachers' certificates granted for one, two or three years shall be regarded as provisional certificates, and be issued and renewed only in compliance with such reasonable regulations and standards and upon such ratios as the board adopts. But when any teacher holds a two or three years' certificate, and for the last five years preceding has been continuously engaged in teaching in this state, such teacher shall be entitled to have such certificate renewed by passing an examination in theory and practice."

Section 7823 of the General Code, as amended, 102 O. L. 49, provides:

> "Applicants for five-years' or eight-years' certificates shall have had not less than forty months' experience in teaching and shall make not less than eighty-five per cent. in any branch and a general average of not less than ninety-two per cent. All five-years' and eight-years' certificates shall be regarded as professional certificates, and shall be renewed without examination at the discretion of the examining board, except that no such certificate will 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."

It will be noted by an examination of the above quoted sections that teachers' certificates granted for one, two and three years are "provisional certificates" and that teachers' certificates granted for five or eight years are professional certificates.

Further, that a teacher holding a provisional certificate of two or three years, and has continuously engaged in teaching in this state for the last five years, shall be entitled to have such certifiacte renewed without an examination in other than "theory and practice," and that professional certificates may be renewed without examination, provided the holder thereof has been actively engaged in teaching within the four years prior thereto.

A teacher's certificate cannot be renewed except that the renewal thereof

shall take effect at the termination of the original certificate. For example, if a teacher holds a three-years' certificate, only one year of which has expired, leaving a balance of two years for which said certificate is to run, he cannot make application to the board of examiners at the expiration of said one year, to *surrender* his said certificate and have a new certificate issued for three years from such application. He is only entitled to a *renewal* of such certificate, which renewal certificate shall begin at the expiration of the original.

Section 7829, General Code, provides as follows:

> "Three kinds of teachers' certificates only shall be issued by county boards of school examiners, which shall be styled respectively, 'teacher's elementary school certificate,' valid for all branches of study in schools below high school rank, 'teacher's high school certificate,' valid for all branches of study in recognized high schools and for 'superintendents and teacher's special certificate,' valid in school of all grades, but only for the branch or branches of study named therein."

It will be noted, therefore, that in elementary schools there are two kinds of teachers' certificates issued by school examiners, the teachers' "elementary school certifiactes," valid for *all* branches of study in elementary schools, and "special certificates" valid only for the branch or branches or study named therein.

Section 7830, General Code, having been amended so as to require the certificates thereunder to include a further subject, and as "teachers' elementary school certificates," both provisional and professional, are by the provisions of section 7829, supra, issued as valid for *all* branches of study, I am of the opinion that such elementary school certifiactes issued prior to the amendment of section 7830, must after such amendment either be considered as rendered entirely invalid, because of said amendment, or else are to be considered since such amendment as "special certificates" by reason thereof.

I do not believe that it was the intention of the legislature by such amendment to absolutely nullify all such certificates, and, therefore, I am of the opinion that such certificates are to be considered after the amendment as "special certificates."

If an elementary school certificate has been issued to a teacher prior to the amendment of section 7830, supra, which said certificate does not show that he is qualified to teach "elementary agriculture" he should present himself to the county board of examiners for an examination in such a subject if he desires to teach after September 1, 1912, provided such teacher is not at present in the performance of his duty under a contract entered into prior to the amendment of section 7830, the term of which extends beyond said date. If he passes such an examination a "teacher's special certificate" should be issued therefor, which it is suggested should be so issued as to terminate as nearly as possible with the termination of the other certificate held by him.

The two certificates, to wit: the certificate issued prior to the amendment of section 7830 and the teacher's special certificate issued on the examination in "elementary agriculture" will together certify that the teacher is qualified to teach *all of the branches* provided for in said section 7830, and will satisfy the provisions of said section.

All examinations held by county examiners, the successful candidates of which will receive teachers' elementary school certificates bearing date September 1, 1912, as provided in section 7821, General Code, as amended, should include an examination in "elementary agriculture."

Coming now to answer your specific inquiries I shall do so in the order in which they are presented.

> "*First*: Whether it will be necessary for the holder of a teacher's elementary certificate, which was issued prior to the amendment of section 7830, General Code, and which continues beyond September 1, 1912, to take an examination in 'elementary agriculture' in order to teach after September 1. 1912."

I am of the opinion that unless a teacher is in the performance of his duties under a contract, entered into before the passage of section 7830, General Code, as amended, the term of which contract will extend beyond September 1, 1912, it will be necessary for a teacher in order to teach after September 1, 1912, to take an examination in "elementary agriculture," although the certificate heretofore issued prior to the passage of section 7830, G. C., as amended does not expire until after September 1, 1912.

> "*Second*: Whether it would be legal to place 'elementary agriculture' on a teacher's elementary certificate which was issued prior to the amendment of section 7830, General Code, and which certificate continues beyond September 1, 1912, on the holder passing an examination in 'elementary agriculture.'"

I am of the opinion that it would not be legal to place "elementary agriculture" on a teacher's elementary certificate which was issued prior to the amendment of section 7830, G. C., the term of which extends beyond September 1, 1912, but that such teacher's elementary certificate, since such amendment is to be considered as a "special certificate," and not a "teacher's elementary certificate," and further, that a special certificate on the subject of "elementary agriculture" should likewise be granted. These two certificates cover all the branches required under said section 7830, G. C., as amended. It will be well for the county examiners to fix the term of such certificate in "elementary agriculture" at such period as will cause the two certificates to expire at or about the same time.

> "*Third*: Whether 'elementary agriculture' could be added as a required branch in examination held after the passage of the amendment of section 7830, General Code, and before September 1, 1912."

I am of the opinion that an examination in "elementary agricuture" should be given together with an examination on the other subjects required by section 7830, G. C., as amended, at each examination subsequent to the amendment of section 7830, G. C., the certificate of which is to be dated September 1, 1912, in accordance with section 7821, G. C., as amended.

> "*Fourth*: Whether the holder of a teacher's certificate which was issued prior to the amendment of section 7830 on making application for a renewal of said certificate after the passage of such amendment should be required to pass an examination in 'elementary agriculture.'"

I am of the opinion that a teacher's certificate, which prior to the amendment of section 7830, G. C., was a "teacher's elementary certificate" is now to be considered as a "teacher's special certificate," and that such certificate may

be renewed as a "special certificate" without such teacher having to pass an examination in "elementary agriculture." However, if such teacher desires to comply with the provisions of section 7830, G. C., as amended, he must pass an examination in "elementary agriculture" and receive a "teacher's special certificate" therefor.

> "*Fifth*: Whether a renewal certificate issued after the passage of the amendment of section 7830, G. C., should have 'elementary agriculture' included in such certificate, the applicant having passed an examination in such subject."

I am of the opinion for the reasons above stated in answer to your fourth inquiry that what was before the passage of the amendement of section 7830, G. C., a "teacher's elementary certificate" is, since the passage thereof, to be considered as a "teacher's special certificate" and cannot have "elementary agriculture" included in such certificate, but that an additional special certificate in such subject is to be granted. Should at any time the two certificates of a teacher be of the same class, i. e., as to being a provisional or professional certificate, and the terms of which will expire about the same time, I can see no reason, on a renewal of said two certificates, why a teacher's elementary certificate should not be issued in renewal of said two certificates.

> "*Sixth*: In view of the amendment of section 7821, General Code, at what time may a teacher's certificate be renewed?"

Prior to the amendment of section 7821, General Code, certificates were issued at each examination for the yearly periods set forth in said certificate and valid for such period from the date of examination. The present law provides that all teachers' certificates shall be valid from September first, following the day of the examination. This in many cases would leave a hiatus of several months between the expiration of the certificates issued prior to the amendment of section 7821, G. C., and the time from which certificates issued under such amendment shall be valid.

It is a principle of law that teachers in order to draw their salaries must have a certificate of their qualifications covering the period for which such salary is drawn, at the time of performing the service.

In many instances, the certificates heretofore issued would lapse before the completion of the term of the contract, and the teacher on presenting himself to a board of examiners for examination and passing the same, would receive a certificate under such examination valid only from September first, following, and would not, therefore, have any certificate to cover the term of his employment between the date of the expiration of his former certificate and the commencement of the new.

Furthermore, as I am of the opinion, that a renewal certificate must be dated to begin at the expiration of the certificate of which it is a renewal, and as all certificates are now required to begin on September 1, 1912, there would likewise be a hiatus between said two dates.

Realizing the difficulties above stated, the legislature amended section 7826 of the General Code (102 Ohio Laws 419), by adding to such section the following:

> "and at any regular examination such board upon proper application being made, subject to the same rules and regulations as applied

to the granting of regular certificates shall issue temporary certificates, which shall be valid from the date of issue until the first day of September following."

I am, therefore, of the opinion that under the above provision the board of school examiners shall issue temporary certificates to cover the period from the date on which the certificate issued prior to the amendment of section 7821, G. C., shall terminate, to the first day of September following, from which time a new certificate or a renewal certificate is to be valid.

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

458.

VILLAGE ADVANCING TO CITY—TEACHER'S CERTIFICATE—BOARD OF EDUCATION—BOARD OF SCHOOL EXAMINERS.

When a village advances to a city by reason of the federal census, the village officials remain in office until the city officers elected in the next election have been inducted into office.

The village board of education may determine the number of members to be elected to the city board of education but the power to appoint the city board of examiners resides only in the board elected under the city plan.

The county certificates will be sufficient to carry teachers through the present year but for later periods a certificate must be obtained from the regularly appointed city board of school examiners.

COLUMBUS, OHIO, November 9, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of September 11th, you state that the village of Wapakoneta, having the necessary population according to the last federal census, became the city of Wapakoneta, and you desire to know whether certificates granted by the county board of examiners in Auglaize county will be sufficient for the teachers now teaching in the schools of Wapakoneta in order for them to draw their salaries.

Section 4686 of the General Code provides:

"When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

Section 7838, General Code, provides in part as follows:

"There shall be a city board of school examiners for each city school district, to be apopinted by the board of education of the district."

I have heretofore held that in reference to the civic government of a city the said city would still remain under the village form of government until the induction into office of the city officers to be elected this fall.

I have likewise held that it is the duty of the village board of education to determine the number of members to be elected at large as members of the city board of education.

Section 4686, General Code, supra, states that the members of the village board of education shall continue in office until succeeded by the members of the city board of education, and

Section 7838, General Code, supra, provides that the city board of school examiners shall be appointed by the board of education *of the district.*

As I view the matter, the village board of education beyond having the power to determine the number to be elected as members of the city board of education which will succeed them, have only the powers of a village board of education, and, consequently, are not authorized under section 7838, General Code, to appoint a city board of school examiners.

Such being the case, and it being a requirement of law that teachers employed in the public schools shall have certificates of their qualifications so to do, and as the county board of school examiners is the only board of school examiners who can issue such certificates, until the creation of a city board of school examiners, I am of the opinion that the certificates granted by the county board of examiners will be sufficient for teachers teaching in the schools of Wapakoneta to entitle them to legally draw their salaries. Having entered upon their duties for the present school year, it will not be necessary for them to obtain from the city board of school examiners to be appointed, a certificate from such board in order to finish out the present school year, but such teachers must obtain from the city board of school examiners a certificate in order to continue their service in such district beyond the present school year.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 461.

VILLAGE ADVANCING TO CITY—BOARD OF EDUCATION—POWER TO APPOINT SUPERINTENDENT.

When a village advances to a city by reason of the last federal census, the board of education of the village continues its duties until the induction into office of the city board of education, but with the powers only of a village board of education. Such village board therefore, has the power only to appoint a superintendent for a term of three years as provided for villages under section 7705, General Code.

An appointment by such board of a superintendent for a longer term as provided for cities under section 7702, General Code, is therefore void.

COLUMBUS, OHIO, November 11, 1911.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of October 5th, wherein you state that you desire my written opinion upon the following question:

"The school laws of Ohio say that a superintendent may be employed for three years in a village and five years in a city.

"Barberton, Ohio, has the required population for a city at the last census, and will go under a city government January 1, 1912, with the officers elected at the coming election.

"A superintendent was employed last May for a term of *four* years. Was it legal?"

Section 4686 of the General Code provides:

"When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

Section 7705, General Code, provides:

"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 school years, to begin within four months of the date of appointment. * * *"

Section 7702, General Code, provides:

"The board of education in each city school district shall appoint a suitable person to act as superintendent of the public schools of the district, for a term not longer than five school years, and to begin within four months of such appointment."

I have heretofore advised you that it is my opinion that the members of the board of education of the village school district continue to serve until the election of the members of the city board of education, but continue so to do only with the powers which by law are given to a village board of education. Consequently, I am of the opinion that the village board of education serving in the interim between the time that the municipality is declared by law to be a city, and the induction into office of the members of the city board of education, have only power to appoint a superintendent under the provisions of section 7705, General Code, supra, and have not the power to appoint a superintendent under the provisions of section 7702, General Code, supra.

Therefore, in answer to your question, I am of the opinion that the employment of a superintendent last May for a term of four years by such board of education is without authority in law, and is not binding upon the members of the city board of education to be elected.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 468.

BRIBERY—PENALTY OF DISFRANCHISEMENT—NOT A DISQUALIFICATION OF OFFICE HELD ON SCHOOL BOARD—CONSTITUTIONAL PROVISION—FELONIES.

Section 13314, *General Code, provides the penalty for bribery at elections and defines such offense to be a misdemeaner.*

As there is no further penalty provided for such offense by law, when the penalty thereon prescribed has been inflicted and the defendant disfranchised as therein provided, such defendant is not disqualified thereby from holding office on the board of education to which he was elected prior to the commission of the offense.

Section 12390 *disqualifying defendants from holding offices of trust applies to felonies only and article* 15, *section* 4 *of the Ohio constitution disqualifies disfranchised persons for "appointment or election to an office but is not extended to offices already held."*

COLUMBUS, OHIO, November 17, 1911.

HON. FRANK W. MILLER, *State Commissioner of Schools, Columbus, Ohio.*

DEAR SIR:—Your favor of October 11, 1911, is received, in which you ask an opinion of this department upon the following:

> "A member of a school board was a worker at the election, and for this work he received $2.00. The judge of the common pleas court brought this man before him and on his pleading guilty of being bribed, disfranchised the school member for five years. This board member holds office for about two years from this date, and as a township member is entitled to $20.00 each year.
>
> "Question: Under conditions mentioned in this letter can this board member legally retain his position as a member of the board of education, and as such, draw $20.00 a year compensation for such services?"

The penalty imposed upon an elector receiving a bribe for influencing his vote, is set forth in section 13314, General Code, which provides:

> "Whoever, being an elector, before, during or after an election, receives, agrees or contracts for money, gift, loan or other valuable consideration, office, place or employment, for himself or another for registering or agreeing to register, or refraining or agreeing to refrain from registering for an election, or for voting or agreeing to vote, or refraining or agreeing to refrain from voting at an election, or for voting or agreeing to vote, or refraining or agreeing to refrain from voting for a particular person, question or proposition at al election, *shall be fined not more than five hundred dollars or imprisoned not more than one year, or both, and be excluded from the right of suffrage for five years next succeeding such conviction.*"

The constitution of Ohio specifically grants power to the general assembly to disfranchise any person convicted of bribery, in section 4 of article 5, which provides:

"The general assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

It appears that the person in question was charged with bribery and plead guilty thereto; and that sentence was passed upon him by a court of competent jurisdiction. Part of that sentence was that he should be excluded from voting for five years. It further appears that this person at the time of accepting the bribe was a member of the township board of education.

Section 4 of article 15 of the Ohio constitution provides that all officers appointed or elected to office must be electors, as follows:

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

At the time of his election he, no doubt, was an elector of the township and qualified to be a member of the board of education. Since his election and acceptance of the office he has been disqualified as an elector.

The question arises: Does the disfranchisement of an officer after he becomes such officer disqualify him from further holding such office?

In the case of State vs. Pritchard, 36 N. J. L., 101, it is held that disfranchisement of an officer does not, ipso facto, cause forfeiture of the office. On page 105 of the opinion, Beaseley, C. J., says:

"At the hearing in this court, the counsel for the relators strongly pressed the conclusion that, inasmuch as a conviction of the crime of conspiracy, by force of the act concerning witnesses, incapacitates the convict from being a witness, in a judicial proceeding, and in consequence thereof, the constitution prohibts such convict from enjoying the right of suffrage, that, as a necessary result, there was a deprivation also of the prerogative to hold office. But this, I think, is a manifiest non sequitior. Because, as a punishment, the law has denounced the loss of two of the rights of citizenship, it does not follow that a third right is to be withheld from the delinquent. Indeed the reverse result is the reasonable deduction, because, it is clear on common principles, that no penalty for crime but that which is expressly prescribed can be exacted. The fact that severely penal consequences are annexed by statute to the commission of a breach of law, cannot warrant the aggravation, by the judicial hand, of the punishment prescribed. In this case it is impossible for this court to say to these officials, that in consequence of their crime, the statute declares that they cannot be witnesses, and that the constitution deprives them, on the same ground, of the right to vote, and that therefore, the law inflicts upon them a forfeiture of office. It may well be, that the provision would be both just and expedient, which should declare that the conviction of any official delinquency should, ipso facto, work a forfeiture of the office which had been so abused. It is possible that the legislature, upon attention being called to the subject might pass an act with such an aspect, but all that the court can say is, that no such law is now in existence. The punishment of the crime of conspiracy is definitely fixed by the constitution and by the statute; no addition can be made to this measure except with the legislative sanction. The severity of the present punishment, may indeed denote that the crime is of a

higher grade; but that fact leaves the question at issue still to be solved, whether a conviction of any crime operates, in the absence of any adjudication to that effect, and without express statutory provision, so as to forfeit an office as a legal result."

The same doctrine is applied in case of People vs. Thornton, 25 Hun. (N. Y.) 456. On page 463, Bockes, J., delivering the opinion, says:

"The right to hold office and to exercise its functions and to enjoy its honors and emoluments constitute the highest privileges of citizenship. In our form of government these rights inhere in every male citizen of full age, unless incapacitated to have and enjoy them by reason of some express provision of the constitution or law; and the courts cannot take those rights away save by virtue of a declared power of disfranchisement based on some specified wrongful or criminal act. *Wrongdoing or criminal conduct which will constitute or work ineligibility, or disability to hold office, to be enforced through the judicial power of the state must be expressly defined and declared by the constitution or laws.* Granting then, that the promises and pledges made by the defendant to the electors of the county in this case constituted an offer of a bribe to them to cast their votes for him, where in the constitution or in the law is such offer declared to create ineligibility to office? We do not find it to be so declared in terms either in the constitution or laws of this state. The offer of a bribe to an elector is unquestionably a grave offense and is punishable as such, but it is punishable only in the manner and to the extent prescribed by the constitution and laws. Section 2 of article 2 of our state constitution excludes from the right of suffrage every person who shall either accept or offer a bribe for the giving or withholding of a vote at any election. And by statute bribery of an elector as well as the offer to him of a bribe, having in view the influence of his vote, is made a misdemeanor punishable by fine and imprisonment. Such are the penalties prescribed by the constitution and laws of our state against those offenders. *But they are not declared to be also ineligible to office, or to be disqualified from holding office.*"

The rule established by these cases is that the right to hold office can be taken away only by express provision of the constitution or laws of the state.

The constitution, article 5, section 4, supra, grants power to the legislature to "exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime." It is left to the discretion of the general assembly to determine what offenses shall cause ineligibility to hold office, and what offenses shall cause disfranchisement. The constitution does not prescribe that the conviction of such an offense shall be punished by disfranchisement or disqualification for office.

The general assembly, in pursuance of this power, has made the conviction of certain offenses cause for forfeiture of office.

Section 12390, General Code, prescribes the penalty for conviction of a felony, as follows:

"A person convicted of felony, unless his sentence is reversed or annulled, *shall be incompetent to be an elector or juror, or to hold an office of honor, trust or profit.* The pardon of a convict shall effect a

restoration of the rights and privileges so forfeited, or they may be restored as provided elsewhere by law, but a pardon shall not release a convict from the costs of his conviction unless so stated therein."

Section 13312 and 13316 of the General Code provide for forfeiture of office when the person elected to such office has used bribery in securing his election or nomination to such office.

Section 13312 provides:

"Whoever gives, or lends, or offers or promises to give, lend, procure or endeavor to procure money or other valuable consideration, to or for an elector or other person, to induce such elector to register or to refrain from registering for an election, or vote or refrain from voting at an election, or vote or refrain from voting at an election for a particular person, question or proposition, or on account of such elector having registered or refrained from registering, or voted or refrained from voting, or voted or refrained from voting for a particular person, question or proposition, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not more than three years, or both, *and shall forfeit the office to which he was elected at the election with reference to which such offense was committed.*"

Section 13316, General Code, provides:

"Whoever, being a candidate for nomination to an office in a convention held as provided by law, pays or promises to pay money or property to a delegate for obtaining his influence or vote for such nomination, shall be fined not less than one hundred dollars nor more than five hundred dollars, and, if nominated and elected to such office, shall forfeit it and be disqualified from voting or being nominated at such election or convention."

The offense of receiving a bribe, defined in section 13314, General Code, supra, is a misdemeanor and not a felony, and cannot therefore come within the provision of section 12390, General Code. The penalty prescribed for such an offense is that which is set forth in section 13314, General Code. The court, in passing sentence exercised its power to fix the penalty, and fixed it as a fine and disfranchisement for five years.

The statute does not provide that a conviction of such an offense shall be cause for forfeiture of office, and in the absence of constitutional or statutory authority conviction of an offense does not cause forfeiture of office.

The receiving of a bribe at an election to influence one's vote does not cause a forfeiture of an office held by the person receiving the bribe.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(To the Clerk of the Supreme Court)

202.

PRINTING BY CLERK OF SUPREME COURT AND OFFICIAL DUTY--EXTRA COMPENSATION ILLEGAL—DISPOSITION OF COMMISSION ILLEGALLY RECEIVED FROM PRINTER.

The work of attending to certain printing for parties involved in cases before the supreme court forms a part of the official duties of the clerk and his salary is intended as full compensation for the same.

Where the clerk has received from a printer a commission for assignment of such work to such printer, the money so received must be returned to the parties legally entitled to the same or turned into the state treasury in trust for such parties. If such commission has been taxed as part of the costs of the case against the parties having the printing done, it should be returned to such parties.

COLUMBUS, OHIO, March 28, 1911.

HON. FRANK E. MCKEAN, *Clerk of Supreme Court, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state:

> "Rule 5 of Rules of Practice now in effect by the supreme court of Ohio, under the caption 'Printing Records, etc.,' provides that the clerk of the supreme court shall attend to certain printing, etc.
>
> "For your information I beg to advise that Mr. Jno. S. McNutt, my immediate predecessor, has informed me that it has been the practice by him, also by Clerks Obermeyer and Emerson, to turn this work over to printing firms and have received for so doing a ten per cent. commission, such commission being paid the clerks of the supreme court by the printer, and that such commission has been claimed by the clerks of the supreme court as belonging to them and consequently such commission has been retained by the clerks of the supreme court as their own.
>
> "Mr. F. B. Toothaker, Columbus, has been favored with a large portion of such printing in the past, and he too informed me that he has paid ten per cent. commission to other clerks of the Ohio supreme court for turning such printing over to his firm, and proposed doing the same with me, which offer I have refused to consider. The things that I desire to know, however, is whether former clerks of the supreme court are legally entitled to such commission referred to in the foregoing; if the charge is legal then should not the fee or commission be paid into the state treasury; or if such fee or commission has been illegally collected and retained by former clerks of the Ohio supreme court what action should be had to cause such fees or commissions to be returned and do they belong to the printer paying same, or should such moneys be paid over to the person or persons against whom the costs in the case are finally taxed?"

The salary of the clerk of the supreme court is fixed by section 2254 of the General Code in the sum of four thousand dollars annually, and section 2259, General Code, provides that no fees whatever in addition to the salaries and compensation named in section 2254 shall be allowed to any such officer. Sec-

tion 1512 of the General Code provides the fees which the clerk of the supreme court shall charge and collect, but nowhere in that section is he allowed to charge and collect a fee for the printing of records under his supervision.

Prior to April 16, 1906, the clerk of the supreme court was allowed in addition to his salary to retain certain fees which, when collected, he is now required to pay over to the state treasurer under section 2264, General Code. But at no time has the clerk of the supreme court been allowed to charge a fee for attnding to the printing of records of cases pending in the supreme court. Rule 5 of the rules of the supreme court is in accord with section 12254 of the General Code which reads in part as follows:

> "The plaintiff in error may have the printing done, or he may deposit with the clerk sufficient money to pay its costs."

thus making it a part of the duties of the clerk of the supreme court to attend to the printing of the records of cases in said court, if required by plaintiff in error. The printing of records by the clerk of the supreme court, when so required, has been one of his duties as far back as April 18, 1883 (80 O. L. 170).

All services that the clerk of the supreme court has to render in his capacity as clerk are deemed compensated by the salary attached to the office and any additional compensation is illegal and void. Burkett, J., in the case of Clark vs. Commissioners, 58 O. S., page 107, at page 109 says:

> "It is well settled that a public officer is not entitled to receive pay for services out of the public treasury unless there is some statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. Jones vs. Commissioners, 57 Ohio State, 189."

Section 1508, General Code (Section 421c, R. S.), provides:

> "On the first Monday of June in each year, the clerk of the supreme court shall make out a certified list of causes in which money has been paid and has remained in his hands or in the possession of a former clerk for one year next preceding such time, and state the amount of money so paid, and in whose possession it is. Such list forthwith must be posted in a conspicuous place in his office for a period of thirty days."

Section 1509, General Code (Section 421*d*, R. S.), provides:

> "The clerk of the supreme court shall pay such advertised moneys, fees and costs in his hands at the expiration of such thirty days, to the treasurer of state on the warrant of the auditor of state. He must also indicate in his cash book the disposition of each item of such fees and costs. The treasurer of state shall hold such moneys as a special fund entitled 'unclaimed costs in supreme court.' Immediately before ceasing to be clerk each clerk shall pay over to his successor all moneys in his hands, received by virtue of his office."

The clerk of the supreme court is an officer of the state of Ohio and all money received by him is received on behalf of the state of Ohio. All money

received for printing the records of the cases pending in the supreme court is received by the clerk in trust for the specific purpose and he is not allowed to obtain any unjust advantage or special compensation therefrom. Section 12254, General Code, provides that the fair expense of the printing of records shall be taxed as part of the costs of the case. I construe the words "fair expense" to mean the actual expense of such printing.

You state in your letter that a commission of ten per cent. has been paid to former clerks of the supreme court by the various printers for having the work given to them. As the clerk is not entitled to any fee for supervising the printing and as he is only entitled to such salary and fees as have been from time to time provided by law, the giving of a commission of ten per cent. to the clerk has the same effect as if it were an over-payment made by the clerk to the printer of ten per cent. of the bill for printing the record, and should on being received from such printer be refunded to the party transmitting the money. As it has not been so refunded it should have been paid over to the state treasurer under section 1509, General Code (former section 421*d*, R. S.), to be held by such treasurer for the party who ultimately paid the costs of the case, the entire bill of the printer plus the commission having been taxed as part thereof.

I hold therefore that the former clerks of the supreme court are not legally entitled to such commissions, nor can such commissions be considered as a part of the fees which the clerk under the law is entitled to charge, but that the same should have been returned to the party transmitting the same, and the costs of printing of the record should have been charged as a part of the costs of the case only to the extent of ninety per cent. of the amount so charged. As I assume, however, that the whole amount of the printing bill plus the commission has been charged as a part of the costs in such cases it is the duty of the state of Ohio to recover said commissions so illegally received and held by the former clerks, the recovery to be for the benefit of those parties against whom the costs were ultimately taxed.

This matter is of such supreme importance I am of the opinion that you as an officer of the court should call the attention of the judges of the supreme court to it.

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

(To the Various Appointive State Officers)

(To the Adjutant General)

194.

ASSIGNMENT OF ROOMS IN STATE HOUSE—JOINT RESOLUTIONS—STATUTORY PROVISIONS.

Joint resolutions of the general assembly with respect to the assignment of rooms in the state house are valid and shall have effect in so far as they do not conflict with general provisions of law or statutory provisions for special departments.

COLUMBUS, OHIO, March 23, 1911.

HON. CHARLES C. WEYBRECHT, *The Adjutant General, Columbus, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of March 22d, requesting my advice as to the authority of certain state departments to use and occupy offices in the state capitol building.

Replying thereto I beg to state that the following state departments are specifically authorized or required by law to have their offices in the state capitol building; I append to this list a list of the sections of the General Code providing that the offices of such departments shall be in the capitol building:

State Commissioner of Common Schools	Section 352
Dairy and Food Commissioner	Section 369
Commissioner of Sinking Fund	Section 383
Board of Public Works	Section 407
Fire Marshal	Section 820
Commissioner of Labor Statistics	Section 872
Chief Inspector of Mines	Section 903
Chief Inspector of Workshops and Factories	Section 980
Chief Inspector of Stationary Engineers	Section 1043
State Board of Arbitration	Section 1061
State Highway Commissioner	Section 1180
Board of State Charities	Section 1350

This list may be incomplete as my examination has been somewhat hasty. It is not, however, provided by law that the chief executive departments of state, such as that of the governor, auditor of state, treasurer of state, secretary of state and attorney general shall have their offices in the state house; it is only inferentially provided that the legislative hall and offices of that department of the government shall be in the state house; there is no provision to the effect that the supreme court, its clerk, reporter and library shall be in the capitol building.

So far, then, as the law of this state applies, comparatively few of the state departments lawfully occupy the rooms used by them. At the time the building now known as the judiciary building, or the state capitol annex, was finished, the general assembly, by joint resolution—not by law—assigned certain rooms in both of the buildings to certain state departments. (See 94 O. L., 763.) A reassignment of these rooms was made at the following session of the general assembly. (See 95 O. L., 970.) And another partial reassignment in 1904. (See 97 O. L., 647.) So far as I am able to find, these are the only legislative assignments of rooms.

It is provided by section 146 of the General Code:

> "By virtue of his office, the adjutant general shall be superintendent of the state house. He shall have supervision and control of the state house." * * *

The adjutant general is not, however, expressly authorized to assign rooms, and inasmuch as this statute was in force at the time the general assembly saw fit to assign rooms by joint resolution, it would seem that at the time the adjutant general was not regarded as possessing this authority. I refer to his powers under the section above quoted, however, because it occurred to me that the adjutant general may have been exercising it in this matter from time to time.

Referring to the list submitted to me in your letter, I beg to state that the board of medical registration and examination and the state board of pharmacy, concerning which you particularly inquire, were authorized to occupy certain rooms in the judiciary building both by the resolution of 1902 and the resolution of 1904 above referred to. I am unable, however, to state what rooms were contemplated by the resolutions.

With respect to the flag and relic room, the following provision of the resolution of 1902 may be quoted:

> "The large room formerly used as the supreme court room is assigned as the flag room and for an assembly room to be under the authority of the adjutant general."

I do not find that any room has ever been assigned to the supervisor of printing, but my time has been so limited that I may have overlooked some joint resolution; nor do I find that any room has been assigned to the bureau of labor statistics, but this department is required to have its office in the state house. All the other departments mentioned in your letter are assigned rooms in one or the other resolutions above referred to, or are expressly authorized to have their offices in the state house.

As to the effect of these joint resolutions, I am of the opinion that they confer upon the departments affected thereby ample authority to occupy rooms in the capitol building. Such joint resolutions have not the force and effect of law, and if there were any general law applicable to the assignment of rooms in the state house and passed either before or after such joint resolutions, it would have to govern. Furthermore, the provisions of the law applicable to the various departments take precedence over a joint resolution, and if it be found that an officer who is entitled to have his office in the state house is not provided for in a joint resolution, such failure to provide for him does not deprive the department of its right to have its office in the state house.

I trust that the information furnished will be sufficient for your needs and those of the house committee.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

467.

ADJUTANT GENERAL AND ASSISTANT QUARTERMASTER GENERAL—POWERS TO BID ON ROAD IMPROVEMENTS.

Neither the adjutant general nor his assistant quartermaster general are authorized to bid on or contract for the building or constructing of a road outside of the confines of Camp Perry.

COLUMBUS, OHIO, November 15, 1911.

HON. CHARLE. C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of November 10th, wherein you state:

> "Bids will be received at La Carne, Ohio, on November 23, 1911, for the improvement of what is known as the Bell road, in Ottawa county.
>
> "This road, which is about one-half mile long, extends south from Camp Perry and connects with the road leading to Port Clinton. During the winter and in wet weather the road is unserviceable for the purpose of transportation to Camp Perry. For this reason it is essential that the road be improved at as early a date as is possible.
>
> "An opinion is respectfully requested as to whether the improvement of this road can be bid in by the assistant quartermaster general of Ohio as an official of this department. On account of certain facilities at his command, it is desired that he make an effort to secure the contract so that a better road can be built than would ordinarily be constructed by some outside contractor."

An examination of the General Code will disclose that section 82 defines the general duties of the adjutant general, while section 84 provides that he "shall have an assistant quartermaster general of the grade of colonel. * * * The assistant quartermaster general shall perform all duties devolving upon an assistant quartermaster general, and aid the adjutant general in the performance of such duties as the adjutant general may assign him. Under the direction of the adjutant general, he shall have charge of all ordnance and quartermaster stores and of the military property of the state."

Neither of the above sections requires or gives to the adjutant general or assistant quartermaster general the right to engage, by reason of his office, in the business of constructing roads.

Section 5278 of the General Code provides:

> "The adjutant general shall have general direction over the state arsenal, state camp grounds and other military property of the state. He shall employ such labor thereat, as the governor deems the necessities and best interests of the state require."

Section 5279 of the General Code provides:

> "The adjutant general shall direct the assistant quartermaster general in the charge of all ordnance, quartermaster's and other military stores received from the United States government or purchased by the state. He shall direct the issue of such stores to the organizations of the national guard, and the return of such stores from the organiza-

tions and provide for the collection and recovery of arms and equipments in the possession of any persons not authorized to retain them."

Nor is there any authority in the two sections just quoted permitting the performance of the work required of in your communication.

Section 5283 of the General Code provides:

"The adjutant general shall be the custodian of the state rifle range and military camp ground, which is hereby dedicated and set apart forever as a state park for military purposes to be known and designated as 'Camp Perry' in honor of Commodore Oliver Hazzard Perry and the naval victory won by him September 10, 1813, near this park."

Section 5283 of the General Code provides:

"The adjutant general may make such changes and improvements in existing roadways and otherwise in such range and ground as the needs of the state and the exigencies of the service may require. All improvements made upon the lands of such park belonging to the state from moneys received from any source, shall become the property of the state of Ohio."

While it may seem from section 5284, supra, that the adjutant general is authorized "to make changes and improvements in the roadways and otherwise in the state park" known as Camp Perry, he is limited by the sections above quoted to the confines of this military park. I am unable to find any statute which would authorize the assistant quartermaster general of Ohio as an official of the adjutant general's department to bid on the proposed road, and while I have no doubt, if he could do so, that the facilities at his command coupled with the interest he would have in the work might be productive of a better road, yet I am constrained to hold that your department is without power to bid on or contract for the building or constructing of this road outside of the confines of Camp Perry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State Armory Board)

22.

ABSTRACT OF TITLE—ICE HARBOR LOT—LAFAYETTE PLACE—RIGHTS OF CITY OF MARIETTA—RELEASES—DEFEASANCE CLAUSE.

Title to Ice Harbor lot or Lafayette place is legally in the state subject to certain claims for religious purposes reserved by act of congress and to the right of the city of Marietta to build public buildings thereon.

The city should release its privilege and the defeasance clause providing that the property shall revert to that city when it ceased to be used for armory purposes should be omitted. The release from the trustees for the aforementioned charitable purposes should also omit such defeasance clause.

COLUMBUS, OHIO, January 14, 1911.

Ohio State Armory Board, Col. Byron L. Bargar, Secretary, Columbus, Ohio.

DEAR SIR:—I have carefully examined the written information and letter of Attorney Charles C. Middleswart concerning the following part of the Ice Harbor lot or Lafayette place, situated in Marietta, Washington county, Ohio, bounded and described as follows:

> "Beginning at a point on Front street where the southerly line of the lot deeded to the United States for the purpose of a lock tender's house intersects Front street; thence from said point southerly along the westerly line of Front street 185 feet; thence westerly on a line at right angles to Front street to the Muskingum river; thence northerly along the east bank of the Muskingum river to a point where the southerly line of the property deeded to the United States for a lock tender's house intersects the Muskingum river; thence along the said southerly line of said United States property to the place of beginning; together with any and all right, title or interest which the said city of Marietta may own or have in said property.",

and have also examined the statutes and court decisions concerning the above described premises and from such examination I am of the opinion that the title to said premises is good of record in the state of Ohio, subject, however, to the claim for religious purposes as provided by the acts of congress and the authority vested by the state in the city of Marietta to erect and permanently maintain city buildings and structures for public use on said premises, together with the necessary and proper rights of way to and across the same. I have also examined the accompanying deed conveying said premises which deed provides that if the state should cease to use the property for armory purposes the same should revert to the city of Marietta.

I am of the opinion that all that is required from the city of Marietta is that it should release to the state the privilege heretofore granted and would suggest that the defeasance clause contained in the deed be eliminated.

The release also, from the trustees managing the lands granted for religious purposes contains a similar provision regarding the reverting of the land to the city in case the state fails to erect or maintain an armory building upon the premises. While I am of the opinion that the title to the property is vested in the state, subject to the claim for religious purposes and the author-

ity given the city of Marietta to build city buildings on the premises, still I think that it would be better for the trustees to pass a resolution eliminating the defeasance clause therein.

I am herewith returning to you the abstract of information and the deed.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

24.

ABSTRACT OF TITLE—CITY OF BUCYRUS—DEED FROM BUCYRUS INDUSTRIAL ASSOCIATION.

COLUMBUS, OHIO, January 14, 1911.

Ohio State Armory Board, Col. Byron L. Bargar, Secretary, Columbus, Ohio.

DEAR SIR:—I have carefully examined the accompanying abstract of title to lot No. 1246 of the revised numbers on the city of Bucyrus, Crawford county, Ohio, prepared by C. W. Kennedy, abstractor, under date of December 23, 1910, and from such examination I am of the opinion that said abstract shows a good marketable title of record at the date thereof in the Bucyrus Industrial Association of Bucyrus, Ohio.

I have also examined the accompanying deed, purporting to convey the property from the Bucyrus Industrial Association to the state of Ohio, and believe that it is correct in form and when accepted by the state will be sufficient to convey the title.

I am herewith returning to you the abstract and deed.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

90.

DEED AND ABSTRACT OF TITLE—BALDWINS AND WRIGHT TO STATE OF OHIO—DEFECTS AND OMISSIONS.

In the deed of A. J. Baldwin, Wright, et al., to the state of Ohio, the words "its successors and assigns" should be inserted in order to convey a fee simple.

The abstract does not disclose whether or not one of the early grantors was married and so either a quit claim deed from the wife should be obtained or affidavits must be obtained to the effect that said grantor was unmarried.

As there are no probate court records to show that the present grantors are the "heirs at law" of the party in whom the abstract shows the title to rest an affidavit to the effect that said party died intestate and that the present grantors are in fact "heirs at law" should be procured.

Futhermore as the abstract discloses only an examination of the records of the recorder's office, nothing being shown as to pending suits, judgments, assignments or other similar proceedings, nor as to taxes, mortgages, nor special assessments, the deed should not be accepted by the state armory board.

COLUMBUS, OHIO, February 1, 1911.

COLONEL BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 16th,

enclosing deed from A. J. Baldwin and Katie Baldwin, his wife, A. W. Baldwin, an unmarried man, and Sam'l B. Wright, an unmarried man, being all the heirs at law of Rebecca Baldwin, deceased, to the state of Ohio, for the following described real estate.

> "Lying and being situate in the county of Clinton and state of Ohio, and further described as follows: Town lot No. one (1) in Jonathan Baldwin's addition to the town of Blanchester which said town lot will be more fully described by reference to the recorded plat of said addition to said town."

Said deed is duly signed and acknowledged, but does not convey a fee simple title to the state of Ohio. The words "heirs and assigns" in the printed form are stricken out; in their place should be the words "its successors and assigns" if your board desires to acquire a fee simple title to the property.

You also submit in connection with the above described deed an abstract of title to the property therein described. There are some defects in the early history of the title as disclosed by the abstract, which, however, are not of sufficient importance to warrant mention. The abstract does not disclose whether Samuel Baldwin, the grantor of Rebecca Baldwin, was married; the deed by which this conveyance was effected was dated April 10, 1891, and it is obvious that if the grantor was married there may be an outstanding inchoate right of dower. If such is the case a quit claim deed from the wife of Samuel Baldwin should be obtained; otherwise, express affidavits should be furnished showing that Samuel Baldwin was, at the time of the execution of this deed, an unmarried man.

The abstract discloses that title is in Rebecca Baldwin; the deed by which is to be conveyed to the state is that of A. J. Baldwin and Katie Baldwin, his wife; A. W. Baldwin, an unmarried man, and Samuel B. Wright, an unmarried man, "*being all the heirs at law of Rebecca Baldwin.*" No proceedings in the probate court are shown by the abstract whereby these persons are identified as all the heirs at law of Rebecca Baldwin, deceased; nor is there any showing that Rebecca Baldwin is deceased, or that she died intestate. In the absence of any probate or administration proceedings, proper affidavit should be furnished showing that Rebecca Baldwin died intestate, and that the above named persons are all her heirs.

The certificate of the abstractor is merely that, the abstract is "true and correct as taken from the records at the recorder's office at Wilmington, Clinton county, Ohio." If this is the extent of the examination of the abstract you should not, in my opinion, accept this deed, for the certificate seems to disclose that no examination has been made in any of the courts of record of Clinton county for pending suits or judgments, for assignments or other similar proceedings. Nor does the certificate show the payment of taxes or the existence or non-existence of tax titles, the existence or non-existence of mortgages, cancelled or otherwise, any examination of the courts of the United States for pending suits and judgments, or any examination of the records of the village of Blanchester for special assessments of any sort.

Until therefore, the deed is so amended as to conform to the above suggestions, and the abstract is so amplified as to obviate the above criticisms I advise that you do not accept the deed tendered to you by the alleged heirs of Rebecca Baldwin, deceased.

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

193.

NO POWER IN MUNICIPALITY TO ISSUE BONDS FOR PURCHASE OF LAND FOR STATE ARMORY PURPOSES—CONSTITUTIONAL PROHIBITION.

A municipality has been delegated by no statute the power to purchase lands for the purpose of donating them to the state for armory purposes.

The sale of bonds by a municipality for such purpose would moreover effect a violation of article 12, section 2 of the constitution of Ohio, that taxes for general purposes must be levied by a uniform rule upon all property within the state.

COLUMBUS, OHIO, March 23, 1911.

COLONEL BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 18th, requesting the opinion of this department upon the following question, viz:

> "Under the armory law and other provisions of the General Code, can a municipality issue bonds for the purchase of a tract of land, which tract is to be conveyed to the state in fee simple?"

In reply I desire to say that under the state armory law, section 5256, General Code, provides:

> "The board may receive gifts or donations of land, money or other property for the purpose of aiding in the purchase, building, furnishing or maintaining of an armory building. All lands so acquired shall be deeded to the state of Ohio, and all property received under the provisions of this section from any source, shall become the property of the state."

Section 3939 of the General Code provides for what purpose a municipal corporation may issue and sell bonds, but in none of the subsections is there any provision for a municipality issuing or selling bonds for the purpose of purchasing land by the municipality for the purpose of giving it to the state of Ohio upon which to erect a state armory.

The question you have submitted to this department has been decided by the supreme court of our state in the case of Hubbard vs. Fitzsimmons, 57 O. S., 436, in which that court held:

> "1. The erection of an armory for the use of the national guard is a general purpose of the state, and taxes to be devoted to that purpose, must, in obedience to the requirement of section 2 of article 12 of the constitution, be levied by a uniform rule upon all the taxable property within the state.
>
> "2. The * * * act to authorize the commissioners of any county containing a city of the first class, second grade, to borrow money and issue bonds therefor, for the purpose of building and furnishing a central armory in such city for the use of the Ohio national guard, and procuring a site therefor, is void, being an attempt to make such general purpose the subject of a local imposition."

The expenses incident to the purchase of land by a municipality for the purpose of deeding it to the state under the armory law, for the purpose of

the erection and maintaining of a state armory would be the performance of a duty of a general character, and, therefore, under the decision above quoted cannot be made the subject of local imposition, and for that reason I am of the opinion that no municipality in this state has the legal authority to issue or sell bonds for the purchase of a tract of land for the said purpose of conveying the same to the state in fee simple for armory purposes without cost to the state.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

198.

DEED AND ABSRACT OF PROPERTY OF B. A. BECKER AND WIFE—DEFECTS OF TITLE—STATUTE OF LIMITATIONS—RECORD TITLE.

The deed of B. A. Becker and wife to the state of Ohio is not materially defective and provided the title of the grantors is good, would convey a fee simple.

All defects of title disclosed in the abstract have been cured by the statute of limitations. The record title should be cleared, however, by the definite disclosure of the heirs of Elizabeth Christy.

COLUMBUS, OHIO, March 24, 1911.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 4th, submitting for my opinion the question as to what title would be acquired by the state under and by virtue of the deed of B. A. Becker and wife to the state of Ohio executed January 9, 1911, but not filed for record. Said deed, which was enclosed in your letter, purports to convey to the state inlot No. 658 in the village of Clyde, Sandusky county, Ohio. The reservations which it makes are unimportant, and if the title of the grantors was good, the state would acquire under this deed a fee simple title to the said premises.

With the deed you submitted the following papers:

"Abstract of title of said lot 658 showing title, if any, in Elizabeth Christy:

"A deed of Joseph Birdseye to Elizabeth Christy;

"A deed of R. J. Christy and wife,

"W. C. Christy and wife,

"Charles J. Christy and wife,

"Stella C. Ensly and husband, and

"Jennie Barnsby and husband to B. A. Becker, duly signed, witnessed, delivered and recorded October 31, 1910; a tax receipt for the said lot 658 for the entire taxes due for the year 1910, including the installment thereon due June 20, 1911."

The obvious question is as to the title of R. J. Christy, et al., signers of the deed to B. A. Becker, above referred to. I have examined the abstract of title and find that the same does not disclose a good record title in Elizabeth Christy. The following defects may be noted: No patent from the United States to David Bright is on record (see page 1).

The abstract fails to disclose the manner in which Abraham Crable, grantor of Joseph Clapp in the deed (shown at page 3) acquired title to the premises.

I have been unable to account for all the interests possessed by members of the Clapp family under the deed shown at pages 3 and 4, and the will shown at page 5 of the abstract.

It appears that Joseph Clapp, grantor in the first deed, has thereby parted with the undivided three-fourths of the N. E. quarter of section 14, T. 4 N, range 16 east, in which quarter the land now said to be conveyed to the state is located, and that by the deed (shown at page 4) the remaining one-fourth interest of so much of the quarter section as contained the premises under consideration was conveyed by the said Joseph Clapp to Edmund Clapp. Evidently, then, Edmund Clapp at that time acquired a half interest, and Ambrose Clapp and Robert Clapp each got one-fourth interest in the quarter section, with the exception of the eleven acres with which we are not concerned.

The will of Ambrose Clapp (shown at page 5) gives and bequeaths to Hannah Clapp, his wife, the undivided half of all of his real estate. It does not show whether or not this gift and bequest was intended to be a life estate, but, evidently, it has been treated as such by the parties. The remainder is devised, subject to legacies to Edmund Clapp and Robert Clapp, but it nowhere in the abstract appears that these parties are the same as those of the same name, grantors of the deed shown at page 3. Subsequently, Edmund Clapp acquired all the title of Robert Clapp and all the interest of his brothers and sisters in the property by the deeds shown on pages 6 to 11 inclusive, some of which are defective, but he does not acquire the interest of Hannah Clapp, his mother, if such interest was more than a life estate; nor does he acquire the interest of Clary Ann Clapp, if any, who acquired an undivided half interest in the estate of Elizabeth Burdze. As said interest of Elizabeth Burdze was, however, merely an equitable one, I do not regard this defect as important in any event.

The abstractor has secured several affidavits showing the history of the Clapp family, but the facts above stated are not explained thereby.

The deed of Joseph Birdseye and wife to Elizabeth Christy is for lot No. 658 in the village of Clyde, of the same description as the property thought to be conveyed to the state. The abstract fails to show any record plat of the Birdseye addition to the village of Clyde, being a subdivision of outlot No. 26 in the said village, and unless the approval of Eaton's map of the village of Clyde (referred to on page 16) by the county commissioners suffices, there is no such land of record as inlot No. 658.

Elizabeth Christy, however, had possession of the premises from the year 1872 to her death in 1908—a period of thirty-six years. The abstractor certifies that her possession and that of Joseph Birdseye, her grantor, was at all times adverse, open and notorious, and I assume that such possession in every respect satisfies the requirements of law as to adverse possession.

The affidavit shown at page 19 states that Elizabeth Christy dies intestate and that no administration of her estate was had, and that she left three sons and two daughters. The identity of these three sons and two daughters is not disclosed in the abstract, and, strictly speaking, I am not informed as to whether the grantors in the deed from R. J. Christy, et al., to B. A. Becker are all the heirs of Elizabeth Christy. In order that the title of the state may be as completely shown as possible under the circumstances, additional affidavits should be obtained on this point.

The abstractor's certificate does not show any examination for street assessments or other local improvements; nor any examination in the federal courts for pending suits or judgments. There is a general statement that there is no mortgage uncancelled or other lien of any kind against the property, and I presume that the abstractor's examination extends to judgment records of the county courts.

All of the defects above discussed, excepting the failure of the abstractor to disclose the identity of Elizabeth Christy's heirs, are so remote as to time that the undisputed possession of Elizabeth Christy, and her predecessors and successors in the title, is such as to vest the grantee, B. A. Becker, with a good and sufficient title, by prescription.

It appears that, excepting in the one particular above referred to, the abstractor has made every effort to amplify the records by such affidavits as might be available, and that the title to the premises in question is as good as that of any property in the village of Clyde, or at least in that portion of it which is included in the northeast quarter of section 14.

I therefore advise you that the title of the state of Ohio under the deed of B. A. Becker and wife, above referred to, would be good in all likelihood, and beyond any reasonable doubt by virtue of the operation of the statute of limitation. I cannot advise that the record title is good and I recommend that before the deed is accepted the abstract show definitely the identity of the heirs of Elizabeth Christy.

I herewith transmit the papers submitted to me.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

199.

DEED AND ABSTRACT OF PROPERTIES OF MARY HYMAN, EMMETT SAVAGE AND SADIE C. SAVAGE, AND EMMETT L. SAVAGE, SITUATED IN PAULDING, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, March 27, 1911.

COL. B. L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of several letters from you submitting for my opinion thereon the following papers: Abstract of title to inlot No. 169 and the west 22 feet of inlot No. 170, original plat of the village of Paulding, Paulding county, Ohio; a continuation of said abstract to March 16, 1911; deed from Mary Hyman to the state of Ohio, dated March 13, 1911; deed from Emmett L. Savage and Sadie C. Savage, his wife, to the state of Ohio, dated March 11, 1911; and deed of Emmett L. Savage, et al., to the state of Ohio, dated March 11, 1911.

With respect to the abstract I beg to state that it commences with the dedication of the original town plat of the town of Paulding by George Marsh on his own part and as attorney in fact of J. D. Loomis and J. Watson Riley. This dedication is dated August 10, 1856. The first warranty deed shown by the abstract, being a deed from William Moneysmith and Serena Moneysmith, his wife, to Robert McCreary, is dated May 5, 1856, and filed for record May 13, 1856. This deed purports to convey inlot No. 169 of the original plat of the village of Paulding, Ohio. At that time apparently, there was no such thing as lot 169, nor does the abstract disclose the manner in which William Moneysmith acquired title to the land which subsequently became inlot No. 169.

The foregoing defect is in all probability cured by lapse of time, but I may state at the outset that I cannot hold that the record title of any of the premises under consideration is good, in consideration of the fact that the abstract itself does not commence prior to 1850.

The abstract does not disclose whether or not Henry A. Fergerson, grantor

of Corinthe C. Russell in the deed executed January 19, 1880, was married. Affidavit should be secured as to this fact inasmuch as it is possible that there may be an outstanding inchoate right of dower in the wife of Henry A. Fergerson.

The abstract does not disclose whether Alexander Sankey Latty, grantor of Edwin N. Day, in the deed executed September 5, 1853, was married. The remoteness of this deed, however, is such as to preclude all reasonable possibility of the existence of an inchoate right of dower. If possible, however, affidavit should be secured on this point.

The grantor Will Thompson, in the deed executed June 26, 1897, is probably the same person as Isaac W. Thompson, the grantee in the deed shown on the preceding page. It would be better, however, if this fact were shown by affidavit as the deed of these conveyances is comparatively recent.

Affidavit should be furnished showing that the recital in the deed of March 11, 1911, to the effect that Emmett L. Savage, et al., are the sole and only heirs at law of W. L. Savage, deceased, is true. The same note may be made regarding the recital in the deed of February 24, 1911, of Josephine Powell, et al., to Emmett L. Savage.

The abstractor's certificate discloses that all taxes and special assessments charged against the premises for the year 1910 are paid in full, and the general certificate made by him relates to all possible liens excepting those existing by virtue of pending suits and judgments in federal courts, concerning which no examination has been made.

The deeds submitted are sufficient in my judgment to vest in the state of Ohio a good and sufficient title to the premises sought to be conveyed. In so holding I advise that the failure of the abstract to disclose the history of the title of the premises prior to 1850 may safely be ignored, but that the other defects above noted with the exception of the possibility of suits and judgments in federal courts should be cured in the manner above suggested.

I herewith return the papers submitted to me.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 199.

DEED AND ABSTRACT—LANDS RESERVED BY CONGRESS FOR SUPPORT OF RELIGION IN OHIO COMPANY'S AND JOHN CLEEVE SYMME'S PURCHASES—INTEREST OF CITY OF MARIETTA AND MINISTERIAL TRUSTEES—QUIT CLAIM DEEDS—NECESSITY FOR LEGISLATIVE ACT.

In order to sell the lands reserved for the support of religion in the Ohio Company's and John Cleeve Symme's purchases or any part of such land, the legislature will have to provide by enactment therefor, in order to convey a fee simple title.

Quit claim deeds from the intended beneficiaries, i. e., the city of Marietta and the ministerial trustees, will not cure the title as the title is already in the state of Ohio for certain purposes only.

COLUMBUS, OHIO, March 27, 1911.

The Ohio State Armory Board, Col. Byron L. Bargar, Secretary, Columbus. Ohio.

GENTLEMEN:—I am in receipt of your letter of March 19, 1910, in which you state:

> "1. The city of Marietta did not convey an absolute fee simple estate, having specified that the conveyance was for a certain purpose. The board understands that this objection will be removed by the city of Marietta; probably by a curative deed.
>
> "2. The ministerial trustees, who have, or formerly had, color of title to this land, refuse to quit claim to the state. The board desires a perfect title, so that they can sell the land and the armory for the state, when no longer used for military purposes. If the ministerial trustees have such title as would interfere with the state's title, in the event that the state desires to subsequently sell, the board deems the title objectionable."

I am also in receipt of letters written to you by C. C. Middleswart, secretary of the board of trade of Marietta, Ohio, dated January 25, 1910, and March 8, 1911; also the abstract of title presented to me.

After having carefully examined the letters and the abstract as submitted, I am of the opinion that unless the provisions in Mr. Middleswart's letter of January 25, 1910, on the second page thereof, are complied with, no fee simple title can be acquired by your board. The said provisions are as follows:

> "No. 133. An act to authorize the legislature of the state of Ohio to sell the land reserved for the support of religion in the Ohio Company's and John Cleeve Symmes' purchases.
>
> "Be it remembered, etc., that the legislature of the state of Ohio shall be, and is hereby, authorized to sell and convey, in fee simple, all or any part of the lands heretofore reserved and appropriated by congress for the support of religion within the Ohio Company's (a) and John Cleeve Symmes' purchases, (b) in the state of Ohio, and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall forever be annually applied, under the direction of the said legislature, for the support of religion within the several townships for which said lands were originally reserved and set

apart, and for no other use or purpose whatsoever, according to the terms and stipulations of the contracts of the said Ohio Company's, and John Cleeve Symmes' purchases within the United States:

"Provided, said land, or any part of it, shall, in no case, be sold without consent of the person who may be lessee thereof, nor without the consent of the inhabitants of the township within which any such land may be situated, to be obtained in such manner as the legislature of said state shall, by law, direct:

"And provided also, that in the apportionment of the proceeds of the said fund, each township within the districts of country aforesaid, shall be entitled to such portion thereof, and no more, as shall have accrued from the sum or sums of money arising from the sale of the church land belonging to such township."

It is expressly provided that the legislature of the state of Ohio shall be, and is hereby, authorized to sell and convey, in fee simple, all or any part of the lands heretofore reserved and appropriated by congress for the support of religion within the Ohio Company's and John Cleeve Symmes' purchases in the state of Ohio, and invest the money arising from the sale thereof in some productive fund; the proceeds of which shall be forever annually applied, under the direction of the said legislature, etc.

I am of the opinion that the legislature of the state by enactment will have to provide for the sale of any part of this real estate, and for a sufficient consideration in money, in order to convey a fee simple title.

Regarding the quit claim deeds which are proposed by the city of Marietta and the ministerial trustees, I do not think that they will cure the title; for the state of Ohio is already the owner of the title, but only for the purposes set forth as hereinbefore noted. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

206.

DEED AND ABSTRACT OF PROPERTY OF DUNHAM AND HOPPING SITUATED IN LEBANON, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, March 31, 1911.

The Ohio State Armory Board, Col. Byron L. Bargar, Secretary, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of March 28th, also paper purporting to be an abstract of title signed by W. Z. Roll, attorney at law, Lebanon, Ohio, and you ask for my opinion regarding the abstract of title to the following described real estate:

"Situate in the village of Lebanon, county of Warren and state of Ohio, and being east part of lot No. ninety-two (92) as the same is known and described in the recorded plat of the village of Lebanon, Warren county, Ohio, being eighty-two and one-half (82½) feet front on Broadway and one hundred (100) feet deep, containing eight thousand two hundred and fifty (8,250) square feet."

You also ask what further papers we need for completion of this abstract,

if any, and what title the state may acquire thereunder on proper deed from Dunham and Hopping.

I am returning you herewith the said paper purporting to be an abstract of title as too vague for consideration.

Each conveyance should at least show all the grantors, grantees, kind of deed, consideration, witnesses, description of the property, acknowledgment by the proper officer, record page, and the covenants. Mortgage record should also be more clearly shown.

The abstract should further show the title from the government to Silas Hurin and Agnes Hurin; title from Joseph Canby and wife to Ichabod Corwin, et al., and who all the parties were in this conveyance; Ichabod Corwin, et al., to Dunlevy and who the other parties in addition to Ichabod Corwin are; whether A. H. Dunlevy was married or unmarried; how Sellers and Hagerman acquired title; the proceedings in the estate of John A. Bone; the proceedings in the estate of Jonathan Conroy; and how Appleyard became trustee and what he was trustee for.

Until these matters are properly presented to me I shall be unable to give you a proper opinion on the title to this property.

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

A 228.

DEED AND ABSTRACT OF PROPERTIES OF B. A. BECKER AND WIFE SITUATED IN CLYDE, OHIO—DEFECTS REMEDIED.

The defects of the abstract having been remedied in accordance with the suggestions of a former opinion, title of state would, beyond reasonable doubt, be good not as regards the record but by reason of the adverse possession of former owners.

COLUMBUS, OHIO, April 21, 1911.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title to inlot No. 628 in the village of Clyde, Sandusky county, Ohio, with deeds for same from Joseph Birdseye to Elizabeth Christy, R. J. Christy and others to B. A. Becker, and B. A. Becker and wife to the state of Ohio, and requesting my opinion as to the title of the state under said deed from B. A. Becker and wife as disclosed by said abstract. In a former opinion addressed to you regarding the title of this lot you were advised that the identity of Elizabeth Christy's heirs was not disclosed by the abstract. This difficulty is now remedied by the deed submitted to me in connection with the affidavits attached to the abstract since my former examination thereof.

As stated in the former opinion, the curing of this defect enables me to advise you that the title of the state under the deed of B. A. Becker and wife would, in all likelihood and beyond any reasonable doubt, be good—not as a matter of record, but because of the adverse possession Elizabeth Christy and Joseph Birdseye, to which the abstractor certifies. For a more specific discussion I refer you to my former opinion.

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

246.

ABSTRACT OF TITLE OF PROPERTIES OF PETER B. DUNHAM AND W. H. HOPPING SITUATED IN LEBANON, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, May 9, 1911.

COL. BYRON L. BARGAR, *Secretary Ohio State Arbory Board, Columbus, Ohio.*

DEAR SIR:—In compliance with your request of April 24th, I have examined the enclosed abstract of title to an armory site in Lebanon, Warren county, Ohio, being one hundred feet off the east end of lot No. 92 in the village of Lebanon, with a view to ascertaining the title which the state will acquire under proper deed from Peter B. Dunham and W. H. Hopping.

The said lot No. 92 was subdivided in 1825 while Joseph Canby was seized thereof. The east half was conveyed by deed shown at page 9 of the abstract to Ichabod Corwin. There is nothing shown in the abstract, however, as to how the west half passed from Joseph Canby. The deed shown at page 15 vests in Samuel Perrott the title, if any, of S. Hageman to the said west half, but the exact nature or extent of the grantor's interest is not established.

The same remark may be made with respect to the deed shown at page 14. These matters, however, are of remote date, and Jonathan Conray who secured Samuel Perrott's title has evidently held possession of the property for a period of fifty-one years, so that I assume that the break in the chain of title to the west half of lot No. 92 is at this time unimportant and may be safely disregarded.

The abstractor certifies on page 19 that "George M. Conrey is the heir of Jonathan Conrey, deceased." The grantor in the deed shown on page — is John M. Conrey, so that the memorandum of the abstractor is not clear. Furthermore it would be insufficient to certify that the grantor in the deed is the "heir of Jonathan Conrey, deceased." Affidavits should be filed showing that George M. Conrey is the sole heir of Jonathan Conrey, deceased, and capable of transmitting the entire interest of the said Jonathan Conrey in said lot No. 92. This conveyance is of such recent date that I would not feel justified in approving the title without being satisfied upon this point.

The abstractor certifies on page 20 that he is of the opinion that the title "trustee" appended to the name of the grantee in said deed shown at page 21 is meaningless. If possible it would be well to secure the affidavit of Arthur E. Appleyard showing that he was not a trustee in fact, so that his power to convey by deed shown at page 21 may be established.

The abstractor's certificate at the end of the abstract is quite complete and shows a very thorough examination. Taxes for the last half of the year 1910 are unpaid and a lien, as is a special assessment of $2.10 for sewer.

I am of the opinion that if the grantors in the deed shown at page 19 were at the time seized of the entire interest of Jonathan Conrey, and if Arthur E. Appleyard, "trustee," had the power to convey a fee simple title by the deed shown at page 21 the present title of Peter B. Dunham and W. H. Hopping to the site now proposed to be conveyed to the state of Ohio is good and that the same may be accepted by your board. Before such acceptance, however, affidavits should be furnished showing the facts with regard to the two questions above suggested.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

253.

ABSTRACT OF TITLE OF PROPERTIES OF CHARLES B. UNGER AND JESSIE N. WISEHART' SITUATED IN EATON, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, May 16, 1911.

Ohio State Armory Board, Col. B L. Bargar, Secretary, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of May 5, 1911, enclosing abstracts of lots 273 and 274 in Eaton, Preble county, Ohio, in which you state:

> "I herewith have the honor to transmit abstract of title to lots 273 and 274, of the village of Eaton, Ohio. These lots are to be conveyed to the state of Ohio for an armory site.
>
> "The state armory board requests opinion as to title of said lots in Charles B. Unger and Jessie M. Wisehart as shown by said abstract."

After having carefully examined said contract, I am of the opinion that the following changes should be made:

1. The deed from Cornelius Van Ausdal to Thomas J. Larsh, page 21 of said abstract, should be secured, but if it is lost or destroyed, an affidavit should be made setting up the facts;

2. Also an affidavit by some other heirs showing who all the heirs of said Cornelius Van Ausdel were and their line of descents so that it can be ascertained whether or not all of the heirs of said Cornelius Van Ausdel have quit claimed all their right, title and interest to Charles B. Unger and Jessie M. Wisehart in said property.

With these additions I am of the opinion that the abstract submitted will show a good title in Charles B. Unger and Jessie M. Wisehart subject to the dower interests of John H. Unger, who should join in the deed of conveyance.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

424.

ABSTRACT OF TITLE OF LOT No. 151 IN THE VILLAGE OF SPENCERVILLE, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, October 16, 1911.

HON. BYRON L. BARGAR, *Secretary of Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of the abstract of title of lot No. 151 in the village of Spencerville, Allen county, Ohio, upon which you request my opinion. The abstract as submitted shows numerous defects, and I shall discuss them in their order.

The deed from Evan B. Jones and wife to William Tyler attempts to convey the undivided one-third part of lot No. 151. Reference to the previous deeds shows that said Jones never owned more than one undivided third part of the said land, which he had theretofore conveyed to A. C. Conover (see No. 6).

The abstract fails to disclose that William Tyler owned more than one un-

divided third part of the said premises at the time he attempted to convey one undivided half thereof to Alexander G. Conover (see No. 8).

There is nothing to establish how the grantors in No. 9 acquired title to the land therein conveyed. These defects, in my judgment, are rather immaterial because of the long continued operation of the statutes of limitation. A further search of the records might disclose instruments curing these defects, and I would suggest that such search be made.

The mortgage from A. F. W. Meyers to Johnzy Keeth is not of record and the estate of A. F. W. Meyers does not appear to have been settled. It would seem that the mortgage was adjudicated in proceedings to sell the real estate to pay debts brought by the administrator of the estate of the said Meyers. These proceedings, together with the showing of the settlement of the estate should be abstracted.

There are no liens so far as disclosed by the abstract. No examination appears to have been made for liens of the records of the United States district and circuit courts.

Upon the execution and delivery of proper warranty deed from the present owner and correction of the abstract in the respects indicated, the state will derive good and sufficient title to the land above mentioned.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

425.

ABSTRACT OF TITLE OF PROPERTY OF LOT No. 152 IN THE VILLAGE OF SPENCERVILLE, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, October 17, 1911.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of the abstract of title of the south half of lot No. 152 in the village of Spencerville, Allen county, Ohio, upon which you request my opinion. There are numerous defects in the title as disclosed by the abstract, and I shall discuss them in their order.

The title to this lot runs the same as that of lot No. 151, upon which I have rendered an opinion, down to and including the deed from Johnzy Keeth to A. F. W. Meyers, and the objections therein stated apply equally to the title of the lot mentioned herein.

The premises in question seem to have been sold by the sheriff of the said county to Robert H. Harrison, but the court proceedings of the said sale are not abstracted.

No showing has been made of the settlement of the estate of Richard Slonson and Edward R. Farrington. The deed of the administrator of the Slonson estate conveys one undivided third interest, and so far as the preceding deeds show, Richard Slonson was owner of one undivided half interest, thus leaving one-sixth interest outstanding, which must be satisfactorily accounted for before the state can acquire good title.

Numerous mortgages have been given which are not released. They appear to have been adjudicated in court proceedings, which proceedings should be set out more fully than by mere reference.

There are no liens disclosed by the abstract. No examination appears to have been made in the United States circuit and district courts for liens.

On execution and delivery of proper warranty deed and correction of the abstract in the particulars above mentioned, and especially with reference to the accounting for the outstanding undivided one-sixth interest, I am of the opinion that the state will acquire a good and sufficient title to said property.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

502.

ABSTRACT OF TITLE—JONATHAN BALDWIN'S ADDITION TO TOWN OF BLANCHESTER.

Failure to release dower cured by act of May 31, 1911, 102 *O. L.* 461.
Mortgage liens against said real estate should be specifically noted in said abstract together with date and cancellation of same.

COLUMBUS, OHIO, December 22, 1911.

HON. BYRON L. BARGAR, *Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of December 12, 1911, enclosing the abstract of title and deed for the following described premises:

> "The following described real estate lying and being situate in the county of Clinton and state of Ohio, and further described as follows: Town lot No. one (1) in Jonathan Baldwin's addition to the town of Blanchester which said town lot will be more fully described by reference to the recorded plat of said addition to said town."

I have very carefully examined the deed and find no defects in the same. I have likewise very carefully examined the abstract of title and find the following defect, to-wit:

In the deed of conveyance from Benjamin Baldwin and Martha Baldwin, his wife, to Jonathan Baldwin, dated October 31, 1848, there is no release of dower on the part of the wife, Martha Baldwin. However, I am of the opinion that such defect is cured by an act of the legislature entitled "An act to cure and make valid certain deeds and the record thereof," passed May 31, 1911, and found in 102 Ohio Laws, 461; said act provides as follows:

> "When any deed conveying real estate shall have been of record in the office of the recorder of the county within this state, in which such real estate is situated, for more than twenty-one years prior to the taking effect of this act, and the record thereof shows that there is a defect in such deed, for any one or more of the following reasons: Because the husband did not join with the wife or the wife with the husband in all the clauses of the deed conveying such real estate, but did join with each other in one of them, in the execution and acknowledgment of such deed; or because any grantor in such deed omitted to affix his seal thereto; or because such deed was not properly witnessed;

or because the acknowledgment to such deed does not show that the wife was examined separate and apart from her husband; or because the officer taking the acknowledgment of such deed, having an official seal, did not affix the same to the certificate of acknowledgment; or because the certificate of acknowledgment is not on the same sheet of paper as the deed; or because the executor, administrator, guardian, or assignee or trustee making such deed, signed the same individually instead of in his official capacity; or because the corporate seal of the corporation making such deed was not affixed thereto, such deed and the record thereof shall be cured of such defects, and be effective in all respects as if such deeds had been legally made, executed and acknowledged. Provided, that nothing herein contained shall be construed to affect rights vesting after the record of such defective deed, and prior to the passage of this act, or operate on any suit, or action now pending, or which may have been heretofore determined in any court of this state, in which the validity of the making, execution or acknowledgment of any such deed has been or may hereafter be drawn into question. Any person claiming adverse title thereto shall bring proceedings within one year from the taking effect of this act, if not already barred by limitation or otherwise."

I am further of the opinion that each of the mortgage liens against said real estate should be specifically noted in the abstract, together with the date of cancellation of the same.

For the purpose of correcting said abstract along the line of the last suggestion I am herewith returning the same for that purpose.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Tax Commission of Ohio)

64.

TAXES AND TAXATION—BANKING CORPORATIONS AND ASSOCIATIONS —TAX ON SHARES OF STOCK—STOCKHOLDERS PRIMARILY LIABLE —COLLECTION THROUGH CORPORATION AND ASSOCIATION—APPLICATION TO UNITED STATES BANKS—UNITED STATES AND CONSTITUTIONAL RESTRICTIONS—NON-RESIDENT SHAREHOLDERS.

Section 5408 of the General Code, et seq., provides that the tax upon shares of stock of incorporated banks or banking associations of Ohio shall be assessed against the shareholders and not against the association as such.

Section 5673 of the General Code provides that such bank or association may pay the taxes assessed upon its shares in the hands of shareholders and deduct the amount thereof from dividends or other funds in its possession belonging to such shareholder.

Under this section, the bank cannot be obliged to pay such in the absence of agreement except by garnishee process.

Such a tax is not in conflict with section 5133, et seq., Revised Statutes of the United States, and may therefore be applied to shareholders of United States banks under the permissions and restrictions therein provided for. Nor is it in conflict with section 5219, Revised Statutes of the United States, providing against a taxation "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of each state," for the reason that article 2, section 12, of the constitution making a distinction between "credits" and "investments in stock" sustain section 5327, General Code, providing that debts may be deducted only from "credits" for purposes of taxation.

This tax on national bank shares must be assessed against shareholders who are not residents of the state of Ohio, and the valuation of such shares shall under section 5606, General Code, which is in compliance with section 5219, Revised Statutes of the United States, be placed upon the tax list of the counties in which the respective banks are located.

COLUMBUS, OHIO, January 25, 1911.

To the Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 18th, enclosing a copy of a circular letter addressed to W. C. Rowland by the Commissioner of Internal Revenue of the United States, and a letter addressed to you by the president of the Franklin National Bank of Newark.

These communications both relate to the collection of the tax assessed by the state of Ohio, upon the shares of stock of incorporated banking companies and associations. With respect thereto, you make the following comments and requests:

> "The disposition on the part of the banks appears to be, that if they are not required to pay these taxes as banks, but the payments made by them are for the accommodation of the individual stockholders, they will decline to make such payments in the future; and they suggest the additional question, that, if the stockholders are liable for these taxes and not the bank, non-resident stockholders are not liable.
>
> "If such contention can be maintained, the effect would be to great-

ly reduce the amount of taxes collectible from the banks of the state.

"Insofar as this matter relates to national banks, it involves a consideration of the extent to which the state may tax national banks.

"In view of the importance of the matter, the commission is not disposed to make a ruling without first submitting it to you for an opinion, and the question it desires to submit may be stated as follows:

"(1) Are the taxes assessed against shares of national banks, liabilities of the corporations, as such, and enforceable against the property of the banks, or are they liabilities of the shareholders?

"(2) If liabilities of the individual shareholders, can the tax be assessed against shareholders not residents of the State of Ohio?"

The following provisions of the General Code of Ohio must be considered in connection with these questions:

"Section 5408. All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state, or of the United States, * * * the capital stock of which is divided into shares held by the owners of such bank, * * * shall be listed at the true value in money and taxed only in the city, ward or village where such bank is located.

"Section 5410. There shall be kept in the office, at all times, where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation.

"Section 5411. The cashier of each incorporated bank * * * shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail * * * the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each, and the par value of each share." * * *

"Section 5412. Upon receipt of such report the county auditor shall fix the total value of the shares of such banks, * * * according to their true value in money and deduct from the aggregate sum so found * * * the value of the real estate included in the statement of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier * * * with the valuation of such shares * * * as so fixed by the auditor.

"Section 5413. If a bank fails to make and furnish to the county auditor the statement required, within the time herein fixed, the auditor shall examine the books of the bank; and also any officer or agent thereof under oath, and such other persons as he deems proper, and make such statement. The auditor shall have like powers, and the probate judge of the county shall exercise like powers and perform like duties in aid of the auditor * * * as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any person has failed to make a return, or has made a false return for taxation. The statement so made out by the auditor shall stand as the statement required to be made by the cashier.

"Section 5414. A bank officer who fails to make out and furnish to the county auditor the return required by section fifty-four hundred and eleven, or wilfully makes a false statement on such return, shall forfeit not more than one hundred dollars. * * *

"Section 5602. The governor, auditor of state and attorney general shall constitute a board of equalization of the shares of incorporated banks. * * *

"Section 5604. The board shall hear complaints and equalize the value of the shares and property, representing capital employed. * * * If in the judgment of the board * * * the aggregate value of all the bank property so reported to the board by the county auditor is not its true value in money, it may increase or diminish the value of the shares and property representing capital employed by such a per cent. as will equalize each to their value in money.

"Section 5606. The auditor of state forthwith after such equalization is made, shall certify to the auditor of the proper counties, the valuations, as equalized, of the shares of * * * banks situated in such counties, which valuation shall be placed upon the proper tax duplicate."

(Sections 5602 to 5606, inclusive, providing for and defining the powers and duties of the annual state board of equalization for banks were repealed, 101 O. L., 399-430, section 123; but the powers and duties created and defined under said sections were by section 115 of the same act, 101 O. L., 425, imposed upon and vested in the tax commission of Ohio.)

"Section 5672. Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien *on such shares* from the first Monday of May in each year until they are paid. If such taxes are not paid at the time required by law by a *shareholder*, and after notice received of the county treasurer of the non-payment thereof, the cashier * * * of such bank or banking association shall not transfer or permit to be transferred the whole or any portion of such stock until the delinquent taxes thereon * * * are paid in full. No dividend shall be paid on stock so delinquent so long as such taxes, * * * or any part thereof remain due and unpaid.

"Section 5673. Such bank or banking association *may* pay to the treasurer of the county in which it is located, the taxes assessed upon *its shares, in the hands of its shareholders respectively* * * * and deduct the amount thereof from dividends that are due or thereafter become due on such shares, or from any funds in its possession belonging to such shareholder."

It is first to be observed, regarding these provisions, that they deal with all incorporated banks in the same manner. The law does not provide one method of procedure with respect to the assessment and collection of a tax upon the shares of stock of state banks, and another with respect to the taxes assessed and collected from national banks. It is to be presumed, therefore, that, if the act is to be given any certain construction on account of its applicability to national banks, that same construction will govern its application to all other incorporated banks.

It has now become well settled that, in the absence of specific permission on the part of congress, a state may not, either directly or indirectly tax an agency of the federal government or any capital employed or invested therein. (Mc-

Cullouch vs. Maryland, 4 Wheaton, 316; Osborne vs. Bank of the United States, 9 Wheaton, 738.) Laws of the kind now under consideration, therefore, are to be upheld, if at all, by recourse to some such federal legislation, and their provisions if doubtful, must be construed in the light of such legislation.

The national bank act of the United States as revised, constitutes section 5133, et seq., Revised Statutes of the United States. Section 5219 of said act provides as follows:

> "Nothing herein shall prevent all the *shares* in any (national banking) association from being included in the valuation of the personal property of the *owner or holder of such shares*, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing *all the shares* of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and *that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere.* * * *"

It is manifest from the language of the above quoted federal law that no authority or permission is thereby granted to any state to impose a tax upon a national banking association *as such*, nor does it provide for an assessment of taxes upon the shares of stock in such an association for which the *association itself shall be solely liable.* (Radley vs. People, 4 Wallace, 459; Bank Tax Cases, 3 Wallace, 573.) On the other hand, however, it was held early in the history of the national banking act that a state in collecting the taxes assessed against the shares of stock of a national bank might make the bank or its officers primarily liable therefor, as agents of the stockholders. First National Bank vs. Commonwealth, 9 Wallace, 353. The statute of the state of Kentucky, under review in this case, imposed a tax on "bank stock or stock in any moneyed corporation of loss and discount, of fifty cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies," and provided that "the cashier of a bank, whose stock is taxed, shall, on the first day of July in each year pay into the treasury the amount of tax due thereon." Mr. Justice Miller in delivering the opinion of the court employed the following language:

> "We entertain no doubt that this provision (referring to the first of the two provisions above quoted from the Kentucky statute) was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collected from individuals. * * *
>
> "But it is strongly urged that to be deemed a tax on the *capital of the bank*, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider; but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on those shares. It has been the practice of many of the states for a long time to require of its corporations, thus to pay the tax levied on their shareholders. * * * In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxa-

tion. We are, therefore, of the opinion that the law of Kentucky is a tax upon the shares of the stockholders. If the state cannot require the bank to pay the tax on the shares of its stock it must be because the constitution of the United States or some act of congress forbids it. There is certainly no express provision of the constitution on the subject.

"But it is argued that the banks, by instrumentalities of the federal government * * * cannot be subjected to such state legislation. The principle * * * has its limitation, a limitation growing out of the necessity on which the principle itself is founded. What limitation is, that the agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. * * * It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest possibility of this in their being required to pay the tax which their stockholders owe to the state * * * when the law of the federal government authorizes the taxes.

"If the state of Kentucky had a claim against a stockholder of the bank who was a non-resident of the state, it could undoubtedly collect the claim by legal proceeding in which the bank could be attached or garnisheed and made to pay the debt out of the means of its shareholders under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it. * * *

"We are of opinion that, while congress intended to limit state taxation to the shares of the bank as distinguished from its capital, and to provide against a discrimination in taxing such bank shares * * * it did not intend to prescribe to the states the mode in which the tax should be collected. * * *"

This case, which is the leading decision upon the point involved, establishes the principle that a state may make a national bank primarily and directly liable for the payment of the tax on its shares, although it may not assess the tax against the bank *as such*.

Statutes similar to the Ohio statute above quoted have been enacted in substantially all the states of the Union. Comparison of such statutes and the decisions construing some with the Kentucky statute involved in the case last above cited and quoted from, on the one hand, and with the Ohio statute above quoted, on the other hand, is interesting and profitable in the solution of the problem under consideration.

In Sumter County vs. National Bank, 62 Ala., 464, a leading case among such decisions, it was held that, in the absence of a specific provision compelling banks to pay taxes on their shares, such taxes could not be collected therefrom, but must be collected from the shareholders personally.

In Hirshire vs. First National Bank, 35 Iowa, 273, the action was brought by the county treasurer against the bank *as such* for taxes and penalties due from non-resident shareholders. It was averred that the shares had been legally assessed for taxation, and that the holders had refused to pay. The statute of Iowa involved in the case, provided a method of collection, different from both the Kentucky statute above quoted, and from the Ohio statute. It provided in part that:

"For the purpose of securing taxes assessed upon said shares, each banking association shall be liable to pay the same, as the agent of each of its shareholders, under the provisions of section 725 of the revision of 1860; and it shall be the duty of the association to retain so much of any dividend or dividends belonging to any shareholder as shall be necessary to pay any taxes levied upon his or her shares."

Said section 725 of the revision of 1860 provides:

"Any person acting as the agent of another and having in his possession or under his control * * * any money, credits, * * * or properly belonging to such other person, with a view of investing * * * the same for pecuniary profit, shall be required to list the same. * * *"

In sustaining a demurrer to the petition, the supreme court of Iowa used the following language (page 275):

"It will be observed upon the bare reading of our statute that it does not, like the Kentucky statute * * * make the banking association directly liable for the taxes levied upon the shares. * * * The banking association could only be made liable, when it had the money, property or credits of its shareholders *under its control*, or when it retained or failed to retain dividends. * * *

"The shares of the banking association are the property and under the control of the shareholders * * * not * * * of the banking association.

"In brief, our view of the statute is, that it effectuates a statutory garnishment of the bank, to secure the payment of the tax due from its shareholders, * * * whereas, the Kentucky statute makes the bank liable absolutely for the taxes upon shares. If that is better than ours it is for the legislature and not for us to enact it here."

In First National Bank vs. Fancher, 48 N. Y., 524, it is held that in the absence of a statute authorizing a levy upon the property of a bank, a collector might levy only upon the property of the shareholders.

In all of the foregoing cases, the Kentucky statute and the decision thereunder, in Commonwealth vs. Bank, supra, were distinguished and regarded antithetical to the statutes under consideration. On the other hand, however, the statutes of many states have been drawn similarly to that of Kentucky, and so long as the assessment is in terms against the stockholders, direct and compulsory collection from the bank under such statutes is upheld. Thus, in Mechanics National Bank vs. Baker, 65 N. J. L., 113, the court upheld a statute of New Jersey, providing that it should be the duty of each bank to retain and pay the amount of taxes assessed to each shareholder out of the dividends, and that "in case said owner * * * shall be a non-resident of this state, then, and in that case, such banks shall be assessed to the amount of such shares as owned or held by non-residents." In construing this statute the court did not regard the assessment provided for in case of non-residents as a direct assessment against the bank, and for which the bank would be ultimately and solely liable, but rather as creating a primary liability against the bank, leaving it "to charge against each non-resident shareholder his true proportion" thereof.

The statute of Missouri makes the bank primarily liable, though the assess-

ment is against the shareholder. Lyonberger vs. Rowse, 43 Mo., 67, Springfield vs. National Bank, 87 Mo., 441.

The statute of the state of Washington, construed and upheld in First National Bank vs. Chehalie County, 166 U. S., 440, assessed a tax against "the aggregate amount of capital, surplus and undivided profits" of all banks; and Mr. Justice Shires in delivering the opinion of the court plainly indicates that "if this section stood alone there might be ground for the contention that it contemplates taxation of the capital of the bank." The constitutionality of the law was established because another section provided that "each bank and banking association shall be liable to pay any taxes hereafter assessed against them, as the agent of each of its shareholders, owners or owner, under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account or to the accounts of such shareholders, owners or owner in proportion to their ownership."

From all the statutes involved in the cases above cited certain types may readily be distinguished, as follows:

1. Statutes making the bank liable for the entire aggregate amount assessed against the holders of its shares of stock, as agent of such holders, and regardless of its possession of any funds or property of such shareholders, or its present or future liability to them for dividends. Under statutes of this type, of course, the tax may be collected directly from the bank.

2. Statutes making the bank liable to pay the tax assessed against its shareholders in the event that it owns or controls property of such shareholders, or owes or will owe dividends to them. Under such statutes the liability of the bank to pay the tax is contingent upon the existence of such facts and cannot be simply and directly enforced.

3. Statutes which do not require the bank to pay the tax assessed against its shares of stock. In such cases the collection of the tax from the bank cannot be enforced.

Before comparing the Ohio statute with the statutes above described and classified, it is perhaps proper to state that in some states, laws making banks liable for the amount of the taxes assessed against their shareholders, have been held unconstitutional as per se discriminatory under the first restriction set forth in section 5219 of the Revised Statutes of the United States, above quoted; that is to say, in states wherein debts are permitted to be deducted from personal property or investments, such a method of collection, affording as it does no opportunity for any such deduction on the part of the individual stockholders, liable in theory for the taxes, subjects such stockholders in effect to "tax * * * at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," as prohibited by said section 5219, Revised States of the United States.

National Bank vs. Richmond, 42 Federal, 577; National Bank vs. Fisher, 45 Kansas, 726.

In Ohio, however, such a discrimination cannot arise, because for purposes of taxation, a distinction is made by article 2, section 12, between "credits" and "investments in stock;" and the general assembly of this state has provided in section 2730, Revised Statutes, section 5327, of the General Code, that debts may be deducted only from credits for purposes of taxation. It is therefore held that holders of national bank stock may not deduct their bona fide debts from the value of such shares in listing for taxation. Chapman vs. National Bank, 56 O. S., 328.

A careful examination of the cases of Supervisors vs. Stanley, 105 U. S. 305, Mills vs. Exchange Bank, 105 U. S. 319, Whitbeck vs. Mercantile National Bank, 127 U. S. 193, will disclose that the distinction drawn by the Ohio constitution

and statutes between "credits" and "investments in stock" did not exist in New York, and apparently, this point was not presented in argument in the Ohio case, so that the limitations of the supreme court with regard thereto are inapt. By the weight of authority in other cases, there is no discrimination against moneyed capital by reason of the fact that the Ohio statutes do not permit debts to be deducted from investments in stocks, and the Whitbeck case if reviewed by the supreme court in this respect, would in my judgment, be limited or reversed.

In order properly to answer your question it becomes necessary to compare the Ohio statute above quoted with the statutes of other states above discussed and classified. The scheme of taxation provided for by the Ohio statute above quoted, clearly indicates that the assessment is upon the shares of stock, and not against the bank; and as above suggested, if this were not the case the act would probably be unconstitutional. Has the general assembly then exercised the right of the state to compel collection of the tax thus assessed from the bank?

Section 5403, *et seq.*, above quoted, provides a method of valuation of shares of incorporated banks. The duties therein created are imposed upon the officers of the bank, and measured by the decisions above quoted, these provisions are of course reasonable and valid. Indeed they add nothing with respect to national banks, to the express provision found in section 5210, Revised Statutes of the United States, which are in part as follows:

> "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, *and the officers authorized to assess taxes* under state authority."

Sections 5407 et seq., however, fall short of authorizing an assessment against the bank, or of imposing any liability taxes upon the bank or the officers thereof. They simply *require the bank to make return for its shareholders.*

That the taxes upon bank shares are assessed upon the shares in the hands of the stockholders, and not upon the bank is clear from reading section 5672 above quoted. The taxes are described as "taxes assessed on shares of stock;" they are made "a lien on such shares." It is clearly inferred that in the first instance they are to be paid by the shareholder himself by the language "if such taxes are not paid at the time required by law by a shareholder * * * the cashier or other officer * * * shall not transfer * * * any portion of such stock." * * *

What remedy then, have the taxing authorities in case a tax assessed upon the shares of stock is not paid by the shareholders and becomes delinquent? Section 5672 provides for notice of the non-payment of such taxes to the cashier or other officer of the banking association. This notice, however, does not seem to fix upon the cashier or other officer, or upon the bank any liability either primary or secondary, for the payment of the taxes and penalties; its effect is, at the most, to prevent the transfer of the stock upon which taxes have not been paid, and the payment of dividends thereon as long as the taxes and penalties remain unpaid. No remedy is thus afforded by statute to the state or its taxing officers whereby they may enforce performance of these obligations; at any rate, the statute does not create any obligation on the part of the bank to pay from the dividends thus withheld, the amount of the tax.

It is true that section 5673 provides for the payment of the taxes assessed

upon the shares of a bank by the bank itself; however, this section does not create a duty, it affords a right; the language is, "such bank or banking association *may* pay * * * the taxes assessed upon its shares in the hands of its shareholders * * * and deduct the amount thereof from dividends, etc." * * * The sole effect of this statute is to authorize a bank as against its shareholder to pay the taxes on their shares and to deduct the same from dividends or other funds in its possession. It confers no right upon the taxing power as against the bank.

That the foregoing is the correct interpretation of the Ohio statute is, it seems to me, clear from the plain language thereof. This interpretation, however, was adopted in Miller, Treasurer, vs. First National Bank, 46 O. S. 424. This was an action by the treasurer of Hamilton county against the bank. The petition alleged that the bank had made for five years previous what purported to be true returns of the resources and liabilities of said bank, and had stated on several of its returns that it would pay the taxes for and on behalf of its stockholders; that the returns so made were afterwards discovered to have been false, whereupon the county auditor proceeded to correct the same and to place upon the duplicate of the county as omitted taxes the differences between the aggregate values of the items of the resources of the bank as returned by it for the several years, and the true values thereof; that such assessment on the duplicate of the county was in the name of the bank; and that the bank refused to pay taxes thereon.

The allegation was further made that the bank "at all times during the years above mentioned had in its possession, and now has, money and property belonging to its stockholders more than sufficient to pay all the sums of taxes as aforesaid due from the said stockholders, but instead of applying the same or any part thereof, to the payment of said taxes, has paid over large portions of the same as dividends to the said stockholders, although the defendant has been repeatedly notified by the treasurer of said county, of the non-payment of said taxes; and notwithstanding the premises, the defendant has during all of said years been transferring and permitting to be transferred * * * the stock thereof." * * * The prayer was not for a judgment against the bank as such, for the amount of the alleged delinquent taxes, but for an accounting of the moneys and property in defendant's possession belonging to the several stockholders, for an injunction restraining the defendant from paying dividends or making transfers during the pendency of the action, and for the payment of the taxes out of the money and property of the stockholders, in possession of the defendant bank.

The court could have disposed of this case upon the ground taken by it, that the county auditor was without authority to avail himself of the statutory machinery for placing omitted taxes on the duplicate in such a case. (See page 432.)

However, the decision of the court which affirmed the judgment of the lower court, sustaining the demurrer to the petition as above drawn, was placed upon broader grounds. The following language from the opinion is pertinent:

> "* * * There is but one question in the case * * * and that is, whether the shares of stock in a national bank are to be listed for taxation in the name of the shareholders or in the name of the bank. The power of the state is to impose any tax upon such shares is conferred by the statute of the United States, section 5219, Revised Statutes. * * * The property of a national bank other than its realty cannot be subjected to taxation by a state or any of its subdivisions. The power conferred by the section just referred to, is 'to include the

shares' in the valuation of the personal property of the 'owner' or 'holder' of such shares. A bank does not own the shares of its capital; it owns the capital and the shares are owned by its stockholders. * * * It is the latter that may be taxed, and not the former. * * * If all the shares of the bank were assessed for taxation in its name and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank. (This does not seem to be the established weight of authority as illustrated in the cases above cited and quoted from.) * * * It seems then, that shares in a national bank must be assessed for taxation in the name of the owners of them and not in the name of the bank itself. * * *

"Nor do the statutes of the state * * * contemplate * * * that such stock should be listed in the name of the bank. They contain special provisions for the listing of the shares of the stockholders of incorporated banks. * * * This is done by the auditor of the county. * * * To facilitate the enlistment of the stock and its valuation for taxation, the bank is required to keep in the office where its business is transacted a full and complete list of the names and residences of its stockholders and the number of shares held by each. * * * And then annually, * * * the cashier is required to make out and return to the auditor a duplicate report of 'the resources and liabilities' of the bank 'together with a full statement of the names and residences of the stockholders therein with the number of shares held by each and the par value of each share.' * * * This constitutes the listing of the stock for taxation, and is necessarily intended to be done in the names of the owners of it. * * *

"Again, unless the shares are assessed for taxation in the name of the shareholders there would be no opportunity given a shareholder to have a deduction in his favor for any bona fide indebtedness on his part; and to which he would be entitled under the decisions in Whitbeck, Treasurer, vs. Mercantile National Bank, 127 U. S. 193-199, Hills vs. Exchange Bank, 105 U. S. 319, Supervisors vs. Stanley, Id. 305. (These cases are distinguished, supra.)

"But if any doubt remained upon this point, it is certainly removed by the provisions contained in section 2839, Revised Statutes, section 5672, General Code, above quoted.

"Each and every provision of this section contemplates an assessment upon the shares in the name of the shareholder. * * * The lien is fastened upon the shares, and in case of the non-payment of the tax 'by any shareholder' the consequence is visited upon *him*, and no one else. It is made unlawful for the cashier or any officer of the bank, on notice, to transfer or permit the transfer of his stock, or the payment of any dividends to him so long as the tax remains due and unpaid.

"This view does not interfere with any arrangement by which a bank may, under the provisions of section 2840, Revised Statutes (section 5673, General Code, above quoted), *as a matter of convenience to its shareholders and the public, agree* to pay the taxes levied upon the stock of its shareholders and deduct the same from dividends or other funds in its hands belonging to them. * * * An agreement by the bank in such case to pay the taxes assessed against its shareholders might be enforced as any similar agreements. * * *"

It follows from this decision that in Ohio the bank may not be held primarily or otherwise liable for the payment of taxes assessed against its shareholders

unless it agrees to pay them; and in such case the remedy of the public against the bank is not by original levy and assessment, but for the enforcement of a contract.

It is also clear from this decision that in case the bank should not choose to agree to pay taxes for its shareholders—which are purely voluntary on its part—no action of any sort could be maintained against it without at least enjoining the delinquent shareholders. It is possible that the remedies provided by sections 2653 and 2655 of the General Code, which are in effect that, the treasurer may collect personal taxes by distress, and in case property cannot be distrained may attach moneys and credits due to a non-resident taxpayer by garnished process issued against the person from whom the credits are due are available to compel the cashier of the bank to pay taxes on non-resident stockholders out of unpaid dividends due to such stockholders, or out of property of such stockholders in the possession of the bank. I do not find any case in this state involving such a procedure. Be that as it may, collection of the tax by such a process would be cumbersome at best.

From all the foregoing, it follows that under the present Ohio statute, the taxes assessed against the shares of national banks are not liabilities of the corporations *as such*, and not enforceable against the property of the banks. They are liabilities of the shareholders and if unpaid when due, the bank can be made liable, if at all, only by garnishee process under section 2605, General Code. Under the federal law it would be competent for the general assembly to provide that the primary liability for the taxes should rest upon such banks, but it has not done so.

With respect to your second question I beg to state that the tax on national bank shares, not only may be assessed against shareholders not residents of the state of Ohio, but must be so assessed. The Ohio statute, section 5606, General Code, contemplates that the valuation of shares of capital stock of such banks shall be placed upon the proper tax list of the counties in which the banks are located, and must be construed as a compliance with section 5219, Revised Statutes of the United States, which provides that such shares of stock "owned by non-residents of any state shall be taxed in the city or town *where the bank is located and not elsewhere.*"

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

111.

TAXES AND TAXATION—PUBLIC UTILITIES—SPECIFIC ARTICLES OF PROPERTY—VALUATION PROPORTIONATE TO ENTIRE CORPORATION VALUATION—CORPORATION ENGAGED PARTLY IN PUBLIC UTILITY AND MAINLY IN OTHER BUSINESS.

The rule of taxing public utilities in Ohio contemplates that the value of specific properties of the business shall be valued at a proportion to the entire enhanced property valuation of the corporation which the independent property value bears to the entire independent property value. Such a method of valuation distributes the enhancement to value, afforded by reason of the good will of a business, among the various taxing districts or jurisdictions having control of specific parts of the corporation property.

Under the Ohio statute, every corporation which may be classed as a public utility, must report to the tax commission all its real and personal property, all its credits and moneys and all facts required by law and the commission. The commission from the information in this manner and otherwise acquired, shall list for taxation under the head of public utility, or other specially designed class of business, only such properties as are actually used in a public utility or other specially classed style of business.

COLUMBUS, OHIO, February 11, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 28th, enclosing copy of letter addressed to you by the president of the Ely Realty Company, of Elyria, Ohio, who states that that company is incorporated for the principal purpose of owning and managing certain real estate; that among the real estate owned by the company are certain business blocks; that on the first floor of one of said business blocks is a power plant producing electric current; that the electric current so produced is used primarily to furnish light and other electric power to the buildings owned by the company; but that a relatively small surplus of such electric current is sold by the company to outside consumers.

It is, inferentially at least, acknowledged that such sale of surplus current constitutes the company a public utility within the meaning of the act of May 10, 1910, but the president wishes to be informed as to the real estate and the amount of the personal property, moneys, credits and receipts of the corporation which shall be reported to the tax commission for the purpose of valuing said personal property and moneys and credits for taxation under sections 72, etc., of said act.

In connection with said letter you request my opinion upon the following more general question:

> "What property is to be considered in determining the value of the property of a public utility; is it only that part devoted to the public utility business, or is it the entire property of the company, where it is an incorporated company?"

The scheme of taxation involved in this question is embodied, as you state, in sections 72, etc., of the act of May 10, 1910, 101 O. L., 399-414. I quote some of the provisions of these related sections.

Section 72:

"Between the first and fifteenth days of January * * * a statement shall be delivered to the (tax) commission * * * by each public utility, as defined in this act * * * with respect to such utility plant or plants, and all property owned or operated, or both, by it wholly or in part within this state. * * * Such statement shall contain: * * *

"6. The number of shares of the capital stock.

"7. The par value and market value of * * * of its shares of stock; * * * the amount of capital stock subscribed, and the amount actually paid in.

"8. A detailed statement of the real estate owned by the company in Ohio, where situate, and the value thereof as assessed for taxation, making separate statements of that part *used in connection with the daily operations of the company*, and that part used otherwise if any such there be.

"9. A full and correct inventory of the personal property, including moneys, investments and credits, owned by the company in Ohio on the first day of the month of January in which the statement is made, where situate, and the value thereof, making separate statements of that part used in connection with the *daily operations of the company.*

"10. The total value and general description of the real estate owned by the company and situate outside of Ohio * * * making separate statements of that part used in connection with the daily operations of the company. * * *

"11. A description or inventory and the total value of the personal property owned by the company and situate outside of Ohio * * * making separate statements of that part used in connection with the daily operations of the company. * * *

"12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts for the preceding calendar year from any and all sources, and the gross expenditures for the preceding calendar year, giving a detailed statement thereof under each class or head of expenditures.

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

"15. In addition to the facts and information herein specifically required to be given, such statement shall contain any and all other facts and information which the commission may require. * * *"

Section 73:

"* * * The commission shall ascertain and assess at its true value in money all the property in this state of each such public utility. * * * In determining the value of the property of such public utility, to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of the said public utility within this state, in the proportion which the value of such property bears to the value of the entire property of the said public utility. The property of such public utilities to be so assessed by the commission, shall be all

the personal property thereof, *which shall include all real estate necessary in the daily operations of the public utility and the money and credits within this state.*"

Section 76:

"* * * The county auditor shall place the apportioned value on the tax duplicate and taxes shall be levied and collected thereon, in the same manner and as the same rate as other personal property in the taxing district in question."

Section 79:

"The commission shall apportion the value of the property of * * * public utilities assessed according to the provisions of this act, as follows:

"(a) When all the property of said utility is located within the limits of a county, the assessed value thereof shall be apportioned by the commission between the several taxing districts therein, in the proportion which the property located within the taxing district in question bears to the entire value of the property of said public utility as ascertained and valued as herein provided, so that, to each taxing district there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value thereof * * *."

Section 121:

"The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers * * * and in this act referred to as * * * electric light companies * * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

Section 46:

"* * * Any person or persons, firm or firms, joint stock association or corporation * * * engaged in the business of supplying electricity for light, heat or power purposes, to consumers within this state is an electric light company * * *."

The above scheme of taxation is substantially the same as that incorporated in sections 28 to 38 inclusive of the same act. These sections constitute a reenactment of sections 5446 and 5463 inclusive of the General Code, sections 2777 to 2780 inclusive of the Revised Statutes, which sections provide for the valuation and assessment for taxation of the property of express, telegraph and telephone companies, and were originally and popularly knows as the Nichols law.

I am of the opinion that the general assembly in applying to the taxation of property of other public utilities, as defined by it, the scheme of taxation which had previously been in operation with respect to express, telegraph and telephone companies, intended to apply to such public utilities the rules and principles embodied in the existing law respecting express, telegraph and telephone companies. That is to say, the purpose of the act of May 10, 1910, in

this respect, may be aptly stated as being to extend the Nichols law principles and practices to the assessment of the property of all public utilities. I think it is fair, therefore, to apply to sections 72, etc., of said act any construction and principle that may have become established with reference to the meaning and application of the Nichols law.

The Nichols law embodied an idea in taxation which the state of Ohio was early to adopt and which has been adopted in many of the states of the Union. The principle of the statute has been most aptly termed "the unit rule or rule of entirety." Judson on Taxation, section 239.

This rule as illustrated in the sections of the law above quoted contemplates that the value of a business as an entirety shall be determined by the taxing authorities, and such entire value apportioned among the various principal properties of the business, so to speak, in the same proportion that the independent value of each such physical property bears to the aggregate independent values of all physical property connected with the business. It is a way of taxing as property the good will and earning power of an enterprise as a whole by considering an apportioned part of its value as an enhancement to the value of specific property used in connection with the enterprise.

The foregoing is an attempt to state the fundamental principle upon which statutes like that under consideration are based. The principle is fully and clearly discussed in the Ohio case of State ex rel. vs. Jones, Auditor, 51 O. S. 492-512. Therein the court in upholding the validity of the Nichols law uses the following language, per Dickman, J.:

> "If by reason of the good will of the concern of the skill, experience and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, *considered as an entire plant*, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements directly entered into its value. * * *
>
> "It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted that by care in the selection of tenants, and in the preservation of the reputation of the buildings, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building."

The clearest and most satisfactory discussion of the nature of such a scheme of valuation, however, is found in the two cases of Adams Express Company vs. Ohio State Auditor, 165 U. S. 194 and 166 U. S. 183.

In the first case Mr. Chief Justice Fuller in delivering the opinion of a majority of the court used the following language:

> "As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property in the several states through which their lines or business extended might be valued as a unit for the purpose of taxation, taking into consideration the uses to which it was put and all the elements

making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state without violating any federal restriction. * * * The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the *combination of the means* by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. * * *

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture than that of railroad, telegraph and sleeping car companies, to roadbeds, rails and ties, poles and wires or cars. *The unit is a unit of use and management*, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio, *possessed a value in combination and from use in connection with the property and capital elsewhere*, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

"We repeat that while the unity which exists may not be a physical unity, *it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case resulting from the very nature of the business.*

"The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two, but the work of each is separate. *The value of the factory in itself is not conditioned on that of the store*, or vice versa, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental, and growing out of unity of ownership. But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. *It constitutes but a single plant, made so by the very character and necessities of the business.*"

The chief justice quotes with approval the decision in State ex rel. vs. Jones, *supra*, and the decision of Judge Lurton in the case of the circuit court of appeals which embodies the same reasoning. In passing the court used the following significant language:

"Special circumstances might exist * * * which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is *no showing of any such separate and distinct property which should be deducted*, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, *the presumption is that all their property is directly devoted to their business*, which being so, a fair distribution of its aggregate value would be upon the mileage basis."

On rehearing of the same case reported in 166 U. S., *supra*, Mr. Justice

Brewer delivered the opinion of the court, and in so doing used the following language:

> "Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership but in a unity of use, there is not infrequently developed a property intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?
>
> "The first question to be considered therefore is whether there is belonging to these express companies intangible property. * * * A property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that is something of no value, is to insult the common intelligence of every man. * * *
>
> "Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable."

It is clear from the foregoing authorities that in a statute like the one under consideration, a provision requiring a taxing authority to ascertain an aggregate valuation of all the personal property of a company engaged in a certain business, including all moneys and credits used in connection with the business, and all real property used in the daily operations of the company, is to be construed as empowering such authority to value for taxation such property only as, though owned by the same person or corporation, is devoted by its owner to a common use. That is to say, valuation by the unit rule is not justified on the ground of unity of ownership alone, and, therefore, a statute will not be construed to mean that all the property owned by a corporation engaged in a certain business is to be taken into consideration for the purpose of determining the value of its property as a company engaged in such business. As the court indicates, the presumption is that a *corporation* is engaged in but one business, and this is particularly true of most corporations formed under the laws of Ohio which provide that corporations may be formed for *any purpose* for which individuals may lawfully associate themselves. However, the courts recognize the possibility of a corporation owning property which is not used in connection with that portion of its business, the value of which in the aggregate is to be determined under such laws, and it is clear that if there is such property it must not be taken or included in the property valued by the taxing authority. It neither contributes to the aggregate value of the remainder nor does it assure any enhancement of the value of the other items of tangible property owned by the corporation because of the good will of the business.

Reading all of the sections of the specific act under consideration together, I am of the opinion that section 72, above quoted, requires every corporation which has acquired the status of a public utility to report to the tax commission all of its real estate, all of its personal property, all of its moneys and credits and all of the other facts required by law and by the tax commission.

This answers the specific question presented by the Ely Realty Company, but the fact that all of the property of the company, and all of its receipts must be reported to the tax commission does not lead to the conclusion that the tax commission may take all of such property into consideration in determining the value of the property of the public utility. While the related sections do not expressly so state, yet in themselves read together, they indicate with a fair degree of certainty that the thing to be valued is what may broadly be designated as the *plant* of the public utility. This conclusion follows ordinarily from the principles laid down in the above quoted authorities.

The value of the entire plant is reached by considering in connection with other things the value of each parcel or article of tangible property used, operated or managed as a part of the business which constitutes the corporation a public utility.

In my opinion then, the general question which you submit must be answered as follows: If from the evidence before the tax commission the commission finds that a corporation owns property, the use of which is entirely disassociated from the business which constitutes the corporation a public utility, and that such property so independently used is devoted by the corporation to the accomplishment of a purpose which, under its corporate powers or otherwise, is paramount to the public utility business in which it is engaged or independent from it, the commission should not regard such property so owned as a part of the property to be used for taxation by it; nor should the commission in such event take the independent value of such property into consideration as an element in determining the aggregate value under the unit rule of the public utility plant owned and operated by the corporation. If, on the other hand, it appears from all the evidence at the command of the commission that a corporation has been incorporated for the principal purpose of engaging in a business which constitutes it a public utility within the meaning of the act of 1910, then the commission may fairly presume that all property, both real and personal, owned by the corporation is used by it for the purpose of furthering such principal business; that is to say, being a corporation, its capital is presumed to be vested so as to further one or more specific enterprises, and any property in which such capital is invested may, in the first instance, at least, regarded as a part of the "plant" of the company. Upon good cause appearing, however, the commission may lawfully disregard property owned by a corporation engaged principally in such a public utility business if it is satisfied that the use of such property, whether lawful or ultra vires, is entirely independent of such public utility business.

In this connection it is to be noted that section 73, above quoted, seems to imply that real property, at any rate, may be owned by an individual or corporation which has acquired the status of a public utility without being used in connection with the business which constitutes such person or corporation a public utility.

It is believed that the above rule is as definite as the nature of the case will permit. Its application to specific facts, including those submitted by the Ely Realty Company is, of course, a matter within the province of the tax commission.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

133.

TAXES AND TAXATION—NATIONAL BANK SHARES—NO DISCRIMINATION IN OHIO IN FAVOR OF OTHER MONEY CAPITALS SIMILARLY INVESTED.

As stated in a former opinion, the Whitbeck case, 127 U. S., held that under the circumstances of that case, if debts were not permitted to be deducted from investments in stocks a tax on national bank shares by a state would act as a discrimination against such investments as compared with other invested moneyed capital.

In Ohio, a different situation is presented as was stated in the former opinion and as was actually recognized in 175 U. S. 205.

COLUMBUS, OHIO, February 24, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In my opinion to you, under recent date, dealing with the question of the construction of our statutes relating to the taxation of shares of stock of national banks, I expressed the view that, should the decision of the supreme court of the United States, in the Whitbeck case, 127 U. S., be reviewed by that court, it would be limited. That decision in part was to the effect that if debts were not permitted to be deducted from investments in stock of national banks by the scheme of taxation embodied in the statutes under consideration in the opinion, that would amount to a discrimination against capital invested in such shares and in favor of other moneyed capital similarly invested. I cited the case of First National Bank vs. Chapman as embodying the true Ohio rule on this point, which is to the effect that, no moneyed capital is in Ohio, entitled to deduction of debts from investments in stocks, and that, therefore, there is no discrimination against moneyed capital invested in national bank shares by reason of the fact that the scheme of taxation embodied in the Ohio statutes, and which would have to be embodied therein if they were strengthened in order to meet the emergency suggested by your letter, fails to provide for such deduction. In some inexplicable manner I overlooked the fact that this very case was affirmed by the supreme court of the United States, 173 U. S. 205. The court in that case expressly limited its prior holding. It was remarked, that in the Whitbeck case this peculiarity of the Ohio statutes had not been pointed out to the court. The Chapman case was later followed by the case of Lander vs. Mercantile National Bank, 22 Supreme Court Reporter, 908.

I wish to make this addition to the former opinion in order to make my own records complete. The statements above made in no wise conflict with the former opinion, but materially strengthen the conclusions therein reached.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 181.

TAXES AND TAXATION—PROPERTY NOT LISTED IN 1910—POWER AND DUTY OF COUNTY AUDITOR.

The county auditor shall place upon the duplicate omitted property which should have been returned in 1910 *for taxation. He shall collect the same in accordance with the law as it existed prior to act of May* 10, 1910.

COLUMBUS, OHIO, *March* 16, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 30th, enclosing a copy of a letter addressed to the auditor of state by the auditor of Lorain county, and submitting to me for my opinion the question therein asked, viz:

> "May a county auditor add to the duplicate in the year 1911 property which should have been returned for taxation during the year 1910?"

The precise question submitted by the county auditor is as to his power to place on the duplicate property disclosed by an inventory of a decedent's estate, which said inventory is filed after January 1, 1911, but I have chosen to state the question in the broader form because I think it is apparent that the acquisition by the auditor of information through the filing of an inventory is in no sense different from his acquisition of information as to omitted property in any other manner. This will more fully appear from the statutes involved and hereinafter quoted.

The sections in question are sections 5398, 5399, 5400, 5401, 5402 of the General Code as amended by the act of May 10, 1910, 101 O. L. page 430, and sections 9 and 11 of the act itself. The material provisions of these sections are as follows:

Section 5398:

> "If a person required to list property * * * for taxation * * * *in the year 1911 or in any year thereafter* makes a false return or statement, or evades making a return or statement, the county auditor for each year shall ascertain * * * the true amount of * * * property * * * that such person ought to have returned or listed for the year 1911 *or for any year thereafter* * * * multiply the omitted sum or sums * * * by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect it as other taxes."

Section 5399:

> "If any person required to list property * * * in the year nineteen hundred and eleven or in any year or years thereafter fails to make a return or statement, or if such person makes a return or statement of only a portion of his taxable property, and fails to make a return as to the remainder thereof, or if he fails to return his taxable property or part thereof, according to the true value thereof in money,

> * * * the county auditor shall each year as to property omitted, and as to property not returned or taxed according to its true value in money, shall ascertain * * * the true amount of personal property * * * that such person ought to have returned or listed, and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section and the next preceding and the next two succeeding sections are made and *not in any event prior to the year* nineteen hundred and eleven and multiply the omitted sum or sums by the rate of taxation belonging to said year or years, and accordingly enter the amount on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect it as other taxes."

Section 5400:

(Applies to placing taxes omitted by virtue of a failure on the part of the officer other than the assessor or the county auditor, and has no application in this connection.)

Section 5401:

> "The county auditor, if he shall have any reason to believe, * * * that a person has in the year nineteen hundred and eleven, or in any year thereafter, given to the assessor a false statement of the personal property * * * that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property * * * subject to taxation, shall proceed in said year nineteen hundred and eleven or in any year thereafter at any time before the final settlement with the county treasurer to correct the return of the assessor, and charge such person on the duplicate with the proper amount of taxes * * *."

Section 5402:

(Applies to the payment of costs incurred in making the inquiries provided for in the preceding sections.)

Section 9 of the act of May 10, 1910, provides that:

> "The provisions of this act shall not apply to the levy or collection of taxes for the year nineteen hundred and ten."

Section 10 of the act repeals original sections 5398, 5399 and 5401.

Section 11 of the act provides:

> "This act shall take effect and be in force from and after January 1, 1911."

It is my conclusion that the following, to-wit: "The provisions of this act shall not apply to the levy or collection of taxes for the year nineteen hundred and ten" leaves operative in all respects the old law so far as the obligation of the taxpayer to the state is concerned.

I do not think that the expression "shall not apply to the levy or collection of taxes" is used in any restricted sense, or that the levy or collection must be made within the year 1910. It suggests itself as reasonable to assume that the

language of section 9 of the act of May 10, 1910, was the legal expression for what in popular language might be stated in the following way: "Nothing in this act shall interfere with the right of the state to collect taxes that should be paid for the year 1910 under the laws as they existed prior to the passage of this act." I suggest that for the purpose of safety auditors be requested to add to the duplicate in the year 1911 property which should have been returned for taxation in the year 1910 as soon as they possibly can.

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

188.

TAXES AND TAXATION—POWERS AND DUTIES OF TAX COMMISSION AND COUNTY AUDITOR TO CORRECT ERRORS IN THE TAX DUPLICATE.

The original duty of correcting the tax list by striking property therefrom which is exempt from taxation, devolves upon the county auditor and the powers of the tax commission are appellate and limited to the duties of review.

COLUMBUS, OHIO, March 21, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department certain correspondence between your commission and the auditor of Hamilton county. You call my attention to a former opinion of this department and suggest that possibly I may desire to reconsider the matter or to elaborate upon the former opinion. The question presented by the auditor is in brief as follows:

> "May the county auditor correct the duplicate by striking therefrom, property exempt from taxation and therefore improperly listed, without being directed to do so by the tax commission of Ohio?"

The former opinion was with regard to the meaning and effect of section 80 of the act of May 10, 1908, 101 O. L., 299, which vested in the tax commission powers formerly imposed upon the auditor of state with the assistance of the governor and attorney general, by section 258, General Code. The holding of the opinion was that the power of the commission therein conferred to "remit taxes and penalties thereon, found by it to have been illegally assessed" and to "correct an error in an assessment of property for taxation or in the duplicate of taxes in the county" was intended to be in a sense appellate, and that the original power to correct errors in a tax duplicate and to remit assessments for taxation is vested in the county auditor under section 2588, General Code. This was regarded as apparent not only from the language of section 2588 itself but also from that provision of section 80 which requires that "no such taxes, assessments or penalties in excess of one hundred dollars shall in any case be remitted until after at least ten days' notice of the application * * * shall have been served upon the prosecuting attorney and the county auditor of the county where such taxes or assessments were levied," * * * which clearly indicates that the power of the commission is one of review rather than original jurisdiction.

Acting upon this advice your commission, as appears from the correspondence, has refused to consider certain applications for remission of taxes which have been made to the commission without having been acted upon in any way by the county auditor. The county auditor is disposed to question the correctness of the ruling and cites section 5571 which provides that:

> "* * * he (the county auditor) shall not make any deductions from the valuation of any tract or lot of real property, except such as have been ordered either by the state board or by the county board of equalization, or upon the written order of the auditor of state * * *."

and the case of State, ex rel., vs. Commissioners, 31 O. S., 271. With respect to section 5571 I beg to call your attention to the first clause thereof omitted in the quotation of the auditor, and which is as follows:

> "The county auditor from time to time shall correct any errors which he may discover in (1) the name of the owner, (2) the valuation, (3) description, (4) quantity of any tract or lot contained in the list of real property of his county."

The limitation concerning deductions in valuations would be held, I think, applicable to the exercise of power to correct such errors as are described in the earlier part of the section. But even if this were not so, the reason of the limitation which is clear, is such as clearly to negative the construction put upon it by the county auditor. The matter of valuation is one requiring the exercise of expert judgment. The matter of exemption on the other hand is a question of law. It is not correct to argue as the auditor argues that, because the law prohibits a deduction from valuation except upon certain authorization, a fortiori the entire valuation should not be omitted without such authority; and this would be the case if the auditor should take it upon himself to determine whether or not property is exempt from taxation.

The auditor calls attention to the uniform practice of the past, of regarding his authority as limited to the correction of clerical errors rather than fundamental errors and cites the above case as establishing the principle. It is true that the case in question holds that:

> "The errors named in the statute are clerical merely, but the error complained of * * * is fundamental. The question whether specified property is or is not subject to taxation, was not, by this section of the statute submitted to the judgment of either the auditor of the county or the board of county commissioners."

This case is the beginning of the distinction drawn between clerical and fundamental errors, to which the auditor refers. Unfortunately for the auditor's contention however, the statute considered by the court in the case was not the same as present section 2588, General Code, in this, that the following language was not in the section construed by the court:

> "From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate * * * *when property exempt from taxation has been charged with tax* * * *."

The italicized portion of the above quoted provision was inserted after the

decision in State, ex rel., vs. Commisioners, and possibly because of it. The case itself is then the best of authority against the contention of the auditor.

Upon the reconsideration which I have given the question I am of the opinion that my predecessor was correct in holding that the original duty of correcting the tax list so as to omit therefrom property exempt from taxation devolves upon the county auditor and that the power of the tax commission is intended to be so to speak, appellate.

I herewith return the correspondence submitted to me.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 205.

TAXES AND TAXATION—POWER OF AUDITOR TO CORRECT ERRORS ON DUPLICATE—FUNDAMENTAL AND CLERICAL ERRORS—ERRORS OF JUDGMENT OF BOARD OF ASSESSORS AND ERRORS OF FACT.

Under sections 2588 and 5571, General Code, a county auditor may correct clerical errors in the tax list but may not correct fundamental error.

What are fundamental and what clerical errors is a mooted question.

A clerical error under the authorities may safely be considered an error apparent upon the face of the record. Later decisions, however, extend the scope further and allow parol evidence to establish error not in its nature fundamental. But an auditor may not correct errors of judgment on the part of the officers whose duty it is to make the valuation, nor may he question their intention or method of calculation, nor their procedure.

Errors of fact, however, may be so corrected.

Under these rules, when a building has been valued by two employes of the board of assessors, resulting in a double valuation, the error is that of the board and may not be questioned by the auditor. When such error causes the duplicate to show buildings upon the land which do not exist, however, a correction may be made by the auditor.

Errors in mathematical calculation or in applying processes of the system of valuation and apportionment adopted by the board are fundamental errors of the board and may not be corrected.

Errors in areas of real estate apparent upon the auditor's records, however, are clerical.

COLUMBUS, OHIO, March 30, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 28th, requesting my opinion as to what corrections of valuations and returns of assessors of real property may be legally made by county auditors under the provisions of the General Code.

The specific facts with reference to which the question is submitted are as follows:

> "A city board of assessors of real property in 1910 used what is known as the Summers system. The proprietors of this system agreed to and did furnish for the use of the board, persons instructed in the

operation of the system. These persons became 'expert assistants' of the board of assessors as authorized by section 5545, General Code.

"Such expert assistants, employes in a sense, both of the proprietors of the system and the board of assessors, were divided, so to speak, into two classes, those whose function it was to ascertain the area and physical description of buildings, and those whose duty it was to apply the methods of the system to the valuation of buildings of the description ascertained by the members of the other class.

"The employes who devoted themselves to what may be termed the initial appraisement of real estate, using the maps and plats furnished to the board by the county auditor divided each of said maps or plats into blocks or squares upon a principle which constituted the secret method of the system. Upon actual view certain factors, also secret and arbitrary, were applied to each tract or parcel of real estate within a given square or block and multiplied by the respective areas, thus producing a result which constituted a tentative appraisement of each parcel of land. Each step in this process was in a sense recorded upon a slip taken with him by the employe when appraising the property. This slip contained the description of the parcel as taken from the official maps and plats, a computation of the area and the multiplications of the areas or portions thereof by the factors employed, together with of course the grand total thus ascertained. These slips, however, were silent as to a reason for the adoption of a given factor or factors as applicable to a given tract or for the subdivision of the tract into arbitrary parcels for the purpose of multiplying given factors by the areas thereof, these matters being as above stated, secrets of the proprietors of the Summers system.

"In making tentative appraisements of buildings the slips used by the system and adopted by the board of assessors were required to pass through the hands of both of the classes of employes above described. He whose function it was to ascertain the description of a building upon actual view and measurement, would record upon the slip in blank spaces provided for that purpose the dimensions of the building, together with certain other facts, such as the number of windows, the material of its construction, etc. This employe would also compute the area of the floor space in the building and such other similar facts as could be ascertained by computation. So that the slips disclosed the additions and multiplications by which totals so to be ascertained were reached. To the totals so ascertained the other building assessor or expert, upon actual view or otherwise, would apply secret factors, no reason in this case appearing for the choice of a given factor or for the arbitrary choice of certain portions of a given building to certain factors. The factors themselves appear on the building slips together with the multiplications of the areas by them, resulting in the product or products the sum of which constituted the tentative valuation of the building.

"In practice it sometimes occurred that more than one appraiser or expert assistant would measure a building or would apply to measurements already ascertained the factors above described. The same possibility of duplication of appraisement existed with respect to the land itself.

"In practice also, the board of assessors adopted as their own the totals ascertained as above described and made them the valuations of the land and building respectively. Such valuations were those set

forth in the returns of the board made to the county auditor under section 5569, General Code, in the form therein prescribed. With the return, however, the board of assessors turned over to the county auditor all the land and building slips above described. It now appears that a large number of mistakes have been made, of which the following are types:

"1. Duplications of slips resulting from appraisement of the same tracts or buildings by more than one employe at different times, and leading the board to affix to the land or the building an aggregate valuation equal to the sum of the appraisements affixed thereto by the respective employes.

"2. Errors in multiplication of areas by factors.

"3. Errors in subdivisions of tracts or buildings for the purpose of applying factors.

"4. Errors in additions and multiplications for the purpose of ascertaining the areas.

"5. Errors in actual measurements of buildings disclosed not by the slips themselves but by subsequent verification of the measurements.

"6. Errors in areas of real estate.

"All of the foregoing except as above indicated are apparent upon the face of the slips, but none of them, excepting the last one, appear upon the plats and other papers furnished to the assessors by the county auditor, or upon the minutes of the board of assessors as such, or upon the returns of the assessors to the county auditor.

"The board of review of the city of Cleveland, sitting as a quadrennial board of equalization regarded all of the mistakes above described as constituting errors which the county auditor upon having his attention called thereto should correct upon the tax list and duplicate, and in the returns of the board. The county auditor questions his power in the premises."

As you state then, the question succinctly stated is:

"What, if any, of the errors disclosed by the slips may be corrected by the county auditor; or may the county auditor take such slips into consideration for any purpose in ascertaining errors which may exist in the tax list?"

In passing, permit me to acknowledge your courtesy in submitting with your letter a transcript of a hearing or conference between the tax commission and the county auditor, from which as will readily appear, I have derived some of the facts above stated.

The following provisions of the General Code are applicable to the solution of questions presented:

Section 2588:

"From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate; either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment."

* * *

Section 5571:

"A county auditor, from time to time, shall correct any errors which he may discover in the name of the owner, in the valuation, description, or quantity of any tract or lot contained in the list of real property in his county; but he shall not make any deductions from the valuation of any tract or lot of real property, except such as have been ordered, either by the state board or by the county board of equalization, or upon the written order of the auditor of state."

These sections were respectively sections 1038 and 2800, Revised Statutes, and as such have received judicial constructions from time to time. The following decisions are illustrative of the development of the rule of construction which has been applied to both of these sections:

McIlvaine, J., in Humphreys vs. Safe Deposit Company, 29 O. S., 608:

"It is not necessary nor would it be safe to attempt, to define cases in which the auditor is authorized by the provisions of this section (the section which has become section 2588, General Code), to correct errors; but we can safely say that his authority does not extend to subjects which the statute places under the control of boards of equalization. * * *

"It seems to us that the legislative intent was to place the correction of any errors in the judgment of assessors as to the valuation, under the sole supervision of boards of equalization, whether such erroneous judgment was induced by ignorance or mistake either of law or of fact.

"In this case the safe of defendant in error (which had escaped taxation as a fixture or betterment of certain real estate) was not the subject of a separate valuation. It could only be valued with, and as, part of the real estate. The real estate of which it was a betterment was valued by the assessor, and the valuations thus made was truly returned by him. It is true that the property was underrated by reason of the ignorance or mistake of the assessor * * * thus presenting a clear case for the board of equalization * * * but not a case for correcting the valuation by the auditor." * * *

State ex rel. vs. Commissioners, 31 O. S., 271, by the court:

"Under the section of the statute above quoted (the section which is now section 2588, General Code), the commissioners of a county are not authorized to order the auditor to draw his orders upon the treasury to refund taxes erroneously collected, unless the error be such as would require correction by the auditor himself, if discovered by him before payment of the taxes; * * * The errors named in the statute are clerical merely, but the error complained of by the relator is fundamental." * * *

McIlvaine, J., in Insurance Company vs. Capellar, 28 O. S., 560-571, holding that the auditor under what is now section 2588, General Code, might correct a personal property return by disallowing a deduction, said:

"The error to be corrected in relation to the plaintiff's taxes was

the deduction of the reinsurance item from its credits. No fact is to be inquired into. Every necessary fact appears on the face of the (personal property) return. Charge the proper rate of taxes upon the amount of credits returned without any deductions on account of the reinsurance item, and the error in the amount of plaintiff's taxes will be corrected—clerical work merely." * * *

Bradbury, J., in State ex rel. vs. Raine, 47 O. S., 477-455:

"The authority of a county auditor to correct errors of omission is to be found, mainly in sections 1038, 1039 and 2800, Revised Statutes (now partly included in sections 2588 and 5571, General Code), which read as follows.

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

"The terms used in these sections are broad and general. No attempt is made to enumerate, specifically, the powers granted; to have undertaken to do so would have been hazardous; for if taxes should be omitted, by other errors or omissions than those enumerated, it might be successfully contended that no provision had been made for them. The object of the legislation was to provide against the escape from taxation, by error, of any property legally taxable; to accomplish this end, it wisely, and no doubt purposely, adopted general and comprehensive language with which to convey the needful authority, instead of attempting to enumerate in specific terms the powers conferred. * * *

"* * * We do not doubt that the power of the county auditor to correct errors is limited to such as are clerical.

"It was held by this court in Ohio ex rel. of the Sister Superior, etc., vs. Commissioners, Montgomery County, 31 O. S., 271-3, that, under what is now section 1038, Revised Statutes, the county auditor could not correct fundamental errors, but only such as are clerical. * * * No attempt, however, was there made to define either a fundamental, or a clerical error, or to draw a distinction between them. * * *

"In Insurance Company vs. Capellar, 38 O. S., 560, the court held that where an insurance company, in making its return for taxation, deducted from its assets, the reinsurance fund required by statute to be reserved by it, the error was clerical and could be corrected by the county auditor. * * * This case shows that the term 'clerical error' is not limited to such mistakes as occur in copying or in computations. Errors by which property escapes its lawful share of taxation must of necessity be either fundamental, and thus beyond the power of a county auditor to correct, or clerical merely, and therefore within that power. The difficulty, however, lies in the attempt to distinguish them. While we are not required in this case to lay down rules, if that were possible, by which, in all cases, the character of these errors—as being fundamental or merely clerical—may be determined, yet, certainly, those only are to be deemed fundamental that pertain to the very foundation upon which a tax rests; this of course includes defects and imperfections in the law itself, and errors of judgment committed by public boards acting within the scope of their authority. But can an error be said to be fundamental and thereby placed beyond the power of a county auditor to correct, where it has been committed by a board of equalization or by any other board or officer while acting without authority of law or in excess thereof? We think not.

> And if, when we come to examine the acts of the boards of equalization, * * * it shall appear that they acted without warrant of law or exceeded their authority, their errors, so committed, are not in any proper sense of the term fundamental, they may therefore be corrected by the county auditor." * * *

In Lewis, Auditor, vs. State ex rel., 59 O. S., 37, the facts were as follows:

A certain building was in course of construction during the decennial appraisement year. It was valued as a finished structure by the decennial appraiser who did not complete his work until long after the date at which he was directed to complete his work by law. Meanwhile the annual assessor had returned the building as an unfinished structure, and in the succeeding year returned it as a new structure, noting the amount to be added to the duplicate on account of the difference between his new valuation and that previously affixed by him. This additional amount was added to the amount returned by the decennial appraiser. (For a statement of facts more complete than that embodied in the supreme court report see opinion of Smith, J., in the circuit court, 8 C. D., 276.)

Bradbury, J., in delivering the opinion of the supreme court, at page 43, employs the following language:

> "Now it is manifest that this action by the auditor was erroneous, that is, he unwarrantably added $2,000 to the value of relator's property, unless a building or structure of that value had been placed thereon after it had been appraised by the decennial appraiser in 1890 and before the appraisal by the annual appraiser in 1891. That this was not done is a conceded fact. It is, therefore, clear that $2,000 was in the year 1891, erroneously added to the value of relator's property and still remains, and that ever since it was thus added, she has paid taxes thereon. This was not a fundamental error in any sense of that term. The addition was not made by reason of any mistaken notion that the relator was legally chargeable with the additional $2,000. It was the result of inadvertence upon the part of some one of the public officers charged with a duty in respect of bringing property on the tax list of the county for taxation. * * *
>
> "Counsel for the relator, however, without denying either the fact that the relator's property was thus overvalued, or the manner in which it was done, contend that it was not the duty of the auditor, under section 1038, Revised Statutes, to correct the error, because all the facts necessary to enable him to make the correction do not appear in the records of his office. It is true that some of the facts necessary in this case to show the error must be ascertained from other sources. This objection, however, we do not regard as conclusive. If all the data necessary to correct the error appear on the records of the auditor's office the duty of correction may of course be readily and unhesitatingly discharged, whereas, if some of the facts must be gathered from other sources the auditor might be warranted in proceeding with caution and to require convincing proof of the facts on which the alleged error may be based. The statute itself does not require the correction to be founded on facts of record in the auditor's office; and as its provisions, in so far as they authorize relief against unjust taxation, may be regarded as remedial in their nature, we perceive no sufficient reason for restricting their operation in such cases by a construction that would

deny relief except on record evidence. It has always been held in making additions to the tax list that a county auditor may add upon information obtained from other sources, and we see no sufficient reason why, upon the facts thus obtained, he may not just as well afford relief against unjust taxation; nor can we find anything to militate against this conclusion in the cases of Ohio ex rel. vs. Commissioners, 31 Ohio St.; Ins. Co. vs. Capellar, 38 Ohio St., 560; or State ex rel. vs. Raine, 47 Ohio St., 477.

In Commissioners vs. Brasheers, 6 O. D. Reprint, 1027, the auditor in making up his plats and records for the use of the decennial appraiser described a certain tract of real estate as containing 2 67-100 acres, whereas it contained in point of fact 1 67-100 acres, and was so described on the original plat in the auditor's office. Johnston, J., in delivering the opinion used the following language:

"It is claimed on behalf of the county that this was an error on the part of the appraiser of a 'fundamental nature' and that the auditor or commissioners were not authorized to correct that kind of an error. * * * By the clerical error of the auditor the assessor was required to assess real estate having in fact no existence whatever, giving it a valuation which would not have occurred but for the error of the auditor. * * * We think the error was not a fundamental error, being an error wholly clerical, and error of the hand, not of judgment and discretion, and the assessor having affixed a valuation * * * to something that had no existence whatever it became the plain duty of the auditor upon the request of the property holder to certify the fact to the commissioners * * * and it became the duty of the auditor to correct the error in the valuation as well."

In Barney & Smith Mfg. Company vs. Montgomery County, 29 W. L. B., an error had been made by the clerk of the city board of equalization and was evidenced by a blotter or pad used by him for the convenience of the board. So far as the records of the board were concerned, however, no error appeared, but the action of the board seemed to be merely an increase in the valuation of a certain parcel of land. Elliot, J., in the opinion, page 368, second column, uses the following language:

"What is a 'clerical error' in such cases? It must, in the nature of things, be such an error as appears by inspection of the books and papers in the auditor's office, under his control and supervision.

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

"Hence, if it becomes necessary for the auditor in order to discover the error and correct the same, to resort to testimony aliunde the record, while the error might be fundamental, it would not be a clerical one, and could not be corrected under section 1038. * * *

It is manifest here that if any error was made in transferring from blotter 'B' to blotter 'C' and final record 'D,' that mistake was made by Mr. Campbell while acting for the board, and such error could only be ascertained and corrected by a resort to testimony outside of the books, and to some extent independent of them, which fact would seem to be in the face of the decisions of the supreme court.

"Hence, if the auditor, in order to discover and correct a mistake,

must resort to testimony outside of the record, and outside of documents in his possession, to make the discovery contemplated by the statute, his proceeding would not be under section 1038.

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

"Supposing a mistake to have been made by the clerk of the board in copying from one book to another, and in making the final return of the board of equalization, can parole testimony, even of a member of the board at that time, be admitted to explain, vary or contradict the return so made? It would seem doubtful if the auditor would be authorized under section 1038 to go into such investigation in order to ascertain what the intent of the board was.

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

"We have said the return makes out a prima facie case of its accuracy. If a mistake is apparent upon the auditor's books he may correct it of his own motion. * * * But would the auditor be authorized, as before said, to go into an investigation, to call witnesses and ascertain as a matter of fact and law that a mistake had been made in an action of the board of equalization? The error which he may correct is merely clerical and must be determined by inspection of his books, or from papers in his possession."

"I think it is apparent from an examination of the foregoing authorities that a great deal of confusion still exists with regard to the proper construction of the two sections of the General Code above quoted. As stated in State vs. Raine, the supreme court has never undertaken to define or describe either of the classes of errors which it has referred to. The courts of nisi prius and to some extent the supreme court itself, have seemed to incline to the opinion that all errors not apparent upon the face of official records are fundamental errors and not subject to correction by the county auditor, under the rule which the court has in theory at least always adhered to. The difficulty arises from a consideration of the syllabus and the opinion in Lewis vs. State ex rel., the most recent decision involving these questions. There it is held that parol evidence may be relied upon by the county auditor to establish the existence of an error not fundamental. If this decision is to be taken literally, much of the exactness toward which the courts seemed to be tending prior to its rendition is destroyed and we are again left without any rule as to what errors may be corrected by the county auditor under the two sections concerned in your inquiry, excepting the dictum that fundamental errors of judgment may not be corrected.

It has seemed to me, however, that the actual facts upon which the Lewis case was decided serve to indicate the true rule—the rule which will harmonize all of the cases. The circuit court report of this case discloses that by comparison of the decennial appraiser's returns with those of the annual assessor's return for the succeeding year, it would be perfectly apparent that the annual assessor's return was erroneous unless a new structure had been erected upon the property in question, or buildings already there, and valued by the decennial appraiser, had been enhanced in value by improvements to the amount of $2,000. This fact then—the actual existence of new buildings or improvements—was the fact concerning which parol evidence was accepted by the auditor. It was not necessary to invite parol evidence for the purpose of ascertaining the intentions and methods of work of either of the valuing officers, both of them having valued buildings upon the same parcel of real estate, and included their valuations in their official returns to the county auditor, the county auditor could form either of two conclusions, and two only, namely:

That a new structure had been constructed since the decennial appraisement, or that the two officers had valued the same property. If the latter was the case the error was purely clerical, and in order to ascertain whether or not a clerical error had been committed, rather than for the purpose of ascertaining what that error was, the auditor relied upon parol evidence.

In view of the oft-repeated holding of the supreme court, to the effect that the errors mentioned in both of the sections concerned in your inquiry, are errors other than fundamental errors, whether they be called clerical errors or not, and in view also of the express adherence to that holding on the part of the court in deciding the Lewis case, I am of the opinion that the principle announced in the latter case should be strictly limited to cases similar to it. It seems, therefore, that while it is not advisable to attempt to frame an exact and comprehensive statement of the rule, the following may safely be regarded as a general statement thereof:

The errors in valuation which the county auditor may correct under the two sections above quoted, are all errors not resulting from a mistaken or erroneous exercise of judgment by the officer whose duty it is to exercise the judgment which results in a valuation; when the valuing officers have made formal return of their conclusions respecting a given parcel of real estate and the buildings thereon, all previous informal proceedings of such officers or their subordinates, tending to show the mental processes and calculations by which such final conclusions were reached, may not be regarded or considered at all; such proceedings are in a sense merged into the final valuation and it is not competent for any person or for any court to inquire as to how or why such final valuations were returned. But where the returns themselves place separate valuations upon property which has no existence in fact, such an error is not one of judgment, but one of fact—one not fundamental—and such errors may be corrected by the county auditor. With respect to the land, of course, an error of this sort could scarcely occur, except in the auditor's office where the plats are made up and furnished; but with respect to buildings it may very easily occur as it did in the Lewis case, by reduplication of the work of the assessor. In the Lewis case, however, the error was plainly indicated by the returns themselves, and I do not feel that the Lewis case warrants the opinion, that where a duplication of appraisement results in a double value being placed on a single building by a single return, parol evidence may be admitted to show what the real intention of the valuing officer was.

Coming now to the specific questions suggested by the statement of facts above set forth, my conclusions thereon are as follows:

1. Where a board of assessors returns a valuation for a single building which valuation happens to have been reached by adding together the valuations reported to it by two or more of its employes who have appraised the same building, the error is not that of the employes, but that of the board; the valuation it placed upon the property was a solemn expression of its judgment as to the value of that property and it is not competent to show that the valuation resulted from such a duplication. Where, however, a duplication in fact results in two separate returns showing on their face more buildings upon a given parcel of real estate than actually exists, this, upon the authority of Lewis vs. State, ex rel., supra, is such an error as may be corrected. The facts giving rise to the inquiry, however, must appear upon the face of the return.

2. Errors in multiplications of areas by factors may not be regarded by the county auditor. The slips which were turned over to him mean nothing to him in his official capacity; like the blotter employed by the clerk of the

board of equalization in the Barney & Smith case, supra, they would constitute evidence aliunde, and would not be competent to convert what in law is an error of judgment into one of fact. Such errors may not be corrected by the county auditor either by carrying the calculations of the subordinate employes of the board of assessors to their correct conclusions or otherwise.

3. Upon the principle above announced, errors in subdividing tracts for the purpose of applying factors to the subdivisions are not such errors as may be corrected by the county auditor.

4. Errors in multiplication for the purpose of ascertaining areas of dimensions shown by a plat or otherwise of record, are not clerical errors, but constitute fundamental errors. The principle above set forth applies here as well as in the other cases already mentioned.

5. Errors in dimensions of buildings disclosed by subsequent measurements must be regarded as fundamental errors.

At the risk of repetition permit me to say that measurement of buildings, computation of errors and the like, are things which have no part in the legal scheme of valuation. If it were specifically made the duty of the real estate assessors to measure the building to be valued or to compute the area in square feet of a tract of land, or the floor space of a building, then of course, an error in calculation or in measurement would be clerical. Inasmuch, however, as these things are done by the valuing officer or under his direction, not as a part of his duty but merely for the purpose of aiding him in reaching the judgment which does constitute his official duty, an error in any of these things must be regarded as fundamental, or more properly speaking, must be disregarded entirely.

6. Errors in areas of real estate arising from erroneous dimensions must in the nature of things appear upon the face of the return, or elsewhere in the office of the auditor. By section 5569 each assessor is required to return the description of each lot, and if a part of a lot is listed, the number of feet along the principal street on which it abuts. By section 5553 the assessor is permitted to rely upon the maps furnished him by the county auditor. By section 5549, maps and plats are required to be made under the supervision of the county auditor. Mistakes in any of these matters are mistakes which appear of record and are clearly not fundamental. In the same connection it may be stated that an error in the acreage of farm property is a "clerical" error which may be corrected by the county auditor. Of course, a mistaken choice of a given factor, as above described, is clearly fundamental.

As I have indicated, it is impossible perhaps, to set forth with completeness and exactness the errors that may and may not be corrected by the county auditor. I trust, however, that the foregoing opinion will be of service to the commission, not only with respect to the particular case which gives rise to your inquiry, but in all other matters of the same sort.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

244.

TAXES AND TAXATION—REDUCTION OF VALUES BY DESTRUCTION OF PROPERTY—POWERS OF AUDITOR TO DEDUCT FROM TAX LIST—POWERS OF ASSESSORS AND BOARDS OF EQUALIZATION.

When a new building or structure has been damaged or destroyed by fire, flood, tornado or otherwise after the second Monday in April, and such fact is made to appear to the county auditor before the first day of October, that official under section 2591, may deduct the lost value from the tax list.

Under section 2591, General Code, such reduction may be made when a building has been depreciated in value by the act of the owner himself, between the aforesaid dates.

The codifying commission changed the language of section 5578, General Code, so as to limit the authority of the assessor and the county and city boards of equalization, to making such reductions for depreciated values, only for new structure.

COLUMBUS, OHIO, May 6, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of the 29th ult., in which you request my opinion on the following questions:

> "1. When a building or structure, other than a new structure, has been injured or destroyed by fire, flood, tornado or otherwise, after the first day of October in any year, is the county auditor or any other officer of the board, authorized to reduce the value of such building or structure or have the amount of such loss deducted from the tax list and duplicate?"

Section 2591 of the General Code provides as follows:

> "When after the second Monday in April and before the first day of October in any year it is made to appear by the oath of the owner or one of the owners of a building or structure and by the affidavit of two disinterested persons, resident of the city or township in which the building or structure is or was situated, that such building or structure has been injured or destroyed by fire, flood, tornado or otherwise, since the second Monday in April of the current year, the county auditor shall deduct from the tax list and duplicate the value of such building or structure or such part of the value thereof as shall correspond to the extent of the injury."

Section 1042, Revised Statutes, fixes the time for the delivery of the tax duplicate by the auditor to the treasurer as the first day of October in any year, and the date fixed by statute when the lien for taxes attaches is the day preceding the second Monday in April; hence, the fixing of the dates within which the value of buildings or structures that have been injured or destroyed by fire, flood, tornado or otherwise may be deducted from the tax list and duplicate was not arbitrary, the time being fixed at a period when the auditor had possession and control of the duplicate. I find no other provision of the statute authorizing the auditor or any other authority to reduce the value of buildings or structures on the tax duplicate, which have been destroyed by fire, flood, tornado or otherwise after the first day of October in any year. I therefore

hold there is no authority to reduce the valuation of buildings or structures, other than new structures, that have been injured or destroyed by fire, flood, tornado or otherwise after the first day of October in any year.

> "2. When, after the second Monday in April and before the first day of October, in any year, it is made to appear to the auditor, as provided in section 2591, General Code, that a building or structure has become depreciated in value by the act of the owner, through his tearing down such building or removing therefrom fixed machinery assessed as part of the real estate, is the county auditor, or any other officer of the board, authorized to reduce the value of such building or structure, or have the amount of such loss or depreciation in value deducted from the tax list and duplicate for the current year."

The circuit court of Cuyahoga county in the case of State of Ohio ex rel. J. A. Smith, Trustee, vs. Robert Wright, Auditor of Cuyahoga County, 8 C. C. (N. S.), 366, has passed on the question involved in your second inquiry. In the case just mentioned, Smith, the relator, tore down and destroyed a building on certain premises between the second Monday in April and the first day of October. The taxes on the building destroyed amounted to $135.68. The auditor refusing to deduct the value of the building torn down and destroyed the relator brought an action in mandamus against the auditor commanding and directing him to deduct from the tax list the valuation of the building torn down and destroyed. The court in construing section 1038*a*, Revised Statutes, now section 2591, General Code, said:

> "Is this statute unreasonable? Notwithstanding it would sometimes relieve one from paying taxes on property from which he had an income during a part of the year, it is not to us so unreasonable as would justify us, in the absence of the holding of any higher court, or any court as far as we know, that the statute is either unreasonable or ambiguous. We do not find it is either. We hold that, therefore, the prayer of the petition should be granted. Judgment will be entered accordingly."

I therefore hold that when it is made to appear to the auditor after the second Monday in April and before the first day of October in any year, as provided in section 2591 of the General Code, that a building or structure has been depreciated in value by the act of the owner, through his tearing down such building or removing therefrom fixed machinery assessed as part of the real estate, the county auditor has the power and authority to deduct from the tax list and duplicate for the current year the amount of such loss or depreciation occasioned by the tearing down of the building or removing therefrom fixed machinery.

> "3. What is the effect of the change in language as it appears in section 5578 of the General Code from the language used in section 2753 of the Revised Statutes? It will be noted that the provisions of section 5578 refer to the case of the destruction by fire * * * '*of a new structure*,' while section 2753 of the Revised Statutes refers to the case of the destruction by fire * * * '*of any structure of any kind*.'"

Section 2753 of the Revised Statutes provides in part that:

> "* * * and in case of the destruction by fire, flood, cyclone, storm

or otherwise, *of any structure of any kind*, or of orchards, timber, ornamental trees or groves, over one hundred dollars in value, the value of which shall have been included in any former valuation of the tract or lot on which the same stood, the assessor shall determine as near as practicable how much less valuable such tract or lot is in consequence of such destruction, and make return thereof, and in case the assessor shall fail or neglect so to do then the county or city board of equalization shall perform such duty, and the auditor shall deduct the same from the value thereof as it stands on the tax list." * * *

Section 5578 of the General Code, which is a modification of that part of section 2753, Revised Statutes quoted above, is as follows:

"In case of the destruction by fire, flood, cyclone, storm or otherwise, *of a new structure*, or of orchards, timber, ornamental trees or groves, over one hundred dollars in value, the value of which had been included in a former valuation of the tract on which they stood, such assessor shall determine, as near as practicable, how much less valuable such tract or lot is in consequence of such destruction and make return thereof. If the assessor fails or neglects so to do, the county or city board of equalization shall perform such duty and the auditor shall deduct the losses from the value of such property as it stands on the tax list."

The codifying commission changed the language of that part of section 2753, Revised Statutes, italicized, and it now reads in section 5578, General Code, "of a new structure." By reason of this change in the language by the codifying commission, the authority of the assessor and the county and city boards of equalization is now limited in reducing the valuation of tracts by reason of the destruction by fire, flood, cyclone, storm or otherwise of structures located thereon, to new buildings or structures. As this section was before codification the reduction could be made on a structure of any kind.

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

A 252.

TAXES AND TAXATION—ERRORS OF CLERK OF BOARDS—ASSESSING MIND—POWER OF AUDITOR TO MAKE CORRECTIONS IN THE DUPLICATE.

In law, all the work of the board of assessors including that of its clerks and employes is presumed conclusively to be the work of the board itself so that the fact that errors were made solely by clerks and employes in matters of mere mathematical processes after the work of the board as such had been completed, does not support the argument that such errors were merely clerical ones, committed after the assessing mind of the board had been made up. The auditor is therefore not permitted to correct such errors.

COLUMBUS, OHIO, May 15, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 11th, enclosing an amended statement of facts submitted to you by the auditor of Cuya-

hoga county with respect to the operation of the so-called Somers unit system of assessing real estate, as used by the quadrennial city board of real estate assessors of the city of Cleveland, and with respect to which I recently rendered an opinion to you.

I am also in receipt of a brief on this subject from Hon. E. W. Doty, representing the Manufacturers' Appraisal Company, and a pamphlet courteously furnished by him describing in detail the method in question.

From all of the additional sources of information which have been submitted to me it is apparent that the statement of facts embodied in my former opinion to the commission was inaccurate in one particular. It was assumed therein that the valuations of the board of assessors were in fact affixed to areas and buildings as computed by the clerks and employes of the board. It now appears, however, that what Mr. Doty in his brief calls the "assessing mind" was called into action at the very outset of the procedure adopted by the board; that is to say, the judgment as to the value of a given tract of real estate was exercised with respect to the value of an ideal or imaginary strip of real estate of certain dimensions abutting upon certain streets. In this way the theoretical value of all the foot frontage of the city was determined by the board before any computations or measurements had been made.

In the same manner certain valuations were affixed by the board to imaginary structures of various classes and ages; and this too was done before the clerical work or work of measurement was performed.

After the board had determined the unit values of real estate in various parts of the city and the unit values of different classes of structures, and presumably the amount or rate of various factors of influence, its employes and experts proceeded to take measurements and make calculations on the basis of these theoretical valuations. It is pointed out that the board really exercised no judgment after it had fixed the unit values and determined the respective rates of certain factors of influence; that thereafter everything that was done in fact was done by the clerks. It is conceded, however, that the board's official return was made up of valuations reached by computation of unit values of factors of influence upon the areas, etc., reached by the clerks, and that the results of these computations were adopted by the board as its valuation.

It is now urged that inasmuch as the "assessing mind" exhausted its functions when it determined its theoretical or unit values everything that followed is to be regarded as clerical and not fundamental, and that errors therein may be corrected by the county auditor.

On careful consideration of the arguments that have been adduced and the facts as they now appear, I find myself unable to change the general conclusion which I expressed in the former opinion. The law makes no distinction between the various functions exercised by the valuing officers; they are all in theory and in law acts of the "assessing mind." The computations of the clerks and the measurements of the employes when adopted by the board are conclusively deemed in law to be the acts of the board, and the totals thereby ascertained are conclusively regarded in law as having been reached by the exercise of the judgment of the members of the board themselves. This, I think, is clear from the authorities cited by me in the former opinion, but it is equally clear from a consideration of all the statutes involved. In a sense it might be said that the method known as the Somers system, while undoubtedly scientific, is the exact reverse of the theoretical process which the law commands; that is to say, the law provides that an assessor of real estate shall "in all cases, from actual view * * * determine, as near as practicable, the true value of each separate tract and lot of real property, * * * etc." (Section 5554, General Code.) The assessor is supposed to view the specific property which

he values and as a result of his view to arrive at the judgment which he expresses and the valuation which he affixes to that property. This is what every assessor and board of assessors is *presumed* to have done. The actual facts of the case may be, as in Cleveland, just the reverse; the "actual view" may be that of the clerks and employes, and the "true value" affixed by the "assessing mind" may be the value of a strip of land one foot wide and one hundred feet long on a certain street, subject to corner influences and alley influences, etc.; but in law the grand total reached by all the various multiplications and divisions and computations involved in the operation of the Somers system is the judgment of the "assessing mind" as to the "true value" of each separate tract.

It follows then, it seems to me, that all the computations and measurements made by the clerks and employes of the board must be regarded as merged into the final judgment of the board in adopting the totals so reached. That this final judgment is not in fact the exercise of the discretion of the "assessing mind" is immaterial; it is such *in law*.

While, therefore, I am glad to correct any misstatements I may have made in the former opinion as to the manner of operation of the Somers system and while in my personal judgment the Somers system affords a scientific and perfectly equitable method of arriving at real estate values, yet I cannot change the conclusions of law I reached in the former opinion.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 255.

TAXES AND TAXATION—CREDITS OF NON-RESIDENT CORPORATIONS—MORTGAGE NOTES—AGENT IN OHIO—"NATURAL GAS COMPANY"—"PIPE LINE COMPANY"—MANUFACTURING COMPANY AS CONSUMER.

The statutes of Ohio are to be construed to effect that credits may be taxed only against residents of this state and against non-residents who actually loan and hold moneys loaned through an agent acting in this state.

The rule, however, is narrowed with reference to corporations under section 5404, *General Code, which renders credits as well as other forms of personal property taxable to all corporations at the place in this state where the credits are held regardless of corporate residence.*

From this principle where a foreign corporation, having its headquarters in another state, loans money on mortgages in this state, through an agent in this state who holds the evidence of such indebtedness in Ohio, such credits may be taxed.

Whether a foreign corporation having its principal office in another state and having but one manufacturing plant, and that plant located in Ohio, must return credits for taxation in Ohio, depends on whether such credits are actually in Ohio.

A corporation engaged in the business of drilling and operating gas wells, who sells part of its gas to a manufacturing company, sells to a "consumer" for power purposes within the meaning of section 467, 101 *O. L.*, 409, *and is therefore to be deemed a "natural gas company."*

As such company, however, is not engaged in the business of "transporting gas through pipes" it is not a "pipe line company."

COLUMBUS, OHIO, May 20, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 1st, requesting my opinion upon the following questions:

"(1) A foreign corporation, having headquarters in Philadelphia, Pa., loans money upon chattel mortgage and other securities in Ohio, through an agent resident in this state. Are the credits represented by such loans taxable in Ohio?

"(2) Must a foreign corporation, having its principal office in another state, and having but one manufacturing plant, and that plant located in Ohio, return its credits in Ohio for taxation?

"(3) A corporation, engaged in the business of drilling and operating gas wells, sells part of the gas from its wells directly to a manufacturing company, which latter company uses the gas in its business of manufacturing bottles; any gas in excess of that taken by the manufacturing company is sold by the producing company to a natural gas company, which transports the gas in its pipe lines and sells the same to its customers throughout the state (the only pipe lines which the company has are those which run to the plant of the manufacturing company): Is such a company a natural gas company 'engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state,' or a pipe line company 'engaged in the business of transporting natural gas through pipes or tubing

within this state,' within the meaning of the provisions of section 46 of the act of May 10, 1910?"

Answering your first question I beg to state that section 5370, General Code, provides in part that:

> "Each person * * * shall list * * * all moneys in his possession, all moneys invested, loaned or otherwise controlled by him as agent * * * or on account of any other person or persons, company or corporation." * * *

Section 5328 provides that:

> "All real or personal property in this state * * * and all moneys, *credits*, investments in bonds, stocks or otherwise *of persons residing in this state* shall be subject to taxation."

Section 5327, General Code, provides that:

> "The term credits * * * means the excess of the sum of all legal claims and demands *whether for money or other valuable thing* * * * over and above the sum of all legal bona fide debts owing by such person." * * *

On the face of these related sections there is a seeming inconsistency. If the term "credits" includes a demand for money there would seem to be a very slight distinction between such a right and the right to "moneys invested." Yet it seems clear that the intention of the statute is to tax the "credits" of residents of Ohio only, while there seems to be an intention to tax the "moneys invested" of persons not residents of Ohio if the investment is made by an agent who is a resident of Ohio.

However, these sections are of long standing in our statute law, and the supreme court has adopted a rule of construction applicable thereto in Grant vs. Jones, 39 O. S., 506, the second branch of the syllabus of which is as follows:

> "Credits owned by a non-resident of this state are not taxable here unless they are held within this state by a guardian, trustee or agent of the owner by whom they must be returned for taxation. The fact that such credits are secured by mortgage on real estate within this state does not change the rule." * * *

In the opinion of the court, per Johnson, C. J., the principle is laid down that the state has no power to tax the credits of persons not residents of it, because for the purpose of taxation the situs is that of the domicile of the owner, regardless of the fact that the debt is secured by mortgage upon property within the state. On this point Worthington vs. Sabastian, 25 O. S., 1; Railroad Co. vs. Pa., 15 Wallace, 300; Bradley vs. Bauder, 36 O. S., 28; Tappin vs. Bank, 19 Wallace, 499, and other cases to the same effect are cited.

In Myers vs. Seaberger, 45 O. S., 233, the syllabus is as follows:

> "A loan of money secured by mortgage on real estate, is a credit within the meaning of the statutes of this state providing for the taxation of property; and, where the creditor resides in another state, is not

subject to taxation in this, although the securities are in the hands of an agent residing here, intrusted by the terms of his agency with the collection of the interest and principal when due, and its transmission to the creditor when collected."

The *per curiam* opinion in this case is instructive because of its reference to section 2734, Revised Statutes, now section 5370, General Code, above quoted. The language of the opinion in this respect is as follows:

"The rule as above stated is qualified as to 'money' by section 2734, Revised Statutes. By this doctrine every person of full age and sound mind is required to list for taxation 'all moneys invested, loaned, or otherwise, controlled by him, as agent or attorney, or on account of any other person or persons.' But the case before us does not come within this provision. The agent of the defendant had no power to loan or invest money for her in this state. His duties were confined to the collection of that which had been loaned; and transmitting it to his principal as fast as it was collected. The phrase 'or otherwise controlled by him' must be construed to mean, in a manner similar to the loaning and investing of money. For it is a settled rule of construction that, in accordance with the maxim *nosoitur a sociis*, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense. Broom's Leg. Max. *523. To loan or invest money is one thing; to collect and transmit it to the owner when collected, is another and different thing. Any other construction would require every attorney in the state engaged in making collections for non-residents, to return the same for taxation. Such could not have been the intention of the legislature, nor does the language of the statute require that such construction should be placed on it."

In other words then, a credit due from a citizen of Ohio to a resident of another state, secured by mortgage on property in Ohio, is as a general principle, not taxable in Ohio; but when the loan was made in the first instance by an agent within the state of Ohio having general authority to invest as well as to collect, the agent must, under section 5370, return the taxable value of such loan as "moneys invested, loaned or otherwise controlled by him as agent." The practical application of this somewhat technical rule is further illustrated by the case of Lee vs. Dawson, 8 C. C., 365. This case, however, does not seem to follow the rule laid down in Myers vs. Seaberger, although that case is cited as authority for the holding.

It will be seen, therefore, that the first question which you present is not free from difficulty. The corporation which you describe clearly has no situs for taxation as such within the state of Ohio. Besides being incorporated under the laws of another state, it actually has its principal office and headquarters for the transaction of business in another state. On the principles of law applicable to natural persons, the credits of this corporation would take the situs of its principal office, but if it had vested an agent in the state of Ohio with full authority to invest its moneys as well as to collect the interest and principal thereof in the state of Ohio, such agent should return the amount of such moneys so invested or rather the taxable value of the investment under section 6730, General Code.

But the case for an incorporated company is in reality weaker than that

for a private individual. Section 5404, General Code, as amended April 11, 1911, provides in part that:

> "The president, secretary and principal accounting officer of every incorporated company * * * whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing all the * * * moneys and credits of such company or corporation within the state at the true value in money."

This section, which was formerly section 2744, Revised Statutes, has been construed by the supreme court in the case of Hubbard vs. Brush, 61 O. S., 253. To attach to corporate property in Ohio a situs for the purpose of taxation other than that of the corporate residence, and to render credits as well as other forms of personal property taxable to such corporation at the place in this state where they are held regardless of corporate residence. In the opinion of the court, per Bradbury, C. J., the following language is found at page 264:

> "Where foreign corporations voluntarily bring their property and business into this state to avail themselves of the advantages found here * * * they should not be heard to complain of laws which tax them as domestic corporations are taxed by the state. We hold, therefore, that the provisions of section 2744 which makes it the duty of foreign corporations to list for taxation in this state their choses in action where they are held within this state and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state. * * * Its choses in action * * * fall within that class of property our tax laws call 'credits.'" * * *

While the facts in this case show that the corporation therein involved did all of its business in Ohio, and maintained its principal office in fact in this state, though incorporated under the laws of a neighboring state, and while also certain language in the syllabus and in the opinion would seem to indicate that this fact was an element in the decision of the court, yet the reasoning as embodied in the above quoted excerpt from the opinion seems to be equally applicable to the case of a foreign corporation doing a relatively small proportion of its business in this state. In any event the clear intention of section 5404, General Code, is to make corporate credits taxable where held in this state, regardless of the domicile of the corporation. In spite, therefore, of the doubt which surrounds the first question which you submit, I am of the opinion that a foreign corporation having its actual headquarters in another state, which through an agent resident in this state, loans money upon chattel mortgage and other securities in Ohio, and holds in Ohio the evidences of indebtedness witnessing such loans, must return the taxable value of such loans as "credits" in this state at the office of such agent.

The answer to your second question depends upon the practice of the company. For instance, the writer has in mind a certain corporation that had a manufacturing plant a few years ago in Jackson county, Ohio; the office of the company was at Philadelphia, Pa.; the plant in Jackson county reported all sales made, and all accounts and notes to the main office at Philadelphia where the books were kept, save such books as were necessary to be kept in Jackson county on account of sales, employment of men, purchases, etc.; all collections were made from the main office whence directions came as to the collection of all accounts and notes and choses in action; in other words, the situs of the

office of the company was at Philadelphia. In that case, clearly, credits should not be returned in Ohio for taxation.

The writer has further in mind a coal company with an office in Jackson county, Ohio, and another office in Chillicothe, Ohio. The president of the company resides in Chillicothe and maintains his office there, and in a general way directs the affairs of the company. However, all notes are turned into the office in Jackson county for collection; the books showing the credits are kept there; all statements and accounts of indebtedness are sent out from there; moneys are deposited in the banks in Jackson county; and it may be said that the real situs of the office of the company is in Jackson county, although there is an office maintained in Chillicothe which directs the business in a general way. The credits of this coal company should properly be returned for taxation in Jackson county, Ohio. See the case of Hubbard vs. Brush, supra.

Answering your third question I beg to state that the same seems to depend upon the meaning which must be given to the word "consumer" as used in section 46 of the act of May 10, 1910, 101 O. L., 409. This section, which is a definite one, provides that:

> "Any person or persons, firm or firms, joint stock association or corporation wherever organized or incorporated * * * when engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state is a natural gas company." * * *

Another section of the act, to-wit: Section 121 applies the term "public utility" to such natural gas company. It may therefore in a sense be said that within the meaning of the whole act a company is not a natural gas company which does not supply the public generally; that is to say, does not sell its product to the individual known in present day parlance as the "ultimate consumer." However, in my opinion a manufacturing company may be a consumer within the meaning of the act. Some significance must be attached to the use of the word "power" in section 46. "Power," as used in this section means a force applied in the process of production. The general public or the ultimate consumer has no need of "power." Therefore, it is clear that if the company sells natural gas to several manufacturers, it is a natural gas company within the meaning of the act. I can perceive no vital distinction between the business of selling to one manufacturer and the business of selling to two or three manufacturers.

In my opinion, therefore, the corporation described in your third question is a natural gas company. It seems to me quite clear that it cannot be regarded as a pipe line company by virtue of the mere fact that it does own and use lines of pipe for the purpose of supplying the manufacturing company with the gas sold to it. The distinction is clear. Section 46 provides in this particular that "when engaged in the business of *transporting* natural gas * * * through pipes or tubing * * * is a pipe line company." It is *transportation as a business* which constitutes a pipe line company.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

B 255.

TAXES AND TAXATION—POWER OF BOARDS OF REVISION TO REDUCE AND DECREASE VALUATION—NECESSITY FOR COMPLAINT—NOTICE TO PARTIES.

A county or city board of revision may not increase the valuation of any real property except upon complaint filed and upon proper notice to parties interested.

All reductions made by the board of revision are subject to the rule of 5601, *General Code, providing that they may not reduce the aggregate valuation returned by the assessors with the additions made thereto by the auditor.*

COLUMBUS, OHIO, May 20, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 18th, in which you submit for my opinion thereon the following question:

> "May a county or city board of revision increase the valuation of any real property without a complaint having been filed with such board to the effect that such property is assessed too low, or may such board, on its own initiative and without complaint being filed, increase the valuation of any real property, first giving notice as provided by law and an opportunity to be heard by the owner thereof?"

That this question must be answered in the negative seems to me to be clear from the provisions of sections 5600 and 5601 of the General Code which provide:

Section 5600:

> "After the completion of the equalization by the board, complaints against any valuation may be filed with the auditor of the county, and, if such complaint has been filed on or before April 15th thereafter against any valuation of a quadrennial county board, or if the auditor deems it advisable he shall notify the members of the proper board of equalization * * * to meet and sit as a board of revision. * * *"

Section 5601:

> "The board of revision shall investigate all such complaints and all complaints against any valuation filed with it as a board, or made by the county auditor, and may increase or decrease any valuation complained of and no other. * * * No valuation * * * shall be increased by the board of revision, in any case, except upon reasonable notice * * * to all persons directly interested and an opportunity for a full hearing * * *."

While it is undoubtedly true that the provision for notice to interested parties is all that the general assembly need have inserted in this section in order to conform to constitutional limitations, nevertheless the legislature has chosen to use unequivocal language in the first sentence of section 5601 from which,

and from the related provisions, the conclusion inevitably follows that the board of revision has no power whatsoever to act in any way, either to reduce or to raise the valuation of a specific parcel of real estate, unless a specific complaint as to the valuation of such real estate has been filed with it as a board or with the county auditor. Such complaint, however, may be filed with the board by the county auditor himself.

It is of course true that under provisions of section 5601, that above quoted, a board of revision may not reduce the aggregate valuation returned by the assessors with the additions made thereto by the auditor.

This requirement will in many cases perhaps operate practically to preclude the board of revision from reducing upon a complaint unless the amount thereby taken from the tax list is restored with respect to the valuation of other specific property. In practice, however, this defect may easily be obviated, either by requiring the complaining owner to specify property not fully valued at the time he complains with respect to the over-valuation of his own property, or by having the county auditor complain in respect to specific undervaluations. Such complaints by the county auditor may apparently be filed at any time.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 256.

TAXES AND TAXATION — TAX COMMISSION POWERS AS BOARD OF EQUALIZATION—CONTROL OVER INFERIOR BOARDS—POWERS TO RECONVENE AND RECONSIDER—REASSESSMENT—FUNDAMENTAL ERRORS—CERTIFICATION TO AUDITOR OF TAXING DISTRICT.

When, under sections 107 *and* 108 *of* 101 *O. L.*, 426, *the tax commission has changed the valuation of the real property as returned by the assessors of any taxing district and has certified its correct statement to the respective auditor, the jurisdiction of the commission in the matter is determined and it cannot reconsider its action, for the purpose of changing its fundamental judgment. Clerical errors may be corrected, however, by a "nunc pro tunc" entry at any time.*

Where, however, the fundamental judgment of the commission has been based upon a defective abstract furnished by the auditor of a taxing district, such fact vitiates the presumed jurisdiction of the commission which may therefore take action anew with regard to the respective district.

Such mistake is furthermore within the power of the commission to correct other than fundamental errors of judgment.

To sustain the intended scheme of taxation of the statutes, section 5542-9a *giving the power to the commission, to order county or city boards of equalization to reconvene and to revalue real property, is to be construed as excluding the exercise of such powers after the commission, having itself acted as a board of equalization under section* 107 *and* 108 *aforesaid has certified its final statement to the auditor. An exception exists where after such certificate errors of fact or errors of record appear, in which case also however such action can only be taken before the commission has itself acted upon such non-fundamental errors.*

Under section 81, *however, the commission may at any time when it deems necessary, upon notice and hearing raise or lower the assessed value of any real or personal property. As a matter of practice, however, it would be proper to exercise this power by way of appeal to local boards of revision.*

COLUMBUS, OHIO, May 22, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 17th, in which you submit for my opinion the following questions:

"(1) The commission having proceeded under the provisions of section 107 of the act of May 10, 1910, and having found that the real property in a certain taxing district, as reported by the county auditor to the commission, was not on the duplicate at its true value in money, and having made an increase or decrease in the valuation of the real property in such taxing district by a certain rate of per cent., and having transmitted to the county auditor a statement of the amount to be added to or deducted from the valuation of the real property in such taxing district, as provided in section 108 of said act, may the commission thereafter reconsider its action and change the rate of per cent. so fixed, to be added or deducted?

"(2) If such action of the commission was based upon an incorrect abstract transmitted to it by the county auditor, may the commis-

sion review its previous finding and correct the mistake caused by such failure of the county auditor to transmit a correct abstract?

"(3) After the commission has certified its action as to a county, city or other taxing district, may it order a county or city board of equalization to reconvene as a board of equalization, as provided in section 5542-9*a* as enacted February 28, 1911, and, if so, may such board change the aggregate as fixed by the tax commission?"

Sections 106, 107 and 108 of the act of May 10, 1910, 101 Ohio Laws, 426, provide in part as follows:

Section 106:

"Each county auditor, on or before the first Monday of November, 1910, and every fourth year thereafter, shall make and transmit to the commission an abstract of the real property of each taxing district in his county, in which he shall set forth the value thereof as returned by the assessors, with such additions as have been made thereto."

Section 107:

"The commission shall, on or before the first day of April following, determine whether the real property of the several * * * taxing districts in the state shall have been assessed at its true value in money, and if, in the opinion of the said commission, the real property which (in) any * * * taxing district * * * as reported by the said auditors * * * is not on the duplicate at its true value in money, the said commission may increase or decrease the valuation in such * * * taxing district by such rate of per cent. or by such amount as will place said property on the duplicate at its true value in money."

Section 108:

"When the commission has determined the true value of the real property in the several taxing districts the commission shall transmit to each county auditor a statement of the amount to be added or deducted from the valuation of the real property of each taxing district in his county. * * * The county auditor shall forthwith add to or deduct from each tract or lot of real property in his county, the required per cent. or amount on the valuation thereof, as it stands, after it has been equalized by the county and city boards of equalization." * * *

Answering your first question I am of the opinion that if the proposed reconsideration is for the purpose of changing the fundamental judgment of the tax commission as to the matter theretofore determined by it under section 107 of the act of May 10, 1910, such reconsideration is unauthorized and beyond the power of the commission. Singularly enough, I have found no case directly in point in such search as I have been able to make for authorities pertaining to your first question. On the one hand it is established that if a mistake, omission or other clerical error has occurred in the certificate of the action of a state or other board of equalization such an error may be corrected by the board itself or by the proper officer of the board at any time nunc pro tunc.

Sheldon vs. Township of Marion, 101 Mich., 256.
State ex rel. vs. Wray, 55 Mo. App., 646.
Cornell vs. Alsup, 107 Tenn., 257.

The tax commission of Ohio at all times has control of its own journals and records required by it to be kept and made up, and I think there can be no question as to its authority to correct errors in such records and certificates.

When the board has finally acted on any matter within its jurisdiction, however, and the certificates and records required to be executed by it are correct and conform to the actual determination of the commission, then in my judgment, in the absence of a statute expressly authorizing reconsideration of such matter, the power of the commission with respect to the same is functus officio. It is well settled as a principle of law that in the absence of any statute, a board or tribunal having administrative or judicial powers with authority to hear and determine a fact or a cause fully executes such authority and loses the same when its final action has been taken or its final determination has been made. Thus, at common law a court of general jurisdiction loses the power to reopen a cause determined by it after the expiration of the term at which its judgment was rendered, except in case of fraud or the like. Au fortiori then, the tax commission being a tribunal of limited jurisdiction, so to speak, as opposed to the general jurisdiction of a court like the court of common pleas, must be held to lose such jurisdiction with respect to a given matter when the same is once fully and completely exercised.

Under the statutes now under consideration it seems to me that the jurisdiction of the tax commission with respect to the equalization or review of the valuation of the real property of any given county is relinquished when the commission has transmitted to the county auditor a correct statement of its judgment as to the amount to be added or deducted from the valuation of the real property of each taxing district in such county. Before such a statement is transmitted to the county auditor the commission still retains jurisdiction of the subject-matter, so that, though it may have determined the same and spread upon its journal the record of such determination, nevertheless, the same may be reconsidered by the commission. It is not until the statement is transmitted to the county auditor that the commission does lose jurisdiction.

The answer to your second question, in my opinion, must be in the affirmative. As indicated in my answer to your first question, the commission at all times has power to review and correct its findings with respect to errors and mistakes other than fundamental errors of judgment. It is, in my opinion, essential to the proper exercise of jurisdiction by the commission under section 107 of the act of May 10, 1910, that the commission should have before it a correct abstract of the taxing district in a given county. A mistake of the county auditor in the exercise of his ministerial duty with respect to making up such an abstract might in a sense be said to vitiate all the proceedings of the tax commission with respect to the county. It is held that the presence of an incorrect tax roll or statement is not a jurisdictional defect which will vitiate proceedings of a board of equalization.

City of New York vs. Davenport, 92 N. Y., 601.
Dayton vs. Board of Equalization, 33 Ore., 131.

Whether or not, however, the auditor's mistake in making up his abstract is to be regarded as a defect of jurisdiction with respect to the power of the tax commission, I am satisfied that such a mistake authorizes the commission to act de nove with respect to the valuations of real property in the county, or

at least with respect to valuations within the taxing districts affected by such mistakes.

Section 5542-9*a* of the General Code, as enacted February 28, 1911, and referred to in your third question, provides in part as follows:

> "The tax commission of Ohio may, whenever in its opinion the same may be necessary or advisable, order the board for the annual equalization of real and personal property, moneys and credits, provided for in section 5580 of the General Code, of any county, the quadrennial board of equalization of real property outside of cities, provided for in section 5594 of the General Code, and such board sitting as a board of revision, * * * the city board of review * * * and such board sitting as a board of equalization or as a board of revision * * * of any city * * * and the quadrennial city board of assessors of real property * * * of any city, to reconvene, notwithstanding the time provided by law for the completion of the work * * * of such board may have passed, or such board may have finally adjourned, and may direct any such board to complete any unfinished work, business or duty, or correct any errors or omissions, *or authorizes it to change any improper valuations theretofore made.* When so reconvened such board in the performance of such duties as the tax commission may have directed shall have and exercise all the powers and perform all the duties imposed upon it by law before its final adjournment." * * *

As enacted, this section is supplemental to section 107 of the act of May 10, 1910, which is re-enacted in the same act and given the sectional number 5542-9.

In order clearly to understand the legal facts bearing upon the solution of your third question, the exact inter-relation of the functions of the various assessing and equalizing boards which form the component parts of the assessing machinery of the state must be understood.

Without citing all the statutes concerned, suffice it to say that the scheme of assessing real estate comprised in our statutes at the present time is substantially as follows:

1. The original assessment for valuations of specific tracts and parcels of real estate is made by township, village and city boards of real estate assessors in the quadrennial years.

2. The valuations so made are returned to the county auditor, and while in his hands are subject to correction and revision for clerical errors.

3. The county auditor lays before the quadrennial board of equalization and the city board of review, sitting as a quadrennial board of equalization, the returns of the various assessors and boards of assessors. The board of equalization then proceeds to equalize the valuations, affixed to specific tracts and parcels of real estate by the assessors and boards of assessors, among the individual tracts or parcels.

4. The equalizing boards certify to the county auditor the tax lists of the various taxing districts within their respective territorial jurisdictions. The auditor while having possession of such lists possesses the continuing power of correcting clerical errors therein.

5. The county auditor makes and transmits to the tax commission an abstract of all the real property in his county with the valuations *as equalized*, and the additions made thereto.

What the abstract of the real property, provided for in section 106 of the act of May 10, 1910, must set forth the *equalized* valuations is not clear from

the language of said section; however, said language is essentially similar to that of section 2817, Revised Statutes, construed by the supreme court in the case of State ex rel. vs. Morris, 63 O. S., 496, wherein it was held that the abstract to be made by the county auditor under the then existing law and transmitted to the decennial state board of equalization should set forth the equalized valuations.

6. The tax commission, acting under section 107, above quoted, and reenacted as section 5542-9, General Code, by the act of February 28, 1911, above cited, reviews, and in a sense equalizes, the valuation reported to it by the various county auditors *by taxing districts or parts thereof.* So far as its power under this section is concerned, the tax commission has nothing whatever to do with individual parcels or tracts of real estate.

In connection with section 107 of the act of May 10, 1910, however, section 80 of the same act must be read. This section provides in part as follows:

> "It (the tax commission) may receive complaints and carefully examine into all cases where it is alleged that property subject to taxation has not been assessed or has been fraudulently or for any reason improperly or unfairly assessed, or the law in any manner evaded or violated, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the taxation laws of the state."

In the same connection a portion of section 81 of the same act is in part as follows:

> "It (the tax commission) shall order a reassessment of the real or personal property in any taxing district, when in the judgment of said commission such property has not been assessed at its true value in money. * * *
>
> "It may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof fixing a time and place for hearing any person or persons interested to the end that the assessment laws of the state may be equitably administered."

Without determining the exact effect of these sections insofar as they refer to the present inquiry, suffice it to say, that I know of no reason why the extraordinary powers conferred upon the tax commission thereby may not be exercised after it has discharged its equalizing function under section 167 of the act with respect to the taxing district within which the specific property under consideration is located.

7. The commission determines the rate of per cent. or amount that must be added to or deducted from all the valuations within a given taxing district and certifies the same to the county auditor.

8. The county auditor, still having the power to make corrections for clerical errors, etc., transmits the tax lists as corrected by him pursuant to the orders of the tax commission, i. e., after the per cent. or proportionate amount has been ascertained and added to each separate valuation as equalized (State vs. Morris, supra), to the board of revision.

9. The board of revision, acting only upon complaint and only as to the specific tracts complained of, may change the valuations as previously made and equalized, if the same are found not to represent the true value in money of the specific tracts in question; so that such valuations shall represent such true value in money.

The foregoing constitutes the assessing machinery of the state with respect to real estate under existing laws.

Your question supposes that the tax commission, after having exercised its powers under section 107, having transmitted to the county auditor the certificate of the rate per cent. or amount to be added to the valuations of property in a given taxing district, ascertains upon complaint or otherwise that the work of the board of equalization having territorial jurisdiction of such taxing district was incomplete with respect to such valuations or was improperly done.

In my opinion, the tax commission, notwithstanding the broad language of section 5542-9*a*, may not order a county or city board of equalization to reconvene after it has itself acted as a state board of equalization. I am at least clear on the point that if the commission has the power to do this the whole machinery of taxation must be set in motion de novo, and the tax commission itself would have to act again as a state board of equalization with respect to the valuations within the taxing district affected by its orders. But I am persuaded that the power to make such an order is not vested in the tax commission. Section 5542-9*a* must be read in connection with all other statutes pertaining to the same subject-matter, and will not be so construed as to lead to confusion and to absurd consequences. The intent of all the related statutes is, that the logical order contemplated by the statutes and consisting of the successive steps of original assessment, equalization as among tracts, equalization as among districts and revision shall be followed; and it is repugnant to all of the sections, other than section 5542-9*a*, to hold that the law contemplates that this order may be in any respect reversed.

Furthermore, the phrase "at any time" as used in section 5542-9*a* cannot in the nature of things be given its broadest meaning. There must be a time when it is too late to equalize as among individual tracts; to hold otherwise would lead to endless confusion. It is certain, for instance, that after the board of revision has acted, and after the tax duplicate of the county has been made up and taxes are being collected it is too late to equalize among individual parcels. This, however, is not in my judgment what may be termed the locus penitentiae of the tax commission. Due deference to the scheme of taxation embodied in all of the related sections leads me to the conclusion that the power of the tax commission to order a re-equalization is lost when the next succeeding step contemplated by the general scheme has been taken; that is, when the tax commission itself has exercised the function of equalization as among taxing districts or parts thereof. In other words, so long as the tax commission has not returned to the county auditor its certificate of the rate per cent. to be added to or deducted from the valuations within a given taxing district it may order the board of equalization to reconvene as such and may direct the county auditor upon the completion of the work of the reconvened board to make an abstract of its finding and transmit to the tax commission for proper action thereon. This statement, however, must be taken in connection with my statements with respect to your second question. That is to say, if, acting under section 5542-9*a*, the tax commission finds that a county board of equalization has made errors or omissions, other than errors of judgment, and has left its work unfinished, so that the fact that its work is not finished appears of record, then of course the errors of the board of equalization would have been carried into the auditor's abstract to the tax commission and would have constituted errors in it, so that all of the work of the tax commission respecting such an abstract could be reconsidered and done over again after the correction of such errors. Therefore, if the tax commission finds that the work of a board of equalization is imperfect on grounds other than those affecting its fundamental judgment respecting valuations, it may reconsider its action, with respect to that taxing

district, which may have theretofore been taken under section 107 of the act of May 10, 1910, reconvene the board of equalization for equalizing purposes and direct the county auditor to transmit to the commission a corrected abstract, so that the commission may again exercise its functions under said section 107 with respect to the real property of that and other taxing districts.

If, however, the fact that the work of the board of equalization was in a sense unfinished does not appear of record, or if the criticism or complaint respecting its work is directed at its judgment in the matter of valuations then, in my opinion, the tax commission has no power to order the board to reconvene after the commission itself has certified the rate per cent. to be added to or deducted from the valuations within the taxing district in question.

In either event, the work of reconvening a board of equalization cannot *follow* the work of the tax commission under section 107 of the act of May 10, 1910; it must at all events *precede* the exercise of the power of the commission.

I have referred to sections 80 and 81 of the act of May 10, 1910, as indicating the proper remedy. In case the action of the tax commission is invoked with respect to the correction of fundamental errors either before or after it has acted under section 107. Under section 80, as above quoted, the tax commission has power to receive complaints and examine into cases of violation of the law or unfair assessment, but it is to be noted that no power is conferred in that section to proceed in any manner to correct such errors or improper determination of local officers. Section 81 permits the tax commission to order a reassessment of the real or personal property in a taxing district. By parity of the reasoning above adopted I do not believe this order can issue after the tax commission has acted under section 107, if indeed it can be exercised after the local board of equalization has acted.

The power of the tax commission, however, to raise or lower the assessed value of any real or personal property after notice and hearing under section 81 seems to be plenary; this power may be exercised at any time when it would seem most proper to exercise it after the entire machinery above described has been carried out. As a matter of practice, if not as a matter of law, I would deem it most proper for this power of the tax commission to be exercised by way of appeal to local boards of revision.

To summarize, my conclusions as to your third question are: The tax commission, after having certified its action as to a taxing district, under section 108 of the act of May 10, 1910, may not order a local board of equalization to reconvene as such unless for the purpose of correcting clerical errors, and other errors manifest on the face of the record or tax list; and then, in order to carry out the scheme of taxation the tax commission must reconsider its actions as to the county within which such taxing district is located, and again exercise its function under section 107 with respect to the corrected abstract showing the conclusions of such local board when so reconvened.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 258.

MESSENGER COMPANIES—DELIVERY AND ERRAND BUSINESS.

An association of individuals engaged in the special delivery business, handling parcels and packages from stores and factories, furnishing guides to strangers, delivering letters and packages, etc., is a "messenger company" within the meaning of section 46 of the act of May 10, 1910.

COLUMBUS, OHIO, May 24, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 12th, submitting for my opinion thereon the following question:

> "Is an association of individuals engaged in the special delivery business—handling parcels and packages from stores and factories, furnishing guides to strangers, delivering letters and packages, and errands in connection with rent of automobiles, taxicabs and livery vehicles—'a messenger company' within the meaning of section 46 of the act of May 10, 1910?"

In my opinion if a part of the business of the association of individuals which you mention is the furnishing of persons for the purpose of carrying messages and running errands the association is a public utility within the meaning of said section 46. The pertinent provisions of that section are as follows:

> "Any person or persons, firm or firms, joint stock association or corporation wherever organized or incorporated * * * when engaged in the business of supplying messengers or of signaling or calling by electrical apparatus, or in a similar manner, for any purpose, is a messenger or signal company."

There can be no doubt that the word "or" in the foregoing provision is disjunctively used. That is to say, if a person or corporation is engaged only in the business of supplying messengers it is nevertheless a messenger or signal company; it is not necessary that it should also be engaged in the business of signaling or calling by electrical apparatus or in a similar manner. The word "messenger" has a very definite meaning. All lexicographers define it as referring to one who carries messages and runs errands.

For all of the foregoing reasons I am of the opinion that the association described by you is a messenger or signal company within the meaning of said section 46. I am aware that such a company cannot well be said to have a "plant" to be valued under the "unit rule" as required by section 72 to section 79, inclusive, of the act of May 10, 1910. This difficulty, however, is inherent in the statute. The intent of the statute to classify such messenger companies as public utilities is clear.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

C 258.

TAXES AND TAXATION—BANKS AND BANKING—SOCIETY FOR SAVINGS OF CLEVELAND—ANNUAL REPORTS TO COMMISSION AND FEE—RETURNS TO ASSESSOR.

The constitutions of Ohio and the United States guard thoroughly against the danger of exempting from taxation any particular class of corporation and the fundamental principles of law are against such exemptions.

The act of 101 *O. L.* 299-421 *in accordance with this principle clearly manifests the intention to tax all corporations in the general scheme of taxation provided for therein and particularly by the express provision of section* 82.

By reason of these premises, the statutes must, if possible, be construed to assess a tax against the Society for Savings of Cleveland and such authorization is to be found in section 90 *of the aforesaid act under which that corporation should be compelled to report annually to the tax commission and must pay the fee of ten dollars therein prescribed, being taxed thereby as a mutual corporation organized for profit but having a capital stock, though it is a mutual corporation in theory rather than such in the strict sense of the word.*

In view of the directory provision of article XIII, section 3 *and article XIV, section* 4 *of the constitution providing for the taxation of all property employed in banking and all property of corporations, and in view of sections* 5325, 5326, *General Code, which specifically mentions societies for savings, the Society for Savings of Cleveland must make returns to the assessor.*

COLUMBUS, OHIO, May 24, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 12th, requesting my opinion upon the following questions:

"(1) Is the Society for Savings, in the city of Cleveland, a corporation organized under the laws of this state for profit, and as such required to make annual reports to the tax commission and pay fee upon the amount of its subscribed or issued and outstanding capital stock, as provided in sections 82, 83 and 84 of the act of May 10, 1910 (101 O. L. 399)? If so, what should be the amount of its fee?

"This company was chartered by a special act of the general assembly passed April 4, 1849 (47 O. L. 279). The act was amended February 15, 1877 (74 O. L. 26). (Sections 9814 and 9815, General Code.)

"(2) Is the Society for Savings of Cleveland such a bank or banking association under the laws of this state as should make report to the county auditor, and be assessed by him under the provisions of sections 5407-5414 of the General Code?"

The act of the general assembly, 47 O. L. 279, is in part as follows:

"An act to incorporate the Society for Savings of the city of Cleveland.

'Section 1. Be it enacted by the general assembly of the state of Ohio, That Henry W. Clark, Louis Henderson * * * and Samuel H. Mattern be and they are hereby incorporated into a society by the name, style and title of the Society for Savings, in the city of Cleveland, and they, and such others as shall be duly elected members of the said so-

ciety * * * *shall be and remain a body politic and corporate* by the same name, style and title for thirty years.

"Section 2. That the said society shall be capable of receiving from any person or persons * * * any deposit or deposits of money, and to use and improve the same, for the purposes, and according to the directions herein * * * provided.

"Section 3. That all deposits of money received by said society, shall be used and improved to the best advantage, and in a manner not inconsistent with the laws of this state. And the income or profits thereof shall be applied and divided among the persons making the deposits, their executors or administrators, in just proportion, with such reasonable deduction *as may be chargeable thereon* and the principal of such deposits may be withdrawn at such time and in such manner as the said society shall direct and appoint.

"Section 4. That the said society shall * * * have power to elect by ballot any other person or persons as members of said society.

"Section 5. That the said society may have a common seal * * * and that all deeds, conveyances and grants, covenants and agreements, made by their treasurer, or any other person, by their authority and direction * * * shall be good and valid; and the said society shall * * * have power to sue, and may be sued, and may defend * * * by the name, style and title aforesaid.

"Section 6. That the said society shall hereafter meet in the city of Cleveland, sometime in the month of June, annually; * * * and all officers * * * shall be under oath to the faithful performance of the duties of their offices respectively.

"Section 7. That the said society hereby are, and forever shall be vested with the power of making by-laws; * * * provided the same are not repugnant to the laws of this state.

"Section 8. That the said society be, and hereby is authorized to hold real estate in the city of Cleveland, other than that which may be conveyed to said society for security, or in payment of debts, not exceeding in value ten thousand dollars.

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

"Section 10. That this act or any part thereof may be altered or repealed at the pleasure of the general assembly of this state."

I think it is elementary that the above quoted provisions, when enacted and assented to by the persons therein named by appropriate action thereunder, constituted such persons at the time and for all purposes a corporation of the class sometimes referred to as "a close corporation," without capital stock or stockholders, for the period of thirty years.

Shortly prior to the time when the foregoing charter would otherwise have expired, and after the adoption of the present constitution, to-wit: on February 15, 1877, the general assembly enacted the following law:

"An act to extend the charter of societies for savings.

"Section 1. Be it enacted by the general assembly of the state of Ohio, That 'societies for savings' * * * now doing business, whose charters are subject to alteration or repeal may continue their business under their respective charters after the expiration thereof, subject, however, to the repeal of any such charter, and to such amendments, alterations, rules and regulations as may be prescribed * * * by any laws of the state.

"Section 2. That before any dividend or interest on deposits shall be paid it shall be the duty of such societies to have a surplus fund equal to not less than five per centum of the whole amount of deposits; and it is made the duty of such societies to gradually increase such surplus fund to an amount equal to ten per centum of the amount of deposits. (74 O. L. 26.)"

Prior to the passage of this act, to-wit: March 31, 1866, the general assembly enacted a law authorizing societies for savings "duly incorporated by the general assembly of this state, and now doing business under their respective acts of incorporation" to invest in land for the purpose of their own business, such sum as the trustees might deem necessary, not to exceed five per cent. of the amount of the deposits held by such society for savings, and to rent such part of the building so erected as shall not be needed for their own use. (63 O. L. 62.)

So far as I am able to ascertain, no other amendment or alteration of the original charter of the Society for Savings of Cleveland has ever been passed by the general assembly. The act of 1866 became section 3813, Revised Statutes, and section 9812, General Code; the act of 1877 became sections 3814-15 and 3814-16, Revised Statutes, sections 9815 and 9814 of the General Code.

I assume from your letter that the Society for Savings of Cleveland has never adopted the general corporation act of the state, but has continued to exercise the corporate powers conferred upon it by its original act of incorporation as made perpetual and as amended in certain particulars by the subsequent acts of the general assembly above quoted and referred to.

Analysis of the charter of the Society for Savings, as amended, establishes the following facts pertinent to the discussion of the first question presented by you:

1. The society is a corporation.

2. The corporation has no capital stock, divided into shares; no authorized capital which, without legislative authority, it may not exceed; and obviously, no attribute which could be described as "subscribed or issued and outstanding capital stock."

3. The corporation is organized for profit. While this fact is not explicitly stated in the charter, the power to withhold from the depositors a reasonable proportion necessarily implies the power in the members of the corporation to derive profits therefrom.

The following provisions of the act of May 10, 1910, 101 O. L. 299-421, et seq., must be applied to the facts as above outlined:

"Section 82. Each corporation organized under the laws of this state, for profit, shall make a report * * * to the commission, annually, during the month of May, * * *

"Section 83. Such report shall contain: * * *

"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 outstanding, and the amount of capital stock paid up.

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

"Section 84. Upon the filing of the report provided in sections 82 and 83 of this act, the commission * * * shall report to the auditor of state, who shall charge and certify to the treasurer of state for collection * * * from such corporation, a fee of three-twentieths of

one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case.

"Section 88. Each corporation organized under the laws of this state, not for profit, *and having no capital stock*, shall make a report in writing to the commission, annually, during the month of November. * * *

"Section 90. Upon the filing of such report, as provided in the last two preceding sections, the commission shall report to the auditor of state * * * who shall charge and certify to the treasurer of state * * * for collection, * * * a fee of ten dollars from each corporation, organized as a mutual insurance corporation, not having a capital stock, or any other mutual corporation not organized strictly for benevolent or charitable purposes, and having no capital stock. * * *

"Section 91. Upon the filing of the report, provided for in sections eighty-eight and eighty-nine of this act, the commission shall report to the auditor of state * * * who shall charge and certify to the treasurer of state * * * for collection * * * one dollar from each corporation formed for religious, benevolent or literary purposes, or of such corporations *as are not organized for profit*, have no capital stock, and are not mutual in their character. * * *"

Analysis of these statutes establishes the following principles:

1. The intent is manifest to impose a franchise tax upon all corporate franchises existing by virtue of the laws of Ohio. (Southern Gum Company vs. Laylin, 56 O. S. 578.)

It cannot be presumed that the general assembly intended to exempt from this franchise tax any single corporation or class of corporations. Aside from the constitutional dangers surrounding such exemption, and the presence of which would undoubtedly lead a court to construe the law in its doubtful provisions so as to avoid such dangers, there is in the law itself clear evidence of lack of any intention to exempt any, save certain kinds of corporations. Thus section 101 of the act of May 10, 1910, provides that:

"Electric light, gas, natural gas, waterworks, pipe line, street railroad, suburban or interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other public utilities required by law to file annual reports with the commission, and insurance, fraternal beneficial, building and loan, bond investment and other corporations required by law to file annual reports with the superintendent of insurance shall not be subject to the provisions of sections eighty-two to ninety-two inclusive of this act."

The scheme of franchise and excise taxation, thus disclosed, effectually negatives any intent to exempt any class of corporations or any particular corporations from the payment of one or the other of the special taxes therein provided for. All these considerations are in addition to the fundamental principle that the presumption is against exemptions from taxation.

2. Three classes of corporations subject to the franchise tax are defined in the related sections as follows: (a) corporations for profit having a capital stock; (b) corporations for profit having no capital stock, (2) corporations not for profit.

This classification is not apparent at first glance, but it becomes manifest upon close study of the related sections. Standing alone, section 82, above

quoted, seems not to recognize any class of corporations for profit, and by itself seems to require all such corporations to report in the month of May; however, the report that is required from the corporations defined in section 82 must set forth the amount of the authorized capital stock, the par value of each share, the amount of the capital stock subscribed, the amount of the capital stock issued and outstanding, and the amount of the capital stock paid up, all of which is manifestly impossible in the case of a corporation having no capital stock.

It is here to be noted also that the phrase "capital stock" as used throughout this portion of the act of May 10, 1910, has a technical meaning. It does not refer to the sum total of the assets of the corporation but to several different things capable of exact definition; thus, the authorized capital stock of a corporation is the total par value of shares of stock which it may have; the subscribed capital stock is the total par value of all the shares subscribed for; and the issued and outstanding capital stock is the total par value of all the shares issued and outstanding in the names of the shareholders.

Close analysis of sections 88 and 90 as above quoted strengthens the conclusion already reached, as to the limited meaning of the phrase "each corporation organized under the laws of this state, for profit" as used in section 82. It will at once appear that the primary question of construction which is presented by all the related sections is embodied in the first sentence of section 88. This section provides that "Each corporation * * * not for profit, *and having no capital stock*" shall report in the month of November. This phrase incapable of two meanings, as follows:

(a) Each corporation which is not for profit and has no capital stock shall report in November. That is to say, the corporations which are required to report in November are those, and only those, having the characteristics of being organized not for profit, and of having no capital stock.

(b) Each corporation organized not for profit, and each corporation which has no capital stock, shall report in the month of November. That is to say, this interpretation of the section makes it refer to and define two classes of corporations.

I am satisfied that the second of the two interpretations of section 88 suggested is the correct one, for the following reasons: In the first place, I have already pointed out that section 82 and succeeding sections of the act of May 10, 1910, while in terms applicable to all corporations for profit, cannot in practice be applied to corporations for profit having no capital stock.

In the second place section 90, above quoted, provides for the collection of a fee of ten dollars from certain corporations therein referred to as being embraced within the definition of section 88, and which, nevertheless, are corporations organized for profit. Thus, mutual insurance companies are in a certain sense corporations for profit. Section 90 must be read in connection with section 88, and it becomes clear upon such joint reading of those two sections that section 88 and succeeding sections include within their scope such corporations for profit as have no capital stock.

Further analyzing the related sections it appears that section 90 is the only section of the entire act of May 10, 1910, under and by virtue of which, corporations organized for profit, and having no capital stock, can be taxed. Section 91 authorizes the collection of a tax of one dollar from corporations organized for religious, benevolent or literary purposes, thus excluding the purpose of profit; from "such corporations as are not organized for profit, have no capital stock and are not mutual in their character," which phrase, because of

its peculiar grammatical construction, is clearly to be construed differently from the somewhat similar phrase employed in section 88; and from religious and secret societies formed not for profit.

That the above quoted phrase of section 91 is to be construed, so to speak, cumulatively rather than disjunctively, seems to me to be clear, as above suggested, from its grammatical construction. That is to say, the second class of corporations liable for a tax of one dollar, are such corporations as possess all three of the characteristics therein mentioned, namely: That of organization not for profit; that of absence of capital stock; and that of non-mutuality of character.

Returning then to section 90, it becomes immediately apparent that aside from certain insurance companies the only class of corporations taxed under said section is "mutual corporations not organized strictly for benevolent or charitable purposes, and having no capital stock."

Referring now again, to the peculiar characteristics of the Society for Savings of Cleveland, it appears that this corporation must be taxed as a "mutual corporation not organized strictly for benevolent or charitable purposes, and having no capital stock," or else as "a corporation, not organized for profit, having no capital stock, and not mutual in its character."

For reasons above suggested I am of the opinion that the intent of the law is, that corporations like the Society for Savings shall be taxed as mutual corporations organized for profit, but not having a capital stock. To be sure, the plan of business defined in the charter of this company cannot be accurately described as "mutual." In a sense, it is mutual, for in theory at least, all the depositors of the company participate in the profits accruing on account of the investments of the funds created by the deposits; on the other hand, however, such profits do not belong exclusively to the depositors, but the members of the corporation are given the right to withhold, presumably for their own use, and in addition to the surplus required to be maintained by the charter, such amounts as they may see fit as their own personal property.

In spite of the fact that the Society for Savings is not a mutual corporation in the strict sense of the word, I have been led to the conclusion that it must be taxed as such. The reasons which I have already indicated support this conclusion. It is not to be presumed that the legislature intended to exempt any single corporation or any class of corporations from taxation. Every suggestion of the actual intent which animated the general assembly in the enactment of this law tends to create the contrary presumption. The constitutions themselves, both that of the United States and that of the state of Ohio, prohibit arbitrary classification, even in matters of taxation, and laws will be construed, if possible, so as to obviate all seeming conflict with the supreme law.

Furthermore, in matters of taxation technical definitions are not to be strictly adhered to. If the phrase "mutual corporations not organized for benevolent purposes and having no capital stock" actually had a definite and ascertained meaning the question would be more difficult. So far as I know, however, the exact meaning of this phrase has never been judicially determined, if indeed it has any exact meaning. It was evidently inserted in the act for the purpose of reaching all classes of corporations organized for profit, and having no capital stock other than those specifically enumerated in section 90. To be sure, the phraseology is borrowed from section 176 of the General Code which defines the fees of the secretary of state for filing articles of incorporation; but I do not think it can be presumed, because of this fact, that the general assembly intended to confine the subjects of franchise taxation to corporations which have been organized since the adoption of the constitution of 1851.

For all of the foregoing reasons, I am of the opinion, with respect to your first question, that the Society for Savings of the city of Cleveland is a corporation organized under the laws of this state for profit, and having no capital stock, and as such is required to make annual reports to the tax commission, but not by section 82 of the act of May 10, 1910; it must report annually to the commission in the month of November under section 88 of said act, and must pay the fee of ten dollars prescribed by section 90 thereof.

The following sections of the General Code are applicable to the solution of your second question:

> "Section 5404. The president, secretary and principal accounting officer of a * * * joint stock company, except banking or other corporations, whose taxation is specifically provided for * * * shall list for taxation * * * all the personal property thereof. * * *"

This section has been amended by the act of April 11, 1911, so as to read as follows:

> "Section 5404. The president * * * of *every incorporated company*, except banking or other corporations whose taxation is specifically provided for, shall list for taxation * * * all of the personal property thereof * * *."

There is a distinction between a "joint stock company" and an "incorporated company," which is made manifest by the peculiar organization of the Society for Savings. Thus, if section 5404 is to be considered at all in connection with your second question it is manifest that, in its original form it did not apply to the Society for Savings, while in its amended form it might apply to this corporation.

> "Section 5407. A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an office or other place of business, and engages 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, is a bank, or banker, within the meaning of this chapter."

It is manifest that the Society for Savings is not embraced within this definition because it *is* incorporated.

> "Section 5408. All the shares of the stockholders in an incorporated bank or banking association * * * and all the shares of the stockholders in an incorporated bank, * * * the capital stock of which is divided into shares held by the owners of such bank, and the capital employed, or the property representing it, in an incorporated bank the capital stock of which is not divided into shares, * * * shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

Upon close analysis it is apparent I think that this section does not apply to the Society for Savings. Not having any shares of stock there is nothing which can be taxed as such; being an incorporated company it is not "an incorporated bank the capital stock of which is not divided into shares." I think

it is manifest that the Society for Savings is not a bank within the meaning of the statutes above quoted.

There seems to be little doubt that the Society for Savings is a bank in the ordinary sense of the word.

In the case of Collett vs. Springfield Savings Society, 12 C. C. 131, affirmed without report, 56 O. S. 776, the question was as to the application of the then existing tax laws to the taxation of the Springfield Savings Society. This system was incorporated under the act of April 16, 1867, 64 O. L. 184. This was an act entitled "An act to incorporate savings societies." It was a general law under which a number of such societies were incorporated, different from the character of the Society for Savings, in that all depositors who might have on deposit in such society the sum of fifty dollars or upwards should be members of the society and entitled to vote; in other words, the corporation was not a close one like the Society for Savings. Furthermore, the trustees of a savings society incorporated under the act involved in the Collett case were prohibited from receiving any emolument or pay for their services, and all deposits in the society were expressly required to be held for the use and benefit of the depositors solely. All deposits were to be paid into the state treasury and there held as a fund in trust for the depositors. Without quoting any of the specific provisions of the act of 1867, suffice it to say, that the general effect thereof was to make a savings society incorporated thereunder a mere trustee or agent for its depositors, and this was the gist of the decision in Collett vs. Savings Society, supra.

It may be that the Society for Savings of Cleveland is, under its charter, in a qualified sense, a trustee for its depositors; but the trust is not absolute, and the trust or agency relation does not so clearly appear as in the case of savings societies incorporated under the act of 1867. Although the Society for Savings has been in existence for over sixty years, I am unable to find any reported decision defining the mutual rights, duties and obligations of the society on the one hand, and its depositors on the other.

The Collett case, supra, which you cite in your letter, has, as above indicated, no direct bearing whatever upon the question at hand as it related to a class of corporations formed under a law quite dissimilar to that which constitutes the charter of the Society for Savings. It does have indirect bearing, however, for the following reasons:

1. It is established by the decision in question that the moneys deposited in the savings society continued to be the property of the depositors, and that the relation of debtor and creditor did not exist as between the society and its depositors in this respect. Of course, a sharp distinction exists as between such societies and banks, and by virtue of this fact alone a society incorporated under the act of 1867 was not a bank, even in the ordinary sense of the word.

2. The controversy in this case was as to the method of making returns on a part of the savings society under the general laws of this state prior to the enactment of section 2759b, Revised Statutes. In order fully to understand the issues involved in the case, certain legislative history must be recited, and this legislative history is instructive with respect to the question at hand.

Prior to April 19, 1904, the scheme and arrangement of the sections relating to the taxation of banks, as such, was quite different from that now embodied in sections 5407 to 5415 inclusive. The sections then existing were sections 2758 to 2769 inclusive, and they were divided into two subdivisions, one entitled "Unincorporated banks and bankers" and the other entitled "Incorporated banks." (See Bates' Annotated Statutes, 4th Edition, Vol. 1, pages 1532 to 1535 inclusive.) Section 2758, Revised Statutes, was identical with section 5407, General Code; section 2759, Revised Statutes, prescribed a form of return to be

made by unincorporated banks and bankers, in case the capital stock of such bank was not divided into shares; section 2759*a*, Revised Statutes, made further provision for the return to be made by such banks; and section 2759*b* was as follows:

> "The provisions of section 2759 shall apply to and govern savings banks incorporated under the act of April 16, 1867."

It was this section which was construed, in Collett vs. Springfield Savings Society. It seems to have been regarded as clear by the judge who rendered the decision (Summers, J.), that prior to the enactment of section 2759*b*, on April 16, 1890, the Springfield Savings Society was not required by law to make returns to the county auditor as a bank. In fact, this society was in a situation with respect to the bank tax laws similar to that in which the Society for Savings seems now to be, viz: It was not an unincorporated bank, nor was it an incorporated bank having shares of stock. It further appears from the report of the case, page 133, that the contention was made therein that the Springfield Savings Society had always been an unincorporated bank within the meaning of the tax laws, but, as I have heretofore stated, this contention was not upheld. It was held that, prior to the enactment of section 2759*b*, the Springfield Savings Society was not a bank at all, and that it never would have been required to make returns to the county auditor as a bank but for the enactment of that statute.

It further appears from the decision of the court that, prior to the enactment of section 2759*b*, the society had returned and paid taxes upon its furniture, real estate surplus and undivided profits, less that part of the same invested in non-taxable securities, leaving to the depositors the duty of returning and paying taxes upon their deposits. This manner of returning and paying taxes on the part of the depositors was by inference at least approved by the court.

By the act of April 19, 1904, 97 O. L. 279, heretofore referred to, the present scheme of taxation for banks was adopted. This act repealed sections 2759 and 2759*a*, Revised Statutes, but left section 2759*b* unrepealed. However, it was correctly assumed, I think, by the codifying commission of 1910, that this section was repealed by implication, inasmuch as it was dependent upon section 2759, Revised Statutes, and that section having been repealed, could have no meaning whatever. It appears, therefore, that under the present law the Springfield Savings Society would be required to make returns to the assessors and to the county auditor just as it did prior to the enactment of section 2759*b*.

I think it is apparent from all the foregoing that section 2759*b*, the section construed in Collett vs. Springfield Savings Society, does not in any way refer to or affect the Society for Savings of Cleveland. As heretofore pointed out, however, that decision is useful in connection with the present question, in that, it shows clearly the failure of the statutory definition of "banks" and "unincorporated banks," used in the tax laws of this state, to exhaust the membership of the class of institutions commonly and popularly known as "banks."

Whether or not then, the Society for Savings of Cleveland is a bank, and the creditor of its depositors, rather than their trustee as was the Springfield Savings Society, I cannot do otherwise than conclude that section 5407 and succeeding sections of the General Code do not provide a method of taxation applicable to it and that it is not required to make returns to the county auditor under said section.

I have, I think, correctly assumed that section 5407, et seq., do not apply to the Society for Savings. The next statute to which one would naturally turn is

section 5404, et seq., providing for the returns of corporations generally. I have already pointed out that original section 5404 was equally inapplicable to the Society for Savings, in that, it failed to exhaust the kinds or classes of corporations, just as section 5407, et seq., fail to exhaust the possibilities with respect to banks; that is to say, original section 5404 applied only to joint stock companies, and the Society for Savings is not such a company. Now, however, the section under consideration, as amended in 1911, does apply to all corporations, the taxation of which is not otherwise specifically provided for, and the conclusion would seem to follow that since the amendment in question the Society for Savings will be obliged to make its returns to the county auditor under said section.

I assume, however, that the question might relate to the application of original section 5405. If that would be the case, then, in my opinion, the personal property of the Society for Savings should, prior to the amendment of section 5404, have been returned to the assessors like the personal property of a private individual.

Clearly, the mere fact that neither the act providing for the taxation of banks nor that providing for the returns of corporations was applicable to the Society for Savings could not exempt such society from taxation. As already indicated the presumption is against such a conclusion. In addition to this principle, the provisions of the constitution expressly prohibit such exemption.

> "Article XXI, section 3. The general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues of every description (without deduction) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation, equal to that imposed on the property of individuals.
>
> "Article XIV, section 4. The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

So that, whether or not the Society for Savings be, in the technical sense, a bank, it could not constitutionally be exempted from taxation by virtue of one or the other of the foregoing sections. It is true that neither one of these sections is self-executing, and that in a practical sense they are directory. In a given case, however, when it is doubtful as to whether or not a certain corporation or a certain bank or class of such corporations or banks is subject to taxation under an ambiguous statute, I have no doubt that those two sections ought to be relied upon in addition to the presumption theretofore referred to so as to resolve all doubt in favor of the taxing power and against the exemption.

But the question is not even doubtful. The general assembly has expressly provided for the taxation of the Society for Savings. Section 5325, General Code, formerly part of section 2730, Revised Statutes, being a definitive taxation section, provides as follows:

> "The term 'money' or 'monies' as so used (in this title) includes any surplus or undivided profits held by *societies for savings, or banks having no capital stock*, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money or demand."

Section 5325, General Code, provides that:

> "The term 'personal property' as so used, includes first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stocks, profits or means, by whatsoever name designated * * *."

Section 5327 provides that:

> "The term 'credits' as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing * * * including deposits in banks or with persons in or out of the state other than such as are *held to be money* * * * over and above the sum of legal bona fide debts owing by such persons."

It will be noted that section 5326 expressly mentions "societies for savings." I know of no other such society in this state than that located in Cleveland, to which your question relates, and I am clearly of the opinion that whether or not there be any other such society the society in question is covered by this section.

Section 5320, General Code, provides that:

> "The word 'person' as used in this title, includes firms, companies, associations and corporations. * * *"

It is clear, therefore, that in the various sections of chapter 3 of the title relating to taxation, being section 5368, et seq., of the General Code, wherever the word "person" is used it may be read "corporation" if there be corporations in the state the taxation of which is not specifically provided for in chapter 4.

But even this conclusion is left to inference. Section 5370 of the General Code expressly provides that "all surplus or undivided profits held by societies for savings, or bank having no capital stock (shall be listed) by the president or principal accounting officer," therefore, the general assembly, under original section 5405 expressly recognized societies for savings as a class of banking institutions which should make returns to the assessors.

Prior then, to the amendment of section 5404, General Code, by virtue of the statutes above quoted, it was the duty of the Society for Savings, as a corporate entity, to return to the assessors for taxation its furniture and other movable property, its credits, and its surplus or undivided profits. Also, by virtue of section 5326, General Code, and not necessarily (as I have already stated) by virtue of the decision in the case of Collett vs. Springfield Savings Society, it was the duty of each depositor in the Society for Savings to return as money the amounts of his deposits in such institution, to the assessor. Also, by virtue of section 5325 it was the duty of the members or trustees of the Society for Savings, as individuals to return to the assessor his several interests as a member of said corporation at its true value in money, not as an investment in a "joint stock company" but rather as "a share or interest" in the means and profits of an incorporated company the capital stock of which is not divided into shares."

A more difficult question is presented under section 5404, General Code, as

amended in 1911. I heretofore stated that it would *seem* that, because of the more general language of the amended section, the Society for Savings, being a "corporation the taxation of which is not specifically provided for," should now make its returns under said section. This conclusion, however, does not necessarily follow. The above quoted provisions of sections 5370, 5326, 5327 remain in the law unrepealed. It would seem that these sections do still specifically provide for the taxation of the Society for Savings. If that is the case, then, of course there is no conflict between amended section 5404 and the sections last above mentioned, and the corporations known as societies for savings would simply be regarded as one of the classes of corporations excluded from the amendment of section 5404, by the language "except * * * other corporations, whose taxation is specifically provided for."

But even if there be a conflict between amended section 5404 and those previously enacted and still retained sections specifically relating to the taxation of the Society for Savings, yet, there would be in such case no implied repeal of the earlier section. It is too well settled to require citation of authorities that the later enactment of a general statute, repugnant to an existing particular statute will not be construed as an implied repeal of such particular provisions, but the latter will be regarded as exceptions to the general rule of the former.

Upon the whole, then, I am of the opinion that even after the amendment of section 5404, above quoted, a society for savings should make returns to the assessor in the manner and form above described.

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

A 263.

TAXES AND TAXATION—EXEMPTIONS—CONSTITUTIONAL PROVISIONS —NATURAL PERSONS—TRUSTEES, GUARDIANS, PERSONAL REPRESENTATIVES, ETC.

The term "individual" as used in article XII, section 3, of the constitution, compels the construction that section 5860, General Code, exempting from taxation the first one hundred dollars of personal property, applies only to natural persons and not to corporations.

Parties owning property in common, are each entitled to a deduction of one hundred dollars from the values of their respective interests.

Trustees, guardians, testamentary trustees, etc., who actually act as legal representatives of others for the purpose of paying their taxes, may deduct in their behalf the one hundred dollars exemption. Executors and administrators represent estates of deceased persons, however, and may not deduct the exemption in behalf of the estate or of separate heirs or legatees.

COLUMBUS, OHIO, June 2, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 20th, requesting my opinion upon the following questions:

"(1) Four brothers and sisters, owning real estate in common, also own in common the stock, farm implements, grain, feed, etc., on the

farm. Are they each entitled to an exemption of $100 or are they entitled to an exemption of $100 for all, or to any exemption on account of this common property?

"(2) Is a trustee of an estate entitled to an exemption of $100 from the personal property held as such trustee?

"(3) Is an administrator or an executor of an estate entitled to an exemption of $100 from the personal property which he lists as such administrator or executor?

"(4) Is a guardian entitled to an exemption of $100 from his ward's personal property which he lists as such guardian?

"(5) Is an incorporated company or a bank entitled to an exemption of $100?"

The constitution, article XII, section 3, provides in part as follows:

"Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money * * * but * * * personal property to an amount not exceeding in value $200, *for each* individual may by general laws be exempted from taxation. All such laws shall be subject to alteration or repeal; and the value of all property so exempted shall from time to time be ascertained and returned as may be directed by law."

This constitutional provision, manifestly not self-executing, constitutes the authority for the enactment of section 3732, Revised Statutes (section 5360, General Code), which is a follows:

"A resident of this state may deduct a sum not exceeding $100 to be exempted from taxation from the aggregate listed values of his taxable personal property of any kind, except dogs, of which he is the actual owner."

The following general observations in connection with the foregoing constitutional and statutory provisions may be appropriately made.

In the first place the word "individual" as used in the constitutional provision is, it seems to me, not accidental. By an examination of related provisions of the constitution it will at once appear that the meaning of this term is technical rather than general and does not include corporations or artificial persons of any kind. Thus section 3 of article XII provides that the "general assembly shall provide, by law, for taxing * * * all property * * * of all banks * * * so that all property employed in banking, shall always bear a burden of taxation, equal to that imposed on the property of individuals."

As the term "individual" is used in this section it is quite apparent that its meaning does not include corporations. Again, article XIII, section 4, provides that "property of corporations * * * shall forever be subject to taxation the same as property of individuals."

Here again the intention is manifested to observe the distinction between individuals and artificial persons.

For these reasons, therefore, I am of the opinion that the authority of the general assembly to provide by law for a uniform exemption from taxation of not more than $200 is limited to the personal property of private natural persons. The statutory provision must, of course, be construed in the light of the constitutional provision. The general assembly's authority to pass any exemption

law is measured by section 2 of article XII. Therefore, the phrase "resident of this state" as used in section 5360, General Code, must be held and deemed to mean "a natural person, resident of this state."

The foregoing comments of themselves answer your fifth question in the negative. See also Bank vs. Hines, 3 O. S. 1.

The peculiar language of section 5360, General Code, and especially the last phrase thereof, "of which he is the actual owner" would seem to indicate that only persons required to list the property of which they are actual owners may claim the exemption. This conclusion would seem to be supported by the general principle applicable to the exemption laws, which is that:

> "As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it."
>
> Cooley on Taxation, Vol. 1, page 356.

On the other hand, however, weight must be attached to the manifest object and purpose of such an exemption as this.

> "The exemptions * * * to the limited personal property which very poor persons may be possessed of, are to be looked upon rather as in the nature of limitations of the general rule, than as exceptions from it; the taxation being only of all that is possessed over and beyond only has been left out as absolutely needful to the owner's support."
>
> Cooley on Taxation, Vol. 1, 262.

> "Some of the customary exemptions are in themselves so reasonable that they readily receive universal assent as proper and politic. Such are exemptions of household furniture, tools of trade, etc., to a moderate amount, and of the personal property of those who by reason of age, infirmity or poverty are unable to contribute to the public burdens."
>
> Cooley on Taxation, Vol. 1, page 346.

> "The language of the constitution is comprehensive and explicit in the requirement, that *all* property of every description, excepting only that which falls within the specified exemptions, should be taxed. The only exception or exemption allowed in favor of individuals, is to be found in the words *'personal property to an amount not exceeding two hundred dollars in value, for each individual, may by general laws, be exempted from taxation.'* It has ever been the humane policy of our laws to allow a certain amount of personal property, sufficient to include the most essential and necessary articles for the support of a family, to be exempt from execution for the payment of debts. And it is in accordance with this benevolent regard for the necessaries of life, that this limited exemption from taxation, in favor of individuals, is authorized by the constitution."
>
> Bartley, C. J., in Exchange Bank vs. Hines, 3 O. S. 14.

This being the purpose of the exemption in question, some ground at once appears for ignoring in part, at least, the general principle of strict construction as applied to exemption statutes. A further ground, however, is afforded by a careful examination of the constitutional provision which is that "personal

property to an amount not exceeding in value two hundred dollars for *each* individual, may by *general laws* be exempted from taxation."

This provision together with that occurring earlier in the section, to the effect that taxation of property shall be "by a uniform rule," and read in connection with the manifest object and purpose of the exemption as defined in the authorities quoted, lend support to the following principle: Under the constitution an exemption statute applying to the property of individuals must be general and uniform; it must apply to all individuals or at least to all individuals within a class determined by the reason of the exemption. That is to say, if the exemption is deemed to be based upon the grounds of public policy above referred to, then the legislature, acting in pursuance of the authority conferred in section 2 of article XII, must extend the exemption to all persons within the reason of that policy. Indeed, it may be seriously questioned whether even in the absence of the significant language above quoted from section 2 of article XII of the constitution, the legislature could arbitrarily classify persons who should be exempted even to a limited extent from taxation. To do so would seem to violate section 1 of article XIV of the constitution of the United States, which provides in effect that no state "shall deny to any person within its jurisdiction the equal protection of the law."

American Sugar Refining Co. vs. La., 179 U. S., 89.
Bells Gap R. R. Co. vs. Pa., 134 U. S., 232.

Upon careful consideration, I am of the opinion that the reason of the exemption in question is controlling, and that inasmuch as this reason animates the constitutional provision, the statute enacted in pursuance thereof is to be construed, if doubtful, in accordance therewith; and that even in case the construction of the statute be not doubtful, but the statute is plainly violative of the constitutional provision, then the statute either fails as an entirety or is limited in its application to the true intendment of the constitution.

Therefore, in my opinion, section 5360, despite the phrase "of which he is the actual owner," cannot be construed to mean that "only persons who are required by law to make up their own tax lists are entitled to the exemption created by this section." It must, on the other hand, in my judgment, be construed to mean that every natural person is entitled to the exemption of $100 for property actually owned by him. Nor is this construction violent or excessively liberal. The emphasis in the phrase "of which he is the actual owner" is not upon the pronoun but upon the last two words. That is to say, the qualification created by this phrase is to the effect that no person shall be permitted to withhold from taxation, as exempted, property which he does not own but which is held by him under some qualified right. It is not, however, in my judgment to be construed as denying to persons whose duty it is to return for taxation the property of another the right to, on behalf of such other person, exercise that person's privilege of deducting the sum of $100 from the total valuation of his personal property.

With the foregoing general principles in mind, the answers to your first four questions are easily worked out. In my opinion the several interests of the persons who own a personal estate in common are separate for the purpose of taxation, notwithstanding the statutes which require the property itself to be listed in tabular form. The undivided interest of each such person in the common property constitutes a part of the personal property from the aggregate listed value of which each separate owner may deduct the sum of $100. A person who has such an

undivided interest in a common personal estate is, nevertheless, "the actual owner" of such undivided interest within the meaning of section 5360, General Code.

Persons required to list personal property for taxation as legal representatives of living persons, such as testamentary trustees, guardians, attorneys, agents and the like may, in my opinion, exercise the right of those whom they represent under section 5360 and may deduct the sum of $100 from the aggregate value of the personal property of each such person. However, there are certain trusts which are not for the benefit of living persons or, more exactly speaking, the beneficial estate of which is not ascertained as to any particular living person. In such cases, under the principles above laid down, no exemption of $100 from the aggregate value of the personal property of the estate will be permitted. As to administrators and executors such persons, of course, are the legal representatives of their respective decedents. The estate in their hands is undistributed, and the heirs, devisees or legatees have not acquired several interests therein. Inasmuch, therefore, as such executors and administrators, and in certain cases testamentary trustees, represent a deceased person rather than a living person or persons, I am of the opinion that they may not deduct the sum of $100 from the aggregate value of the personal property of the estate in their possession when listing the same for taxation nor may they deduct a like sum from the value of an estimated share of a living person entitled ultimately to a specific legacy or a distributive share in such estate.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

E 267.

TAXES AND TAXATION — BOARDS OF REVISIONS — PROCEDURE OF EQUALIZATION UNDER AMENDED STATUTE—COMPLAINTS.

Section 5601, *as amended, absolutely prohibits the board of revision from increasing or decreasing the aggregate value of the real property within its jurisdiction as fixed by the tax commission. Aggregate value must be sustained by the board, not by distributing among all other property the amount taken from a specific reduced tract but by applying amount subtracted from specific tract to other specific tracts complained of as being too low.*

Where one party complains that his own property is valued too high and some one else's too low, this is in effect a double complaint and justifies the reduction of the former's value and the increase of the latter's.

COLUMBUS, OHIO, June 10, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In a recent opinion to your department I held that boards of review would have no authority to increase valuations not complained of. In the course of this opinion I quoted section 5601 of the General Code. Since the rendition of the opinion, or at least since the same was originally prepared, said section 5601 has been amended by the passage of House Bill No. 502, so as to read as follows:

> "Each county and city board of revision shall investigate all such complaints and all complaints against any valuation filed with it as a board, or made by the county auditor, and may increase or decrease any

valuation complained of and no others. Such boards in all respects shall be governed by the laws governing the valuing of real property, and shall make no change in any valuation complained of except in accordance with such laws. A board of revision shall not increase or reduce the aggregate valuation of the real property of a county or city as fixed by the tax commission of Ohio. No valuation, as fixed by the tax commission of Ohio, shall be increased by a board of revision, in any case, except upon reasonable notice as prescribed by this chapter, to all persons directly interested and an opportunity for a full hearing. The auditor of the county shall correct the tax duplicate according to the deductions and additions ordered by the board of revision, in the manner provided by law for making corrections thereof."

I am writing you in order to correct my own and your records in the matter. It will be observed, I think, upon comparison of amended section 5601 with the former sections of the same number that, while the section has been changed in important respects and particularly in that the board of revision is now absolutely prohibited both from increasing and from reducing the aggregate of the real property within its jurisdiction as fixed by the tax commission—a radical departure from the policy of the old section—it is not changed with respect to the language relied upon in the former opinion to sustain the conclusion therein reached. That is to say, while the aggregate must in every case remain the same this fact alone does not authorize, in my opinion, the board of revision to perform the function of equalization and to distribute, for instance, among all the other tracts of property in the county or the city, the amount taken from a specific reduced valuation. Instead, the quality of aggregate valuation must be maintained by adding the amount subtracted from the aggregate in making reduction to other specific property which has been complained of.

Since the rendition of the former opinion you have informed me that some question has been raised as to the sufficiency of a complaint in a given case as a basis for an action of the board of revision in adding to a particular valuation. A typical case of the sort in point is as follows:

A complains that his property is valued too high and that the valuation of B's property is too low; C complains that the valuation of his property is too high and that of D's too low. The board of revision finds that A's property is valued too high, that the valuation of D's property is at its true value in money, that C's property is valued at its true value in money, and that D's property is valued too low. Can the valuation subtracted from the aggregate by means of reducing A's valuation be added to that of D's property?

In my opinion this may be done. When one party complains that his property is valued too high and that of another person too low, this is two complaints, not one, and the board of revision may reject one complaint and act upon the other.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

284.

BANKS—RETURNS TO AUDITOR FOR TAXATION—FIRM OR CORPORATION RECEIVING DEPOSITS AND PAYING ON CHECKS.

A firm or corporation doing a general merchandising or other business and not incorporated for banking purposes, which engages in the business of receiving money on deposit, subject to check and paying interest thereon, without also engaging in the business of loaning money and buying and selling bullion and other evidences of indebtedness, does not engage in all four pursuits enumerated in section 5407 and is therefore not a bank within the comprehension of that statute. Such firm or corporation is therefore not required to make the returns to the auditor which the law demands of banks in this chapter.

COLUMBUS, OHIO, June 30, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of sometime ago in which you request my opinion on the following:

> "Is a firm engaged in doing a general merchandising business, which accepts deposits of money and permits the depositors to check on the same, to be classed as an unincorporated bank, which should make return to the county auditor under the provisions of sections 5407 to 5414, inclusive, of the General Code?"

Section 5407 of the General Code provides:

> "A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an office or other place of business, and engages 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, is a bank, or banker, within the meaning of this chapter."

The question is not free from doubt and because of the doubt attending it I have given very careful attention to it. I have at last come to the conclusion that a person, firm or corporation not incorporated for banking purposes, which engages in the business of receiving money on deposit subject to check and paying interest thereon without also engaging in the business of lending money, and buying and selling bullion and other evidences of indebtedness, is not a bank within the meaning of section 5407.

In my opinion no person, firm or corporation can be regarded as an unincorporated bank which does not engage in all of the four particular kinds of business referred to therein.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 293.

TAXES AND TAXATION—POWER OF COUNTY AUDITOR, BOARDS OF REVIEW, AND THE TAX COMMISSION TO SUMMON WITNESSES WITH BOOKS AND PAPERS TO DISCLOSE PROPERTIES.

County auditors, boards of equalization, boards of review and the tax commission have full power to bring witnesses before them and to compel them to bring books and documents and all things reasonable to obtain a full disclosure of all properties subject to taxation.

When published statements of banks and building and loan companies and other corporations holding money on deposit, which are obligated to publish the state of their accounts, show that the tax returns are false, erroneous or insufficient, ample inquiry may be made to ascertain the truth.

Unnecessary inquiry into private affairs, however, must be avoided.

COLUMBUS, OHIO, July 12, 1911.

To the Tax Commission of Ohio.

GENTLEMEN:—In reply to your inquiry as to the power of county auditors, boards of equalization, boards of review and your board to inquire of a witness concerning depositors and stockholders in banks and building and loan associations, the inquiry not being directed to any particular person or specific piece of property, permit me to say:

Section 14 of the Hollinger bill provides that the commission, or any commissioner, or any person employed by the commission for that purpose, shall, upon demand, have the right to inspect the books, records and memoranda of any company, firm, corporation, association, co-partnership or public utility subject to the provisions of such laws; and to examine under oath, any officer, agent or employe of such company, firm, corporation, person, association, co-partnership or public utility.

Section 15 provides that the commission may require the production of books, papers, etc., and affixes a penalty for failure or refusal to comply.

Section 5401 of the Gneral Code provides:

> "The county auditor, if he has reason to believe or is informed that a person has given to the assessor a false return of * * * personal property; * * * *that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise which are by law subject to taxation, shall proceed to correct the return and charge such persons on the duplicate with the proper amount of taxes.* To enable him to do so, he may issue compulsory process and require the attendance of any persons whom he thinks have knowledge of the articles, or value of the personal property, moneys or credits, * * * and examine such person on oath in relation to such statements *or returns.*"

Section 5584 provides that the county board of equalization may:

> "Call persons before it and examine them under oath as to their own or others' property, moneys, credits and investments to be placed on the duplicate for taxation, or the value thereof and order any property, moneys, credits or investments to be placed on the duplicate which have not been listed for taxation."

Section 5624 grants boards of review for municipalities as follows:

> "All the powers provided by law for other municipal boards of equalization or review."

That a state has power to call upon persons or corporations to submit their books, papers and the like for examination, and compel officers of corporations to appear and testify for the purpose of completing its tax lists has been decided in

> Waite vs. Dowley, 94 U. S., 527,

and that national banks were not excepted is held in

> Bank of Youngstown vs. Hughes, 106 U. S., 523.

It is claimed by very many, and it seems to be the general opinion that the power of the auditor under section 5401 ends with the right to inquire as to a particular piece of property or particular individual against whom the inquiry is directed, and, while the language used by Chief Justice Waite in Bank vs. Hughes is susceptible of being more broadly construed, the case itself did not call for more than the holding that the auditor had the right to bring the cashier of a national bank before him, and inquire as "a depositor."

In 1907 Auditor of State Guilbert asked the then attorney general:

> "Can boards of review compel the attendance of the officers of banks and require them to produce the books of the banks showing the accounts of an individual depositor?"

The question was answered in the affirmative, but in the answer, which is limited by the question asked, a quotation is made from Heffner vs. Mahoney, 19 W. L. B., 369, which is as follows:

> "The board has neither right nor power to question a person generally about his business as was done by it on the 30th day of July, 1886, when it required the defendant to give the names of *all* the persons for whom he loaned money during the year 1886. The inquiries in any given case should be limited to some particular property or persons, the property not assessed, or the persons who own such property."

From the character of the question asked and the above quotation, the general opinion above mentioned seems to have gathered strength and support.

In the Mahoney case, supra, there were two hearings, one on July 30, 1886, above referred to, and the other on the 2d day of August following. As a result of the second hearing, Mahoney was charged individually with taxes upon $76,395.00. He did not pay and suit was brought to collect. Issue was taken and trial was had, and while the hearing of July 30th was set forth in the pleadings and mentioned in the opinion, it had no place in either, and whether correct or not, it was mere obiter and should not be construed as more than a holding that the general question as then asked, is improper, but that an inquiry as to property not assessed, or its ownership might be made.

An examination of the case, however, will show the following statements in the opinion:

"If at the time Mahoney refused to answer the question of the board, the $76,395.00 was not assessed to any person for taxation; if it was subject to taxation; if it did not belong to Mahoney; the board had the right and it was its duty to find out to whom it belonged, so that it could be assessed to the owners. The law required it, and justice to the people who returned all their property for taxation required it. And the questions propounded to Mahoney were evidently put for the purpose of discovering who the owners were; they were pertinent, plainly so; and Mahoney had no right to take refuge behind the claim that it was an inquisition into his private business as a reason for refusing to answer. This proposition is so obvious that a discussion of it would be irrelevant. Very little money would be taxed if such an excuse for refusing to answer questions about the ownership of property was defensible. A person asked by an assessor what was his property subject to taxation might say it was none of his business, because it was an inquiry into his private affairs, but it would be an inexcusable answer. A fortiori, would not such an answer to a question put by a board in respect to some other person's property be equally untenable? Taxes are necessary. Governments cannot exist without them. All citizens owe them for the protection given in return to their lives, person and property. Taxes may not be equally distributed, but the distribution would be made more unequal if persons who have information about the ownership of property not taxed should be allowed to withhold such information from officers or boards whose duty it is to inquire about such matters upon the pretext that it was an inquisition into their private business.

"There is no privilege which exempts a person from imparting such information. * * *

"That no particular person's tax return was then under investigation was not material. *If the board was required to have some particular person's return under inquiry before it could question any one, take evidence from him, one purpose of the law would be defeated. If knowledge of who was the owner must precede investigation, then investigation would never be made when the owner of property not assessed was not known to the board.*"

Heffner vs. Mahoney, 19 W. L. B., 369-374.

The inquiry made on August 2d was for Mahoney to give the names of the persons who furnished him the money with which he effected the loans secured by recorded mortgages taken in his name and aggregating said sum of $76,395.00.

When the above language is considered in the light of the power given county auditors as above quoted in regard to his duty when he discovers an assessor has not made a full return of all the taxable property in his district; his power to compel the attendance of witnesses; his duty to correct "such returns" and the objects and purposes for which he is authorized to make inquiry, the conclusion seems inevitable that no particular person or property need be the subject of inquiry, but that when the auditor is informed or believes that the return of an assessor is not full, does not show all the taxable property of his district, he may institute proceedings to determine the truth as to whether such return is full or not, the inquiry being directed to the matter or matters coming to his knowledge or belief.

He may not go upon a fishing excursion and inquire generally as to the

business of the witness or other person, as was done in the Mahoney case on July 30, 1886, but, if he is informed or has reason to believe that all the depositors of a bank residing within his county, or all the depositors or stockholders of a building and loan association residing therein have not made return of their stock or deposits, so that the returns of some of the assessors are not "full" as required by law, he may call upon the proper officer or agent of such bank or building association and compel such person to testify concerning the subject of inquiry and to produce the necessary books, papers, accounts or memoranda of his bank or association showing the facts as to who, residing within his county, are depositors and stockholders, to the end that he may correct the return of the assessor or assessors so that they may show a full and complete listing of all the taxable property of his county.

The authority granted boards of equalization and review are as broad as granted the auditor under section 5401, and whatever the auditor may do may be done by them in the event of its becoming necessary.

As to the power of the commission, little need be said. The Hollinger bill in its original form was of such character that section 162 was added, exempting building and loan associations from being made the subject of inquiry as to their stockholders and depositors. As the bill passed, it contained that provision, and that section was eliminated by Governor Harmon's veto. In the opinion of the legislature section 162 was necessary in the Hollinger bill to prevent inquiry of building and loan associations, and there can be no question of the correctness of that construction. With that section eliminated, there can be no doubt of the power of the tax commission under the sections above mentioned, and other provisions of the law not here necessary to cite, to institute such proceedings as described in the statutes, as will bring upon the tax duplicate of the several counties of the state all of the taxable property and assets found therein including credits belonging to all persons domiciled in the state.

It will be kept in mind that section 5401, as amended, *supra*, provides:

> "The county auditor if he shall have reason to believe, or is informed that a person has in the year nineteen hundred and eleven or in any year thereafter, given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, etc., * * *"

This part of the section goes to the person, but this is not all. Reading section 5401 still further to gather its meaning and repeating the first part of the section so as to make proper connection it appears as follows:

> "The county auditor if he shall have reason to believe, or is informed that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed in said year nineteen hundred and eleven or in any year thereafter at any time before the final settlement with the county treasurer to correct the return of the assessor and charge such persons on the duplicate with the proper amount of taxes."

The aim of this provision is not directed toward any person. The matter is comprehensive and reaches out to the return of the assessor and to all persons who have failed to return. Then the statute goes on to provide:

"To enable him (that is the auditor) to do so, he may issue compulsory process, and require the attendance of any persons whom he thinks have knowledge of the articles or value of the personal property, moneys or credits, investment in bonds, stocks, joint stock companies or otherwise, and examine such persons, on oath, in relation to such statement or return."

The law of taxation does not recognize hair-splitting differences. It implies equality, and the means should be adequate and I think are adequate to accomplish the purposes of equality. The county auditor has full power to bring witnesses before him, compel them to bring books and documents and to do all things reasonable to aid him in placing upon the tax duplicate all of the property of whatever kind or description within his jurisdiction, and as to just how the auditor shall proceed is a matter that is left within his own judgment, of course to be reasonably, properly and in good faith exercised.

The language of the statute must, of course, be directed to a definite purpose, and is so directed. However, it may not embrace all of the details of the action of the public officials in respect to taxation, and it is not necessary that it should. I think clearly and plainly and unmistakably it appears that the object of the statute is that the county auditor is entitled to employ the same means as a court would in order to ascertain the truth with respect to that of the property within his jurisdiction.

It might further be well said that when the published statements of banks and building and loan companies, and other corporations holding money on deposit, which are required to publish the condition of their accounts, disclose, as they frequently do, that the tax returns indicate only a mere bagatelle compared with what is the real property within their jurisdiction, and the auditors thereby have every reason to believe that the property within their jurisdiction has not been rightly returned for taxation, and an honest belief comes to such county auditor from facts of this character there exists a sufficient predicate to make ample inquiry so as to ascertain the truth. I cannot understand why those who have knowledge as to where the wealth is should wish to conceal it and impose the burden of public taxation, as has unfortunately generally been done in this state upon the man of limited means whose humble home is mortgaged, perhaps, but always taxed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

299.

TAXES AND TAXATION—BOARDS OF REVIEW—LEGAL ADVISER—ATTORNEY GENERAL—ASSISTANCE OF PROSECUTOR.

The matter of fixing values for taxation in Ohio is an exclusive prerogative of the state.

Members of boards of review are neither county nor municipal officers but are "state agents."

Since the attorney general is the legal adviser of the board that possesses the power of appointment of boards of review, namely, the state board of appraisers and assessors, and also the legal adviser of the tax commission, all questions requiring legal advice for boards of review should be submitted to that official through the medium of the tax commission, or the state board of appraisers and assessors.

Under section 11 of House Bill No. 491, upon the request of the tax commission to investigate, try or prosecute under any law which the commission is required to administer, the attorney general may direct the prosecutor of the proper county to aid him in such matters.

COLUMBUS, OHIO, July 19, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your favor of recent date duly received, wherein you request an opinion on the following question to-wit:

> "Is the prosecuting attorney of the county in which a city is situated, or the city solicitor of the city, the adviser or legal representative of the city board of review of such city? If neither, has a city board of review the right to employ counsel to represent it in proceedings in the courts, to which it may be a party?"

Members of the board of review occupy rather an anomalous position, it having been held they do not perform any of the functions of county officers, and the courts have also held that the predecessor boards, to-wit: the various equalizing and revision boards (the same law is equally applicable to the later boards of review) have none of the functions of municipal officers.

In the case of Crawford vs. Madigan, 13 Ohio Decisions, at page 494, the validity of a tax board was involved, and in that case Judge Phillips said:

> "The power to value property for taxation, or to assist therein, does not belong to municipalities, because it is, in its legal nature, a function of the state and not a municipal function. The taxing power is inherent in sovereignty. It is, in its nature, legislative power, and is conferred upon the general assembly by the general grant of legislative power in section 1 of article II of the constitution; and the exercise of this power is limited and regulated by the provisions of article XII, one of which is that 'laws shall be passed, taxing property according to its true value in money.' Mays vs. Cincinnati, 1 Ohio State, 269, 273; Baker vs. Cincinnati, 11 Ohio State, 534, 542; Anderson vs. Brewster, 44 Ohio State, 576, 581 (9 N. E. Rep., 683). The constitution of some states provide the mode in which the value of property shall be arrived at for taxation. Most of the constitutions do not; ours does not. The taxation of property, the raising of revenue for defray-

ing the expenses of administration, is a matter that belongs exclusively to the state, and not to municipalities or to localities.

"The methods and agencies for ascertaining this 'true value in money' not being provided by our constitution, it therefore rests exclusively with the legislature, wherein the whole power is vested, to provide suitable methods and agencies; and the doing of this is therefore a function of the state and not a municipal function, and cannot be exercised by the municipality, unless the power be delegated to it, if indeed that can be done. The legislature has delegated to municipalities a limited power to *levy taxes*, but it has not delegated power to value property for taxation. Therefore, the municipality cannot legislate upon it; cannot provide for it; cannot control it; cannot interfere with it.

"Of course the legislature in providing modes for the valuation of property, may make use of a locality—of municipal territory in dividing the state into districts for the valuation of property; it may make use of municipal machinery for the ascertainment of values, but, when that is done and however it is done, it is always the exercise of the state function."

Our supreme court soon after the enactment creating boards of review had the question of the constitutionality of such boards presented in the case of the State of Ohio ex rel. vs. Rockwell, et al. This was an action in quo warranto begun in the circuit court of Ashtabula county to oust the board of review for the city of Ashtabula. The constitutionality of the board of review act was attacked principally upon the grounds that the members of the boards were officers under article II, section 20 of the constitution; the circuit court, and later the supreme court, at the January term, 1904, upheld the constitutionality of the act, thereby holding that the members of the boards of review were not such officers.

In Scarborough vs. Gibson, Treas., 13 Ohio Decisions, 738, which was subsequently affirmed without report by our supreme court in 69 Ohio State, 578, the validity of city decennial boards of revision was involved, and the statements and reasoning of the court in that case are equally applicable to boards of review. Judge Spiegel said:

"There has been no claim made, nor would it be tenable that the state cannot create board of equalization and revision not to relist for taxation the property already listed by the assessors, but to equalize, within tax districts and among individuals, the valuation fixed upon different pieces of property. One of the chief maxims governing taxation is that taxes shall operate uniformly and equally upon all persons. This uniformity, experience has taught us, can be obtained by board of revision, upon complaints filed, or by direct action of the taxing officers, due notice being given thereof to those interested. Such revision dates back to the original assessment, and of uniformity of taxation is not violated because in certain large and populous districts the state's agents for the purpose of equalization and revision are more numerous, and the time in which to perform their duties is no longer, than in smaller taxing districts. Nor are their appointments, nor the functions they perform, the exercise of a corporate power. They are the *state's agents*, to carry out, in accordance with the constitutional rules, giving taxations one of its sovereign powers."

Members of boards of review are appointed by *state boards*, render services in a *municipality* involving property situated within the corporation, yet they receive their pay from the *county* treasurer in such sum as is fixed by the *county* commissioners. They are neither county nor municipal officers, but, as stated in the case last above quoted, they are *state agents.*

Section 4305, General Code, provides that the city solicitor shall be the legal counsel and attorney for the several directors and officers mentioned in the title referring to municipal corporations.

Now, since it is evident that boards of review are not municipal officers, and since they are not mentioned in title XII of the Code, which deals exclusively with municipalities, and, further, since nowhere in the statute is it made the duty of city solicitors to act as legal advisers to boards of review, I have no hesitancy in saying that city solicitors are not the legal counsel or attorneys of city boards of review.

Section 2917, General Code, provides that the prosecuting attorney shall be the legal adviser of county and township officers. Since, under the authorities, boards of review are not county officers, nor the board a county board, there is no duty towards said board for the prosecutor or by reason of section 2917, General Code, nor do I find any other statute expressly providing that prosecuting attorneys shall act as legal counsel to such boards.

Section 35 of House Bill No. 491, passed May 31, 1911, provides:

> "All powers, duties and privileges imposed and conferred upon any state board, which board was abolished or its powers in whole or in part conferred upon the tax commission of Ohio, by an act of the general assembly, passed May 10, 1910, or any power or duty theretofore conferred upon any state or county officer or board, which power and duty by such act was conferred upon such commission, is hereby imposed and conferred upon the commission created by such act.
>
> "Provided further, that the auditor of state, treasurer of state, attorney general and secretary of state shall constitute a board of appraisers and assessors with the power to appoint boards of review in municipalities as provided in section fifty-six hundred and eighteen to fifty-six hundred and twenty-four inclusive of the General Code."

Of course, as you well know, the attorney general under the law, section 333, General Code, is the legal adviser of the tax commission and also of the board of appraisers and assessors spoken of in section 35, supra, and since the attorney general is the adviser of the board that possesses the power of appointment of the boards of review, as well as of the tax commission, which has direct supervisory control over said boards, it is my opinion that all questions arising before said boards of review necessitating legal advice should be referred to the attorney general through the medium of the tax commission, or the state board of assessors and appraisers respectively.

I do not find any provision of the statute authorizing any particular officer to furnish legal advice to boards of review other than is found inferentially in section 11 of House bill No. 491 above referred to, which provides:

> "Upon the request of the commission the attorney general, or under his direction, the prosecuting attorney of any county, shall aid in any investigation, hearing or trial had under the laws which the commission is required to administer, and to institute and prosecute all necessary actions or proceedings for the enforcement of such laws, and for the

punishment of all violations thereof, arising within the county in which he was elected."

From a consideration of that section I am constrained to hold that it is within the power of the attorney general, when matters are, in the manner before stated, referred to him from boards of review, to direct the prosecuting attorney of the proper county to aid him in the various matters in which he is called upon to render legal services to boards of review within the state.

Trusting that this fully answers your inquiry, I am,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 348.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATIONS—INTEREST AND SINKING FUND—LEVIES FOR ROAD IMPROVEMENTS—LEVIES FOR EPIDEMICS.

Section 5449-3a of the Smith one per cent. law, excludes from the consideration of the budget commission in ascertaining internal limitations, special levies for road improvements by township trustees upon authorization of electors. In ascertaining the ten mill limitation and all other limitations, however, such levies must be considered.

Where there is no record of an election authorizing such levy, however, the budget commission need not pay any attention to the same.

Section 5694-4 of the Smith law provides that levies by municipal corporations and township trustees under sections 4450 and 4451, General Code, for meeting the expenses of epidemics of dangerous diseases, may be made without regard to the limitations of the Smith law.

Levies for sinking fund and indebtedness created prior to June 2, 1910, are not within the interior limitations of the Smith one per cent. law nor are they within the ten mill limitation. They are, however, within the limitation of the aggregate amount raised for all purposes in the year 1910 and also within the fifteen mill limitation.

The budget commission should reduce any and all levies within the limitations of the Smith law, but levies for interest and sinking fund purposes should be preferred over other levies.

COLUMBUS, OHIO, September 8, 1911.

The Tax Commission, Columbus, Ohio.

GENTLEMEN:—You have handed to me a letter dated August 28th, addressed to you by the auditor of Perry county, and have requested me to advise you upon the questions submitted by the auditor, as follows:

"1. In cases in which the territorial boundaries of a municipal corporation are not co-extensive with those of the township in which situated, have both the township trustees and the city authorities power to levy for the relief of the poor; or is the power of the trustees limited to making a levy in the territory outside of the boundaries of the municipal corporation?

"2. The trustees of a certain township state to the county auditor that a vote was taken several years ago in which the township and a municipal corporation therein agreed to make a joint levy annually, of a

certain sum for pike purposes. There is no record of any such vote and no indebtedness is incurred; has the budget commission power to reduce any such levy?

"3. Is a levy to meet the expenses of a smallpox epidemic exclusive of the ten mill limitation of the Smith tax limitation law?

"4. What limit, if any, is there on the amount a taxing district may levy for sinking fund and interest purposes, provided the total amount levied by all subdivisions within a single taxing district does not exceed the amount raised in such district in the year 1910?

"5. If the amount asked by the various subdivisions levied within a single taxing district exceeds the amount received within the district in the year 1910, must the budget commission reduce the levies requested, although within all the other limitations; and if they must make such reductions may they reduce levies for sinking fund and interest purposes?

"6. Are levies for interest and sinking fund purposes exclusive of the fifteen mill limitation of section 5649-5*b*; or if the rates asked by the various subdivisions levied within a taxing district in the aggregate, exclusive of sinking fund and interest levies, are within all the other limitations of the act, and the addition of sinking fund and interest levies causes the aggregate rate to exceed fifteen mills, must th budget commission reduce any levies?"

In answer to your first question I beg to enclose copy of an opinion addressed by me to the bureau of inspection and supervision of public offices under date of May 3, 1911, a portion of which answers your question.

Answering your second question I beg to state that sections 6976 et seq., of the General Code seem to authorize a procedure somewhat similar to that to which the auditor's question refers. These sections have been in force since 1904, when an act was passed repealing the act passed April 16, 1900, 94 O. L. 284, which seems to be the original act. This act, however, does not authorize a vote upon the question of levying a certain sum. The questions to be submitted are as follows:

"Section 6977. The qualified electors of such township at such election shall have submitted to them the policy of the improvement of its public roads by general taxation.

"Section 7001. * * * When the petition of twenty-five per cent. or more of the taxpayers of such township, including any village therein, is presented * * * praying that no further levy be made * * * the qualified electors of the township and village * * * shall have submitted to them the policy of making no further levy under such provisions.

"Section 7007. * * * When the petition of one hundred or more of the taxpayers of the township, including a city or village therein, is presented to them (the township trustees) praying for an increase of tax levy * * * the qualified electors of such township and city or village * * * shall have submitted to them the policy of an increase of tax levy for the improvement of its public roads and streets by general taxation."

but the exact rate or amount of increase is not submitted.

The power of the township trustees under these sections to levy taxes is defined in section 7006 to be that of levying annually upon all taxable prop-

erty in the township "an amount not exceeding six mills * * * and shall continue such levy from year to year until the roads and streets by said commissioners designated for improvement, have been improved, as herein provided."

It will not be necessary further to quote the provisions of these sections. Suffice it to say that they provide in general for a special levy made by authority of a vote of the electors. In my opinion such a levy is one of those excluded from consideration by the budget commissioners in ascertaining the internal limitations of section 5649-3*a* of the Smith law, which provides that:

> "Such limits for county, township, municipal and school levies shall be exclusive of any special levy provided for by a vote of the electors * * * and levies and assessments in special districts created for road or ditch improvements over which the budget commissioners shall have no control."

The words "special levy provided for by a vote of the electors" are in themselves, in my opinion, sufficient to include such a levy as that referred to. True, section 5649-3 eliminates from consideration in ascertaining the ten mill limitation "such additional levies as may be authorized by a vote of the people as provided in section 5649-5 of the General Code as herein enacted." But the intent of section 5649-3*a* seems to be broader than that of section 5649-3 and to include in its exemptions, special levies provided for by vote of the people, other than those made under authority of section 5649-5.

It is therefore my opinion that if, as I imagine, the levy referred to in the auditor's second question is one made under authority of proceedings referred to in what are now sections 6976 et seq., General Code, such levy is not to be counted in ascertaining the internal limitations of the Smith law, but must be counted in ascertaining the ten mill limitation and all other limitations thereof.

I think it proper to say, however, that if there is no record of such an election the budget commission would not be bound to pay any attention to the report which has reached their notice.

The auditor's third question is answered by the express provisions of section 5649-4, 101 O. L., 431, which is in part as follows:

> "For the emergencies mentioned in sections 4450, 4451, * * * General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

This section was left untouched by the act of 1911. The latter act, however, is in form amendatory to the act of 1910, of which said section 5649-4 was a part. Accordingly, in my opinion, the phrase "limitations of this act" as used in section 5649-4, now means and refers to all the limitations of the act of June 2, 1911.

Sections 4450 and 4451 of the General Code authorize municipal corporations and township boards of health to make special levies and to borrow money for the purpose of meeting the expenses of an epidemic of a dangerous communicable disease.

It is clear, therefore, that a levy to meet the expenses of a smallpox epidemic may be made by a municipal corporation irrespective of any of the limitations of the Smith law.

Answering your fourth question I beg to state that the supreme court in the case of State ex rel. vs. Sanzenbacher, recently decided, held that levies

for sinking fund and interest purposes, and in particular for the purpose of discharging indebtedness created prior to June 2, 1911, or after that date, by vote of the people, are not to be counted in ascertaining whether or not a municipal corporation, a township, a county or a school district has levied more than the rate severally allotted to such subdivisions by the provisions of section 5649-3*a* of the Smith law. The law itself provides that such levies shall not be taken into consideration in ascertaining whether or not the maximum limitation of ten mills upon the rate of taxes which may be levied in a taxing district for all purposes has been exceeded. Section 5649-1, as enacted in 1910, expressly requires the taxing authorities of each subdivision to make the necessary levies for sinking fund and interest purposes. The various provisions of the General Code as they existed prior to the adoption of the tax limitation laws of 1910 and 1911, respectively, impose no limit whatever upon the amount of the levy for sinking fund and interest purposes. The constitution commands that the general assembly shall restrict the power of municipal corporations to tax and assess and borrow money, and to contract debts (article XIII, section 6). However, this the general assembly has done, not by limiting the power of taxation for the purpose of paying debts, but by limiting the amount of indebtedness that may be incurred by such municipal corporations.

The precise question now under consideration, as to whether there is any limit upon the amount a taxing district may levy for such sinking fund and interest purposes as are specifically mentioned in the act of 1911, provided the total amount to be raised in the taxing district does not exceed the amount raised therein in 1910. To this question, in the light of the facts to which I have called attention, a negative answer must be returned. That is to say, at least so long as the aggregate amount to be raised for all purposes in the taxing district does not exceed the aggregate raised therein in the year 1910, there is no limitation, or rather no other limitation upon the amount which may be levied within such taxing district for the purpose of providing a sinking fund for the payment of a debt created prior to the enactment of the act of June 2, 1911, or thereafter, by a vote of the people, and the interest thereon.

Answering your fifth question I beg to state that in my opinion it is the duty of the budget commission to enforce the limitation of section 5649-2, which is measured by the amount of taxes raised in the district in the year 1910 by reducing any or all of the levies, subject to such limitations. It is expressly provided in said section that this limitation shall include levies made under section 5649-1—that is, levies for interest and sinking fund purposes. Such levies, however, are in my judgment preferred levies, and unless absolutely necessary for the operation of government I would advise that other levies be first reduced by the commission, though themselves within the other limitations of the act, before such sinking fund and interest levies be reduced. I am not prepared to hold as a matter of law that any hard and fast rule governs the action of the budget commission in this particular. Their primary duty, however, is to enforce all of the limitations of the act (section 5649-3*c*), and this being the case, the commission certainly has power in a proper case to reduce sinking fund and interest levies when necessary to bring the total amount levied in a taxing district down to the amount raised therein in the year 1910.

Answering your sixth question I beg to state that the fifteen mill limitation of the act of 1911 is imposed by section 5649-5*b* thereof, as follows:

> "In no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing

district, under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code, as herein enacted, exceed fifteen mills."

Section 5649-2, referred to and adopted in the foregoing sections, provides in effect that the aggregate of the tax levy by all subdivisions within a single taxing district, *including taxes levied under section* 5649-1, shall in no case exceed the amount of taxes raised in the district in the year 1910. The taxes levied under authority of section 5649-1 are levies for interest and sinking fund purposes. Thus it will be seen that although such levies are directly dealt with by section 5649-1 they are in the fullest sense of the word "taxes levied under the provisions of section 5649-2" and, therefore, in my opinion, interest and sinking fund levies, whether for the discharge of pre-existing debts or not, are within the fifteen mill limitation of section 5649-5*b*.

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

B 357.

TAXES AND TAXATION — CORPORATION AS MANUFACTURER AND MERCHANT FOR PURPOSES OF TAX ON STOCK IN TRADE—PERSONAL PROPERTY—CREDITS—PROPERTY OUTSIDE OF OHIO—"AVERAGE PROPERTY ON HAND."

By provision of the constitution and the statutes, a rule of taxation applicable to persons generally is presumed to be applicable to corporations unless otherwise specifically provided.

In the case of merchants' and manufacturers' stock, provision is made by the statutes of Ohio for a taxation of the average stock on hand for the year instead of a tax on the aggregate of each and every article possessed on the day preceding the second Monday of April of a given year. Corporations engaged in manufacture of merchandise are within this rule.

By express provisions of statute, tangible personal property of a corporation domiciled in this state, which property is locted outside of the state, is not subject to taxation in Ohio.

Merchants' and manufacturers' stock is treated as tangible personal property, though the tax is applied rather to the whole stock as a unit than to the specific articles which compose it. Therefore, under the rule aforesaid, such stock is not subject to taxation in Ohio unless actually located in this state.

When machines produced by a manufacturing company are leased or rented to a user, they cease to be "on hand" within the meaning of section 5385, General Code, and are therefore not to be taxed as manufacturers' stock except in so far as they must be taken into account in computing the value of the manufacturer's stock as a part of the monthly inventory taken at a time before such machines were "on hand."

Machines so leased or rented, however, may be taxed as specific articles of personal property but only when they are located within the state.

The credits which such leases constitute, however, if held in Ohio are taxable to the corporation at its principal office.

When a corporation maintains its nominal principal office in another state but whose only manufactory and whose headquarters wherein are kept the books and evidences of indebtedness and all papers except its mere corporate records are maintained in Ohio, a very strong presumption exists that all of the credits of such corporations should be listed and assessed at the office of the company in Ohio.

The question of taxation against vendor or vendee when an article is undergoing process of sale, depends upon where the title rests at the time the articles are listed and upon this question the intent of the parties control, governed and determined by the usual rules of law.

Where a corporation of this state has ordered machinery to be constructed for it in another state, such machinery before it reaches Ohio cannot be listed for taxation as property of the Ohio corporation. Such a transaction, however, represents a right on the part of the Ohio corporation to certain acts and values which is taxable under the head of "credits" within the broad meaning of the statute.

When a corporation contracts to sell the output of another corporation to a third person, such corporation is a merchant within the meaning of section 5381, *General Code, and taxable as such. Therefore, where the output of the second corporation is located outside of Ohio at the time property is to be listed, such output cannot be taxed.*

COLUMBUS, OHIO, September 13, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of September 5th, receipt of which is hereby acknowledged, you ask for my opinion upon the following questions:

"1st. Is a manufacturing corporation, organized in Ohio, with its principal office in this state, required to list stock manufactured by it in the hands of agents without the state and should such manufactured stock in the hands of agents without the state be assessed and taxed in Ohio?

"2d. An Ohio corporation manufactures machines for a particular purpose, which it does not sell outright, but leases to users, not only in this state but elsewhere, upon an annual rental payable monthly at the home office of the company in Ohio, where such leases are held, such machines costing to manufacture about $1,000 each, and are leased so as to produce an annual rental of not less than $500.00.

"Question: Should the company list as part of its return at its home office in Ohio all of its machines, wherever located, and should the same be assessed and taxed as property of the company, or should the contracts be considered as credits or investments and listed, assessed and taxed as such against the company in Ohio?

"3d. A New York company claiming to maintain its principal office in that state, but in fact keeping its books at the office of its factory in this state where it has its headquarters, and where one of the principal owners resides, and where it is admitted by the officers of the company that everything is kept showing its debts and credits.

"Question: Should such credits be returned by the company and assessed and taxed in this state, where its headquarters are located and such books and records are kept?

"4th. A New York company manufactures vaults for banks at its factory located in Ohio and sells same, not only to banks in Ohio, but elsewhere. When the company takes a contract for building a vault, it issues a bill of sale on the same and requires a cash payment on account, the remainder to be paid as the work progresses, final payment to be made when the vault has been erected in place. When the bill of sale has been issued, the materials for the particular vault are bought in the name of the company, billed to its factory in Ohio and paid for by the company when the vault is manufactured or assembled. A representative in the employ of the purchaser is permitted to be present at the factory during the process of the construction of the vault for the purpose of inspecting the materials and work, approving and accepting the same from time to time when satisfactory. The claim of the company is that those materials so ordered and paid for by the company for the purpose of constructing a particular vault contracted for in the manner stated are not the property of the manufacturer, but are the property of the purchaser of the vault.

"Question: Should these materials be listed by the company and assessed and taxed as part of the property where its plant is located?

"5th. A New Jersey corporation having all of its assets invested in Ohio, with one small plant in one place and its principal plant in another in the state, and having its principal office located at the latter place, had paid on April 9, 1911, on account of machinery being constructed for it at various places outside of Ohio for its use in the con-

struction of a new plant in Ohio, a large sum of money. The company inspects the material and work as it is being done in the construction of this machinery, but carries no insurance on it and claims to have no ownership in the machinery until it is built, delivered and erected in its plant in Ohio and is finally approved by the company.

"Question: What return, if any, should the company have made for taxation on this account in Ohio?

"6th. An Ohio corporation, having its office in this state, where it transacts all of its business, contracts for the output of a number of factories located in different parts of the country, which it sells to its customers from its office in Ohio. When the company makes a sale, it orders the goods shipped from the manufacturing company whose output it has purchased direct to the customer. None of the manufactured articles it has purchased are delivered at its place of business in Ohio.

"Question: What, if any, property should the company return and be assessed and taxed upon in Ohio on account of such business?"

To the solution of your first question, the following constitutional and statutory provisions of this state are, I think, applicable. Section 5404 of the General Code, as amended 102 O. L., 61, provides as follows:

"The president, secretary and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for * * * shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation *within the state*, at the true value in money."

Section 5405 of the General Code, as amended 102 O. L., 61, provides:

"Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each * * * taxing district therein. * * *"

Article XIII, section 4 of the constitution:

"The property of corporations, now existing or hereafter created, shall forever be subject to taxation, *the same as the property of individuals.*"

Section 5328 of the General Code:

"All real or *personal property in this state*, 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, * * *"

Section 5320 of the General Code:

"The word 'person' as used in this title, includes * * * corporations; * * *"

Section 5325 of the General Code:

"The term 'personal property' as so used, includes first, *every tangible thing being the subject of ownership*, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; * * *"

Section 5381 of the General Code:

"A person who owns or has in his possession or subject to his control personal property *within this state*, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

Section 5382 of the General Code:

"When a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property, *he shall state the value of such property appertaining* to his business as a merchant. In estimating the value thereof, he shall take as the criterion the average value of such property, as provided in the next preceding section. * * *"

Section 5385 of the General Code:

"A person who purchases, receives or holds personal property * * * for the purpose of adding to the value thereof by manufacturing * * * or by the combination of different materials with a view of making a gain or profit by so doing, as (is) a manufacturer, and, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter provided, of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing * * * and of all articles which were at any time by him manufactured or changed in any way, either by combination * * * or adding thereto which, from time to time, he has had on hand during the year next previous to the first day of April annually. * * *"

Section 5386 of the General Code:

"Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer, on the last business day of each month * * * adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. * * *"

Section 5371 of the General Code:

"* * * Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which

it is situated. All other personal property * * * except as otherwise specially provided, shall be listed in the township, city or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed."

The following preliminary observations may be made with respect to the effect of the foregoing provisions of the General Code and the constitution:

First. By virtue of article XIII, section 4 of the constitution, and by virtue also of the expressed provision of sections 5328 and 5620 of the General Code, a rule of taxation applicable to persons generally is presumed to be applicable to corporations, unless an intention to apply a different scheme to corporations clearly appears. (See Cleveland Trust Company vs. Lander, Treasurer, 62 O. S., 266-277.)

Second. The above quoted statutes applicable to the return of merchants' and manufacturers' stock and property used in such business constitutes not a separate rule of taxation, but merely a separate and peculiar method of *valuation* of certain kinds of personal property. The general assembly has recognized the inequality of applying to merchants and manufacturers the rule applicable to ordinary individuals, namely, that the value shall be affixed to specific property which it possesses on the day preceding the second Monday of April of a given year, and that only such personal property shall be returned for taxation as is owned by the taxpayer on the said day. As a substitute for this rule, the legislature has provided, in effect, that a merchant's or manufacturer's stock shall be regarded as an entity and shall be valued by determining, not the aggregate value of specific articles, which constitute it, on the day preceding the second Monday of April, but by determining the average value of such specific articles on hand during the year preceding that date.

Third. The corporation engaged in the manufacturing business and required to make returns as a corporation to the county auditor of all its personal property must value that portion thereof which is used or partly used in the process of manufacturing and which consists of completed manufactured article on hand during the year as manufacturer's stock. There seems to be very little question as to this conclusion. Courts have practically adopted it wherever the application of the sections relating to the valuation of manufacturer's stock to corporations have been involved.

Brewing Company vs. Hagerty, 8 C. C., 330.
Bridge Company vs. Yost, 22 C. C., 376.

I mention this point because both the sections relating to the return of merchants' stock and that relating to the return of manufacturers' stock expressly provide that when a person is required to make his *return to the assessor* he shall proceed as therein provided. Corporations, of course, do not make their returns to the assessor. However, the controlling principle is that, already alluded to, namely, that the rules applicable to individuals are presumed to be applicable likewise to corporations, unless a contrary intent clearly appears.

Fourth. Tangible personal property of a corporation domiciled within this state, which said property is located outside of the state, is not subject to taxation in Ohio. This is clear under the provisions of amended section 5404, and from those of section 5328, General Code.

Putting it in another way, the state has expressly waived its right, if it

had any right, to tax tangible personal property located outside the limits of the state, whether the same be that of a corporation or of an individual, although the ordinary rule is that tangible as well as intangible personal property is given, for purposes of taxation, the situs of the owner's residence.

Fifth. Merchants' and manufacturers' stock are treated in our statutes as *tangible* personal property. True, the specific articles composing such a stock are not taxed as such; rather, as already pointed out, the stock as a whole is regarded as a unit and valued according to the arbitrary rule, but it does not follow that because of this method of valuation, the tangible nature of the stock as a unit is lost. On the contrary, the following facts apparent on the face of the related sections clearly indicate an intention to class merchants' and manufacturers' stock as tangible property, or, more accurate than the words of the statute, simply as "personal property" as distinct from "moneys, credits and investments":

(a) The definitive sections found in chapter 1 of the taxing title, and particularly section 5325 thereof, above quoted, shows that the only definition within which merchants' and manufacturers' stock could properly be included is that of the term "personal property."

(b) Proper reading of section 5371 shows that not only are merchants' and manufacturers' stock to be regarded as a class of personal property and together with personal property upon forms to be treated in a different manner from "all other personal property" but also that such merchants' and manufacturers' stock is given a special situs for taxation, namely, "the township, city or village in which it is situated." As to corporations, of course the provision as to separate listing of merchants' and manufacturers' stock in the place where situated adds nothing to the provisions of section 5405 as amended, which requires that all tangible property of a corporation be returned in the county in which it is situated with a statement of the amount thereof which is situated in each taxing district of such county.

At this point, permit me to remark that in the case of Bridge Company vs. Yost, supra, there was no account taken of the fact that merchants' and manufacturers' stock is required to be listed in the taxing district in which it is situated. The holding in this case was that a corporation engaged in the manufacturing business would be required to list as part of its manufacturer's stock in the county in which its plant was located materials used in constructing a bridge in another county. This decision might be reconciled with the statutes upon the theory that while a manufacturer's stock must be listed in the county in which it is situated, yet the stock as a whole, being an entity, any portion of it used and operated upon in another portion of this state is deemed part and parcel of it and is to be returned for taxation in the county and district where the major portion of the stock is. Unfortunately, however, the court failed to take any account whatever of the statute which I have mentioned and its decision, which is otherwise instructive, is weakened thereby.

It is to be noted, however, that the court refused to pass upon the question as to whether property used in manufacturing by a company whose sole plant was in the state of Ohio, but which property was never actually brought into the state of Ohio, could be taxed in this state for the reason that same was not necessary to the decision. (See page 365, 22 Ohio C. C. Reports.)

Whether or not the rule suggested for the purpose of reconciling the case of the Bridge Company vs. Yost with section 5371 of the General Code, which was in force at the time the case was decided, would be the proper one, that rule is not inconsistent with the principle already laid down to the effect that merchants' and manufacturers' stock is regarded as tangible property, nor with

the other principle defined to the effect that tangible property situated outside of the state is not subject to taxation.

(c) In sections 5382 and 5385 referring respectively to merchants' and manufacturers' stock the phrase "when he is required to make and deliver * * * a statement of the amount of his *other* personal property subject to taxation."

Sixth. As a necessary conclusion from the last two general principles above referred to, manufacturers' stock being "personal property," i. e., *tangible personal property,* is not subject to taxation in Ohio unless it is located in Ohio, regardless of the legal residence of the principal place of business of the person or corporation holding it.

The foregoing is in itself an answer to your first question; for the sake of exactness, however, further discussion is necessary. If the case of the Bridge Company vs. Yost, supra, be regarded as establishing a principle, not in so many words as included in the decision, that a manufacturer's stock, including his materials (the thing directly concerned in the case) was taxable as an entity or unit regardless of the location of the specific articles at the place where the bulk of it is customarily located, then it might be urged that because the bulk of the manufacturer's stock of the corporation, to which you refer in your first question, is located in Ohio, the situs of that stock is for the purpose of taxation the situs of all kinds of property belonging to it wherever located—whether within or outside of the state. That is to say, wherever the main stock is located all materials and manufactured products have their situs whether actually part of the main stock or not. Hence if this be the rule, a manufactured product on hand in a warehouse in another state at all times during the year preceding the taxing date is to be regarded as part of the stock on hand of the manufacturer at the place where the bulk of his stock is kept and its value taken into consideration in ascertaining the average value of the stock taxable in Ohio.

I have already suggested what seems to me to be excellent reasons for rejecting this view, at least in its entirety. Whatever may be the true rule as to *unity* of a manufacturer's or merchant's stock where a single person, firm or corporation carries on a manufacturing or mercantile business, principally at one place, but incidentally at others, *all within this state,* I am convinced that the controlling intention evinced by the statutes above cited, which is, that tangible personal property located outside of the state shall not be subject to taxation within the state, impels the conclusion that such goods and materials belonging to a manufacturer or merchant whose principal business is carried on at a point within this state, and during a portion of the year preceding tax day are kept on hand in connection with such business outside of the state, are not to be taken into consideration in determining the value of such merchants' or manufacturers' stock on hand in this state during such time as it is held outside of the state.

Authorities on the point are meager. The following cases, however, are suggestive: In the American Steel and Wire Company vs. Speed, 110 Tenn., 524, affirmed 192 U. S., 500, it was held that a manufacturing corporation, carrying on its manufacturing business outside of the state of Tennessee and having an agent in that state to whom it shipped its manufactured products to be kept in stock in the agent's warehouse, and therefrom delivered to buyers ordering from its traveling salesmen and not from its warehouse agent who had no authority whatever to sell or to fix prices, was itself a "merchant" within the meaning of a statute quite similar to our own respecting merchants' stock, and was obliged to pay taxes in the state of Tennessee upon the value of its stock in warehouses. The contention on the part of the corporation was that it was a manufacturer and carried on no business that a manufacturer would not be obliged to carry

on; and that when it carried a stock on hand in the state of Tennessee, it was a portion merely of its manufactured stock and was not there kept as merchant's or dealer's stock. This contention, the court, of course, denied.

It is obvious, to be sure, that this case is not decisive of the question of itself. It merely decides that the stock such as that described in your first question, may be a merchant's stock in another state. This would not prevent it from being a part of a manufacturer's stock in the state of Ohio. The reasoning upon which the decision is based, however, is helpful in that it tends to establish the proposition that there may be a line at which manufactured stock ceases to be such and becomes merchants' or dealers' stock.

In Selz vs. Cagwin, 104 Ill., 647, the facts were as follows:

> "A partnership was engaged in the business of manufacturing at Joliet; the same firm was also engaged in the business of wholesale jobbing in Chicago, handling there not only the goods manufactured at Joliet but other goods of like kind purchased elsewhere."

The statutes of Illinois did not require a listing of merchants' and manufacturers' stock on the average basis, but they did require that:

> "The personal property of * * * merchants and manufacturers shall be listed * * * in the county * * * or district where the business is carried on, except such property as shall be listed or assessed elsewhere, in the hands of agents."

The decision was, that the stock on hand on the taxing day at the manufactory should be assessed as manufacturing stock in Joliet, and the stock on hand at the jobbing house in Chicago on the same date should there be listed and assessed as merchants' stock.

This last case suggests still another reason for reaching the conclusion which I have already announced. Section 5381 of the General Code provides that a merchant shall be defined as "a person who * * * has in possession * * * personal property within this state with authority to sell it * * * which has been consigned to him from a place out of the state for the purpose of being sold at a place within this state, * * *" That is to say, this is one of two definitions of the word given in this section. It is clearly the intent of the legislature, therefore, as evinced by this section, to embody in statutory form the rule announced in the Tennessee case. That is to say, if the facts stated in your first question were reversed and the corporation's manufactory were in another state, and its agent in the state of Ohio, such agent would clearly be required to list the stock in his possession as a merchant.

This section suggests a policy which I think must be presumed to exist unless the contrary clearly appears from related sections, namely, that when a portion of the manufacturer's stock is shipped out of the state for the purpose of storage and ultimate sale, it becomes separate from the balance of the manufacturer's stock at the manufactory and loses its character as such stock and is, therefore, treated as merchants' stock.

Every consideration, therefore, save only the silence of section 5385 upon the question, points to the conclusion which I have already suggested. I am, therefore, of the opinion that when manufactured products are sent or consigned to an agent of the manufacturer located in another state to be sold by him, or by the manufacturer himself from a stock in the hands of such agent, the articles so shipped cease to be "on hand" within the meaning of section 5385, and no longer constitute a part of manufacturers' stock of finished products.

The value of such specific articles so shipped then is to be taken into consideration in an effort to ascertain on the average basis the value of the manufacturers' stock subject to taxation on the day preceding the second Monday of April only by including the same in the value of the property subject to be listed on the last business day of each month, that the specific property so shipped was at the manufactory or kept and maintained elsewhere in this state without being separated from the principal stock of finished products in such a manner as to acquire the character of merchants' stock.

This rule applies as well to corporations in listing their returns of personal property as to individuals and firms.

Answering your second question, I beg to state that in my opinion, when a machine produced by a manufacturing company is leased or rented to a user, it ceases to possess the character of part of manufacturers' stock of finished articles within the meaning of section 5385, supra, upon the principles already discussed. Therefore, such machines so rented and leased and in the hands of customers of the manufacturers are to be listed and assessed for taxation as specific articles of personal property and not as part of manufacturers' stock, except insofar as they must be taken into account in computing the value of the manufacturer's stock, as a part of a monthly inventory taken at such times or at such times at which they do compose a part of the stock.

This being the case, amended section 5404 is in itself a complete answer to your second question. It provides, as I have already pointed out, that corporations other than those for the taxation of which specific provision is elsewhere made in the statutes, shall list for taxation "all the personal property thereof * * * within the state." The reasons for holding that the phrase "within the state," as used in this section, modifies all the nouns and phrases preceding it and subject to modification instead of merely the nouns, "*moneys* and *credits*," have already been stated.

Inasmuch, therefore, as in the case described in your second question, the machines referred to would constitute specific personal property of a corporation located outside of the state, I am of the opinion that such machines need not be listed and returned as a part of the personal property of the corporation under section 5404 as amended.

Your second question, however, asks also as to the status of the amounts due a corporation under the circumstances therein defined as credits or investments subject to be listed and assessed in Ohio.

Sections 5323 and 5324 of the General Code define the phrases "investments in bonds" and "investments in stock." I shall not quote those sections, but suffice it to say, that in my opinion the rentals such as those described in your second question are not to be regarded as "investments" within the meaning of that word wherever used in the constitution or in the statutes.

Section 5327 of the General Code provides in part as follows:

> "The term 'credits' * * * means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, * * * when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing to such person. * * *"

This definition is broad enough, it seems to me, to include all claims including choses in action, and indeed the supreme court has so construed it.

Rheinboldt vs. Raine, 52 O. S., 160.

Myers vs. Seaberger, 45 O. S., 235.
Cameron vs. Cappeller, 41 O. S., 533.
Grant vs. Jones, 39 O. S., 506.

The mere fact that in the given case the claim of the corporation might not be fixed and determined and the debt of its leases liquidated does not effect the question. The true value in money of each lease held in Ohio must be taken into consideration in ascertaining the sum total of the credits of the corporation in the state.

Your question states specifically that the annual rental which the corporation exacts for the use of its machines is payable monthly at the home office of the company in Ohio and the leases which constitute the evidence of indebtedness in a given case are there held. That being the case, I am of the opinion that the credits which these leases constitute are held in Ohio and taxable to the corporation at its principal office. The ordinary rule is, of course, that credits are taxable at the residence of the owner and that is the express declaration of section 5328, General Code, above quoted. In the case of corporations, however, a different rule seems to obtain by reason of the amended section 5404, which taxes the credits of a corporation when held within this state whether at the principal office of the corporation or elsewhere. Hubbard vs. Brush, 61 O. S., 252.

On either theory, however, the situs of the credits described in your second question for taxation is the home office of the company and same must be there listed and assessed at their true value in money as part of the sum total of credits due the company in Ohio.

The above discussion suggests the answer to your third question. In my opinion a foreign corporation which maintains its nominal principal office in another state, must return as part of its credits, subject, of course, to proper deduction, and at the true value in money, such claims and demands due the company and for which the evidences of indebtedness consisting of books, accounts and other papers are kept in Ohio; and if, in point of fact, such a foreign corporation maintains its only factory in this state and there maintains headquarters and keeps its books and papers, excepting its mere corporate records, a very strong presumption, to be rebutted only by the most convincing testimony, will exist that all of the credits of such corporation should be listed and assessed at the office of the company in Ohio. Hubbard vs. Brush, supra.

Your fourth and fifth questions present inquiries which ought not be categorically answered as propositions of law. In each case the question is as to which person or corporation, as between a vendor and a vendee, must list specific property for taxation. The questions, therefore, depend upon where the title to such specific property is at the time when it must be listed for taxation or taken into account in determining the value of some stock subject to taxation. Both questions also are of one particular type in that they present instances of the ordering of articles by one party to be manufactured by another. The peculiar fact of each case and in particular the actual intent of the parties controls, is the devolution of title in all such cases. That is to say, it is unsafe to state as a general rule just when title passes from the manufacturer to the vendee when property is ordered to be manufactured and delivered under circumstances such as these. The general rule in Ohio is perhaps best stated in the case of Shawhan vs. Van Nest, 25 O. S., 490. The statement of facts in that case is in part as follows:

> "V., who is a carriage maker, agreed with S. * * * that for the sum of seven hundred dollars, he would furnish the materials and make

for S. a two-seated carriage in accordance with his directions, and have the same completed and ready for delivery at V.'s shop on the first day of October following, in consideration of which S. agreed to accept the carriage at the shop, and pay V. the contract price for it.

"V. completed the carriage and tendered it to S. who refused to accept and pay for it. V. sued for the contract price with interest. The court held that the action was maintainable."

The decision turned upon the question as to whether or not the title passed prior to the actual delivery of the carriage. If title had not passed, the measure of damages would have been the difference between the contract price and the market price at the time and place of delivery. If title had passed, however, the measure of damages would be the entire contract price. The court held that the facts above stated were sufficient to pass title from V. to S. as soon as the materials furnished by him were appropriated to the use of the vendee and worked into the finished product which he had agreed to purchase.

Many authorities are cited in the decision, but it is apparent from the decision itself, as well as from an examination of the authorities outside of the case, there is a division of authorities upon the exact question in Shawhan vs. Van Nest. The case, however, related not to the title to materials, but to the title to the finished product. It not only did not decide in whom the title to the materials rested at any time during the process of manufacture, but it also failed to decide in whom the title to the manufactured article was vested during the process of manufacture. The case is helpful, however, because of the difference between its facts and those stated in your fourth and fifth questions. The following differences are to be noted:

1st. In the case cited the article was not to be paid for until delivered; in the case you state advance payment is required and partial are exacted from time to time. The manner of payment, however, is immaterial—it is determined by the contract of sale, and of itself is not a determining factor in deciding when the title passes.

2d. The vendee in the case cited agreed to approve the work when finished; in the case you submit the vendee has the right to inspect both the material and the manufactured product during the course of manufacture, and I take it that this right implies the right to reject defective and improper material and to refuse to accept the finished product. This difference is quite material. If the vendee has the right to reject either the material or the finished product, it is clear that he is under no obligation to pay anybody for any material or product properly rejected by him. This fact, then, tends to support the conclusion that in the case you submit no title passes to the purchaser until acceptance of the product.

3d. The case cited does not, as already pointed out, relate to the title to the *materials* vested in the vendee upon their appropriation by the vendor to the work ordered by the vendee; the case relates particularly to the title to materials and it would seem that whatever doubt might exist as to the title to such materials under the circumstances involved in the decided case, there can be no doubt that the materials in the case submitted by you being subject to rejection by the vendee belonged to the vendor, at least until they are actually worked into the product in the course of manufacture and probable (on the fact you submitted) until the finished product is itself accepted.

For all of the foregoing reasons I am of the opinion that the materials ordered and paid for by the corporation described in your fourth question for the purposes of being worked into products ordered to be manufactured by its customers and used by it in producing specific ordered articles subject always

to the approval or rejection of a representative of the vendee, belongs to the corporation so long at least as they retain the characteristics of materials and property—although additional facts might be necessary to establish these points —until they are completely worked into a finished product which is not accepted by the vendee. Such materials, therefore, should be taken into consideration by the corporation in question as a part of its materials on hand on such monthly days as they were held by the company as materials; such products as are described in your second question in the process of manufacture to be taken into account as a part of the stock of the corporation in the process of manufacture during such monthly days as the specific articles remaining on hand in such condition; and the finished product if in the possession of the corporation disapproved by its customers on the last business day of any month of the year preceding taxing day should be regarded by it as part of its stock of finished products.

As I have pointed out, however, the above holding, especially with respect to the character of the property in the process of manufacture and to the completed product is made only upon the facts submitted which are somewhat meager. A more complete statement of fact might result in a different conclusion.

For reasons similar to those referred to in discussing your fourth question, your sixth question must be answered in general by holding that the corporation therein referred to need make no return whatever of machinery being constructed for it in another state for use in the construction of a new plant in this state. Here, however, an additional reason is suggested which would seem to warrant returning an unequivocal answer to this effect. Under section 5386 of the General Code each manufacturer is required to "list at the fair cash value all engines and machinery of every description used or designed to be used in * * * manufacturing, except such fixtures as are considered a part of the * * * real property. * * *" In my opinion this provision must be construed in the same manner in which the remaining provisions of this section and of section 5385 have been construed by me in answering your first question. That is to say, the tax being upon the specific property and the controlling intent of the general assembly that specific property outside of the state shall not be taxed. I am of the opinion that whether or not the machinery in question belongs to the company, and whether or not it is intended for use in Ohio, either as a fixture or movable property, it does not become subject to taxation in this state until it is brought into Ohio.

It does not follow, however, that because the specific property is not subject to taxation, no returns should be made on account of the transaction described in your fifth question. The company has expended a large amount of money. In return for this expenditure it has a claim or demand. That claim or demand is to have certain machinery completed for it, subject to its approval and delivered at its principal plant in this state; in case its right in this respect is violated it has the right to recover damages from the manufacturer who is constructing the machinery for him as for breach of contract or the like. This right of the company in question possesses an assessable value and, in my opinion, is taxable as "credits" within the broad meaning term above defined and discussed.

Now, in the case you submit, the legal domicile of the corporation is in the state of New Jersey. Prima facia, then, its credits, especially a credit of this kind which does not pertain to the ordinary business of manufacturing, have their situs for taxation purposes in that state. On the other hand, however, your question states the "principal office of the company" by which I presume you mean the principal business office is located in Ohio. If the contracts under

which the work in question is being done by the company are held in Ohio then under the rule of Hubbard vs. Brush, supra, construing what is now section 5054 of the General Code, the situs of these credits for taxation would, in my opinion, be at the principal office in Ohio. If the facts are, then, as I presume them to be from the form of your question, the corporation referred to in your fifth inquiry should return on account of the transactions therein referred to, and as a part of its credit subject, of course, to deductions for debt, the true value in money of all of its rights growing out of the same as credits.

Upon principles already announced, it is my opinion that an Ohio corporation whether it be engaged principally in the business of manufacture or in the mercantile business, which you describe in your fifth question, contracts for the output of a number of factories located in different parts of the country and sells the same to its customers is as to this branch of its business a *merchant* and not a manufacturer. If the corporation contracted with the owners of different factories for the manufacture of materials furnished by it in the finished product, the corporation would then, in my opinion, be a manufacturer within the meaning of the Ohio statute as to such business. (See State vs. Clarke, 64 Minn., 566.) This, however, is not the case. The transaction is one in which the corporation buys the manufactured product rather than one in which itself manufactures through another inasmuch as the purchase of such manufactured products is for the purpose of selling "at an advanced price or profit"—at least I presume that to be its purpose. The definition of the word "merchant" as embodied in section 5381 of the General Code is satisfied in all respects. This section specifically provides that returns as a "merchant" shall be made only by persons having property in their possession *within this state* with a view to being sold at an advanced price or profit. It follows, therefore, that as to stock on hand at the manufactory with which the Ohio corporation contracts, and which is located outside of the state of Ohio, the corporation is not taxable in Ohio either as a merchant or manufacturer or otherwise.

Your question does not specify as to whether or not any of the factories from which the corporation purchases their products sold by it are located in this state. If any of them are located in Ohio, then, in my opinion, a stock of goods located at any such factory and from which specific articles are sold, must be valued and listed as a merchant's stock in the county in which it is located. The principles and the statutory provisions fixing the situs of such stock for taxation have already been averted to.

In addition to being taxable upon goods kept by it in stock at various factories in this state, the corporation is also required to list as credits, at their true value in money, any claims or demands payable to it at its principal office in Ohio or elsewhere in the state growing out of this kind of business.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 391.

TAXES AND TAXATION—MINERAL RIGHTS—VALUATION BY PERSONAL PROPERTY ASSESSOR—NO REVIEW BY AUDITOR OR BOARD OF EQUALIZATION.

The power to value mineral rights, rests by section 5562, General Code, as amended 102 O. L. 89, in the personal property assessor who shall value such rights annually, and the valuation so fixed shall be final for the year.

When, therefore, after valuation by the assessor and before the time for payment of taxes, knowledge is acquired of the lessened value of such mineral rights, neither the county auditor nor the board of equalization may reduce the valuation so fixed.

The same rule applies even though by the terms of lease or contract, the ownership of the mineral rights be automatically relinquished by the discovery of the absence of minerals, and the mineral rights will nevertheless remain on the tax.

COLUMBUS, OHIO, September 25, 1911.

The Tax Commission, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 13th, enclosing a copy of a letter addressed to you by the auditor of Athens county, requesting my opinion upon the question submitted by him, as follows:

> "An owner of mineral rights has filed with the auditor a statement to the effect that an effort has been made to find or develop minerals in accordance with such rights, but that the effort is unsuccessful and that no minerals are found in the land covered by such rights.
>
> "May the auditor or the board of equalization reduce the value of the mineral lands in accordance with this statement; or should the statement be made to the personal property assessor at the time of taking the lists of personal property subject to taxation for next year?"

The question involves consideration of sections 5562 and 5563, General Code, as amended, 102 O. L., 89, which provide in part:

> "Section 5562. At the time of making the lists of personal property, the assessor shall make a list of * * * works of any kind designed for the production of minerals of any kind, which have been begun or constructed, since the last preceding quadrennial appraisement. * * * If the assessor finds that *rights to minerals* contained or produced in or upon any lot or parcel of land has been previously created and not separately assessed for taxation, he shall report the same, together with his aggregate valuation of the lot or parcel and the right or rights to minerals therein, to the county auditor, who shall apportion such aggregate valuation as provided in section 5563 of the General Code. If the value of any lot or parcel of land containing or producing * * * minerals or of *any right to the minerals therein* shall *decrease within the year* by reason of the exhaustion of any such minerals or by the failure to find or develop such minerals the assessor shall determine as nearly as may be practicable how much less valuable such lot or parcel is in consequence of such exhaustion or failure to find or develop, in case the fee of the soil and the right to the minerals is

owned and assessed for taxation against the same person, and make return thereof to the county auditor; where the title to the fee of the soil is in one or more persons, and the right to the minerals therein, * * * is in another person, the assessor shall determine as nearly as practicable, how much less valuable the right to the minerals therein is by reason of such exhaustion or failure to find or develop, and make return thereof to the county auditor. If the county auditor finds that the value of any such lot or parcel or of any such right to the minerals therein has decreased to the amount of one hundred dollars or more, by reason of such exhaustion or of such failure to find or develop, he may reduce the valuation of such lands or of any such rights to the minerals therein, as the case may be, so as to place such valuation at its true value in money."

Section 5563 need not be quoted. It provides for the equitable apportionment by the county auditor of the taxable valuation of the fee of the soil and the minerals or mineral rights as between the owner of the fee and the separate owner of such minerals or mineral rights.

No other statute so far as I have been able to ascertain bears in any way upon the question submitted. It seems to me that the phrase "within the year," as above italicized, points to the conclusion that no reduction in the valuation of the mineral rights in question can now be made. The theory of section 5562 is that mineral rights and minerals themselves, considered as a part of the real estate, shall be quadrennially assessed for taxation, by the quadrennial assessor of real estate, but that the valuations so made shall be annually reviewed, so to speak, by the annual assessor of personal property, for the purpose of adjusting such taxable valuation to reductions in actual value, caused by exhaustion of minerals or failure to find the same. The general assembly has thus taken cognizance of the fact that the actual values of mineral rights and minerals in place fluctuate from time to time, so that it would be unjust to affix to such minerals or mineral rights, considered as part of, or pertinent to, a parcel of real estate, a valuation which should continue in force, so to speak, for a quadrennial period.

But the legislative intention, as evidenced by the section is that the determination of reductions in valuations of mineral rights, from the causes enumerated in the statute, shall be made *annually*. It might have gone further and determined that whenever minerals are worked out prior to the payment of taxes or discovered between the month of April and the 20th of December or the 15th of February following, the duplicate should be changed and the taxes assessed and collected upon the basis of the actual value at tax paying time, or upon some proportionate valuation, as in section 5593, General Code. This, however, the legislature has not done. It has provided in effect that both increases and reductions in the actual value of mineral lands and mineral rights as compared with the taxable valuation thereof, fixed by the quadrennial assessors of real estate, and as equalized, shall be returned annually by the assessor of personal property at the time of taking the lists of personal property.

The auditor's question does not so state, but I assume the fact to be that the owner's discovery in the case concerning which he inquires, was not made until after the assessor had made his return. At the time when the assessor listed the property, then, it is to be presumed that as a result of the quadrennial assessment of real property the land and the mineral rights therein were both assessed at what was then supposed to be their true value in money. Putting it in another way, on the day preceding the second Monday of April, 1911, and prior thereto, the right of the applicant in the case mentioned by the

auditor possessed a certain value in money. It was a speculative value, to be sure, but this is true of all mineral values. There is no injustice in compelling the owner of the mineral rights to pay taxes on this value for the year 1911. The statute plainly requires that this be done and that the application filed with the auditor be made, so to speak, through the assessor of personal property for the year 1912.

In addition to the foregoing considerations, the very fact that section 5562 was amended is significant. This section formerly vested in the annual board of equalization the power of reducing the mineral value assessed against lands in proportion as the product diminished, etc. The amendment takes this power from the annual board of equalization and vests it in the assessor, thus affording additional evidence of the correctness of the above construction.

It is my opinion, therefore, in a case in which the non-existence of minerals covered by mineral rights in lands is discovered after the annual assessor of personal property has made his return to the county auditor, there is no right in the owner of such rights to have the assessment of such mineral valuation reduced or abated for the current year; but that at the next time for listing personal property for taxation the owner may report the facts to the personal property assessor who may afford proper relief. In case, however, such personal property assessor fails to afford the relief to which the owner of the mineral rights is entitled, then, ample power is conferred upon the annual board of equalization by the section defining its general powers and duties to correct the same.

I can conceive, however, of a possible state of facts which might give rise to some confusion. Some mineral rights, if I am not mistaken, are in the form of leases terminable upon the failure to fine or develop the minerals covered thereby. If the case presented by the auditor is of this type the conclusion which I have above announced would still follow even though upon failure to develop mineral rights the same are automatically extinguished; yet, if they were in existence at the time of taking the lists of personal property they are taxable as of such time against the persons or corporations owning them at that time.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A-413.

TAXES AND TAXATION—CONSTITUTIONAL POWERS OF LEGISLATURE TO EXEMPT PROPERTIES FROM TAXATION—GREAT CAMP OF MACCABEES OF THE WORLD—MUTUAL BENEFIT ASSOCIATIONS.

The real and personal property and the moneys, credits and investments belonging to the Great Camp of the Knights of the Maccabees, must be placed on the tax duplicate at their true value in money.

The provisions of section 5364, General Code, exempting from taxation, the properties of "secret benevolent associations maintaining a lodge system" and of associations organized to create a fund to be used for the care and maintenance of indigent members of the organization and the widows, orphans and deceased members, and of "associations not operated with a view to profit and having as their principle object the issuance of insurance certificates of membership" are beyond the powers of the legislature to exempt properties from taxation as laid down in article XII, section 2 of the constitution and therefore void.

COLUMBUS, OHIO, October 7, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 27th, requesting my opinion upon the following question:

> "The Great Camp of the Knights of the Maccabees of the World, whose main office is located in Norwalk, Ohio, had money on deposit in banks subject to withdrawal on demand and was the owner of office furniture on the day preceding the second Monday of April, 1911. The order claims that such money and other property are not taxable, being exempt under the provisions of section 5364 of the General Code, for the reason that it is a 'secret benevolent organization maintaining a lodge system,' and also 'an association which is intended to create a fund to be used for the care and maintenance of indigent members of said organization, and the widows, orphans and beneficiaries of the deceased members; that it is not operated with a view to profit, and that it has for its principall object the issuance of insurance certificates of membership, covering sick and accident benefits.'
>
> "Question: Is the property of such association taxable in this state?"

Section 5364, General Code, provides as follows:

> "Real or personal property belonging to an incorporated post of the Grand Army of the Republic, Union Veterans Union, grand lodge of Free and Accepted Masons, grand lodge of the Independent Order of Odd Fellows, grand lodge of the Knights of Pythias * * * a religious or secret benevolent organization maintaining a lodge system * * * incorporated association of commercial traveling men * * * not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or income derived therefrom, shall not be taxable, and the trustees of any such organization shall not be required to return or list such property for taxation."

This section of itself answers your question if it is valid. However, the general assembly lacks general legislative power with regard to the subject of exemptions from taxation. Its powers in this particular are strictly limited by article XII, section 2 of the constitution which provides that:

> "* * * 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 $200 for each individual may by general laws be exempt from taxation * * *."

No property belonging to persons or institutions other than those enumerated in this constitutional provision may be exempted by legislative action from taxation, and any act of the general assembly undertaking to create an exemption in favor of some class of institutions or individuals other than those enumerated is void. These propositions are elementary.

Manifestly a secret benevolent organization maintaining a lodge system, and being an association which is intended to create a fund to be used for the care and maintenance of indigent members of the organization, and the widows, orphans and beneficiaries of the deceased members, whether operated with a view to profit or not is none of the following things: burying grounds, public school houses, houses used exclusively for public worship, public property used exclusively for any public purpose or personal property not exceeding in value $200. The institutions mentioned in section 5364, General Code, must be considered as institutions of purely public charity if their exemption from taxation is to be justified.

In Morning Star Lodge No. 26, I. O. O. F. vs. Hayslip, 23 O. S., 145, it was held by the court that:

> "A charitable or benevolent association which extends relief only to *its own* sick and needy members and to the widows and orphans of its deceased members is not 'an institution of purely public charity' and its moneys held and invested for the aforesaid purposes are not exempt from taxation."

No more succinct application of the constitutional provision to facts and statutes like those under consideration could have been made. That is not "purely public charity" which extends its benefits to a particular order or to the dependents of its members. Charity does not become public, at least purely public, until it is dispensed freely without regard to affiliation with any secret order, religious denomination or other organization.

So much then of section 5364, General Code, as extends exemption to associations organized to create a fund to be used for the care and maintenance of indigent members of said organization and the widows, orphans and beneficiaries of the deceased members is clearly unconstitutional. If the order of the Knights of the Maccabees claims exemption under this part of the section it is clearly not entitled thereto. Nor, in my judgment, is that part of section 5364 which exempts from taxation the property of "secret benevolent organizations maintaining a lodge system" constitutional. Certainly the fact that a society is secret does not make it an institution of purely public charity. Surely the fact that it maintains a lodge system does not add to the charitableness of its nature. The word "benevolent" might seem to justify the exemption, but it is well known that societies are called "benevolent" whose benefits are strictly limited to members and their families and dependents.

Because, therefore, the benefits of the statute are not strictly limited to such benevolent secret societies having a lodge system as confer their benefits in a public way, this part of the section is unconstitutional.

In fact I am reasonably certain that practically the entire section 5364, General Code, is void. There may be portions of it, however, that may be justified under the constitution and I would prefer not to base my opinion upon the entire invalidity of the section.

It follows, however, from all the foregoing that so much of section 5364, General Code, as in terms applies to the Great Camp of the Knights of the Maccabees of the World is unconstitutional and void, and that it is the duty of the taxing officers to cause the real and personal property and the moneys, credits and investments belonging to said great camp to be placed on the tax duplicate at their true value in money.

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

442.

TAXES AND TAXATION—CORPORATIONS OWNING AND OPERATING A PUBLIC UTILITY—EXCISE TAX—FRANCHISE TAX—LIABILITY OF RAILROAD CORPORATION WHICH HAS SOLD ALL ASSETS AND SHARES OF STOCK.

When all the shares of the capital stock of a railroad corporation, and all its tangible and intangible assets have been sold to another corporation, which operates the first railroad and conducts its business, while the first railroad retains its existence as a corporation of record in the office of the secretary of state, and maintains its organization solely for the purpose of protecting its properties now owned by the other corporation, such first railroad corporation does not "own nor operate" a public utility under 102 *O. L.* 254 *providing for an excise tax upon gross receipts and earnings of public utilities.*

Such corporation must, however, pay the annual fee required of domestic corporations for profit not owning or operating a public utility under 102 *O. L.* 224-249, *section* 109, *amounting to* 3-20 *of one per cent. upon its subscribed, or issued and outstanding capital stock and the burden is upon such corporation to show that all of its originally subscribed capital stock is not issued and outstanding.*

COLUMBUS, OHIO, October 31, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 10th, requesting my opinion upon the following statement of facts and question:

> "On the 12th day of August, 1911, the Scioto Valley & New England Railroad Company filed with the commission its annual report as a domestic corporation for profit for the year 1911, and accompanied same with a statement, copy of which is enclosed.
>
> "Question: Upon the statement of facts therein set forth, is the said railroad company required to pay an annual fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital

stock? If so, what is the amount of the subscribed or issued and outstanding capital stock of the company upon which it is required to pay an annual fee?"

The statement of facts made by the railroad company is very lengthy and I shall not set it forth in full herein. It appears therefrom that the Norfolk & Western Railroad Company in the year 1880 acquired ownership of all of the shares of the capital stock of the Scioto Valley & New England Railroad Company, and at the same time the said Scioto Valley & New England Railroad Company sold and conveyed its entire tangible and intangible assets to the said Norfolk & Western Railroad Company subject to a certain mortgage made to secure an issue of bonds made by the Scioto Valley & New England Railroad Company. Since that date the Norfolk & Western Railroad Company has operated the railroad theretofore operated by the Scioto Valley & New England Railroad Company, which said railroad company has ceased to exist as a business agency but continues to exist as a corporation of record in the office of the secretary of state. Meanwhile in reorganization proceedings whereby the Norfolk & Western Railroad Company became the Norfolk & Western Railway Company all but a few of the shares of stock of the Scioto Valley & New England Railroad Company were delivered to a certain trust company for the purpose of being held as muniments of title to the property formerly held by said Scioto Valley & New England Railroad Company.

The corporate organization of the Scioto Valley & New England Railroad Company is kept up from year to year solely for the purpose of protecting the properties formerly owned by it for the benefit of those who now own them.

The act of June 2, 1911, 102 O. L. 224-249, provides in section 106, etc., thereof as follows:

> "* * * annually * * * each corporation organized under the laws of this state for profit shall make a report * * * to the commission."

Section 109:

> "Upon the filing of the report * * * the commission * * * shall * * * determine the amount of the subscribed or outstanding capital stock of each such corporation. The commission shall certify the amount so determined by it to the auditor of state who shall charge for collection * * * from such corporation a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case."

Section 129 of the same act, 102 O. L. 254, provides that:

> "An incorporated company * * * owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings shall not be subject to the provisions of sections 106 to 115 inclusive of this act."

It is clear from the statement of facts that the Scioto Valley & New England Railroad Company is not a corporation owning or operating a public utility. In fact the corporation neither owns nor operates anything. It is simply a formal body corporate doing no actual business whatever, yet it is kept alive

on the records of the secretary of state and at any time might, if its stockholders so elect, and its directors so determined, again engage in the business for which it was originally incorporated or otherwise exercise its corporate powers. Indeed, it is exercising its corporate powers in that it is causing its officers to be elected from year to year. As originally incorporated it was a corporation "organized for profit." That it may not now be conducted for profit is a matter of no concern. The corporation has never been dissolved nor has it in a technical sense retired from business, so that it is unnecessary to rely on section 131 of the act of 1911, 102 O. L. 254, nor upon the corresponding section of the original Willis law in order to establish the fact that the corporate existence of the company has continued since the sale of its assets and still continues.

Accordingly, it is my opinion that the Scioto Valley & New England Railroad Company must pay the annual fee required of domestic corporations for profit not owning or operating a public utility. The amount of that fee is determined by the amount of the issued and outstanding capital stock. The statement of facts as above quoted shows that the Norfolk & Western Railroad Company became the owner of certain shares of capital stock of the Scioto Valley & New England Railroad Company. These shares in order to be the subject of separate ownership must have been issued by the Scioto Valley & New England Railroad Company and must now be outstanding. Unless the fourteen shares which have not been delivered to the trust company referred to in the statement of facts have in some lawful manner been retired and are no longer outstanding, it is my opinion that the 50,000 shares originally acquired by the Norfolk & Western Railroad Company, and being the entire capital stock of the Scioto Valley & New England Railroad Company constitute its issued and outstanding capital stock as well, of course, as its subscribed capital stock. The presumption in such a case should be that the amount originally subscribed and originally issued and outstanding continues to be the amount of the subscribed and issued and outstanding capital stock, the burden being upon the corporation to show that any reduction in the amount thereof has lawfully been made.

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

D 468.

DOMESTIC CORPORATIONS NOT FOR PROFIT—CERTIFICATE OF DISSOLUTION—CERTIFICATE OF TAX COMMISSION AS TO FILING OF REPORTS—CORPORATIONS REQUIRED TO REPORT TO SUPERINTENDENT OF INSURANCE.

Under section 5521 *stipulating that the secretary of state shall not file certificates of dissolution of corporations until the tax commission shall have furnished a certificate to the effect that all necessary reports of such corporation have been filed with it, the commission must furnish such certificate with regard to domestic corporations not for profit organized six months prior to November,* 1910, *for the reason that such companies are under obligation to file reports with the commission for the years prior to and including the year* 1910.

But with respect to such domestic corporations not for profit organized after the aforesaid date, they being never obliged in law to file reports with the tax commission, or to pay fees thereon, such a certificate is not required from the commission.

Said section 5521 *does not apply to insurance, fraternal, beneficial, building and loan, bond investment and other corporations required by law to file annual reports with the superintendent of insurance.*

COLUMBUS, OHIO, November 17, 1911.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 10th, requesting my opinion upon the following questions:

> "Section 5521 of the General Code, as enacted May 31, 1911, provides as follows:
>
> "'In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid.'
>
> "(1) Under this section is the commission required to furnish such certificate for domestic corporations not for profit?
>
> "(2) Is it required to furnish such certificate for insurance, fraternal, beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance?"

In addition to the section of the act of May 31, 1911, quoted by you, I beg to call attention to the following provisions of said act:

> "Section 129. (Designated therein as section 5518, 102 O. L. 254). * * * insurance, fraternal, beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act."

"The provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act," require all domestic corporations for profit and all foreign corporations for profit, doing business in this state, to file reports with the tax commission, and to pay annual fees, based, generally speaking, upon the amount of the capital stock of such companies.

Supplementing this citation, I beg to state that none of the provisions of the act of May 31, 1911, exact any report from, or assess any tax against, domestic corporations not for profit, as such.

It is to be noted that section 5521, above quoted by you, requires the certificate of the tax commission that all reports "required to be made *to* it" have been filed in pursuance of law, and that all taxes or fees and penalties *thereon* (i. e., on such reports) have been paid.

Under the act of May 10, 1910, 101 O. L., 399, section 88, therein designated as section 5532, domestic corporations not for profit are required to file reports with the tax commission; and under section 90 of the same act a tax or annual fee was exacted from each such corporation. By section 101 of said act, however, the same exemption from the franchise tax provisions thereof was made with respect to corporations required by law to file annuall reports with the superintendent of insurance as is made by section 129 of the act of 1911.

By section 115 of the act of 1910, above referred to, all powers and duties theretofore devolving upon state officers, and by that act devolving upon the tax commisison, were imposed upon the commission. This language, I take it, made it the duty of the tax commission to exact reports from corporations delinquent for reports prior to the year 1910, on July 1st of which year the tax commission assumed the duties of its office. Prior to that time, also, the law was substantially the same as it was in the year 1910, excepting that the duties of the tax commission, above referred to, were those of the secretary of state. That is to say, domestic corporations not for profit were required to file reports and pay franchise taxes but insurance companies, and other companies required to report to the superintendent of insurance, were not required to file reports with the secretary of state or to pay taxes under what was then known as the Willis law.

From all the foregoing. the following facts are apparent:

1. Prior to July 1, 1910, no corporation was required to file any report with the tax commission or to pay any fee thereon.

2. After July 1, 1910, the duty of each domestic corporation for profit, then existing, was to file with the tax commission, in the month of November, 1910, reports for the succeeding year. At the same time, companies delinquent for previous reports were required by law to file the same with the tax commission, and not with the secretary of state, as formerly.

3. At the present time no domestic corporation not for profit is charged with the duty of reporting to the tax commission or paying a fee on any such report for the year 1911; but the duty to report for the year 1910 and previous years still remains, by virtue of the saving clause of section 161 of the act of 1911.

4. At no time and for no reason have corporations required to file annual reports with the superintendent of insurance been under obligation to file any report with the tax commission or to pay any fees thereon.

From these facts, then, it is my opinion that the commission is required to furnish a certificate, under section 5521, as to a domestic corporation not for profit organized six months prior to November, 1910. (See section 102 of the act of 1910. 101 O. L. 425.) This is because such domestic corporations not for profit are still under legal obligation to file annual reports with the tax com-

mission for the years prior to and including the year 1910, if such reports have not already been filed, and to pay taxes thereon.

I am further of the opinion that domestic corporations not for profit, organized after the date above mentioned, were never obliged by law to file reports with the tax commission, or to pay fees thereon, and, therefore, in the case of the dissolution of any such corporation the commission need not furnish the certificate referred to in section 5521.

I am further of the opinion that section 5521 does not apply at all to insurance, fraternal, beneficial, building and loan, bond investment and other corporations required by law to file annual reports with the superintendent of insurance.

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

A 469.

TAXES AND TAXATION—WILLIS TAX LAW—CORPORATIONS IN HANDS OF RECEIVER, ASSIGNEE OR TRUSTEES—FEES COLLECTIBLE UNTIL CERTIFICATE OF DISSOLUTION FILED.

A corporation in the hands of a receiver, assignee or trustee for the benefit of creditors and stockholders, must through such receiver, assignee or trustee, file the reports and pay the fee prescribed by the Willis law (102 O. L. 249) until the corporation is dissolved or its charter revoked by a court of competent jurisdiction and the certificate of dissolution provided by section 11975, has been received and filed by the secretary of state.

COLUMBUS, OHIO, November 19, 1911.

To the Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Appended hereto is an opinion in re liability of a receiver, assignee or trustee in bankruptcy of a corporation as to the Willis tax.

Some days ago Messrs. Hogsett & Watson raised the question before my department in reference to the claim of the State vs. The Cleveland Hippodrome Company. There seems to have been a good deal of confusion throughout the state amongst receivers, assignees and trustees as to their duty in the premises.

To the end that you might have a permanent guide for action in reference to this subject I prepared the opinion herein referred to and transmit the same for your information and guidance. In cases wherein an opinion rendered by any of my predecessors is reversed I conceive it to be my duty to forward cop of the opinion to departments that are interested without awaiting request.

This opinion reverses an opinion on the same subject rendered by my predecessor bearing date May 18, 1909. The latter opinion was given in reliance upon the decision of a lower court in New Jersey, while this opinion is founded upon the decisicn of the court of errors and appeals of New Jersey wherein the lower court was reversed. I feel quite confident that the highest court of New Jersey is correct in its conclusion.

Inasmuch as receivers up to this time in not filing reports during the time of their receivership relied upon Mr. Denman's opinion, it is my judgment that

no penalty should attach against any receiver, assignee or trustee who files a report for past period and remits the proper amount, providing the same is done within due season after the rendition of this opinion.

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

COLUMBUS, OHIO, November 15, 1911.

In re the liability of a receiver, assignee or trustee in bankruptcy of a corporation as to the Willis tax.

There seems to be a great deal of confusion and misunderstanding as to the duty of receivers of corporations, etc., as to the filing of reports and the payment of fees under the Willis law. The former ruling of this department was that receivers of corporations appointed for the purpose of winding up the affairs of such corporations, whose duties are to preserve the property, collect the assets and report the funds to the court for distribution, should be required to file reports and pay the franchise tax which becomes a lien upon the property prior to the appointment of the receiver; and that receivers, appointed for other purposes than winding up the affairs of the corporations, and continuing the business of the corporation under its franchise, should be required to file the annual report and pay the annual fee as long as they are permitted to use the franchise.

In other words, if the receiver were appointed solely to wind up the affairs of the corporation and not to continue its business, the only report and fees required of him would be those which become due prior to his appointment; but if he continued the business of the corporation, under its franchise, then he should be required to report and pay fees as long as this was continued.

This ruling was made by Attorney General Denman on May 18, 1909. (See annual report of Attorney General of Ohio, 1909-1910, page 104.)

This ruling was based largely upon the case of George Mather's Sons Company, 52 N. J. Equity Reports, 607. This case, decided by the court of chancery of New Jersey, has since been overruled by the court of errors and appeals of New Jersey, by its decision found in 60 N. J. Equity Reports, page 514. In the matter of the United States Car Company, 514, reversing Cruse vs. the United States Car Company, 57 N. J. Equity, 357. This seems to be a case directly in point and the final authority of the court of errors and appeals of New Jersey upon this question; and as the New Jersey statute is very similar to the Ohio statute, this case should control, and I shall refer to it more at length later in this opinion.

The law imposing the franchise tax on corporations, commonly called the Willis law, is now found in section 105 et seq. of the act of May 31, 1911, 102 O. L., 224 (at page 249).

It has been held that this tax (which in reality is not a tax at all, but for convenience it is thus designated in this opinion) is not a tax upon property, but a franchise tax, the amount of which is fixed and graded by the amount of subscribed or issued and outstanding capital stock. (Southern Gum Company et al. vs. Laylin, 66 O. S., 578). In other words, it is the requirement exacted by the state from corporations for the privilege given the corporation to do business, by the state; as long as this privilege exists, it makes no difference whether the same is exercised or not, nor does it make any difference whether the same be profitable or not. It is the mere privilege, or franchise, the

right to do business, which is taxed. This tax is made the first and best lien on the property of the corporation by section 117 of the act, which is as follows:

> "The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof."

This section would seem to settle the question of itself, as the lien attaches whether the property is *employed by the public utility or corporation in the prosecution of its business or is in the hands of assignee, trustee or receiver for the benefit of the creditors and stockholders thereof.* Therefore, the receiver, assignee or trustee would be required to make all reports and pay the fee prescribed by this act until the corporation was dissolved and the proper certificate therefor filed as directed by law.

Section 11938 et seq. of the General Code provides as to the dissolution of a corporation by petition of the stockholders.

Section 11943 of the General Code is as follows:

> "When the report is made, if it appears to the court that the corporation is insolvent, or that its dissolution will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects. The corporation thereupon shall be dissolved, and cease."

Section 11960 of the General Code relates to manufacturing and mining corporations and is as to the method of dissolution the same as section 11943 above quoted. It will be noted the last sentence of section 11943 is: "The corporation thereupon shall be dissolved, and cease."

The provisions of the Code as to the filing of certificate when a corporation is dissolved, are as follows:

> "Section 11974. In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation.
>
> "Section 11975. In case of dissolution or revocation of charter by action of a competent court, or the winding up of a corporation, either domestic or foreign, by proceedings in assignment or bankruptcy, such certificate shall be signed by the clerk of the court in which such proceedings were had. The fees for making and filing it, shall be taxed as costs in the proceedings, be paid out of the corporate funds, and have the same priority as other costs.
>
> "Section 11976. When it retires from business in this state, every foreign corporation is required to file with the secretary of state a certificate, to that effect, signed by the president and secretary of the corporation."

Section 131 of the act of May 31, 1911 (102 O. L., 234), is as follows:

"The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundren and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act."

Section 132 of the same act provides:

"In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid."

When an order has been made dissolving a corporation under section 11943, and the proper certificate therefor filed as provided for by section 11975, it would seem that the liability to file the reports and pay the fee provided by the Willis act would cease from that time, provided, of course, all fees and reports due theretofore had been filed as provided by section 132; but if a receiver is not appointed under the provisions of section 11938 et seq., then the receiver must be required to file reports and pay the fees until a proper order is made by the court in which the matter is pending dissolving the corporation, revoking its charter or winding up its affairs, and the proper certificate thereof, as provided by section 11975, is filed.

This ruling is supported by the case in 60 N. J. Equity Reports, 514, in the matter of the United States Car Company, the syllabus of which case is as follows:

"'An act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof' (Gen. Stat. p. 3335), requires that all corporations incorporated under the laws of this state, with certain specified exceptions, shall pay an annual license fee or franchise tax of one-tenth of one per cent. on all amounts of capital stock issued and outstanding, etc. Held, that a license fee assessed against an insolvent corporation by virtue of this statutory provision is entitled to priority in payment out of the assets in the hands of the receiver of said corporation, notwithstanding the fact that such a license fee was imposed upon the corporation subsequent to the appointment of the receiver, and that the latter had not, since his appointment, exercised any of the corporate franchises."

I wish also to call attention to the language used by the court on pages 515 and 516, as follows:

"In the court below it was considered that the liability of a receiver to pay such tax, to the detriment of the general creditors, depended upon whether the franchises of the company were a valuable asset in his hands, and whether he continued to use them, after his ap-

pointment, for the benefit of the creditors and stockholders of the corporation, and, reaching the conclusion that in the case now before us the corporate franchises were valueless, and it being admitted that they had not been used by the receivers, the court decreed that the tax assessed was not payable out of the funds in their hands until after all indebtedness existing at the time of the appointment of the receivers was discharged.

"We cannot concur in this view. Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The state, in creating a corporation, has the right to impose upon its creatures such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it in the performance of those conditions so long as it continued to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or nonexistence of the corporation."

The ruling of this department, therefore, in brief, which is intended to cover all cases of this character, is that when a corporation is in the hands of an assignee, trustee or receiver, for the benefit of the creditors and stockholders thereof, such receiver, assignee or trustee must file the reports and pay the fee prescribed by the Willis law (as it now appears in 102 O. L., 249 et seq.), until the corporation is dissolved, or its charter revoked, by a court of competent jurisdiction and the certificate provided by section 11975 of the General Code, above quoted, has been filed with the secretary of state.

Very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Railroad Commission)

A 58.

POWER BRAKES FOR STREET CARS—REQUIREMENT ON CARS OPERATED WHOLLY WITHIN MUNICIPALITY.

House Bill No. 145 regarding the equipment of street cars with power brakes, applies to cars operated on the tracks of a street railway wholly within a municipality.

COLUMBUS, OHIO, January 24, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication under date of January 11th in which you enclose copy of a letter received from Charles V. Critchfield, secretary of the Mt. Vernon Electric Company, regarding the equipment of street cars with power brakes, as provided by House Bill No. 145, passed May 10, 1910, and in which you request my opinion as to whether or not this act, known as House Bill No. 145, above referred to, applies to cars operated on the tracks of a street railway wholly within the limits of a municipality.

In reply to the same would say that it is my opinion that this act applies to cars operated on the tracks of a street railway wholly within the limits of a municipality. The act, in section 1 provides as follows:

> "That from and after January 1, 1913, it shall be unlawful in the state of Ohio, for any corporation, company, person or persons owning or controlling the same, to operate, use or run or permit to be run, used or operated for carrying passengers or freight on an urban or interurban railroad or street car line, any car propelled by electricity, not equipped, in addition to the hand brake in use on such car, with an air or electric power brake or apparatus, capable of applying to all the brake shoes and wheels of such car a maximum permissible braking pressure, and of automatically reducing such braking pressure, as the speed of the car decreases. Fifty per cent. of such cars to be so equipped prior to January 1, 1911, and seventy-five per cent. prior to January 1, 1912. It shall be the duty of the railroad commission of Ohio to enforce this act."

While section 503 of the General Code provides that this chapter shall not apply to "street and electric railroads engaged wholly in the transportation of passengers within the limits of cities, or other private railroads doing business as common carriers," nevertheless, it is my opinion that the legislature of Ohio has the legal authority and power to enact such a law as that above referred to compelling urban railway companies to equip their cars with brakes as provided for therein, and had the further power to give to the railroad commission of Ohio authority to enforce said act, therefore the same is legal and applies to cars operated as aforesaid.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

A 59.

RAILROADS—"INTERMEDIATE RATE PROVISION"—APPLICATION TO EXPRESS COMPANIES.

In the "intermediate rate provision" of section 8988, General Code, the term "railroads" includes "express companies" and the provisions of this section may be applied to tariffs published and filed by express companies in this state.

COLUMBUS, OHIO, January 24, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated December 23d, addressed to my predecessor, Hon. U. G. Denman, to which communication is attached a copy of a letter received by your commission from Charles W. Stockton, counsel of the Wells Fargo Company, raising the question of the authority of your commission to apply the intermediate rate provision contained in the statute to tariffs published and filed by express companies, and on which you ask the opinion of this department, is received.

In reply I desire to say that I am of the opinion that section 8988 of the General Code which provides that:

> "No company, or person owning, controlling or operating a railroad in whole or part within this state, shall charge or receive for transportation of freight for any distance within this state a larger sum than is charged by the same company or person for the transportation in the same direction, of freight of same class or kind, and for an equal or greater distance over the same road and connecting lines of road."

applies to express companies as well as to railroads under the term "railroad" as defined by section 501 of the General Code, which reads in part as follows:

> "* * * Such term 'railroad' shall mean and embrace express companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof, insofar as they are applicable, shall be required of and imposed upon express companies and their officers and agents. *The commission* (meaning the railroad commission) *shall have 'the power of supervision and control of express companies to the same extent as railroads.'* "

Section 502, General Code, provides:

> "This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad corporations, express companies, etc., * * * which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers and property wholly by rail or partly by rail and partly by water."

It is very clear that it was the intention of the legislature to make said section 8988 of the General Code applicable to express companies as well as rail-

road companies, and I am, therefore, of the opinion that your commission has the right and authority to apply the intermediate rate provision contained in said statute to tariffs published and filed by express companies in this state.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

69.

INDUSTRIAL ROADS—"COMMON CARRIERS"—FILING OF TARIFFS WITH COMMISSION—"RAILROADS."

The railroad commission has no discretion with reference to compelling the filing of tariffs showing car service charges by industrial roads, if the commission finds that any of all such industrial roads come within the term "common carriers."

COLUMBUS, OHIO, January 26, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated January 18, 1911, is received in which you request an opinion from this department on the following question, as to whether any discretion rests with the railroad commission in the matter of compelling the filing of tariffs showing car service charges by industrial roads.

In reply thereto I desire to say that the question rests upon one proposition, viz: Are such industrial roads common carriers within the meaning of the statute?

The supreme court of Ohio in the case of United States Express Company vs. Backman, 28 O. S., 144, has defined a common carrier to be one that "undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another."

The same court also held in the case of Scofield vs. Railway Company, 43 O. S., 571, that "a railroad company organized under the statute of Ohio, is a common carrier, and is subject to judicial control to prevent the abuse of its powers and privileges."

The same court in the case of Pittsburgh, etc., Ry. Co. vs. Bingham, 29 O. S., 364, held that

> "by accepting a grant of corporate power from the state, a common carrier, such as a railroad, binds itself to do and perform certain things conducive to the public welfare. These things consist principally in the duty to carry and transport persons and property from one point to another under reasonable rules and regulations",

and said court laid down the rule that the obligation to carry, thus assumed, could not be disregarded or rejected at pleasure, and said "it is an indispensable condition to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with a surrender of its corporate privileges."

Further, section 501 of the General Code provides that:

> "The term 'railroad' as used in this chapter shall include all cor-

porations, companies, individuals, associations of individuals, etc., which owns, operates, manages or controls a railroad, or a part thereof as a common carrier in this state."

Therefore, under the rule laid down in the cases above referred to, and the definition of the term "railroad," as defined by the General Code, it is my opinion that any industrial road that is duly incorporated, is a common carrier, and if your commission finds that any or all of said industrial roads are common carriers under the rule laid down, it has no discretion in the matter of the filing of tariffs showing car service charges by said industrial roads.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

156.

POWER TO DISTRIBUTE SURPLUS MAPS.

The commission has the ordinary power of distributing its public documents not specifically provided for and may therefore legally control the disposition of surplus maps as are provided by law to be printed, with regard to which no designation of the power of distribution is made.

COLUMBUS, OHIO, March 7, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of March 4th, wherein you request my opinion as to the authority of your commission to control the distribution of the surplus maps, numbering 900, the distribution of which is not specifically provided for by the amendment of sections 2269 and 2276 of the General Code, passed May 10, 1910, as found in volume 101, Ohio Laws, pages 350 and 351, was duly received.

In view of the fact that the distribution of all public documents other than those specifically provided for certain state officials, is vested either by statute or precedent in the officer or state board in relation to which said document is published, I am of the opinion that your commission would have, and legally has, the control of the distribution of such surplus maps as are provided by law to be printed, and not specifically designated by whom to be distributed.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

265.

MISSHIPMENT BY RAILROAD TO ONE OF TWO TOWNS HAVING IDENTICAL NAME.

When there are two towns of the same name and a shipper marks goods marked for a town of such designation with no further directions, the shipper is guilty of contributory negligence and the railroad is not liable for shipping such goods to the one of the two towns not intended.

COLUMBUS, OHIO, June 6, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of April 3d, which contains copy of a letter addressed to you by the Canton Lime & Fertilizer Company on April 1st, in which they submit the following statement of facts, to-wit:

> "On March 2d said company shipped a carload of lime from North Industry, Ohio, on the B. & O. Railroad, billing it to Silver Creek, Ohio. It afterwards developed that there are two stations by that name in the state of Ohio, one in Hardin county and one in Medina county. Silver Creek in Medina county was the destination said company expected the car to reach, but the railroad company took it to Silver Creek, Hardin county, Ohio, and the said company was compelled to pay the freight from North Industry to Hardin county and return and then from North Industry to Medina county."

Said company requests you to advise them as to their rights in the matter in this, to-wit:

> "In the event of two stations of the same name in the same state, is it incumbent upon the railroad company to ascertain for which point the shipment is intended before accepting the same?"

I note that you request my opinion on said matter. I take it from the letter addressed to you by said Canton Lime & Fertilizer Company that the said shipment, delivered to the B. & O. Railroad Company at North Industry, Ohio, above referred to, was simply marked "Silver Creek, Ohio," without any further indications as to the county, or the road on which said Silver Creek is located. In view of said facts I am of the opinion after investigating thoroughly and finding that neither of the towns by the name of Silver Creek, Ohio, is located on the B. & O. Company's lines, that it was the duty of the shipper, the Canton Lime & Fertilizer Company, to use due care and diligence in furnishing shipping directions to said railroad company in order that the said company would be able to know the destination intended by the shipper of said goods, and that if it failed to use such care and diligence it would be guilty of contributory negligence and the railroad company would not be liable for the mistake made by its agent at North Industry, Ohio, in forwarding the goods to Silver Creek in Hardin county instead of Silver Creek in Medina county.

There is no case in Ohio that directly settles the question involved in this controversy, but in the case of Conger, et al., vs. the Chicago & Northwestern Railroad Company, 24 Wis., page 157, the supreme court of that state held that:

"Where the mistake arose from plaintiff's failure to mark the goods with the name of the county, as well as town (there being two towns in the state of like name), or to indicate the nearest railway station or the proper line or road plaintiff was guilty of contributory negligence and the railway company not liable in damages for said mistake."

I might say in addition that I am of the opinion that, where goods are delivered to the railroad company by a shipper, marked for a certain destination, and there are two or more towns in the state of that name, and the agent of said company has knowledge of said fact, it would be incumbent upon him to make inquiry and ascertain if possible what destination is actually intended by said shipper. But I am of the opinion that legally the said railroad company, under the decision in the case above referred to, would not be liable for the mistake made by its agent as stated in the letter of the Canton Lime & Fertilizer Company.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Publice Service Commission)

286.

PUBLIC SERVICE COMMISSION ACT—SALARY OF COMMISSIONERS, INCREASED SALARY NOT UNCONSTITUTIONAL—REPEAL OF FORMER STATUTE BY IMPLICATION.

Section 87 of the act creating the public service commission, which makes the salary of the commissioners $6,000 a year, repeals by implication the former statute, section 2250, General Code, which authorized a salary of only $5,000 per year.

As the salary of the later act is intended as extended compensation for further duties not germane to the former work of the commissioners there is no violation of section 20, article II of the constitution of Ohio, stipulating that "no change therein shall effect the salary of any officer during his existing term, unless the office be abolished."

COLUMBUS, OHIO, July 6, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter dated July 1, 1911, in which you submit the following question, is received:

> "Whether the salary provided for in section eighty-seven (87) of Sub. House Bill No. 325, applied to and is available for the present members of the commission?"

The second section of said bill creating the public service commission of Ohio provides as follows:

> "The railroad commission of Ohio shall hereafter be known as the public service commission of Ohio. In addition to the *powers, duties,* and *jurisdiction conferred* and *imposed* upon said commission by chapter one, provision two, title three, part first, of the General Code, and the acts amendatory, or supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties and jurisdiction provided *for in this act.*"

Section 3 of said act in defining and construing certain words and phrases used in said act provides:

> "(a) The term 'commission' when used in this act, or in chapter 1, division 2, title 3, part first of the General Code and the acts amendatory or supplementary thereto means '*The Public Service Commission of Ohio.*'
>
> "(b) The term '*commissioner*' means one of the members of such 'commission.'"

Section 87 of said act provides:

> *"That each member of the commission shall receive an annual salary of $6,000, payable in the same manner as the salaries of other state officers are paid."*

The general assembly by this act changed the name of the railroad commission and added many powers and duties to the new commission over those of the railroad commission, but the general assembly did not by any section of this act, or by separate act directly repeal that portion of section 2250 of the General Code which provides in part that the salaries of members of the state railroad commission shall be $5,000 annually.

The question then arising and now being considered is whether or not the commissioners being state appointive officers, and receiving annual salaries of $5,000 under the said section 2250 of the General Code, can receive the increased salary of $6,000 as provided by this act.

Section 20 of article II of the constitution of Ohio provides:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, *unless the office be abolished.*"

The general rule laid down by the text books, and in the case of State ex rel. Harrison vs. Lewis, Auditor, 8 N. P., 84, is

> "*That where a public officer is employed to render services in an independent employment, not germane or incidental to his official duties to which the law has annexed compensation, he may receive for such services additional compensation.*"

In the case of White et al. vs. East Saginaw, 43 Mich., 567, the supreme court held that:

> "*The imposition of new duties upon an officer does not change his office, but invests him with a new office.*"

The supreme court of Ohio in case of State ex rel. vs. Raine, Auditor, 49 O. S., 580, on page 581, in passing upon the constitutionality of an act of the general assembly, O. L. 76, which act increased the salaries of the county commissioners of Hamilton county, Ohio, during the terms for which they had been elected, as being in contravention of section 20 of article II of the constitution of Ohio, said:

> "Constitutional guarantees would afford but slight barriers to encroachments by any of the departments of the government, if the forbidden object could be accomplished by simply using a form of words that did not name it in express terms. *If the effect of the statute under consideration is to increase the salary of those county commissioners who were serving current terms of office; it is unconstitutional to that extent.*"

From an examination of the case just cited it is plain that our supreme court laid down the rule of construction that the intent of the legislature should guide.

In this case the salaries were simply increased but no additional duties imposed upon said officers.

It is manifest that the legislature in passing said Sub. House Bill No. 325, did not intend simply by use of words to evade the constitutional inhibition contained in section 20, article 2 of the constitution.

The powers and duties of the railroad commission have been heretofore well defined and understood, and under the rule laid down in the Michigan case above cited, the general assembly of Ohio, by imposing a vast amount of additional powers and duties upon the new commission, created by the act, has not changed the office, but invested said commissioners with a new office. These additional duties not having been connected directly or indirectly with their former duties and power of the railroad commission, but relate to other public utilities than railroads.

In the case of Thorniley vs. State, 81 O. S. 108, on page 118, Judge Shauck, in rendering the opinion, says:

> "It is true that repeals by implication are not favored, the meaning of which is, and it must be, only that a court will not; in the absence of an express repeal, consider former legislation as repealed by implication, when the former and later act may be harmonized by reasonable construction so as to continue both in operation. It is consistent with the elementary rule, always recognized as indispensable to the right administration of the written law, that the present will of the legislature is found in its latest expression."

Under the rule laid down in the above case by our supreme court that act creating the public service commission, not having expressly repealed that portion of section 2250 of the General Code under which the railroad commissioners have formerly drawn a salary of $5,000 per annum, and having provided by section 87 of said act for a salary of $6,000 for members of the public service commission, I am of the opinion that said part of section 2250 referred to is by implication repealed, and that section 87 of said act is now the one in force and effect.

In view of the rules laid down in the cases above cited, and the additional duties incumbent upon the new commission, and the repeal of said salary section by implication, I am of the legal opinion that the increase of salary referred to in said act is not in contravention of section 20, article II of the constitution, and that a new office has been created by the legislature, and that the members thereof are entitled to the salary of $6,000 per annum from July 1, 1911, as provided by said section 87 of said act.

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

289.

OLD RAILROAD COMMISSION PROVISIONS NOT REPEALED—APPROPRIATIONS AND POWERS REMAIN.

In changing the railroad commission to the public service commission and extending the powers of that body to control of public utilities other than railroads, there was no repeal of the statutes with reference to the old railroad commission. It was the intention of the legislature to keep alive all of the former powers, prerogatives, jurisdiction and purposes, together with the appropriations in connection therewith.

COLUMBUS, OHIO, July 7, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 26th in which you request my opinion upon the following question, namely:

"Whether the unused portion of the appropriations carried in the appropriation bills for 1911-1912 for the railroad commission will be available for the use of the public service commission after its organization July 1st."

In reply I desire to say that Substitute House Bill No. 325, passed by the seventy-ninth general assembly, provides in section 2 thereof that

"The railroad commission of Ohio shall hereafter be known as the public service commission of Ohio."

and also that

"In addition to the powers, duties and jurisdiction conferred and imposed upon said commission by chapter 1, division 2, title 3, part first of the General Code, and the acts amendatory and supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties and jurisdiction provided for in this act."

The title of the act itself is, "A bill changing the name of the railroad commission of Ohio to that of the public service commission of Ohio, etc."

In construing said bill, under the rules of construction laid down by the courts, the intent of the legislature must be taken as the guide. It is plain in this case that the intent of the legislature was to combine under one head what might with propriety under different policies be kept entirely under two heads, to-wit: (a) the railroads of the state; (b) public utilities other than railroads. The state railroad commission has heretofore had jurisdiction over the former but not of the latter. The legislature left unrepealed statutes in relation to the state railroad commission. The object of this undoubtedly was that the policies, jurisdiction and purposes of the state railroad commission in reference to railroads might be continued. At least there is no repeal in reference to the powers of the railroad commission over railroads. However, the legislature, by the enactment of Substitute House Bill No. 325, placed a commission over public utilities other than railroads, and gave the railroad commission under a different name, to-wit: the public service commission of Ohio, jurisdiction over public utilities other than railroads, as well as continuing their jurisdiction over the railroads I do not think that any of the legislation with reference to the state railroad commission, in respect to appropriations or its powers has been withdrawn. My judgment is that there is no inconsistency in the idea that the state railroad commission is entitled to all of the powers, benefits, prerogatives and privileges existing under former acts, together with the appropriations in connection therewith; and that the public service commission is at the same time entitled to enjoy all of the powers, functions, privileges and appropriations conferred upon it by the legislature, because it is evident that there is a merger in connection with this legislation, which may not be separated by any interpreting authority.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

301.

ASSESSMENTS UPON PUBLIC UTILITIES—DATE OF CERTIFICATION TO AUDITOR—APPROPRIATIONS — COLLECTIONS — LIMITATION ON EXPENDITURES.

Amended section 606, *General Code, stipulating that the public service commission shall certify to the auditor of state the amount of the assessment apportioned by it against each railroad and other public utility, on or before August* 1*st, is directory and not mandatory for the reason that section* 605 *gives every railroad company and telegraph company until September* 15*th to make their reports.*

For the year ending June 30, 1911, $15,000 *should be assessed as provided in original section* 606, *General Code.*

The first assessment of $75,000 *under amended section* 606, *General Code, should be made for the year preceding June* 30, 1912, *and the first certification of such assessments to the auditor of state will be made as soon as possible after September* 15, 1912.

Limitations upon appropriations and expenditures.

COLUMBUS, OHIO, July 19, 1911.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 7th in which you request my interpretation of that portion of section 1 of Substitute House Bill No. 325, known as the utilities bill, designated as section 606 of the General Code as amended. Said section as above referred to provides as follows:

> "For the purpose of maintaining the department of the public service commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shall be apportioned among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intra state gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments were made.
>
> "On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public service commission."

In order to give the proper interpretation to the section just quoted and referred to in your letter, and to advise you what your duties and powers thereunder, it is necessary to look to the code section number 606, also section 605 of the General Code which defines the duties of railroads and other companies relative to reports necessary to be filed by them, in order to give to your commission the proper information to carry out the provisions of said section. Section 605 of the General Code provides as follows:

> "On or before the 15th day of September in each year, each railroad or telegraph company incorporated or doing business in this state

> shall make and transmit to the commission a full and true statement under oath of the proper officers of such corporation, of the affairs of such corporation relative to the state of Ohio for the year ending on the thirtieth day of June preceding. Such statement shall be similar in character and detail to the annual report required to be made by railroad companies to the interstate commerce commission. The commission may submit additional interrogatories to a railroad or telegraph company at any time. If such report is defective or erroneous, the commission may require the railroad or telegraph company to correct or amend it within fifteen days."

Said section 605 was neither repealed nor amended by said Substitute House Bill No. 325, and as it now stands said section gives all railroad and telegraph companies until September 15th in each year to transmit to the commission a full and true statement under oath of the proper officers of such corporation of the affairs of such corporation relative to the state of Ohio, for the year ending on the 30th day of June preceding, thereby fixing the year for which said assessments should and could properly be made by the commission as the year prior to the 30th day of June of each year; and section 606 as amended by said Substitute House Bill No. 325 being silent as to the date to which the term "on or before the first day of August next following" shall apply, I am of the opinion that for the purpose of determining the year upon which your commission shall base its assessment against railroads and public utilities under said section, said section 605 of the General Code and section 606, General Code, as amended by said Substitute House Bill No. 325 must be read and construed together.

Under said section 606, as amended, I am of the opinion that that part thereof which provides that

> "On or before the first day of August next following the commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public service commission."

is directory and not mandatory; and in view of the fact that said section 605 of the General Code gives all railroads until September 15th in each year to file or transmit to the commission a statement of the affairs of such corporation relative to the state for the year ending on the 30th day of June preceding, I am of the opinion that it would be a physical and legal impossibility for your commission to follow any other rule than the one above stated, which should be followed by your commission; and the assessment of $15,000 under original section 606 of the General Code for the year preceding the 30th day of June, 1911, should be assessed against said railroads of the state as heretofore assessed by the railroad commission, and thereafter your commission should follow that system of certification of said assessments against said railroads and other public utilities within this state. The first assessment of $75,000 under Substitute House Bill No. 325 should be made by your commission for the year preceding the 30th day of June, 1912; and that being the earliest period under the two sections quoted, namely, section 605, General Code, and section 606, General Code, as amended by said Substitute House Bill No. 325, your first certification to the auditor of state of such assessments apportioned against railroads and public utilities would be as soon after September 15th in the year 1912 as might be possible for your commission.

I am also of the opinion that under House Bill No. 627, passed by the last general assembly, and appropriating $75,000 for the use of your commission in order to carry out the provisions of said Substitute House Bill No. 325, your commission may use said appropriation of $75,000 in addition to any appropriations made to the railroad commission during said period of two years, so long as the total of said amounts appropriated and used by your commission do not exceed in any one year the sum of $75,000 in addition to such sum or sums as may be derived under section 606, General Code, as provided in section 88 of said Substitute House Bill No. 325.

I am also of the opinion that your commission will be unable to collect the $75,000 provided by section 1 of said Substitute House Bill No. 325 prior to June 30, 1912; and further, that no money collected under the provisions of said Substitute House Bill No. 325 is subject to be expended by your commission until appropriated by the next general assembly of the state of Ohio; and that all the funds available for the use of your commission in the meantime are those now appropriated, above referred to, namely, the $75,000 appropriated by House Bill No. 627 and the amounts carried by the general appropriation bills for the years 1911 and 1912 for the railroad commission.

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

321.

PUBLIC UTILITIES—POWERS OF COMMISSION TO COMPEL EXTENSIONS AND ADDITIONS.

The public utilities act does not give the commission power to compel a transit company to install extensions to the existing system.

It may, however, compel additions within the existing system and within the scope of its charter.

COLUMBUS, OHIO, August 9, 1911.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication dated July 25, 1911, containing a petition signed by one Peter Eichels and nine other citizens of Cincinnati, Ohio, copy of said petition, omitting names, being as follows:

> "To the Honorable Board of Public Service Commission of Ohio, Columbus, Ohio:
>
> "We, the undersigned citizens of the city of Cincinnati, Ohio, petition your honorable board for a just relief which power the legislative of the state of Ohio has conferred upon your honorable board.
>
> "Some hundreds of our citizens have petitioned our city council and also the Cincinnati Traction Company and same had no effect and no attention paid to same, only to be pigeonholed. We have time and again requested the Cincinnati Traction Company and the city council for the extension of the east end car line (and the most lucrative street car route in Cincinnati, Ohio), about four thousand (4,000 feet) feet to the corporation line of Cincinnati, Ohio, upon and over Eastern avenue,

and this has been refused to us. Our city council refuses to compel said traction company to comply with our request. We, therefore, pray that your honorable board will take such action at once, to comply with our request, and give us citizens car service over Eastern avenue to the corporation line of said city and the terminal of Eastern avenue, as other citizens now have."

In reply thereto permit me to say that as I understand it, the petitioners claim the right to an extension under favor of section 53 of House Bill No. 325 passed May 31, 1911, which said section provides as follows:

"The council of any municipality shall have the power upon filing of an application therefor by any person, firm or corporation, to require of any public utility, by ordinance or otherwise, such additions or extensions to its distributing plant within such municipality as shall be deemed reasonable and necessary in the interest of the public, and, subject to the provisions of section 9105 of the General Code, to designate the location and nature of all such additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed and operated. Such requirements and orders of the council shall be subject to review by the commission, as provided in sections 46 and 48 hereof. The council and commission in determining the practicability of such additions and extensions shall take into consideration the supply of the product furnished by such public utility available, and the returns upon the cost and expense of constructing said extension and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole."

You call my attention particularly to sections 23 and 29 and 30 of said act. Without quoting these sections I think it will be conceded that the Cincinnati Traction Company is a public utility. To my mind section 23 of the act aforesaid need not be considered in the determination of the question at hand.

Section 29 of said act provides as follows:

"Whenever the commission shall be of the opinion, after hearing had upon complaint as in this act provided, or upon its own initiative or complaint, served as in this act provided, that the rules, regulations, measurements or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service thereof is in adequate, inefficient, improper or insufficient, or cannot be obtained, it shall determine the regulations, practices and service thereafter to be installed, observed, used and rendered, and fix and prescribe the same by order to be served upon the public utility. It shall thereafter be the duty of such public utility and all of its officers, agents and official employes to obey the same and do everything necessary or proper to carry the same into effect and operation; provided, that nothing herein contained shall be so construed as to give to the commission power to make any order requiring the performance of any act or the doing of anything which is unjust or unreasonable or in violation of any law of the state or the United States."

Section 30 of said act provides as follows:

"Whenever the commission shall be of the opinion, after hearing

had, as in this act provided, or upon its own initiative or complaint, as in this act provided, that repairs or improvements to the plant or equipment of any public utility, should reasonably be made, or that any additions thereto should reasonably be made, in order to promote the convenience or welfare of the public, or of employes, or in order to secure adequate service or facilities, the commission may make and serve an appropriate order with respect thereto, directing that such repairs, improvements, changes or additions be made within a reasonable time, and in a manner to be specified therein. Every such public utility, its officers, agents and official employes shall obey such order and make such repairs, improvements, changes and additions required of such public utility by such order."

I take it that the claim of the petitioners is based on the following part of section 30:

"Or that any additions thereto, should reasonably be made, in order to promote the convenience and welfare of the public, or of employes, or in order to secure adequate service or facilities, the commission may make and serve an appropriate order with respect thereto, directing that such repairs, improvements, changes or additions be made within reasonable time, and in a manner to be specified therein."

It would appear at first glance that because of that provision in section 53 which says "subject to the provisions of section 9105, General Code, to designate the location and nature of all such additions and extensions" that the act referred to, known as House Bill No. 325, would confer upon the public service commission of Ohio power to order extensions to street railways. Your jurisdiction in my judgment is subject to limitations. I do not think that the act referred to requires the addition of a new line for the accommodation of what might be termed people outside the range of the original line. The legislature unquestionably would have no power to order any street railway company or railroad to extend its lines so as to reach out for new traffic, either freight or passenger. It has only the right to see that the street railway company or railroad company shall afford proper facilities between its termini points. Now section 9105, General Code, is referred to in section 53 of the act unquestionably because it might be necessary for a public utility in order to afford proper facilities between its already established terminal points to have occasion to occupy an additional street, and its rights thereunder are subject to section 9105 of the General Code.

I have carefully examined sections 23, 29 and 30 of Substitute House Bill No. 325, passed by the legislature, and I have come to the conclusion that the jurisdiction of your commission goes only so far as relates to the operation or rendering of services by said public utility, and not to compelling said utility to make extensions to its railroad lines for the purpose of reaching a new traffic or accommodating a new traffic. Under section 30, providing that your commission has the right to compel utilities "to make any additions thereto in order to promote the convenience or welfare of the public or of employes, or in order to secure adequate services or facilities," it seems clear that this means additions to the then existing system or utility but not extensions. In other words, the jurisdiction of your commission is limited to repairs, or improvements to the plant or equipment of any public utility, or additions in connection thereto all reasonably necessary to execute what could fairly be expected of public util-

ity in the light of its charter and according to the principles of House Bill No. 325.

In short, your jurisdiction is ample to compel any public utility to execute the purposes fairly declared by its own charter, but you are without jurisdiction to order any street railway company to extend its line into new territory for the accommodation of an additional public. My holding, in conclusion is, that the public service commission of Ohio is without jurisdiction to order the things petitioned for by the citizens referred to in your communication.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

353.

INSPECTION OF BOILERS—OHIO LAWS NOT IN CONFLICT WITH FEDERAL LAW—UNITED STATES CONSTITUTION—REGULATION OF INTERSTATE COMMERCE.

The Ohio laws requiring inspection of locomotive boilers operated within this state are valid, as it is a regulation passed under the police power and does not conflict with federal regulations of the same nature.

COLUMBUS, OHIO, September 12, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication dated June 26th, in which you request an opinion upon the following question:

> "As to the continued operation of the law of Ohio, 101 O. L., 328, 329 and 330, requiring inspection of locomotive boilers in view of the fact that the federal government has legislated upon the same subject."

In reply thereto I beg to say that sections one and two of the act referred to provide as follows:

> "Section 1. Every person, firm or corporation operating a steam railroad wholly or in part within this state shall require thorough inspection to be made of the boilers and appurtenances of all locomotives which shall be used by such person, firm or corporation on such railroad within this state.
>
> "Section 2. All such boilers so used shall comply with the following requirements: The boilers and appurtenances shall be well made of good and suitable material; the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat, shall be of proper dimensions and free from obstructions; the spaces between and around the flues shall be sufficient; the flues, boiler, furnace, safety valves, fusible plugs, low water indicators, feed water apparatus, gauge cocks, steam gauges, and means of removing mud and sediment from the boiler, and all other machinery and appurtenances thereof shall be of such construction, shape, condition, arrangement and material that the

same may be safely employed in the active service of such railroad without peril to life or limb."

This act was passed by the legislature in the exercise of its police power, The first section in itself provides for inspection of the boilers and appurtenances of all locomotives which shall be used on such railroad within this state, where the same is operated wholly or partly within this state.

The Ohio act questioned herein is nowhere in conflict with the federal law. The act in question does not purport to be a regulation of interstate traffic, but is limited strictly to inspection to be made of the boilers and appurtenances of locomotives which shall be used by such person, firm or corporation on such railroad *within this state*, and it is evident from its various requirements, as well as its title, that it was passed in the exercise of the police power of the state, to promote the safety in the *state* of employes and travelers upon railroads, and without any thought or intention of meddling with interstate commerce.

The regulation of commerce among the states is within the exclusive jurisdiction of congress, but it is well settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce, or in *conflict* with federal regulations, but merely regulative of the instrumentalities of commerce is not void; and when such state regulations do conflict with federal regulations they are not void on the ground that the state has exercised a power exclusively in congress, but because the constitution and the laws of the United States, made in pursuance thereof, are the supreme law of the land.

The decisions, both federal and state, are uniformly to the effect that so long as a state statute is a police regulation and does not attempt to regulate interstate commerce and is not in conflict with the federal constitution or act of congress, that it is valid although congress may have enacted a similar law.

While, from the foregoing, it will appear that the matter at hand is as much one of fact as law, at the same time I am not able to see where there is any conflict between the act of congress referred to and the legislative enactment on the same subject. It can, I think, be safely laid down as a general rule that the legislature of Ohio has full power to regulate steam railroads operating wholly or in part within this state, subject only to this the paramount power of the federal government to regulate railroads doing an interstate business. So long as the state laws do not conflict with the federal laws upon this subject the power of the legislature as between the state and federal governments is ample; but in case of any conflict the state law must yield and ceases to be operative in respect to the conflicting features, but those only.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 354.

RAILROADS—INTERPRETATION OF FULL CREW LAW—DOES NOT APPLY TO ELECTRIC RAILWAY TRAINS.

COLUMBUS, OHIO, September 12, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I beg to acknowledge receipt of your communication, dated August 28th, in which you request my interpretation of the terms of House Bill No. 93, commonly known as the "Passenger full crew law," found on pages 508-509, volume 102, Ohio Laws. In reply I desire to say that my interpretation of said act is as follows:

The act provides that, whoever, being superintendent, trainmaster, or other employe of a railroad company, sends or causes to be sent outside of the yard limits,

1st. A train of not more than five cars, any one of which carries passengers, with a crew of less than one engineer, one fireman, one conductor and one brakeman;

2d. A train of five cars, four of which said cars are day coaches carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman,

3d. A train of more than five cars, three or more of which are day coaches carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and less than one additional brakeman;

4th. A train of more than six cars, four of which carry passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman;

5th. A train of more than seven cars, two or more of which carry passengers, with a crew consisting of less than one engineer, one fireman, one conductor and one brakeman, with less than one additional brakeman;

6th. A train of six or more cars carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman,

"Shall be fined not less than twenty-five dollars for each offense."

Said act also defines another offense, namely:

That whoever, being superintendent, trainmaster or other employe of a railroad company, sends or causes to be sent outside of yard limits a passenger train with more than two cars, either of which carries passengers, and requires the brakeman to perform the duties of a baggage master or express agent, shall be fined not less than twenty-five dollars for each offense.

The act also provides that a combination mail or baggage and passenger car shall be regarded as a day coach and counted as one car, but exempts straight dining cars and private cars from being classified as such cars as are carrying passengers.

I am also of the opinion that that portion of said act designated as section 12554 plainly exempts all trains picking up cars between terminals in this state, and cars propelled by electricity. In other words, I am of the opinion that this act does not apply to electric railway trains.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

355.

INSPECTORS OF PUBLIC SERVICE COMMISSION—RESIDENCE—TRAVELING EXPENSES AT COLUMBUS.

As there are no regulations to the contrary, inspectors of the public service commission may maintain their residence where they will, and may be allowed traveling expenses while engaged in their official duties at Columbus.

COLUMBUS, OHIO, September 12, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 22d, requesting my opinion upon the following question:

> "May inspectors employed by this department, who maintain residences at places other than Columbus, legally include in their expense accounts items of expense while in Columbus, in the discharge of their official duties."

Section 496 of the General Code gives your commission authority to appoint inspectors, and fix their compensation; but there is no provision contained in the General Code relative to the residences of inspectors or the right of the inspectors to expenses while in the performance of their official duties.

The duties of inspectors are defined by section 496 of the General Code as follows:

> "In the discharge of their duties, may inspect freight in cars or warehouses, of transportation companies, waybills, bills of lading and shipping receipts of such transportation companies."

In the discharge of their duties the inspectors are subject to the instructions of your commissioner and may be sent to any part of the state at any time. There being no legal residence fixed by law for an inspector, and no requirement made by your commission relative to the same, I am of the opinion that your inspectors may maintain their homes where they desire.

The legislature has made appropriations for your commission, covering traveling and other expense, and, the duties of inspectors being such that they are required to travel from place to place in order to carry out the duties devolving upon your commission, and while so traveling or temporarily stationed at Columbus, discharging a public duty connected with and growing out of their official relation to your department, they are in my opinion entitled to their traveling and other necessary expenses and should be paid the same on the allowance of your commission.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

460.

RAILROAD COMPANIES—BLACKBOARD NOTICE OF INCOMING TRAINS—FAILURE TO ENFORCE.

Sections 8924 and 8925, providing for the maintenance of a blackboard notice of schedule of trains and penalty for failure to so do is requested to be considered by the commission and its enforcement advised.

COLUMBUS, OHIO, November 10, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—My attention has been directed in the way of complaint made to me of the violation of section 8924, General Code, which provides as follows:

> "Each company or person operating a railroad within this state shall place a blackboard, at least four feet in length and two feet in width, in a conspicuous place in each passenger depot of such company located at any station in the state at which there is a telegraph office. Such company or person must have written upon such board, at least ten minutes before the schedule time for the arrival of each passenger train stopping regularly upon such road at such station, the fact whether such train is on schedule time or not, and if late, how much."

and I have been requested to assist in the enforcement of said section. This section was construed by the circuit court and its opinion is found in 8 Ohio Circuit Court Reports, page 604.

Section 577 of the General Code, provides as follows:

> "Upon request of the commission (referring to the railroad commission) the attorney general or the prosecuting attorney of the proper county shall aid in an investigation, prosecution, hearing or trial had under the provisions of this chapter, and shall institute and prosecute necessary actions or proceedings for the enforcement of such provisions and of other laws of this state relating to railroads and for the punishment of all violations thereof."

Section 8925 of the General Code provides the penalty for violation of section 8924, such penalty being as follows:

> "For each violation of any provision of the next preceding section, such company or person so neglecting or refusing to comply therewith, shall forfeit and pay the sum of ten dollars, to be recovered in a civil action in the name of the state, one-half of which shall go to the party commencing proceedings, and the remainder to be paid to the treasurer of the township, village or city in which such proceedings are had."

I am of opinion, both from personal experience, and from the information gleaned from the complainant herein before referred to, that section 8924 of the General Code is not being properly observed by many railroad companies in this state. This section is one designed to accommodate the general public and its enforcement should cause very little inconvenience to railroad companies.

I ask your permission to submit for your consideration the matter of an order directing all prosecuting attorneys in the state to see to the enforcement of this statute.

Awaiting the pleasure of your advices, I beg to remain,

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

G 468.

RAILROADS—RECEIVER APPOINTED BY FEDERAL COURT—NO POWER IN STATE COURT TO ENFORCE STATE PENAL LAW—FEDERAL COURT CAN COMPEL PUBLIC DUTY.

As a railroad in the hands of a receiver appointed by a federal court is beyond the authority of a state court to impose a penalty for a violation of a state statute, such railroad cannot be proceeded against for failure to fence its road.

The federal court, however, can compel a receiver to perform public duties and would enforce an order made to such receiver by the public service commission.

COLUMBUS, OHIO, November 17, 1911.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 26th, in which you enclose copy of a letter addressed to you by William S. Rockel, of Springfield, Ohio; also, copy of a letter addressed to Mr. Rockel by George K. Lowell, receiver and general manager of the Detroit, Toledo & Ironton Railway Company, and request my opinion as to whether or not a railroad company in the hands of receivers, appointed by the United States court, is liable to the statutory penalty of $50 per day for failure of said railroad company to fence its right of way, as required by section 8920, General Code, of Ohio.

In reply thereto I beg to state that under the rules laid down by the courts, a state court is powerless to enforce payment of a statutory penalty against a railroad company, out of funds, in the hands of a receiver appointed by the United States court. The theory upon which said decisions are based is that, a receiver being appointed and receiving his authority from the federal court, and being charged with the duty of operating the road, and accountable to that court for the proceeds, such proceeds are beyond the jurisdiction or control of the state court. However, where there is a statutory duty upon a railroad company to perform certain acts with regard to the public, I am of the opinion that the railroad commission would have jurisdiction to make an order, and that said order would be valid as against a receiver, and the federal court appointing such receiver would, upon application, compel compliance with such order; the commission would, in my opinion, be entitled to, and could successfully, invoke the aid of the court to make its order effective. While the federal court may not authorize the receiver to pay a statutory penalty, it would nevertheless be authorized to, and no doubt would, order the receiver to perform the duty enjoined upon the railway company by a state statute, for a receiver is bound, in general, to perform the public duties imposed by law upon the corporation whose franchises he is exercising. It is a general proposition of law

that the courts will order a receiver to perform such public duties connected with the operation of the road of which he is receiver as the company was obliged to perform; and that the commission would have a right to apply to the federal court for an order compelling said receiver to execute an order of the commission, under complaint filed against said receiver for failure to perform a statutory duty, such as is referred to in your letter.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

475.

PUBLIC UTILITIES ACT—PROSPECTIVE—COMPLAINTS AGAINST ORDINANCES TO COMMISSIONERS—ORDINANCE FIXING RATES PASSED PRIOR TO UTILITIES ACT.

Section 46 of the public utilities act providing for appeal to the commission by the municipal corporation or public utility after the passage of an ordinance fixing rates, terms, etc., with respect to the operation of such public utility is by its terms prospective.

An appeal may be made to the commission and a hearing given by them after passage of such ordinance and before acceptance by the utility upon complaint in writing by the utility or by one per cent. of electors within sixty days. After acceptance of the ordinance by the utility, however, written complaint must be made by three per cent. of the electors within thirty days.

Such an ordinance passed prior to the passage of the utilities act though by its terms it was not to take effect until after the passage of that act, and although not accepted by the public utility until after the passage of the act, is not within any clause giving jurisdiction to the commission to hear complaints. The ordinance itself was a finality which could not be affected by the legislative act enacted after its passage.

COLUMBUS, OHIO, November 23, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On October 26th you requested my opinion upon the following:

> "There is pending before the commission a petition, purporting to be signed by three per centum of the qualified electors of the city of Columbus, protesting against the rate accorded to the Federal Gas Company and the Columbus Gas & Fuel Company for gas by ordinance enacted by the city council of Columbus. This ordinance, it appears, was passed on June 12, 1911, to become effective July 1, 1911. It was accepted by the gas companies on July 3, 1911.
>
> "Under this state of facts, the question arises: Has the public service commission of Ohio jurisdiction over this case under sections 46 and 47 of the utility act? The ordinance was enacted before the utility law had become effective, but, by its own terms, it did not take effect until July 1, 1911, on which date the utility act was in force, and, further, there was no acceptance by the gas companies until July 3d, on which date the utility law had been in force for several days."

Section 46 of the public utilities act provides that:

"Any municipal corporation in which any public utility is established, may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility with respect to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility or service, by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll, or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in sections 3644, 3982 and 3983 of the General Code. Thereupon the commission, upon complaint in writing, of such public utility, or upon complaint of one per centum of the electors of such municipal corporation, which complaints shall be filed within sixty after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

"If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, *unless* within sixty days after such acceptance there shall have been filed with the commission, a complaint, signed by not less than three per centum of the qualified electors of such municipality. Upon such filing the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day. * * *"

For the determination of the question at hand, section 3644 of the General Code is immaterial and, therefore, will not be herein quoted.

Section 3982, General Code, is as follows:

"The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains, or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them."

Section 3983, General Code, is as follows:

> "If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

Section 90 of the act creating the public service commission of Ohio is as follows:

> "This act shall take effect and be in force from and after June 30, 1911."

In order to properly answer your question, it is well enough to explain the meaning of section 46 of the act creating the public service commission of Ohio. To do this it is well to ask the question whether such section is wholly prospective, or whether it is both prospective and retrospective. In my judgment, it is prospective, and the reasons therefor become apparent as we proceed.

> "Any municipal corporation in which any public utility is established, may, by *ordinance*, * * * proceed to fix the price, rate, charge, toll, or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in sections 3644, 3982 and 3983 of the General Code." (It appears here that the determination of the municipal corporation is *by ordinance.*)
>
> (When?) "At any time within one year before the expiration of any contract entered into under the provisions of sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility, etc."

Without the expression "at any time within one year before the expiration of any contract entered into, etc.," it is apparent that section 46 is prospective, but with this expression there is no escape from that conclusion.

The ordinance referred to in section 46 of said act, in the phrase "by ordinance," is evidently not any ordinance passed solely by virtue of sections 3644, 3982 and 3983. It is apparent that said section 46 is supplementary to sections 3982 and 3983, General Code. In some respects it is cumulative; but as to the time within which council may act, section 46 is exclusive, and fixes the time. Council also fixes the price by ordinance *for an ensuing period*, as provided in sections 3644, 3982 and 3983, General Code. These sections, to-wit: sections 3644, 3982 and 3983, are controlling except as to matters especially provided for in section 46 aforesaid.

Now, after council has proceeded to fix the price, rate, charge, toll, rental, etc., under section 46, what is the next step? The next step is shown by the word "thereupon." What does the word "thereupon" relate to? Unquestionably,

the council, by ordinance, proceeding to fix. Proceeding to fix under what? Proceeding to fix under section 46.

The commission may proceed, before acceptance by the utility, upon complaint in writing, either of such public utility or the electors of such municipal corporation. Under this condition of affairs, the thing to do is to have a hearing by the commission, thirty days' notice of which shall have been given to the public utility and the mayor of the municipality. This complaint must be filed within sixty days after the passage of the ordinance. Suppose now, that neither of the two complaints be filed; then what? The following explains:

> "If any public utility shall have accepted any rate, price, charge, toll or rental, fixed by ordinance of such municipality, the same shall become operative *unless* within sixty days after such acceptance there shall have been filed with the commission a complaint signed by not less than *three per centum* of the qualified electors of such municipality."

Now, it appears that provision is made: (first) for a hearing in case complaint is made by the public utility, or one per centum of the electors, prior to acceptance; and (second) for procedure, in case there is an acceptance, without any complaint from the public utility or one per centum of the electors; in the latter case it requires three per centum, preceded by acceptance by the public utility. Acceptance of what? Acceptance of the rates fixed by ordinance of the municipal council in harmony with section 46 aforesaid.

What is the situation as to the question presented to you by the petitioners in the Columbus case? Rates were fixed by an ordinance passed prior to the taking effect of the public service commission act. If the gas companies had accepted the ordinance referred to prior to July 1st, no one would claim that the public service commission would have jurisdiction. It certainly cannot be claimed that the gas company, by its act of withholding acceptance, could confer jurisdiction; it is not the acceptance that comes within the jurisdiction of the public service commission. Acceptance may be an element necessary to jurisdiction under given circumstances; but the subject-matter for review by the public service commission is the rates, rentals, charges, demands, exactions, etc., fixed by ordinance under section 46. Your board has not before you any ordinance of that kind.

Section 49 of the act provides:

> "This act shall not apply to any rate, fare or regulation now or hereafter prescribed by any municipal corporation, granting a right, permission, authority or franchise, to use its streets, alleys, avenues or public places, for street railway or street railroad purposes, or to any prices so fixed under sections 3644, 3982 and 3983 of the General Code, *except as provided in sections* 46, 47 and 48 of this act."

Without going further into the matter, it seems apparent to me that it would be unusual to confer jurisdiction upon a board or commission to review the rates or conditions of an ordinance which was lawfully passed prior to the existence of the commission. The passage of the ordinance was not a nullity; it was a finality, so far as the state or its agents were concerned, when passed. As long as it was left open to the gas company to be accepted by them it was a continued invitation to sign the agreement; an invitation that was put in motion before the public service commission act came into effect; an invitation that continued to the first day of July, at any rate.

I am, expressly, not passing upon the question whether or not the acceptance by the gas companies, on the 3d of July, two days after the time the contract was to become effective upon the face of the ordinance, is binding. That is a matter about which the gas companies and the city are concerned, and does not come within the jurisdiction of the public service commission.

I am clearly of the opinion that your commission has no jurisdiction over the subject-matter of your inquiry.

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

A 476.

PUBLIC UTILITIES COMMISSION--TELEPHONE COMPANIES — PHYSICAL CONNECTIONS — MERGER OF ENTITIES — "CONSOLIDATION" — "MERGER."

Where two telephone companies applying to the public service commission contemplate a mere physical connection or an out and out sale or lease by one company to the other whereby the public will be benefitted, the public service commission is not required to make a valuation of their properties as a condition precedent to the granting of the applications. Such valuation, may, however, be made at any time the commission deems it advisable.

When, however, two or more telephone companies contemplate a consolidation, or a merging of the entities, or the operation of the lines jointly or in connection with each other by combined entities, or by the entities acting as a unit with respect to the operation, a valuation must be made and all other requirements of section 64 of the public utilities law complied with.

The terms "consolidation" and "merger" are not synonymous.

Section 63 of the public utilities law applies to physical connections and is altogether independent of section 64 of the same act which provides for the merging of corporate entities.

COLUMBUS, OHIO, November 24, 1911.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 6th, in which you state:

> "The commission heard four telephone cases. In two of them the question was simply the right to connect for interchange service. To illustrate:
>
> "The Central Union Telephone Company and the Van Wert Telephone Company filed a joint petition asking authority of the commission to connect their lines so as to give the subscribers of Van Wert through toll service to points located on the Central Union Telephone Company's lines.
>
> "In the other two cases their petition was for the right to purchase and sell. The Ashtabula Telephone Company prayed for the right to purchase the equipment of the Central Union Telephone Company in Ashtabula, and the Citizens Telephone Company of Delaware asked for

permission to purchase the plant and equipment of the Central Union Telephone Company in Delaware. In both cases the Central Union Telephone Company joined in the petitions, and the petitions recite the consideration to be paid, amount of property to be transferred in each case, and further recited that the action in each case would result in a benefit to the public, in that the subscribers to the local companies would secure through service to points reached by the Central Union Telephone Company's lines, and the American Telephone & Telegraph Company's lines, which service they do not at present enjoy. It was further represented that rental rates would not be advanced."

and request my opinion upon the following question:

"Whether, under the last paragraph of section 64 of the public utilities law, 102 O. L., 549, it is necessary for the commission to make a valuation of the plants, or whether section 63 applies in either or both cases."

Replying thereto, I beg to state that section 63 of the act creating the public service commission of Ohio, provides as follows:

"With the consent and approval of the commission but not otherwise:

"(a) Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

"(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

"(c) Any such public utility may sell or lease its property or business to any other such public utility.

"(d) Any such public utility may purchase the stock of any other such public utility.

"The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

"There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order."

Section 64 of said act provides as follows:

"With the consent and approval of the commission, but not other-

wise, any two or more telephone companies, defined in this act, and doing business in this state or partly within and partly without this state, may consolidate with each other, when such telephone companies shall have complied with the orders and requirements of the commission and the provisions of this act.

"Such telephone companies shall file with the commission a joint petition for such consolidation, signed and verified by the president and secretary of the respective companies, in which shall be set forth in detail, all of the terms, conditions and proceedings pertaining to such consolidation and in such form as the commission may require, and thereupon the commission shall fix a time and place for the hearing of such petition.

"If, after such hearing, the commission is notified that such consolidation will promote public convenience, and will furnish the public adequate service for a reasonable rate, rental, toll or charge therefor, it shall make an order authorizing such consolidation, which order before taking effect shall be filed with the secretary of state. Other proceedings relating to such consolidation shall be in the manner and with the effect, not inconsistent with the provisions of this act, as is provided for in the consolidation of railroad companies under the laws of this state.

"No consolidation, purchase, lease or contract by which two or more telephone companies merge or operate their lines or plants jointly or in connection with each other, shall become valid or effective until after the commission shall have ascertained and determined the valuation as provided in this act upon which the rates, tolls, charges and rentals are based and also shall have fixed and determined such rates, tolls, charges and rentals so to be charged.

"All valuations so ascertained and determined shall be at all times open to public inspection."

Before quoting further, it is well to inquire, what is the purpose of section 63; does it relate to an authority to pursue a course looking to the making of physical connections, to the end that the public may be the better served; is its purpose to authorize the commission to give its consent to, and make its approbation of, certain physical connections which the public utility would be compelled to make, under the order of the commission, agreeably to section 66 of said act, in case a complaint is made in writing, or the commission proceed on its own initiative, by order, to require any two or more telephone companies, whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections, or the joint use of equipment, or the transfer of messages at common points between different localities which can be communicated with or reached by the lines of either company along where such service is not already established or provided?

Without holding that the commission may not give its consent to, and approbation of, connections, under section 63, with a wider scope than under section 66, yet, the objects provided for in section 66 throw light on the scope of section 63. It can be further said that section 63 appears to be complete in itself, in its remedial purposes. Regardless of section 64, telephone companies could and can do all the things specified in said section 63 with the consent and approval of the public service commission. Had section 64 not been enacted as it now stands, covering, as hereinafter explained, a separate and distinct sub-

ject, but, instead, the provisions thereof incorporated in section 63 as a condition precedent, and applicable alone to telephone companies, thereby laying down a more stringent rule as to them in the matter of sale and purchase than as to public utilities generally. The section would have been subject to challenge as being unconstitutional, but the legislature covered the subjects contained in section 63 fully, and put all public utilities on the same footing as to the matters contained therein; and the procedure in every respect is full and complete, as contained in section 63 by which all utilities may do the things therein specified.

The legislature, having provided for these things fully, turned to a new and more intricate subject, and one not theretofore regulated by statute, namely, the merger and consolidation of telephone companies, as set out in section 64.

At this point let a few things be noted:

(a) Section 63 applies to physical connections. To illustrate:

Some few years ago the Citizens Telephone Company of Jackson county owned and operated a telephone system in said county; their long distance connections were with the United States Telephone Company. The Bell Telephone Company had long distance connections from the outside with Jackson county. The United States Telephone Company was compelled to withdraw from said county; whereupon, the Jackson County Telephone Company made connections with the Bell Telephone Company for long distance purposes; and that connection, which is purely a physical one, is still in existence. No combination of entities of the two corporations was effected, nor was there any community of interest made, except insofar as related to the physical connection. The Jackson County Home Telephone Company conducted its own operations; the Bell Telephone Company conducted its own operations; and the two corporate entities were kept entirely distinct; there was no merger or consolidation. There was no merger effected, either by lease or purchase or contract, providing for the union of the two entities. Suppose the two telephone companies to which I refer were to attempt to do now what they did then. In my judgment, all that would be necessary for them to do would be to proceed under section 63, and procure the approbation of the public service commission. This, because on the very face of things the public, by such an arrangement, is a beneficiary.

If, having approved of such physical connection, the public service commission be of the opinion that the rates are more than the investments owned, it may proceed under section 26 of said act, which is as follows:

> "The commission shall have the right to investigate and determine the value of all the property, including the value of its physical property, of every public utility within its jurisdiction actually used and useful for the service and convenience of the public, whenever it deems the ascertainment of such value necessary in order to properly carry into effect any of the provisions of this act."

The commission may in all cases resort to section 26, and, applying the procedure provided for in sections 23, 24 and 25 of said act, reduce any unjust or unreasonable rate, fare, charge, toll or rental. So that, the public is fully protected in that behalf. In fact, the jurisdiction of the commission may be invoked under section 23 of said act, upon complaint of any one person or corporation; so that the rights of the public in this respect are fully protected. On the other hand, when the object is merely to make a physical connection, it

seems to me that, aside from what the law appears to be, it is wholly unnecessary to put the state to the expense of making valuations, where there is no danger of abuse, and where the jurisdiction of the commission is fully reserved, to be exercised at any time.

Section 63, it will be observed, authorizes public utilities, subject to the consent and approval of the commission, to enter into contracts with each other for the purpose of *operating* their lines or plants in connection with each other. What kind of public utilities may do this? Division "a" of section 63 answers this question, as follows:

> "Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other."

Division "b" provides:

> "Any public utility may purchase, or lease the property, or business of any other *such* public utility."

To what does "such" refer? Undoubtedly to the kind of public utilities mentioned in "a."

Passing, now, to division "e," which reads:

> "Any such public utility may sell or lease its property or business to any other such public utility."

"such" again refers back to "a."

Passing to division "d," which reads:

> "Any such public utility may purchase the stock of any other such public utility."

"such" refers back again to "a."

So that, the idea of physical connection and physical closeness is the controlling feature cropping out as to the kind of public utilities that may be connected under section 63.

It will be noted, further, that section 63 provides as follows:

> "There shall be filed with the commission, a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service, for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem

proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order."

Under this, it will be noted that the commission is not called upon absolutely to fix a time and place for the hearing itself; this is to be done only when the commission deems the same necessary. It appears, further, that no hearing need be required, but that if the commission is satisfied that the prayer of the petition should be granted that is the end of it. The proceeding lacks the formalities and the requisites of that under section 64.

Coming now to section 64, and requoting part of it:

"With the consent and approval of the commission, but not otherwise, any two or more telephone companies, defined in this act, and *doing business in this state, or partly within and partly without this state may consolidate with each other when such telephone companies shall have complied with the orders and requirements of the commission and the provisions of this act.*"

The kinds of telephone companies referred to here are not limited as in section 63. Section 64 only requires that such companies be doing business in this state, or partly within and partly without this state. They need not be furnishing service to the same municipality; their lines need not intersect each other, or be parallel with each other, in this state.

Quoting again from section 64:

"Such telephone companies shall file with the commission a joint petition for such consolidation, signed and verified by the president and secretary of the respective companies, in which shall be set forth *in detail, all* of the terms, conditions and proceedings pertaining to such consolidation and in such form as the commission may require, and thereupon the commission *shall* fix a time and place for the hearing of such petition."

There is nothing, under section 64, left to the option of the commission; it must have a hearing.

Quoting again:

"If, after such hearing, the commission is satisfied that such consolidation will promote public convenience, and will furnish the public adequate service for a reasonable rate, rental, toll or charge therefor, it shall make an order authorizing such consolidation, which order before taking effect shall be filed with the secretary of state. Other proceedings relating to such consolidation shall be in the manner and with the effect, not inconsistent with the provisions of this act, as is provided for in the consolidation of railroad companies under the laws of this state."

The meaning of section 64, thus far quoted, is perfectly apparent.

We now come to the paragraph whose interpretation has given so much trouble. It is as follows:

"No consolidation, purchase, lease or contract by which two or more telephone companies merge or operate their lines or plants jointly

or in connection with each other, shall become valid or effective until after the commission shall have ascertained and determined the valuation as provided in this act upon which the rates, tolls, charges and rentals are based and also shall have fixed and determined such rates, tolls, charges and rentals to be charged."

It is asked whether or not the last quoted paragraph controls section 63, or whether it is merely a part of section 64. After the most careful investigation of the subject, and particularly the meaning to be gathered from studying the entire act, I am of the opinion that section 63 is complete in itself without reference to section 64; and section 64 in itself is complete without reference to section 63; also, that the words "purchase," "lease" and "sale," as used in section 63, mean "purchase," "lease" and "sale" as a means for effecting a physical connection as a primary object; that when the purchase, lease or sale is made under section 63 the corporate entities are not thereby connected nor destroyed, nor in any way interfered with. If the purchase be outright, and the two companies are no longer directly or indirectly associated with each other, that is the end of it; if the property be leased for its physical advantages, and the two companies not connected directly or indirectly as such, that is the end of it. The confusion arises from the fact that the words "purchase," "lease" or "contract," as referred to in section 64, are taken to be identical with the words "purchase," "lease" or "contract," as used in section 63. While these words have a uniform meaning, yet, it must be kept in mind that they may be vehicles for the accomplishment of different purposes.

Section 63 does not refer in any wise to section 64, nor vice versa. Section 63 provides that a petition, *joint or otherwise*, shall be filed, setting forth the *object* and *purpose* desired, whether "for the purchase, sale, lease or making of contracts, or any other purpose in this section provided." It does not say "any of the purposes provided in section 64." The purposes provided in sections 63 and 64 are separate and distinct. Rates are necessarily involved in section 64; not so in section 63. Also, in section 64, the provisions applicable to the consolidation of railroad companies, not inconsistent with "this" act, are to be observed and followed, which provisions are made a part of the act by reference. The commission, under section 64, must ascertain and determine the value of the new or consolidated corporations, and shall fix the rates, etc.

Section 64, as to merger and consolidation, follows the general rule, and makes the exercise of such power subject to strict rules and *the closest scrutiny*. Notice the different phraseology in sections 63 and 64. You will find evidence conclusive in itself, aside from what has been said, that section 63 refers to the physical property, while section 64 refers to the corporate entities and corporate relations.

The last paragraph of section 64, it appears to me, means the same thing as though it read as follows:

> "No legal status brought about by consolidation, purchase, lease or contract, by which two or more telephone companies merge or operate their lines or plants jointly or in connection with each other, shall become effective until after the commission shall have ascertained and determined the valuation, etc."

The essence of the thing requiring careful scrutiny at the hands of the commission is the merging of the entities, the operation of the lines jointly or in connection with each other by combined entities, entities acting as a unit in respect to the operation.

Some confusion presents itself, at first, because "consolidation" is taken as the equivalent of "merge," and, therefore, the statute might appear to be read: "No consolidation by which two or more companies merge shall become valid or effective, etc." But this will not do. The merging may be accomplished by the consolidation, purchase, lease or contract; again, the operation of the lines jointly or in connection with each other may be accomplished by consolidation, purchase, lease or contract.

Section 6035 of Thompson on Corporations, second edition, volume 5, chapter 165, speaking of consolidation, merger union and amalgamation, says:

> "The uniting or joining together into one of two or more existing corporations is variously denominated 'consolidation,' 'merger,' 'amalgamation,' or 'union,' depending on the nature or the result of the union. There seems to be a recognized difference between 'consolidation' and 'merger.' While 'merger' and 'amalgamation' are sometimes used synonymously. Consolidation takes place where two or more existing corporations are consolidated into a single corporation, and the existence of the uniting corporations is terminated and the consolidated company succeeds in a general way to the rights and franchises and acquires the property and assumes the obligations and liabilities of all the constituent companies. In the ordinary legal phraseology, the term 'consolidation' is generally used to indicate both the act and the result of uniting two or more corporations into one."

Now, the act of uniting these two or more corporations into one may be accomplished unquestionably by purchase, or even by lease.

Thompson on Corporations, section 6037, distinguishes between "merger" and "consolidation" as follows:

> "There seems to be a recognized difference between merger and consolidation. A "merger" as used and understood by the courts is not the equivalent of 'consolidation;' it exists where one of the constituent companies remains in being, absorbing or merging in itself all the other companies. In a merger of two or more corporations, one of the merged corporations survives; that is, the merger consists in the uniting of two or more by the transfer of all the property to some one of the existing corporations, which continues its existence, while the others are swallowed up by or merged in the one that exists. And in this respect, it differs from a consolidation, wherein, as will be seen, all the corporations terminate their existence and become parties to a new one. * * *"

Whether a merger be effected, or a consolidation be effected, the means for effecting the same may be different. Quoting further from Thompson, section 6037:

> "A legislature may authorize the consolidation of corporations by merging one in the other and continue the existence of the latter with the property, rights and franchises of both."

It will be seen from this that consolidation is brought about by means of the merger, and that whether we use the expression "consolidation" or "merger" the idea is prevalent of a union or combination of entities.

Thompson, section 6038, discussing consolidation not a sale and purchase, thus discusses:

> "A consolidation is entirely different from a sale of the property and assets of one corporation and the purchase by another. A consolidation is wanting in the essential elements of a sale. Thus, as said by the Ohio court: 'A sale implies a vendor and a vendee, and by it the former sells and transfers a thing that he owns to the latter for a price paid, or to be paid to himself. The vendor parts with nothing but his property, and for it receives a quid pro quo. Such is not the case where companies are consolidated under this statute. It is true that the owner of each constituent road parts with its property. But it does much more; it not only parts with its property, but ceases to be a juristical entity, capable of owning or acquiring property. It does not, and could not receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement. The issuance of stock by the new company to the stockholders of the old companies characterizes the transaction as a consolidation and not a purchase; as such a transaction is by no means necessary in a mere sale and purchase. *The fact that one step in the process of consolidation may take the form of purchase and sale does not affect the nature of the transaction or make it any the less a consolidation.*' "

The last sentence herein quoted discloses the fact that purchase and sale may be elements in accomplishing consolidation. Thompson, section 6039, says:

> "A lease of the property of one corporation to another may be such as to constitute a merger but it is not a consolidation. Under a lease, the right to use the property only and not the title passes; and in such a case the existence of neither corporation is terminated."

Further discussing the question, Thompson says (quoting from a Montana court):

> "Ordinarily, no idea of a lease would ever enter into any explanation of what constituted a consolidation, unless such contract of lease was for so long a period of time, or by its terms was such as to make it a practical merger of one corporation into another. Lease does not imply consolidation, nor consolidation lease. The power to consolidate, as has been seen, is a power to make two corporations one; the power to lease carries with it no power to pass anything except the right to use the property leased."

Further, Thompson says (section 6039):

> "However, a lease may be of such duration as to amount to a consolidation or merger. Statutes sometimes prevent the leasing as well as a consolidation of parallel or competing lines of railroads."

Numerous decisions are quoted to support the last proposition.

The terms "consolidation," "lease," "merger," "amalgamation," "union," "purchase" and "sale" in connection with the idea of combining entities, are

discussed at great length in Thompson on Corporations, section 6035, et seq., and I need not quote further here. Suffice it to say, that after a careful reading of them one is convinced that the legislature in adopting the last paragraph of section 64 of the public utilities act was not at all so much confused as is one who has not studied the real meanings of "consolidation," "purchase," "lease," "sale," "merger," etc.

In concluding the discussion of the principles involved, permit me to say that section 63 applies to the physical connections; that it is complete in itself; and that where two telephone companies, of the description mentioned in section 63, desire to make physical connections, either by purchase, lease or contract, and the fact of merger or union of corporate entities does not appear, your commission need not make any valuation, and is controlled entirely by section 63. Where, however, it appears to your commission, regardless of the form in which such appearance comes to you, that the real purpose of the companies is to merge their corporate entities and pull together in their corporate capacities for their own purposes, and not primarily for the benefit of the public, you are to be governed by the provisions of section 64.

Coming now to your four telephone cases, you say in two of them the question is simply the right to connect for interchange service, and give the following illustration:

> "The Central Union Telephone Company and the Van Wert Telephone Company filed a joint petition asking authority of the commission to connect their lines so as to give the subscribers of Van Wert through toll service to points located on the Central Union Telephone Company's lines."

As to these two cases it is apparent you are governed by section 63 exclusively and need not consider section 64.

As to the other two cases you say:

> "The Ashtabula Telephone Company prayed for the right to purchase the equipment of the Central Union Telephone Company in Ashtabula, and the Citizens Telephone Company of Delaware asked for permission to purchase the plant and equipment of the Central Union Telephone Company in Delaware. In both cases the Central Union Telephone Company joined in the petition, and the petitions recite the consideration to be paid, amount of property to be transferred in each case, and further recite that the action in each case would result to the benefit of the public, in that the subscribers to the local companies would secure through service to points reached by the Central Union Telephone Company's lines, and the American Telephone & Telegraph Company's lines, which service they do not at present enjoy." It was further represented that rental rates would not be advanced.

As to these two cases I think your commission should be the judges, because you have before you more of the facts than the writer. In other words, the writer could not advise you as to whether section 64 applies without treading upon the prerogatives of the commission. If you are satisfied that the companies are of the kind described in paragraph A of section 63, and that there is to be no combining or uniting of corporate entities, and that the sale in each case is to be absolute, and that all interest in the two properties, so far as relates to the selling company, disappears, you may proceed under section 63. If,

on the other hand, you are satisfied that the purchase is only a means to a combining of corporate entities and that each of the companies will retain an interest in the subject-matter of the contract as distinguished from one you should proceed under section 64.

I beg your pardon for the great delay in answering your request. Your inquiries gave me much difficulty, and I am pleased to herewith acknowledge the assistance rendered by members of the commission, some on one side and some on the other, in arriving at a conclusion; and also to thank those who furnished briefs in the case.

I may say in conclusion that I feel confident that the principles hereinbefore set forth are correct, and that your commission may feel sure that in following these principles you will not be misguided in your official action.

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

COLUMBUS, OHIO, November 29, 1911.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have been making some inquiry as to the discussion before the committee which recommended sections 63 and 64 of the public service commission act. I am not through with my investigation in that connection, but from the information gleaned thus far I deem it my duty to recommend to you, in relation to the two cases wherein petition was filed with you for the right to purchase and sell, to ascertain and determine the valuation, as provided in the public service commission act, upon which the rates, tolls, charges and rentals are based; and also have fixed and determined such rates, tolls, charges and rentals, so to be charged.

There is no doubt that you have the power to ascertain and determine such valuation; and, pending the further investigation of the proceedings leading up to the enactment of the law, I deem it my duty to advise you that all doubts should be resolved in favor of the jurisdiction and obligation of the commission.

Permit me further to say that it is my desire, for the present at least, not to lay down any definite rule for your government, in reference to telephone companies, under sections 63 and 64, but to pass upon the law applicable to each case as it is presented to you. Later on, I can give you a rule for permanent guidance.

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

(Superintendent of Banks)

138.

HOLIDAYS—SATURDAY HALF DAYS—LEGALITY OF BUSINESS—TRANSACTIONS.

Transactions of a business character made on Sunday are not void unless absolutely prohibited by statute, and the same rule applies to Saturday half holidays and other legal holidays.

COLUMBUS, OHIO, February 27, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 16th, which is as follows:

> "This department has been asked for an opinion concerning the legality of transactions made after twelve o'clock, noon, on Saturday, in the event a bank kept open for business after that hour. This department has held it to be the intent of section 4446-5, Revised Statutes, that the Saturday afternoon holiday shall, from a legal point of view, be regarded the same as any other legal holiday.
>
> "Please advise me as to whether or not in your opinion my judgment in this matter is correct."

I think the ruling of your department upon this matter is entirely correct. Section 5978 of the General Code, providing for the one-half holiday on every Saturday of the year expressly states:

> "Every Saturday of each year shall be a one-half holiday for all purposes, beginning at twelve o'clock noon and ending at twelve o'clock midnight. Bills, bonds or promissory notes presentable for payment or acceptance on Saturday or on the preceding day, if it is a holiday, shall be presentable for acceptance or payment at or before twelve o'clock noon of such Saturday, but if not then paid or accepted, a demand of acceptance or payment therefor may be made and notice of protest or dishonor thereof given on the next succeeding secular business day."

Section 8190, General Code, provides:

> "Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day except that, at the option of the holder instruments payable on demand may be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

The provisions of this statute, I think, are in full accord with your holding. It is my opinion, however, that these statutes simply apply to the time of presentment for payment or acceptance of bills, bonds, promissory notes or

other negotiable instruments. Contracts entered into and business transacted upon holidays are not void, and in fact transactions of a business character made upon Sunday are not void unless especially prohibited by statute.

See Bloom vs. Richards, 2 O. S. 387.
Spidel Grocery Co. vs. Armstrong, 8 C. C. 489.
43 Bulletin, 137.

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

150.

BANKS AND BANKING—PAYMENT INTO SURPLUS TO CREDIT OF STOCKHOLDERS SUBSCRIPTIONS — LIMITATION — LIABILITY OF STOCKHOLDER FOR SUBSCRIPTION INSTALLMENTS.

Section 9735, General Code, stipulates that one-tenth of profits of a bank must be credited to the surplus fund unless the surplus fund amounts to twenty per cent. of the capital stock.

Section 9716, et seq., General Code, provides that fifty per cent. of the capital stock shall be paid up before the company can do business and that ten per cent. of the balance shall be paid monthly thereafter.

Under these statutory provisions, up to the time that the surplus has accumulated to the extent of 20% of the capital stock, the excess over one-tenth of the profits, only, may be paid into the surplus fund to the credit of stockholders subscriptions, and should such excess not be sufficient to equal the monthly installment due on each share, the stockholder must make up the difference. After the surplus has reached the aforesaid twenty per cent. of the capital stock, all dividends may be paid into the surplus fund to the credit of stockholders subscriptions.

The same liability however, to make good the difference between such credits and the full amount of the installment due, remains upon the stockholder.

COLUMBUS, OHIO, March 6, 1911.

HON. F. E. BAXTER, *Superintendent Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 27th, requesting my opinion upon the following question:

> "May a bank legally use its entire surplus fund toward payment of its capital stock in full?"

The form of your letter indicates that your inquiry relates to a bank incorporated under chapter 2, division V, title IX, part 2, General Code, relating to the organization powers of banks in general. You refer specifically to section 9735, General Code, which provides in part as follows:

> "* * * Before any * * * dividend is declared, not less than one-tenth of the net profits of the company for the preceding half year, or for such period as is covered by the dividend, shall be carried to a surplus fund until such fund amounts to twenty per cent. of its capital stock."

Other pertinent provisions of the chapter in question are as follows:

"Section 9710. The persons named in the articles of incorporation of any such company, * * * shall order books to be opened for subscription to the capital stock. * * * An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and an installment of forty per cent. on each share of stock shall be payable as soon thereafter as may be required by the board of directors, the remaining fifty per cent. being payable in the manner hereinafter required."

"Section 9716. The entire capital stock of such corporation shall be subscribed, and at least fifty per cent. thereof paid in before it may be authorized to commence business. The remainder of its capital stock shall be paid in monthly installments of at least ten per cent. each on the whole amount of the capital, payable at the end of each succeeding month from the time it is authorized by the superintendent of banks to commence business. * * *"

"Section 9717. When a stockholder or his assigns fails to pay an installment on his stock * * *' the directors for such company may sell his stock at public sale for not less than the amount due thereon, * * * If no bidder can be found * * * such stock *shall be sold* as the directors order, within six months for not less than the amount then due thereon with all costs of sale.

"Section 9719. If the cancellation of the stock of a delinquent holder reduces the capital of the corporation below the minimum required by law, the capital of such corporation shall be increased by additional subscription, * * * within sixty days from the date of such cancellation; in default of which, a receiver may be applied for by the superintendent of banks. * * *"

The words "capital stock" as used in section 9735, General Code, clearly mean, the authorized capital stock of the banking company. See sections 9703 and 9704, General Code, wherein these terms are first used in the chapter. It is evident therefore, that the surplus required by section 9735 is twenty per cent. of the authorized capital stock of the company.

As I understand your inquiry, it supposes that at the time a dividend is about to be declared by the board of directors of a banking company, it appears that there are installments due on the stock subscriptions required to be paid in monthly installments, under section 9716, above quoted. The 20% surplus mentioned in section 9735 has not yet been accumulated, but it is desired either to credit the capital account of each stockholder by the declaration of a dividend, or to pass all profits shown by the books of the bank to the credit of a surplus fund with the intention of ultimately crediting the account of each stockholder with ratable proportion, and thus assisting him in paying up his capital subscription, as he is required to do by section 9716.

The procedure thus suggested seems reasonable in view of the fact that the bank and its stockholders, during the period within which the stock subscriptions are being paid, and the bank is doing business and reaping profits, have mutual accounts which can be easily adjusted in either manner above described. Such a proceeding, however, would, in my judgment, not be in compliance with the law. The evident intent of section 9735 is to prevent a declaration of a dividend until one-tenth of the profits out of which such divi-

dend must be paid, if at all, are credited to the surplus fund, and until, further, the surplus fund mentioned in the section has already been accumulated. On the other hand, there does not seem to be any power in the board of directors of a bank to waive the statutory requirement that the stockholders shall complete the payment of their subscriptions in monthly installments of at least ten per cent. If therefore, at a given dividend paying period installments of stock subscriptions are due and unpaid, and the surplus fund mentioned in section 9735 has not yet been accumulated, and if at such dividend paying period the nine-tenths of the net profits available under such circumstances, as ratably divided among the stockholders, are sufficient to pay the entire installment then due from each stockholder, the directors may lawfully regard the nine-tenths of the profits as available for that purpose, and may credit the capital account of each stockholder accordingly. That is to say, at such a time each stockholder would owe the company an amount equal to one-tenth of his subscription, while the company would have in its possession funds, which the directors might lawfully distribute to the stockholders in proportion to their interests; such funds would be the entire net profits, less one-tenth which must be credited to the surplus fund. It would be perfectly proper in my judgment for the directors to save bookkeeping and unnecessary trouble, by crediting the entire nine-tenths of the net profits to a surplus fund, and then ratably therefrom, to the individual accounts of the stockholders; but they may not so use the one-tenth that is required by section 9735 to be credited to the surplus fund; nor, may they so use any portion of the surplus already accumulated under section 9735 for this purpose. If the amount which would be thus available to be credited upon the capital accounts of the several stockholders, ratably distributed among such accounts, would be insufficient to pay a ten per cent. installment on each subscription, as required by section 9716, then each stockholder would be required to make up the difference. *The intent of the law is that the subscription shall be paid up from month to month*, and the law is violated if the accumulation of a surplus is used for the purpose of thus discharging the subscription liability of each stockholder.

What has been said above concerning the crediting of one-tenth of the undivided net profits for any given period to the surplus required by section 9735 does not of course apply in case the twenty per cent. surplus has been accumulated. If such a surplus has been accumulated before the capital stock is, in accordance with section 9716, paid up, then of course, any dividend declared may be applied directly to the capital account without crediting any portion of the net profits to the surplus account.

To recapitulate, it is my opinion that until the surplus of 20% of the authorized capital stock of a bank is accumulated under section 9735, it is unlawful for the directors of a bank to fail for any reason to credit to such surplus at least one-tenth of the undivided profits at any dividend paying period; that it is unlawful for any portion of the twenty per cent. surplus fund accumulated under section 9735 to be used for the purpose of paying up stock subscriptions, because the clear intention of the statute is, that the twenty per cent. surplus should be an asset of the bank in addition to the assets represented by the stock subscriptions; that the requirement of section 9716 that the last fifty per cent. of each stock subscription shall be payable in monthly installments cannot be waived by the directors; and that the only categorical answer which can be returned to your general question must be in the negative, such answer, however, being subject to the qualifications above pointed out.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

K 222.

FOREIGN TRUST COMPANIES—TRUST AND MORTGAGES AFTER APRIL 1, 1910--STATUTORY REQUIREMENTS FOR ORGANIZATION AND INSPECTION OF BANKS.

Before a foreign trust company could certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon property located wholly or in part in this state, so as to make the same valid after April 1, 1910, it must have complied with sections 9777-9780, General Code. Any such acts performed subsequent to said date are void.

All other acts not included in said sections are valid if all requirements of the law existing prior to April 1, 1910, have been complied with, so far as the above statutes are concerned.

COLUMBUS, OHIO, April 18, 1911.

HON. F. E. BAXTER, *Superintendent of Banks. Columbus, Ohio.*

DEAR SIR:—I have your favor of April 17, 1911, requesting my opinion upon the question which you submit as follows:

> "This department is asked the question as to whether or not trusts and mortgages accepted by a foreign trust company prior to April 1, 1910, and the enforcement thereof and the validity of an acts performed in connection with such trusts after that date, would be affected by a non-compliance with the provisions of sections 9778 to 9780, inclusive, and as to whether or not the said sections only relate to trusts and mortgages accepted on and after April 1, 1910."

Sections 9777, 9778, 9779 and 9780 of the General Code constitute the four subdivisions into which section 69 of the act relating to the organization of banks and inspection thereof, 99 Ohio Laws, 269, was divided by the codifying commission. This section 69, as originally passed and which comprises all of said sections 9777 to 9780, inclusive, of the General Code, is as follows:

> "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 if 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. The treasurer of state shall hold

such fund or securities deposited with him as security for the faithful performance of all the trusts assumed by such corporation, but so long as any such corporation shall continue solvent said treasurer shall permit it to collect the interest on its securities so deposited. The treasurer of state shall from time to time permit withdrawals of such securities or cash, or any part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of said deposit as hereinbefore provided.

"No such corporation either foreign or domestic authorized to accept and execute trusts shall either directly or indirectly through any officer, agent or employe of such corporation, certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part in this state without complying with the provisions of this section, and any trust, deed or mortgage given or taken in violation of the provisions of this act shall be null and void."

Section 91 of the original act which is found in sections 9793, 9794 and 9795 of the General Code is as follows:

"Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other corporation or association except building and loan associations, having the power to receive, and receiving money on deposit, now existing and chartered or incorporated, or which may hereafter become incorporated shall be subject to the provisions of this act, provided that no such corporation or association having a less capital stock than the minimum amount provided in section 2, hereof, shall be required to increase its capital stock in order to conform to the provisions of that section, but no such association or corporation, may avail itself of any of the privileges or powers conferred by this act until it has complied with the provisions of section 36 of this act, and no corporation or association, shall be required to comply with the provisions of sections 1 to 77, inclusive, of this act before April 1st, 1910, but every such corporation and association, shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided in this act. The books and records, except books and records of deposit and of trusts, of every corporation, society or association operating under the provisions of this act, shall, at all reasonable times be open to the inspection of every stockholder."

I think I can answer your inquiry by quoting part of section 69 and part of section 91 as follows:

"Section 69. * * * No such corporation either foreign or domestic authorized to accept and execute trusts shall either directly or indirectly through any officer, agent or employe of such corporation, certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part in this state without complying with the provisions of this section, and any trust, deed or mortgage given or

taken in violation of the provisions of this act shall be null and void." (Section 9780, General Code.)

"Section 91. * * * but no such association or corporation, may avail itself of any of the privileges or powers conferred by this act until it has complied with the provisions of section 36 of this act, and no corporation, or association, shall be required to comply with the provisions of sections 1 to 77, inclusive, of this act before April 1st, 1910, but every such corporation and association, shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided in this act." (Section 9794 of the General Code.)

It is my opinion that before a foreign trust company could certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon property located wholly or in part in this state, so as to make the same valid, after April 1, 1910, it must have complied with the provisions of section 69, now sections 9777 to 9780 inclusive, General Code; and if any of such acts were done subsequent to the first of April without having complied with the provisions of said sections, said acts would be void.

As to other acts, not expressly mentioned by the statute, it is my opinion that if they could validly be performed by such trust companies prior to April 1, 1910, and such companies had complied with all the provisions of law in existence prior to said date, then such acts by a foreign company would not necessarily be invalid, for the reason that it had failed to comply with the provisions of the present law in regard to trust companies, above quoted.

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

B 228.

ANNUAL REPORTS OF DEPARTMENT OF BANKS AND BANKING—LIMITED NUMBER.

The general assembly having limited the supply of annual reports of the department of banks and banking to 700 copies, an extra supply may not be ordered by the department and charged to the contingent fund.

April 22, 1911.

HON. F. E. BAXTER, *Superintendent Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Under recent date you state:

"Under the present law a certain number of copies of the annual report of this department is furnished for distribution. I should like to have your opinion as to whether or not, in the event we find the supply is not sufficient for our needs, it would be legal for this department to have an additional supply printed and charged to the contingent fund made available for our use."

Section 2269, General Code, as amended 101 O. L. 350, reads in part as follows:

"The annual reports of the appointive state officers and boards shall be printed as follows:

"Superintendent of banks, seven hundred copies."

It is my opinion:

(1) That the general assembly having provided a definite number of copies of the annual report to be furnished to your department it has seen fit to limit the amount of such copies to that number.

(2) That the contingent fund which is made available for the use of your office is for the sole purpose of meeting such expenses as are incidental to the operation of your department, and for which there is no other provision made.

It is my opinion, therefore, that it would not be legal for your department to use such contingent fund to supply you with an additional number of copies of the annual report of your department.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

252.

SECRECY OF BANKING DEPARTMENT—RIGHTS OF STOCKHOLDER TO INSPECT BOOKS—BANK IN RECEIVERSHIP.

Under section 12898, *General Code, the superintendent of banks, his clerks and examiners are forbidden to disclose any information, obtained in the course of bank examination or in connection with action taken by the department when the condition of the bank requires such action, except to proper officials. These restrictions are extended to stockholders.*

Under section 9795, *however, the stockholder has the right to inspect all books and records except deposits and trusts and this right exists notwithstanding the fact that the bank is in the hands of a receiver.*

COLUMBUS, OHIO, May 15, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of recent date enclosing a letter from Mr. Stephen R. Hollen of Cincinnati, Ohio, and asking my opinion as to what answer you shall make to the same. This letter is as follows:

"I represent J. J. McDermott, one of the stockholders of the defunct Commerce and Deposit Bank of this city. He has only had his stock some two or three months and desires to ascertain some facts relevant to its condition. I have applied to Mr. Mathis, the receiver, who directed me to write you and get your authority for him to give me these facts. What I desire to know is as follows:

"1. The condition of the bank as to solvency on December 7th, 1910, and December 31st, 1910.

"2. Whether from July 1st, 1910, to December 7th, 1910, the bank was earning 40% (gross) on its capital stock.

"3. Was the bank solvent during the above mentioned periods?

"4. What actually led to your closing its doors, and how long such condition lasted before such action was taken?"

Section 12898 of the General Code, as amended May 19, 1910, 101 O. L. 276, at page 284 is as follows:

"Whoever, being the superintendent of banks, a deputy assistant, clerk in his employ or an examiner, fails to keep secret the facts and information obtained in the course of an examination except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the corporation, company, society or association so examined, or willfully makes a false official report as to the condition of such corporation, company, society or association, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both."

By this section you and your assistants, clerks and examiners are forbidden from giving out or making public any facts or information obtained in the course of an examination of a bank except to the proper officials, or in connection with action taken by your department when the condition of the bank necessitates such action.

It is my opinion that under this section you are not authorized to give out any information obtained by you from your examinations to private citizens, even though they may be stockholders in the bank.

Sections 737, 738, 739 and 740 of the General Code provide for reports to be made to you by banking institutions and for the publication of the same, and in the absence of statutory authority you would not be justified in giving out any other information.

It seems to me that under section 9795 of the General Code, which is as follows:

"The books and records, except books and records of deposits and of trusts, of every corporation, society or association operating under this chapter, at all reasonable times shall be open to the inspection of every stockholder."

a stockholder can himself, through his attorney, obtain all the information which he asks from you, as this section gives him the right to inspect all the books and records, except records of deposits and trusts, of the bank, and from such inspection he can inform himself as to the condition of the institution at any given time. The stockholder would have the right to this inspection, while the books are in the hands of the receiver to the same extent as before the receiver was appointed.

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

257.

POWER OF SUPERINTENDENT OF BANKS TO APPOINT CLERKS AND EXAMINERS AND FIX SALARIES—APPROVAL OF GOVERNOR—APPROPRIATIONS.

Subject to the approval of the governor, the superintendent of banks may employ as many clerks and examiners, with such compensation as his discretion dictates, and the legislature will appropriate sufficient funds to meet the requirements.

COLUMBUS, OHIO, May 23, 1911.

HON. F. E. BAXTER, *State Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You inquire as to the interpretation of sections 712 and 713 of the General Code, and in addition thereto an interpretation of section 713 of the General Code as amended by the act of May 18th, 1910 (101 O. L., page 276).

Section 712 of the General Code is as follows:

> "With the approval of the governor, the superintendent of banks may employ from time to time necessary clerks and examiners to assist him in the discharge of the duties imposed upon him by law. With such approval, he may remove any such clerks or examiners."

Section 713 of the General Code is as follows:

> "The superintendent of banks shall fix the salaries of the clerks and examiners at such rates per annum as the governor approves. Upon vouchers approved by the superintendent, such salaries shall be paid monthly by the treasurer of state upon the warrant of the auditor of state."

The last section was superseded by act of May 18th, 1910, just referred to, in volume 101, page 276, and now reads as follows:

> "Section 713. The superintendent of banks shall fix the salaries of the deputies, assistants, clerks and examiners at such rates per annum as the governor approves. Upon vouchers approved by the superintendent of banks, such salaries shall be paid monthly by the treasurer of state upon the warrant of the auditor of state."

Section 712 of the General Code is very plain and authorizes the superintendent of banks, with the approval of the governor, from time to time to employ necessary clerks and examiners to assist him in the discharge of the duties imposed upon him by law. With such approval, he may remove any such clerks or examiners.

Inasmuch as section 712 of the General Code was superseded by section 713 of the act of May 18th, 1910, I will refer only to the latter section. This section commands the superintendent of banks to fix the salaries of the deputies, assistants, clerks and examiners at such rates per annum as the governor approves. It further provides that upon vouchers approved by the superintendent of banks, such salaries shall be paid monthly by the treasurer of state upon the warrant of the auditor of state.

These two sections are living provisions of the law and give you full authority in the premises, provided you have the approval of the governor, to employ the necessary clerks and examiners to assist you in the discharge of the duties imposed on you by law. You are the sole judge of the necessary number of clerks and examiners. You are also authorized, under section 713, last mentioned, to fix the salaries of your deputies, your assistants, clerks and examiners, subject only to the approval of the governor. Upon the vouchers being approved by the superintendent of banks, such salaries shall be paid monthly by the treasurer of state upon warrants of the auditor of state.

All this presupposes that the legislature will make suitable appropriation to enable you to carry out the provisions of these two statutes. The general assembly, so long as these sections are in force, has nothing to do with the fixing of any of these salaries. All obligations incurred by the state bank superintendent in the discharge of his duties are, under the command of these sections, obligations resting on the state and which it should discharge. This is especially true in the light of the fact that the amount of the salaries to be fixed by the state superintendent of banks is made subject to the approval of the governor precluding the idea that the appropriation should at any time be less than the amount required as fixed by the statutes themselves.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

B 262.

BANKS AND BANKING—POWER OF BANK TO BORROW MONEY.

Under the powers granted by section 9708, *General Code. "to contract and be contracted with" and "to do all needful acts to carry into effect the objects for which it was created, and by virtue of sections* 9714 *and* 8705, *General Code, a bank, like other corporations may borrow money in any sum not exceeding the amount of its capital stock."*

COLUMBUS, OHIO, June 1, 1911.

HON. F. E. BAXTER, *Superintendent Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—In your letter of March 31, 1911, you make the following request:

> "Please render to this department an opinion as to what extent a bank operating under the laws of this state can borrow money?"

This question, it seems to me, is answered by the following sections of the General Code, to wit:

> "Section 9708. Upon such filing of the articles of incorporation, the persons who subscribe them, their associates, successors, and assigns, by the name designated therein, shall become a body corporate with succession, and, as such, shall have power:
>
> "a. To adopt and use a corporate seal, and to alter it at pleasure.
>
> "b. To contract and be contracted with;

"c. To sue and be sued;

"d. To adopt regulations for the government of the corporation, not inconsistent with the constitution and laws of this state;

"e. To do all needful acts, to carry into effect the objects for which it was created."

"Section 9714. In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

You will note from subdivision "b" of section 9708, that the bank has the power to contract and to be contracted with; and also (subdivision "e") to do all needful acts to carry into effect the objects for which it was created. It might well be said that either one of these subdivisions of section 9708 gives to a bank organized under the laws of Ohio, the power to borrow money. Section 9714, it will be observed, provides that banks "shall be created, organized. governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter," and I find no provision of the chapter which inhibits a bank from borrowing money.

The extent to which a bank operating under the laws of this state can borrow, in my opinion, is fixed by section 8705. As above quoted, section 9714 provides for the banking corporations being organized, governed and conducted in the manner provided for other corporations, and said section 8705 provides as follows:

"A corporation may borrow money in any sum not exceeding the amount of its capital stock, issue its notes, or coupon or registered bonds therefor, bearing any legal rate of interest, and secure their payment by a mortgage of its property, real or person, or both."

Therefore, taking these two sections, 9714 and 8705, in connection, I would say that as far as the statutes speak upon this subject a bank can borrow money in any sum not exceeding the amount of its capital stock.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

269.

APPROPRIATIONS—DUTY OF LEGISLATURE WHEN SUPERINTENDENT OF BANKS HAS FIXED SALARIES OF THE DEPARTMENTS.

When the superintendent of banks has appointed his deputies, assistants, clerks, etc., and fixed the salaries thereof as authorized by law, the legislature is obliged to appropriate sufficient funds to meet these arrangements.

COLUMBUS, OHIO, June 14, 1911.

HON. F. E. BAXTER, *Superintendent Department Banks and Banking, Columbus, Ohio.*

DEAR SIR:—In your letter of June 7, 1911, you ask me to advise you as to your standing and rights in the following matter:

"In making up the estimate of appropriations required by this department for 1911-12 for use of the auditor of state and finance committees of the general assembly, I asked for an allowance for examiners of $2,400 per year each. The appropriation bill as passed by both branches provided for only $2,100 per year each.

"Am I authorized and empowered under the law to pay said examiners at the rate of $2,400 per year regardless of the fact that the appropriation made was at the rate of $2,100; and if so, what could be my mode of procedure?"

The General Code gives you the power to appoint examiners in your department, and sections 713, 714 and 715 of the General Code as amended 101 O. L. 276 provide for the manner of fixing the salaries of said examiners, and other assistants and employes, and the payment of the same.

These sections are as follows:

"Section 713. The superintendent of banks shall fix the salaries of the deputies, assistants, clerks and examiners at such rates per annum as the governor approves. Upon vouchers approved by the superintendent of banks, such salaries shall be paid monthly by the treasurer of the state upon the warrant of the auditor of state.

"Section 714. The actual and necessary traveling expenses of the superintendent of banks and of the deputies, assistants, clerks and examiners incurred in the discharge of their official duty shall be paid monthly by the treasurer of state upon warrant of the auditor of state. Vouchers therefor shall be fully itemized, approved by the superintendent of banks and countersigned by the auditor of state.

"Section 715. All expenses incurred by the superintendent of banks in the performance of the duties imposed upon him by law, including the salary of such superintendent, his deputies, assistants, clerks and examiners, shall be paid from funds appropriated therefor."

Section 713 is too clear to require any explanation or construction. It provides in direct terms that you, as superintendent of banks, *shall* fix the salaries of the examiners at such rates per annum as the governor approves. You state in your letter to me that you have fixed the salaries of your examiners at $2,400 per year each, and while you do not so state, I assume that said salary as fixed by you was approved by the governor. This being so, the salary of $2,400 per year for each examiner is for all purposes as definite and fully fixed as if the same had been fixed by a statute upon that subject. This being true the legislature has only one duty to perform with reference to said salaries, namely, to appropriate sufficient funds to pay the same. If it saw fit, it might by amendment take the power to fix the salary of examiners out of your hands and fix the same itself as in the case of other public officers and employes, but as it has not done so, it cannot interfere with the salary as fixed and determined by you, as provided by law, by failure to appropriate sufficient funds to pay the salaries as fixed. If it could be done, then section 713 would be of no effect and the legislature would thus usurp, in an indirect manner, namely, by manipulation of appropriations, a power expressly given to you by statute. This cannot be done.

Therefore, my opinion is, that the salaries as fixed by you at $2,400 per year are legal and valid and should be paid upon that basis. If the funds appropriated by the legislature are insufficient to pay said salaries for the

entire period then the examiners, after the appropriation is exhausted, will have a valid claim against the state for the difference between the amount they receive from said appropriation and the sum of $2,400 as fixed by you.

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

B 275.

BANKS AND BANKING—LIQUIDATED BANKS—ENTERING OF INTEREST ON DEPOSITS OF THE GAMBIER BANKING COMPANY DUE PRIOR TO DATE OF LIQUIDATION.

As the Gambier Banking Company had the power to receive and pay interest upon deposits, the state superintendents after taking over such banks for liquidation should credit the depositors with the accrued interest on deposits which was not entered on the books and which was due on the last interest paying date preceding the date of liquidation.

COLUMBUS, OHIO, June 23, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of June 21, 1911, enclosing copy of charter of the Gambier Banking Company, stating that you request my opinion "as to the right of this bank to accept savings deposits in the manner prescribed for savings banks, and as to whether or not such interest, accrued and not credited on the books of the bank May 16, 1911, the day upon which possession was taken by this department, shall be now credited to the accounts of said depositors."

I understand that this bank is now in the process of liquidation by your department.

The purpose clause of the articles of incorporation of the Gambier Banking Company filed in the office of the secretary of state of the state of Ohio on February 18, 1905, is as follows:

> "Said corporation is formed for the purpose of doing a general banking business, including the acquiring of the necessary real estate and bank equipment for the transaction of said business, the receiving of deposits from patrons and paying interest thereon, and the paying out of said deposits, the loaning of money, including deposits upon proper security, the purchasing and sale of stocks and securities, and the doing of any and all things incident to or connected with the conducting and carrying on of a general banking business."

These articles of incorporation, including, of course, the purpose clause above set forth, were duly approved by the attorney general of Ohio and said corporation authorized to do business as provided in the said articles of incorporation. This was prior to the enactment of the present banking laws, and section 35 of the present act, now section 9739 of the General Code, provides:

> "Banks, savings banks, savings societies, societies for savings,

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

Therefore, this bank undoubtedly had the power to receive deposits and pay interest upon the same, and as the acting as depository and the paying of interest would be in the nature of a contract, I am of the opinion that the said bank had the power, by that contract, to accept savings deposits in the manner prescribed for savings banks; but the said depository in the payment of interest would, of course, be subject to the rules adopted by the bank governing the same.

As to your second question—whether or not interest accrued on such deposits and not credited on the books of the bank on May 16, 1911 (the date upon which your department took possession of this bank) shall be now credited to the accounts of the said depositors—my answer is that these deposits were in the nature of contracts between the bank and the depositors and as I presume that the bank has fixed periods, either semi-annually or quarterly, upon which interest was to be credited, it would therefore be your duty to carry out the said contracts, that is, to credit the interest on each deposit up to the date fixed by the bank for crediting such interest next preceding May 16, 1911; that is, if the rules provided that interest should be credited upon January 1, and July 1, each year, you would credit interest up to January 1, 1911, and would not make any further credit of interest for the reason that the bank became insolvent prior to the next date upon which interest should be credited, namely July 1.

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

294.

DISHONORED CHECK OR DRAFT—ORIGINAL INDEBTEDNESS UNIMPAIRED.

Where a check or draft is properly presented and for any reason dishonored, the debt is not discharged thereby and the holder thereof may proceed against the drawer upon the original indebtedness.

COLUMBUS, OHIO, July 11, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of July 7th, submitting to me two questions asked you by Mr. B. J. Schurr, of your department, and upon which you request my opinion. Question 1 is:

"What is the legal status of an outstanding check on a personal

account with Gambier Banking Company and in what manner and against whom should the claim be filed?"

A giving of a check does not extinguish the debt for which it is given unless the payee of the check expressly agrees, at the time he accepts it, that the check is in payment. If a check is given in payment of a debt, or for any consideration whatever, and it happens that the bank upon which the check is drawn fails before the check is presented, or the drawer of the check has no funds in the bank, then the payee of the check still has his claim against the drawer, and can collect such claim by any method known to law. Question 2:

"A draft was issued a short time before the bank was closed and it did not have time to be given credit. Can the one who received it compel the one who sent it to take it back and pay the amount in full in some other way?"

The answer to your first question practically disposes of the second also. The person who received the draft can, if it is dishonored for any reason, compel the one from whom he received it to pay the amount represented by the draft.

In answering each of the above questions, I presume that there was no delay in the presentment of the check or draft to the bank for payment. A failure to present same within a reasonable time, in case of failure of the bank, would absolve the drawer of the check or draft from liability.

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

A 295.

POWER OF SUPERINTENDENT OF BANKS TO LEASE ROOMS—APPROPRIATIONS FOR PURPOSE—STIPULATION AGAINST PERSONAL LIABILITY OF SUPERINTENDENT.

Section 719, General Code, provides that the superintendent of banks shall be furnished by the state suitable rooms and as the statutes in no way specify who shall have the power to contract for such rooms, it is to be presumed that the superintendent is to be vested with such power.

The amount and term of a lease for such purposes is dependent upon the amount which the legislature appropriates therefor. The superintendent is advised therefore, to enter into no lease dependent upon future action of the legislature unless provision is made exempting that official from personal liability.

COLUMBUS, OHIO, July 13, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a lease proposed to be entered into by the department of banks and banking of the state of Ohio, through its superintendent, F. E. Baxter, as lessee and Maribel H. Schumacher, as owner of the Hartman building, leasing certain offices for the use of the department of banks and banking of Ohio in the Hartman building, in Columbus, Ohio,

for a term beginning on the 1st day of December, 1911, and extending until the 1st day of December, 1916, a period of five years, at an annual rental as specified in said lease to be paid in monthly installments, and you request my opinion, first, as to your authority as superintendent of banks to execute this lease; and second, assuming that you have the power to execute a lease for the rental of the rooms, for your department, then have you the power to execute this lease which provides for a term of five years, you now having, as I understand it, two years remaining of your present term of office.

Answering your first inquiry, section 719 of the General Code provides as follows:

> "The superintendent of banks shall be furnished by the state suitable rooms at the seat of government for conducting the business of his office."

This is the only provision of the General Code relative to your powers and duties as to obtaining yourself, or being furnished by the state, with offices for the use of your department.

For some years the offices in the state house have been inadequate for the accommodation of the many state departments, and it has therefore been necessary for many of the departments to obtain quarters in different office buildings outside of the state house in the city of Columbus. In each instance authority for doing this has been given by an act of legislature similar in substance to section 719, above quoted.

The General Code is silent as to the manner of renting or leasing these offices outside of the state house, and no state official is authorized to take charge of the same, and upon no state official is the duty cast by law to select suitable offices, nor to fix or approve a rate to be paid for the rental of same. Therefore, as the law is silent as to this, and as there is no state official whose duty it is to take charge of this matter, and as section 719, above quoted, expressly provides that you should be furnished with such offices, it must necessarily be held that in the absence of a law designating some particular officer or board as the proper person to perform this necessary duty, you, as superintendent of banks, must therefore have the power to make the necessary contract, or lease for the rental of suitable rooms for conducting the business of your office.

This power, under section 719, must be exercised in some way, and in the absence of expressed authority to the contrary, it must be held that you are the logical and proper official to exercise it.

The case of Ashley vs. Cowell, 10 N. P. N. S., 310, while not directly in point, still tends strongly to support this conclusion. The syllabus in this case is as follows:

> "The power vested in a director of public service, under section 4326, General Code, to manage property after the lease thereof has been made on behalf of the city, carries with it the power to make the lease or contract itself."

Having held that you have the power as superintendent of banks to make a lease or a contract for office rooms for the use of your department, the next question becomes pertinent as to whether, having only two years of your present term remaining, you have the power to enter into a lease for five years.

I am unable to find any expressed authority in the General Code or any decision of court covering this exact question. It seems to me, however, that

this matter must necessarily be considered in relation to the appropriation made by the legislature, or to be made, to your department for the purpose of paying office rent.

If the present legislature made an appropriation to your department for the purpose of paying office rent in an amount equal to, or greater, than the sum specified in the present lease, then you would, undoubtedly, be justified in making a lease for two years at that price. If you should make a lease for a longer period than two years, then the appropriation to pay for the same would have to be made by the next legislature, and you can readily see that if the legislature failed to make an appropriation in an amount equal to the sum specified in the lease, it would probably be held that whatever sum the legislature appropriated would be regarded by it as a proper amount for *providing suitable offices* for your department, and there would be no way of paying the difference between the amount appropriated and the amount specified by the lease, unless you individually wanted to assume this responsibility, which, of course, you would not do, nor would it be properly required of you. If, however, the subsequent legislature appropriated a sufficient amount to pay the rental specified in the lease, then there would be no trouble.

My opinion, therefore, is that if the lessor will incorporate in his lease a statement that you are not to be held personally responsible under the same in any event, then you can safely sign the lease as it stands, provided however, of course, a sufficient amount has been appropriated by the legislature for the payment of the rental specified by you. If the lease does not specify that you in no event are to be held individually responsible, then, I am of the opinion that you should not execute it for a term to exceed two years.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 296.

BANKS AND BANKING—LIQUIDATION—EXPENSES—NOTICE—APPROVAL OF COMMON PLEAS COURT.

Section 742-4 of the General Code providing for the fixing of expenses of liquidation, upon the approval of the common pleas court, by requiring notice to be given to the corporation, society, company or association involved, intended this notice for the purpose of permitting the latter to object to the expenses before the said court.

To be safe, notice should be given in accordance with the methods prescribed for service of summons on like companies by the General Code.

COLUMBUS, OHIO, July 15, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as to section 742-4 of the General Code as found in 101 O. L., page 279. This section is as follows:

> "Section 742-4. The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks

and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, of deputies or assistants, clerks, and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located, on notice to such corporation, company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first, in the order of priority."

Your inquiry is specifically in regard to the words—"on notice to such corporation, company, society or association" and to what such *notice* shall contain and to whom it is to be given.

The language of this section is somewhat involved and it is not altogether clear as to whether the notice shall be given of the time when you, as superintendent of banks, are to fix the compensation of counsel, deputies, etc., or whether it is to be of the time when you are to present statement showing the amount in which you have fixed the same to the common pleas court for its approval; but it seems clear to me, taking the common sense view of the matter, that the procedure should be as follows:

At the proper time you, as superintendent of banks, should fix the compensation of counsel, deputies, clerks and examiners, and all other expenses of the liquidation, and thereupon give notice to the corporation, company, society or association that on a certain day, at a certain time, you will submit your statement of such compensation as fixed by you to the common pleas court of the county in which such corporation, company, society or association was located for the approval of the said court.

It seems to me that this proposition was made for the purpose of giving the corporation, company, society or association an opportunity to be heard upon the question as to the amount of compensation allowed by you and to object to same if it were excessive; therefore, notice of the time when you yourself intended to fix it would be of no avail as the matter is subject to the approval of the common pleas court and therefore the proper time for objections or exceptions to compensation to be made would be when the same was submitted to the court for its approval.

Answering your second question as to whom the notice should be given, the statutes are silent as to this also except the provision is "to such corporation, company, society or association." This being so if you will follow the method prescribed by the General Code for the service of summons upon corporations, you can make no mistake; this section, so far as it specifies the person upon whom such summons shall be served (except as to railroad companies, in which, of course, you are not interested) is as follows:

"Section 11288. A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief office be not found in the county, upon its cashier, treasurer, secretary, clerk, or

managing agent; or, if none of such officers can be found, by a copy left at the office or usual place of business of a corporation with the person having charge thereof. * * *"

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

352.

BANKS AND BANKING—SUITS BY SUPERINTENDENT OF BANK TO COLLECT ASSETS OF LIQUIDATED BANK—STYLE OF SUIT.

When the superintendent of banks has taken possession of a bank for the purpose of liquidation and distribution, actions for recovery on notes and mortgages found among the assets of the bank, shall be brought under section 732, General Code, in the name of the state upon the relation of the superintendent of banks.

COLUMBUS, OHIO, September 11, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have addressed to me the following inquiry under date of August 15th, 1911.

> "In matters where the superintendent of banks has taken possession of a bank for the purpose of liquidation and distribution, who shall be the party plaintiff in actions brought to recover on notes and mortgages found among the assets of the bank?
>
> "Section 732 provides how suits brought by the superintendent of banks shall be styled; does this section, in your opinion, cover such a case as above stated?"

Section 732 of the General Code provides as follows:

> "All suits or proceedings brought by the superintendent of banks under authority of law, or to collect any penalty or forfeiture, shall be brought in the name of the state upon his relation, and shall be conducted under the direction and supervision of the attorney general."

You will note the language, "All suits or proceedings brought by the superintendent of banks under authority of law," and it is my view that said language includes the actions which you mention, viz: "actions brought to recover on notes and mortgages found among the assets of an insolvent bank of which you have taken charge" as by law it is made your duty to collect upon such evidences of indebtedness and securities, and such case should be brought, therefore, in the name of the state upon your relation as superintendent of banks.

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

D 352.

BANKS AND BANKING—BANK ACT—MAINTENANCE OF RESERVE FUND BY SAVINGS BANKS—OLD BANKS NOT EXEMPTED.

Section 9739 of the General Code stipulating that banks incorporated prior to the passage of section 9764, General Code, might continue business without injury to any rights, powers or privileges theretofore conferred upon them does not have the effect of exempting such banks from maintaining a reserve fund on time deposits as required by section 9764, General Code.

The acts under which such banks were incorporated did not confer a right to remain exempt from such regulations but merely failed to provide for such restrictions.

COLUMBUS, OHIO, September 11, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have received your letter of September 6th, requesting my opinion as to the validity of the claim made by the American Trust & Savings Bank of Zanesville, Ohio. Your statement as to this matter is as follows:

> "The American Trust & Savings Bank of Zanesville, Ohio, possessing the powers of a savings bank, a safe deposit and trust company, dispute the right of this department to require it to maintain a reserve on time deposits as is required by section 9764 of the General Code, claiming that it is exempt from this provision because of the adoption of section 9739 of the General Code."

I call your attention to the following sections of the General Code:

> "Section 9739. Banks, savings banks, saving societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and trust companies, and combinations of any two or more of such corporations, heretofore incorporated under any law of this state, may continue business and the exercise of powers they now have without prejudice to any rights acquired under the acts under which they were incorporated; and there shall be saved to such associations and corporations all the rights, privileges and powers heretofore conferred upon them.
>
> "Section 9741. Banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and trust companies and combinations of any two or more of such corporations, heretofore incorporated in this state which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred by signifying such election and declaration under their seal, attested by the signature of the president and secretary, to the secretary of state, and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all the privileges and powers conferred by this chapter and from that time such association or corporation shall be governed by its provisions.
>
> "Section 9742. Such election and declaration shall be made only

when authorized by a vote of at least two-thirds of the capital stock at a meeting of stockholders, thirty days' notice of which meeting, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where such association or corporation has its principal place of business. But after April 1, 1910, every such corporation or association in all respects must conform its business and transactions to the provisions of this chapter.

"Section 9793. Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section.

"Section 9794. No such association or corporation, may avail itself of any of the privileges or powers conferred by this chapter until it has complied with the provisions of sections ninety-seven hundred and forty-one and ninety-seven hundred and forty-two. No corporation, or association, shall be required to comply with the provisions of this chapter before April first, 1910, but every such corporation and association shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided by law."

I presume the claim of the American Trust & Savings Bank, that you are without authority to require it to maintain a reserve fund on time deposits, as required by section 9764 of the General Code, is based upon the provision found in section 9739, quoted above, that banks incorporated before the passage of the present banking act may continue business and exercise the powers they now have without prejudice to any rights acquired under the acts under which they were incorporated.

The act or acts under which the American Trust & Savings Bank of Zanesville was incorporated did not give it the right or power to invest all of its funds and relieve it from the duty of maintaining a reserve fund. It simply failed to make a provision requiring the maintenance of a reserve fund as required by section 9764. Therefore the requirements of section 9764 as to a reserve fund are not invasions of any rights heretofore acquired by said bank nor are they in any way prejudicial to the same; and taking the other provisions I have quoted, viz: section 9741, which provides that banks heretofore incorporated, when they avail themselves of the privileges conferred by the present act, shall thereafter be governed by the provisions of this chapter, and the provision of section 9742, that after April 1, 1910, every such corporation or association in all respects must conform its business and transactions to the provisions of this chapter; and the provisions of section 9793 that all banking companies and banking corporations existing, chartered or incorporated at the time of the passage of said act, or thereafter incorporated shall be subject to the provisions of this chapter, and the provisions of section 9794, that all such associations or corporations must avail themselves of the provisions of sections 9741 and 9742 before they may have any of the privileges or powers

conferred by the present banking act, it seems beyond question that the American Trust & Savings Bank of Zanesville must comply with the requirements made by section 9764, as it is clearly the intention of the legislature to provide for the proper regulation of savings banks and safe deposit and trust companies as well as all other banking institutions; and section 9764, which simply provides certain regulations for such banks, does not in any way abrogate or interfere with any right it may have, but is a regulation which is intended to, and if enforced, will protect such banks as well as provide for the safety of its depositors.

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

354.

BANKS AND BANKING—INVESTMENTS OF SAVING BANKS IN MORTGAGE OR COLLATERAL TRUST BONDS OF NON-DIVIDEND PAYING COMPANIES.

Under subdivision "A" of section 9765, General Code, and 9758, a savings bank may not invest in mortgage bonds or collateral trust bonds of any regularly incorporated company which has not paid dividends of at least four per cent. upon its capital stock for at least four years.

COLUMBUS, OHIO, September 12, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On July 25th, 1911, you sent me the following inquiry:

> "Please render to me an opinion as to whether or not mortgage bonds or collateral trust bonds of any regularly incorporated company which has not paid dividends upon its capital stock, are legal investments for a *savings* bank?

In answering your question it is necessary to consider the following sections of the General Code of Ohio:

Section 9758, General Code, as amended 102 O. L. 173:

> "Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:
>
> "a. Personal or collateral securities.
>
> "b. Bonds or other interest bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the District of Columbia; also in bonds or other interest bearing obligations of any foreign government.
>
> "c. Bonds of interest bearing obligations of this or any other state of the United States.
>
> "d. The legally issued bonds or interest bearing obligations of any city, village, county, township, school district or other district, or

political subdivision of this or any other state or territory of the United States and of Canada.

"e. Mortgage bonds or collateral trust bonds of any regularly incorporated company, which has paid, for at least four years, dividends at the rate of at least four per cent. on their capital stock. Such loan shall not exceed eighty per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order that any such securities which he deems undesirable be sold within six months.

"f. Notes secured by mortgages on real estate, where the amount loaned thereon inclusive of prior incumbrances does not exceed forty per cent. of the value of the real-estate if unimproved, and if improved sixty per cent. of its value, including improvements, which shall be kept adequately insured. Not more than fifty per cent. of the amount of the paid-in capital, surplus and deposits of such banks at any time shall be invested in such real estate securities."

Section 9764, General Code:

"Savings banks shall keep as a reserve the same percentage of their deposits as commercial banks, subject to the same restrictions as to such reserve, except that one-half of the reserve required to be kept in the vaults of the bank may be invested in the securities named in paragraphs b and c of section ninety-seven hundred and fifty-eight, and the bonds of any city or county within this state. When the reserve of savings banks required to be kept in its vaults exceeds five hundred thousand dollars, the amount in excess thereof may be invested in bonds or other interest bearing obligations of the United States."

Section 9765, General Code:

"A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following:

"a. The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal security shall be upon the notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate, not exceeding thirty per cent. of the capital, surplus and deposits of a savings bank shall be so invested.

"b. Stocks which have paid dividends for five consecutive years next prior to the investment, bonds, and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the

board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"c. Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Section 9764, quoted above, is self-explanatory, and it provides that savings banks must keep as a reserve the same percentage of their deposits as commercial banks, which shall be subject to the same restrictions except that one-half of such reserve fund may be invested in the securities named in paragraphs b and c of section 9758. The percentage of deposits required to be kept by commercial banks is specified in section 9759 of the General Code, and it is unnecessary to consider that subject any further.

Section 9764 also provides when the reserve funds of a savings bank required to be kept in its vaults exceeds $500,000, the amount in excess thereof may be invested in bonds or other interest bearing obligations of the United States. Therefore, this section definitely provides what shall be done with the reserve fund of savings banks, and the investment of the residue of the funds of savings banks, that is, all its capital, surplus and deposits over and above the reserve fund is governed by section 9765. Under subdivision "a" of section 9765 the same may be invested in the securities mentioned in section 9758, "*subject to the limitations and restrictions therein contained,*" and you will find under subdivision "a" of section 9758, quoted above, such investments may be made in "*mortgage bonds or collateral trust bonds of any regularly incorporated company, which has paid for at least four years, dividends at the rate of at least 4% on their capital stock.* * * *"

Therefore, it seems clear that under the provisions of subdivision "a" of section 9765 and its direct reference to section 9758 mortgage bonds or collateral trust bonds of any regularly incorporated company which *has not* paid dividends upon its capital stock, for at least four years, at the rate of at least 4% on its capital stock, are not legal investments for a savings bank.

My attention has been called to subdivision "b" of section 9765, the first part of which said section which is quoted above is as follows: "stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations * * *," the claim being asserted that because there is no limiation or modification of the words, "bonds and promissory notes of corporations" that investments may be made in such bonds or notes whether the company issuing the same has paid dividends as required by section 9758 or not. But I take it that this claim is without foundation for the reason that subdivision "a" expressly refers to the securities mentioned in section 9758 and provides that investments in the same shall be subject to limitations and restrictions contained in said section.

Therefore, the only question to be determined when an investment in certain securities is proposed to be made by a savings bank, is whether or not such securities are named or come under the catalogue of securities given in section 9758. If they do, then by the express provision of the statute they are subject to the limitations of said section; and the bonds and promissory notes referred to in section "b" of section 9765 must necessarily refer to bonds and promissory notes not named in the securities mentioned in section 9758.

I return herewith correspondence of Mr. John C. Shea which you transmitted to me with your inquiry.

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

356.

BANKS AND BANKING—NOTE OF DIRECTORS TO BANK IN CONSIDERATION OF A NOTE FROM THE BANK IS A NULLITY.

When the directors of a bank, in order to make good a loss suffered by it, promise by note to pay $9,000 to the bank and the bank executes a note of the same amount to the directors in consideration thereof, the one obligation is an offset of the other and the transaction amounts to nothing.

COLUMBUS, OHIO, September 12, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am just in receipt of your letter of the 11th, in which you ask my opinion as to whether or not the agreement entered into by the directors of the Orangeville Savings Bank Company (a copy of which agreement you enclose with your letter) is legal and binding upon the said bank. The agreement is:

"In consideration of the payment of nine thousand dollars, receipt of which is hereby acknowledged, the Orangeville Savings Bank Company, by and with the consent of the directors thereof, eight of said directors concurring therein, as per resolution passed by said board of directors this 13th day of January A. D. 1909, agrees to repay E. R. Fell, C. S. Fenton, M. Giltner, A. E. Hunt, E. U. Hyde, Brunell Hull, Chas. Micheltree, J. H. Morrison and J. E. Wade the above named sum, with interest payable annually, same to be paid in such amounts and at such times as the directors may determine, in equal and proportionate amounts to each endorsed on notes given to said bank by the parties above named; and it is agreed and understood that any and all sums that may be realized on a certain note discounted by the bank for R. S. Thomas shall be applied on the above mentioned notes, and also such part of the surplus and profits of the bank as the directors may deem advisable from time to time, or by such other payments as may legally and lawfully be made until said notes are paid in full.

"In witness whereof the authorized officers of the bank have this day affixed their official signatures and the seal of the corporation.

"(Signed) President.....
"Secretary....."

You further state:

"In explanation I beg to say that in January, 1909, certain of the directors of this bank gave their notes aggregating $9,000.00 to make good certain losses of the said bank, with the understanding that the

said directors would be reimbursed out of the earnings of the bank. The said notes of directors being made to mature within one year and now stand past due.

"It transpires that the earnings of this bank have not been sufficient and may not be sufficient to make good any part of the amount covered by the said notes."

From this explanation given by you, supplemented by further verbal information from Mr. Waters, my understanding of the matter is this: That in January, 1909, the Orangeville Savings Bank Company suffered a loss amounting to nine thousand dollars upon some paper which it discounted; there were no surplus funds or undivided profits of the bank out of which to make good this loss; thereupon, in order to cover said loss, the directors mentioned in the said agreement gave their individual notes to the bank aggregating the amount so lost, namely, nine thousand dollars; and thereupon the document, or agreement, which is copied above, was executed by the president and secretary of the bank in order to secure the said directors for their said individual notes so given to the bank. This document is in the form of a non-conditional promise to pay the said directors by the bank the amounts of the respective notes given by the directors to the bank. Briefly stated the situation is this: *The directors promised to pay to the bank nine thousand dollars, and the bank thereupon promises to pay to the directors nine thousand dollars.*

In my opinion, this whole transaction is of no value whatever, especially in view of the fact that the earnings of the bank have not been sufficient to make good any portion of the amount covered by the said notes. If the directors had given their individual notes payable to the bank for the amount of the loss without taking this document from the bank, which, in effect, relieves them from all liability on the said notes, then said notes could be counted as a valid asset of the bank, provided that the makers were good; but with this agreement or promise on the part of the bank to repay to them any amount they paid to it, said notes, in my opinion, are valueless so far as the bank is concerned, as the notes are offset by the obligation of the bank and vice versa.

This agreement on the part of the bank should be rescinded and the notes should be paid or renewed without taking any security from the bank to reimburse the makers of the same, or the amount of the loss should be made good in some other way.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

380.

BANKS AND BANKING—LIQUIDATION BY SUPERINTENDENT OF BANKS—POWER TO KEEP ALIVE CONTRACT SECURITIES TO PRESERVE ASSETS—INJUNCTION.

When certain loans of a bank undergoing process of liquidation by the superintendent of banks are secured by assignments of certain contracts, the superintendent is endowed, under 742-2 of the banking act, with the power to keep alive such contracts by making advancements to the contractors if his best discretion dictates that such act is necessary for the preservation of the securities.

It would be well, however, to seek the approval of the common pleas court for such action under section 742-2 of the aforesaid act. In the event that the court refuses to so assert itself, its power so to do might be tried out by injunction.

COLUMBUS, OHIO, September 20, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of September 20, 1911, in which you state:

> "Among the assets of a bank, which is in the process of liquidation by myself as superintendent of banks, are loans aggregating over $200,000.00 secured only by assignments of contracts, or assignments of retainers held by the county or city. These are all loans made upon contracts for city or county public improvements, and the only way by which these loans can be realized on is by these several contracts being carried through to completion. In many instances, and possibly all, unless these contractors can make arrangements to complete their work and meet their weekly payrolls, including that of this week, complications will certainly follow, and such security as these contracts may now be, will certainly depreciate and possibly be entirely worthless.
>
> "Under the provisions of section 742-2 of the banking act of Ohio, the superintendent of banks is authorized, among other things, 'to do such other acts, as may be necessary, to preserve its assets and business.' The question I wish to submit to you is whether or not I have the authority and discretion, if in my judgment such act is feasible and will be for the interest of the bank, under this act to advance sufficient money out of the general assets of the bank to these contractors in order to keep up their payrolls and complete their contracts.
>
> "If this can be done, I have no doubt that at least some of these contracts held as security may be preserved and carried through to completion, and the loans which they secure, thus paid in full to the bank; if this cannot be done, it is very probable that a part, at least, of these securities will become worthless."

Section 742-2 of the General Code as found in 101 O. L., page 278, is as follows:

> "Upon taking possession of the property and business of such corporation, company, society or association, the superintendent of banks

is authorized to collect money due to such corporation, company, society or association, *and to do such other acts as are necessary to preserve its assets and business*, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The superintendent of banks shall collect all debts due and claims belonging to it, *and upon the order of the common pleas court in and for the county in which the office of such corporation, company, society or association was located, may sell or compound all bad or doubtful debts, and on like order may sell all the real estate and personal property of such corporation, company, society or association, on such terms as the court shall direct;* and the superintendent of banks upon the terms of sale or compromise directed by the court, shall execute and deliver to the purchaser of such real or personal property, such deeds or instruments as shall be necessary to evidence the passing of the title; and if said real estate is situated outside of the county in which the office of the corporation, company, society or association, was located, a certified copy of such order authorizing and ratifying said sale shall be filed in the office of the recorder of the county within which said property is situated; and may, if necessary to pay the debts of such corporation, company, society or association, enforce the individual liability, if any, of the stockholders. The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents, to assist him in the duty of liquidation and distribution—a certificate of appointment to be filed in the office of the superintendent of banks and a certified copy in the office of the clerk of the county in which the office of such corporation, company, society or association was located. The superintendent of banks shall require from such agent or agents such surety for the faithful discharge of their duties as he may deem proper."

It is clearly your duty, under this act, upon taking charge of a bank to collect all the money due to such bank and all claims belonging to it. These collections must necessarily be made in the manner that is most feasible and expeditious. As I understand from the statement in your letter, the claims, or loans, which are represented by these contracts cannot possibly be collected at this time. Money has been advanced by the bank to the various contractors to enable them to carry out these said contracts, when the same will be completed the money so advanced will be repaid to the bank out of the money which the contractors will receive for their work; if the contracts are not completed, the contractors will be liable for the breach thereof and will be paid either nothing at all or an amount far less than the contract price, and the bank will consequently lose all or a part of the money which it has advanced to such contractors. The situation is, therefore, this: If these assets or claims are to be realized upon or collected, the contracts must be kept alive; this can only be done by the bank continuing advancements to the contractors which will enable them to take care of their payrolls and other current expenses necessary in carrying out their contracts.

The same situation exists in case you, as superintendent, wish to sell or compound the claims or loans represented by such contracts. Unless the contracts are kept alive by advancements to the contractors, it would be impossible to either sell or compound them.

As stated above, your duty is to collect all claims and debts due the bank and to preserve its assets and business, and the power given to you by section

742-2 is very broad, especially that clause which authorizes you "to do such other acts as are necessary to preserve its assets and business." There can be no doubt from your statement, as I understand it, that to preserve these particular assets of this bank, it is necessary to advance money out of the general assets of the bank to these contractors. As I understand your letter, unless money is thus advanced, these contracts, and consequently the assets of the bank represented by the loans made upon the said contracts, instead of being preserved, will be partially or totally lost. It, therefore, seems to me that under section 742-2, above quoted, and particularly the clause thereof authorizing you "to do such other acts as are necessary to preserve the assets and business of the bank," you are authorized to advance money out of the general assets of the bank upon these contracts, but this is a matter of discretion—not a mere discretion only, but a matter in which you should act only after making a most careful personal investigation of these contracts, and being firmly convinced that by making such advancements the *assets and business of the bank will be preserved.* It seems to me that in a case of this kind the discretion to be exercised is the highest. It is a matter which vitally affects the interest of all depositors and creditors of the bank. If, after a thorough investigation, it is your best judgment that the bank will be protected, that there is no possibility of a further loss, and that only by so doing you can collect the said loans, then, in my opinion, you are authorized by this act to advance further money upon these contracts.

While it is my opinion, as above stated, that this is a matter for the exercise of your discretion and sound judgment, still as it is a matter of such great importance, I suggest that you might properly bring this matter before the court of common pleas of the county in which such bank is located. You will note the language in section 742-2 which provides that you "may sell or compound all bad or doubtful debts" upon the order of the common pleas court of such county, and I rather think that this language would give the court jurisdiction to make an order in a case of this character. In order for you to sell or compound these claims or debts, the same must be kept alive. They, undoubtedly, fall under the head of "doubtful debts," and, therefore, it seems to me, the power of the court to authorize you to take proper steps to keep them alive would be ancillary to the power of the court to authorize you to sell or compound the same.

If, for any reason, the court should conclude that it was without authority to entertain an application of this character and to make an order as to your duty in the matter, the question could well be raised by an injunction suit brought by some stockholder or creditor of the bank against you in which the allegation, in addition to the ordinary allegations in an injunction petition, would be made that you intended to follow the course outlined above, but that you were without authority so to do.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

412.

BANKS AND BANKINK--BANKING ACTS—APPLICATION TO EXISTING COMPANIES—REQUIREMENT THAT DIRECTORS BE STOCKHOLDERS.

Section 9739, General Code, providing for the continuance of business of all banks formerly incorporated and for the retaining of all rights, powers and privileges of said banks, does not exempt them from the requirements of section 9731, General Code, making it necessary for directors to be holders of at least five shares of stock.

The act of 1908 intended that on and after April 1, 1910, every banking company would be obliged to conform to the provisions of the act of 1908 with the one expressed exception with regard to the increase of capital stock.

COLUMBUS, OHIO, October 6, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—In your letter of September 6th, 1911, you state

> "A certain savings bank maintains that this department has not the right under the law to require that each of its directors shall be the owner and holder of at least five shares of stock as is required by section 9731 of the General Code, claiming to be exempt from this provision because of the adoption of section 9739 of the General Code."

and ask my opinion as to whether or not this claim is well founded.

I wish to refer you to my opinion of September 11th, 1911, rendered to you in answer to your request as to whether or not a savings bank could be required by your department to maintain a reserve on time deposits as is required by section 9764, General Code. The same reasoning applied to that question applies to the question you now ask, as both banks claim that under the provisions of section 9739 of the General Code they are exempt from the requirements and regulations made by other sections of the present banking law as found in 99 O. L., page 269, now incorporated in the General Code as sections 9702, etc.

The opinion of September 11th, above referred to is really decisive of your present inquiry, but it seems best to again go into the matter somewhat more fully than in the former opinion.

It is necessary to consider the following sections of the General Code which were all parts of the act of 1908 as found in 99 O. L., 269, etc.

Section 9727 is as follows:

> "The corporate powers, business and property of corporations formed under this chapter, shall be exercised, conducted and controlled by the board of directors, which shall meet at least once each month. Such board shall consist of not less than five nor more than thirty directors, to be chosen by the stockholders, and hold office for one year and until their successors are elected and qualified."

Then follow sections 9728, 9729 and 9730 providing for the duties and proceedings of boards of directors, and then follows section 9731 which is as follows:

> "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, and at least three-fourths of the directors must be residents of this state."

Section 9739, General Code, is as follows:

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

It is claimed that the provisions of this section exempt banks organized prior to the passage of said act from the requirements of section 9731, above quoted. I further call your attention to the following sections of the General Code which were also parts of said original banking act, viz:

Section 9741, General Code:

"Banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and trust companies, and combinations of any two or more of such corporations, heretofore incorporated in this state, which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred, by signifying such election and declaration under their, attested by the signature of the president and secretary, to the secretary of state and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all the privileges and powers conferred by this chapter, and from that time such association or corporation shall be governed by its provisions."

Section 9742, General Code:

"Such election and declaration shall be made only when authorized by a vote of at least two-thirds of the capital stock at a meeting of stockholders, thirty days' notice of which meeting, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where such association or corporation has its principal place of business. But after April 1, 1910, every such corporation or association in all respects must conform its business and transactions to the provisions of this chapter"

Section 9793, General Code:

"Every banking company, savings bank, savings and loan associations, savings and trust company, safe deposit and trust company,

society for savings, savings society, and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section."

Section 9794, General Code:

"No such association or corporation, may avail itself of any of the privileges or powers conferred by this chapter until it has complied with the provisions of sections ninety-seven hundred and forty-one and ninety-seven hundred and forty-two. No corporation or association, shall be required to comply with the provisions of this chapter before April first, 1910, but every such corporation and association, shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided by law."

From these last quoted sections, especially the language used in section 9739 this intention of the legislature is defeated and different regulations and that the banking business in this state, after April 1st, 1910, should be conducted on a uniform basis, and that all banking corporations in this state after said date should be governed by its provisions and regulations.

The only question to be decided is, whether by the provisions of section 9739 this intention of the legislature is defeated and different regulations and provisions made for the government and management of banks by the act of 1908 can be held to apply only to banks organized after the passage of said act. One phase of this question was raised in the case of the American Trust & Savings Bank Company vs. B. B. Seymour, Superintendent of Banks, Franklin county common pleas court, No. 56258, decided June 26, 1909, the question being as to whether or not a bank existing at the time of the adoption of the act of 1908 could be compelled to increase its capital stock so as to conform to the provisions of section 9704 of the General Code. This case was decided by Judge Bigger, and his opinion, so far as it relates to the question at issue is as follows:

"In construing an act, of course the whole act is to be construed together, so that every possible effect shall be given to all of its provisions, and that one part shall not defeat the operation of another. It seems, from a reading of the act, that sections 2, 18, 35, 36 and 91 are the only sections of the act which refer to the matter, and construing them together, I am of the opinion it does not require banking institutions which were incorporated prior to the passage of the Thomas act to increase their capital stock to comply with the provisions of section 2 of that act

"Section 35 provides that 'all banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and 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 of

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.'

"Section 91 is even more specific. It provides that 'such companies now existing and chartered or incorporated or which may hereafter become incorporated shall be subject to the provisions of this act, provided that no such corporation or association having a less capital stock than the minimum amount provided in section 2 hereof shall be required to increase its capital stock in order to conform to the provisions of that section, but no such association or corporation may avail itself of any of the privileges or powers conferred by this act until it has complied with the provisions of section 36 of this act.' No language could be plainer than this.

"Section 36, which is relied upon as authorizing the defendant to enforce this requirement, does not seem to me, when rightly interpreted, to be in conflict at all with the provisions of sections 35 and 91. Section 36 provides that existing banks may, 'if they so elect,' avail themselves of the privileges and powers conferred by the act. This is optional with existing banks. This section further provides that 'after April 1st, 1910, every such corporation or association shall in all respects conform their business and transactions to the provisions of this act.' It is this language which gives rise to the claim that it is mandatory upon all such institutions after the 1st of April, 1910, to increase their capital stock so as to conform to the provisions of section 2 of the act Construing this language with the provisions of sections 35 and 91, and in the light of the rule which requires that effect be given to all of the provisions of the act and that it shall not be so construed as to make one part defeat another, I am of opinion this provision of section 36 is not susceptible of the construction put upon it by the superintendent of banks. Section 36 provides that when existing banking institutions elect to avail themselves of the provisions of this act, they shall signify their election to the secretary of state and that, when such election is recorded by the secretary of state in his office, such association shall thereafter have all the privileges and powers conferred by the act, and from that time shall be governed by its provisions. The proviso relates to 'every such corporation,' that is, to such existing corporations as elect to avail themselves of the privileges of the act, and it requires them after April 1st, 1910, to conform their business and transactions to the provisions of this act. It is not very clear just why which proviso should have been inserted as the section provides that from the time when the election is recorded, the bank shall be governed by the provisions of this act. But in the light of the plain provisions of sections 35 and 91, I am of opinion the language contained in the proviso must be restricted to such existing institutions as shall elect to avail themselves of its provisions. To give to it the effect claim by the defendant is to defeat the plain and specific provisions of sections 35 and 91, which is not permissible. For these reasons I conclude that the act does not authorize the defendant to make or enforce this requirement against the plaintiff, and it is, therefore, unnecessary to consider the question of the constitutionality of the act."

This decision, of course, is not decisive of the question which you ask. It

relates solely to the application of the capital stock provision of the act of 1908 to corporations organized prior to its passage, the contention of the state being that such banks could be compelled to comply with the provisions of said section in face of the express exception found in section 9793 of the General Code "that no such corporation or association having less capital stock than the minimum amount provided in section 9704 shall be required to increase its capital stock in order to conform to the provisions of such section," and the fact that it was considered doubtful and therefore an opinion of the court was required as to whether or not banks organized prior to the passage of said act could be compelled to comply with the requirement of said act, from which they were by the act itself expressly exempted, shows conclusively that there was no doubt in the mind of any one at that time that such banks must be subject to all the other regulations and provisions from which no exemption whatever was made.

I again quote section 9793 to show the express exemption of corporations organized prior to the act of 1908 from the requirement that they shall have the capital stock specified in section 9704 of the General Code:

> "Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated or which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section."

From this language the conclusion seems to be clear that in all respects (except with respect to capital stock) banking corporations organized prior to the passage of the act of 1908 must conform their business and transactions to the provisions of that act. The meaning of section 9793 is best indicated by reading it in connection with section 9794. Both of these sections were parts of original section 91 of the act of 1908, and said original section 91 (99 O. L. 288) provides in part as follows:

> "Every banking company * * * now existing and chartered or incorporated, or which may hereafter become incorporated, shall be subject to the provisions of this act, provided that no such corporation * * * having less capital stock than the minimum amount provided in section 2 hereof shall be required to increase its capital stock in order to conform to the provisions of that section * * * *and no corporation * * * shall be required to comply with the provisions of sections 1 to 77 inclusive of this act, before April 1, 1910.* * * *"

Sections 1 to 77 inclusive, of said act of 1908 contain section 25, which is now section 9731 of the General Code, requiring that a director must be the owner and holder of at least five shares of stock, etc., and there is no exception as to this requirement, the only exception being as to the increase of capital stock as above pointed out.

Therefore, it seems clear that the meaning of the original act was that on

and after April 1st, 1910, every banking company must conform its business and organization to the provisions of the act of 1908, except the provision in regard to the increase of capital stock. This conclusion is in harmony with the decision of Judge Bigger above referred to, and harmonizes all of the sections of the original act, and gives effect to the clearly expressed intent of the legislature.

I am, therefore, of the opinion that section 9739 does not exempt corporations, organized prior to the act of 1908, above referred to, from the requirements of section 9731 of the General Code.

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

423.

BANKS AND BANKING—STOCK AS SECURITY FOR LOAN—LIEN ON STOCK FOR UNPAID INSTALLMENTS

By provision of section 9717, General Code, a bank has a lien upon stock for unpaid installments thereon. The bank cannot however, by reason of 9761, General Code, obtain a lien upon its stock for any other indebtedness and an indorsement upon shares of stock providing for such a lien is invalid.

COLUMBUS, OHIO, October 15, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 8, 1911, which is as follows:

> "Please advise me as to whether or not in your judgment the following indorsement printed on a stock certificate of an Ohio state bank would be legal and binding upon the holder of said stock:
>
> " 'This company shall have a first and paramount lien upon all shares of stock registered in the name of each stockholder for his debts and liabilities to the company, whether the period of payment or discharge thereof shall have arrived or not, and said lien shall not be impaired by transfer of said stock.'
>
> "Would this indorsement not be conflicting with the provision of section 9761 of the General Code?"

Section 9761 of the General Code, as amended, and now found in 101 O. L. 284, is as follows:

> "No commercial bank, savings bank, safe deposit company or trust company shall loan money on the security or pledge of the shares of its capital stock; nor be the purchaser or holder of any such shares, unless such security or purchase be necessary to prevent loss upon a debt previously contracted in good faith. Stock so acquired, shall within six months from the time of its purchase, be sold or disposed of at public sale on thirty days' notice from the superintendent of banks, and in default thereof the superintendent of banks may forthwith take possession of the property and business of such corporation until its affairs be finally liquidated, as herein provided."

In many of the states the laws expressly give the power to a corporation or bank to have a lien upon all of the stock held by its members, for all debts due from them to such corporation, and it seems to be settled that where, by a general law, a lien is given to a corporation upon its stock, for the indebtedness of the stockholders, it is a valid and enforceable lien. This was decided by the supreme court of the United States in the case of Hammond vs. Hastings, 134 U. S. 401.

But it further seems to be the rule that a bank or corporation has no such lien upon its stock unless the same is authorized by law. As there is no common law lien of this kind, and the policy of the law is to protect the bona fide vendee of shares of stock the courts have held that such a lien must be created by the plain provisions of the statutes or in some statutory authority granted to such companies or banks to pass by-laws providing for such lien. See case of Driscoll vs. the West Bradley, etc., Company, et al., 59 N. Y. 96.

Sections 9716 and 9717 are the only provisions I find in the General Code which even by inference give a bank any authority to assert a lien upon shares of Driscoll vs. the West Bradley, etc., Company, et al., 59 N. Y. 96.

> "Section 9716. The entire capital stock of such corporation shall be subscribed, and at least fifty per cent. thereof paid in before it may be authorized to commence business. The remainder of its capital stock shall be paid in in monthly installments of at least ten per cent. each on the whole amount of the capital, payable at the end of each succeeding month from the time it is authorized by the superintendent of banks to commence business. The payment of each installment shall be certified under oath to the superintendent of banks by the president, secretary, treasurer, or cashier of such corporation.
>
> "Section 9717. When a stockholder or his assigns fail to pay an installment on his stock, as required by the preceding section to be paid, or for thirty days thereafter, the directors for such company may sell his stock at public sale for not less than the amount due thereon, including costs incurred, to the person who will pay the highest price therefor, having first given the delinquent stockholder twenty days' notice of such sale personally or if no personal notification can be given, then by mail at his last known address as appears from the corporate record, and having advertised the sale for a like period in a paper of general circulation within the county in which the corporation is located. If no bidder can be found who will pay for such stock the amount due thereon, with costs incurred, such stock shall be sold as the directors order, within six months for not less than the amount then due thereon with all costs of sale."

And under them it seems clear to me that the bank does have a lien against such shares to the extent of the amount the stockholder has failed to pay an installment or installments due on the same; and to this extent the indorsement to which you refer, and which is set forth in the first part of this opinion, would be valid, as it is authorized by law; but the bank would have a lien, under authority of said sections 9716 and 9717, to the extent of the amount the stockholder has failed to pay an installment or installments due on the same, *without* the indorsement. For any debts, however, due from the stockholder to the bank, except for installments due upon said stock subscriptions, it is my opinion, under the decisions of the courts, that said indorsement would be of no value. To hold that it were good as between the stockholder, to whom

the certificate was issued, and the bank would, in effect, be a violation of section 9761, General Code. To issue the stock with such indorsement thereon and afterward loan the stockholder money, or extend him credit, and by virtue of said indorsement attempt to assert a lien on his stock for the amount of money borrowed or credit extended, would be indirectly loaning money on the security or pledge of the shares of its capital stock, which section 9761, General Code, expressly prohibits.

It is my opinion, therefore, that said indorsement, printed on the stock certificate of an Ohio state bank, would not be legal and binding upon the holders of such stock.

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

A 424.

BANKS AND BANKING—POWERS OF BANKS TO ISSUE PREFERRED STOCK UNDED BANKING ACT—EFFECT OF INCREASE OF CAPITAL STOCK—LEGISLATIVE INTENT—PUBLIC POLICY.

A banking corporation organized under the Thomas law of 1909, *may not in the first instance, have preferred stock, and may not acquire the right to issue such preferred stock by increasing its authorized capital stock.*

The sections of the Thomas act providing for the kind of stock, show the intention that banking corporations were not to have the powers usually incidental to preferred stock issues and generally understood to be essential thereto, such as the power to create voting preferences, the power to redeem stock and the dissolution preferences. Furthermore, the fact that the practice of issuing preferred stock by banking corporations is unusual, supports the assumption that the legislature's silence on the question is expressive of its intention not to provide therefore and this assumption is further upheld because the legislature had its attention called to this question by the existing safe deposit and trust company acts (9838, *General Code*) *and which acts it held in contemplation in creating the Thomas act.*

The question is not whether there would be anything against public policy in permitting the issue of preferred stock, but rather whether public policy demands such a construction.

COLUMBUS, OHIO, October 16, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Hon. James S. Martin, representing the Spitzer, Rorick Trust Company, who encloses a letter from Messrs. Spitzer, Rorick & Co., Toledo, Ohio, and copies of opinions of Messrs. King, Tracy, Chapman & Welles and Marshall and Frazier, attorneys-at-law, Toledo, Ohio. All these papers relate to the question as to whether or not the Spitzer, Rorick Trust Company, not yet fully organized, may lawfully increase its capital stock which is now $300,000 fully subscribed, and in process of increasing acquire authority to issue and dispose of preferred stock. The question arises upon consideration of the following sections of the General Code:

Section 9702:

"Any number of persons, not less than five * * * may associate and become incorporated to establish a * * * bank * * * upon the terms and conditions and subject to the limitations hereinafter by law prescribed."

Section 9703:

"Such persons shall subscribe and acknowledge * * * articles of incorporation * * * which must contain:

"a. The name * * *;

"b. The city, village or township where its principal office is to be located * * *;

"c. The purpose for which it is formed * * *;

"d. The amount of its capital which shall be divided into shares of $100 each."

Section 9704:

"The capital stock of a * * * trust company (shall not be) less than $100,000. * * *"

Section 9710:

"The persons named in the articles of incorporation of any such company * * * shall order books to be opened for subscription to the capital stock of the company in the manner provided for other corporations. An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and an installment of forty per cent. on each share of stock shall be payable as soon thereafter as may be required by the board of directors, the remaining fifty per cent., being payable in the manner hereinafter required."

Section 9714:

"In all other respects (save as mentioned in the statutes quoted and other preceding sections which relate to matters immaterial in this connection) such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

Section 9716:

"The entire capital stock of such corporation shall be subscribed, and at least fifty per cent. thereof paid in before it may be authorized to commence business. The remainder of its capital stock shall be paid in in monthly installments of at least ten per cent. each. * * *"

Section 9717:

"When a stockholder or his assigns fails to pay an installment on his stock * * * the directors * * * may sell his stock. * * *"

Section 9723:

"Hereafter, all corporations incorporated as * * * trust companies * * * shall be incorporated and organized with a capital stock, and under the provisions of this chapter. * * *"

Section 9725:

"*A corporation doing business under the provisions of this chapter may increase its capital stock as provided for other corporations.* * * *"

Section 9726:

"Such a corporation may reduce the amount of its capital stock in the manner provided for other corporations. * * *"

Section 9730:

"In the election of directors, and in deciding questions at meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock held by him. Any stockholder also may vote by proxy duly authorized in writing."

Section 9737:

"The stockholders of such a corporation may provide and determine the conditions upon which shares of its stock shall be assignable and and transferable. * * *"

Section 9738:

"A book shall be provided and kept by every such corporation in which shall be entered the name and residence of each stockholder * * *; also all transfers of stock. * * *"

Section 8667:

"If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash of property."

Section 8668:

"When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent. payable * * * out of the surplus profits of the company * * * in preference to all other stockholders. Such dividends also may be made cumulative."

Section 8669:

"A corporation issuing both common and preferred stock may

create designations, preferences, and voting powers or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par. * * *"

Section 8670:

"Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been exhausted, and then only for such amount as remains unpaid. Such liability in no event shall exceed that fixed by law for the common stock of such corporation."

Section 8671:

"On the insolvency or dissolution of the corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities the full payment of its par value, before anything is paid to the common stock."

Section 8698:

"After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit * * * may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of * * * which has been given by publication * * * and by letter * * *. Or the stock may be increased at a meeting of the stockholders at which all are present * * *; and also agree in writing to such increase * * *. A certificate of such action shall be filed with the secretary of state"

Section 8699:

"Upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock it may issue and dispose of preferred stock in the manner by law provided therefor. Upon such increase * * * a certificate shall be filed with the secretary of state."

Section 8737:

"This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern unless it clearly appears that the provision is cumulative."

The foregoing are all the statutory provisions to which attention should be directed in the consideration of the question as to the right of a bank to

acquire the power to issue and dispose of preferred stock by increase of its capital stock.

I think it is reasonably clear that the right of a banking corporation to acquire the power to issue preferred stock in this manner, is to be determined by the right of such a corporation to have preferred stock in the first instance. If a banking corporation may be originally organized with preferred stock then it would seem to follow that it might acquire such preferred stock through the procedure of increasing the capital stock. If, on the other hand, a bank may not be organized originally with preferred stock then, in my judgment, the power to have preferred stock cannot be acquired by the method of increasing the authorized stock. That is to say, the phrase "as provided for other corporations" in section 9725, General Code, must be deemed to refer to the method by which a banking corporation may increase its capital stock rather than to the kinds of capital stock which may be acquired by increase. Such a phrase cannot be regarded as by implication conferring the right to have preferred stock in the absence of some positive provision of law conferring this right. Instead, therefore, of this phrase having the effect of adopting all of the provisions of the general corporation act relating to increase of capital stock, including both section 8698 and section 8699 above quoted, it has the effect, in my opinion, of adopting so much of those sections, and so much only as is appropriate to the acquisition of the kind of capital stock which a banking corporation might have in the first instance.

Now the right to have preferred stock is not expressly conferred upon banking corporations as such by any provision of the chapter relating to such corporations, which chapter begins with section 9702 above quoted. The right, however, is one conferred upon corporations formed under the general laws by section 8667, etc., supra. The question is, therefore, as to whether under section 8737 and section 9714, above quoted, banking corporations are entitled to issue preferred stock. The substance of these two sections considered together is that wherever a provision of the general corporation act is not inconsistent with any provision of the act relating to the organization and government of banking corporations, or with that act as a whole, such general provisions apply to banking corporations. Phrased in another way, the effect of these two sections is to declare that it is the legislative intent that matters not specifically dealt with by the banking act are to be regarded as covered by the general act. Whenever, then, a question arises as to whether a particular subject has been dealt with by the banking act in such manner as to take it, so to speak, out of the provisions of the general act, such question is again resolved into the further question as to whether it was the intention of the legislature to deal completely with the given subject in the banking act.

If it is apparent from an examination of any or all of the sections of the banking act that its provisions were intended to provide a complete scheme of procedure or power with regard to a given subject matter then, in my opinion, the provision of the general act relating to the same subject matter, or a part of it, must be regarded as "inconsistent" with such provisions of the banking act within the meaning of section 9714 even though they relate to a specific matter not expressly mentioned in the banking sections. That is to say, the mere silence of the banking sections may in logic establish their inconsistency with corresponding provisions of the general act, and it is not necessary in order to establish such inconsistency to find in the banking act a positive prohibition of the exercise of powers referred to in the general act; it is sufficient if the provisions of the banking act may fairly be said to embody a complete scheme of procedure or power with regard to the particular matter under consideration.

Now the exact question is as to the kinds of capital stock which a banking corporation may have. This question is to be answered by an examination of the statutes and not by any supposed considerations of public policy, unless the statutes are so ambiguous as to make necessary recourse to supposed public policy.

Examining the related sections it appears that sections 9702 and 9703, General Code, correspond with sections 8625 and 8626, General Code. I think that it is clear that upon the principles above stated nothing in sections 8625 and 8626 can be held or deemed to apply to banking corporations because sections 9702 and 9703 are a complete substitute, so to speak, for the corresponding sections of the general corporation act so far as banking corporations are concerned.

In like manner section 9730 establishes the legislative policy with regard to the voting power of stockholders, and shows that it could not have been the legislative intention by virtue of section 9714 that a banking corporation should be subject to section 8638, etc., General Code, or that the stockholders of a banking corporation should have the voting rights conferred upon stockholders of a general corporation by section 9636. These matters are mentioned by way of illustration. They do not in themselves relate to the exact question under consideration.

Now section 8667 and section 8684, inclusive, General Code, constitute the provisions of the general corporation act applicable to capital stock. Solely by virtue of these provisions is it possible for any Ohio corporation organized under the general law to have preferred stock.

Section 9704, together with paragraph "d" of section 9703 are the only sections relating to the capital stock of banking corporations. Paragraph "d" of section 9703 corresponds with paragraph 4 of section 8625.

The question is as to whether or not section 9704 is intended as a complete substitute for all the capital stock sections of the general corporation act, and particularly for section 8667 to 8684 inclusive thereof. More accurately stated, however, the question is as to whether all of the provisions of the banking act read together show an intention not to incorporate by reference through section 9714 any of the provisions of the general act relating to capital stock or particularly to preferred stock.

The first phrase of section 8667, General Code, is as follows: "If a corporation be organized for profit it must have a capital stock."

Section 9704 is manifestly a substitute for this provision. It not only requires that banking corporations have capital stock but fixes the amount of capital stock which each class of banking corporations shall have.

Section 8669 provides that:

> "A corporation issuing both common and preferred stock may create * * * voting powers, or restrictions or qualifications thereof, in the certificate of incorporation."

This provision is clearly inconsistent with section 9730, General Code, which fixes the voting power of each stockholder of a banking corporation. If, therefore, a qualified or enlarged voting power be regarded as an essential attribute of preferred stock, this fact would tend to establish the conclusion that the general assembly did not intend that a banking corporation should have preferred stock. At least it is clear that the general assembly did intend that all stockholders of a banking corporation should be on an equality with respect to their voting powers.

Section 8669 also provides that:

"* * * preferred stock may be made subject to redemption at not less than par, at a fixed time and price."

This provision is inconsistent with the whole spirit of the banking sections, and particularly with section 9716, etc., above quoted. It seems to be the intention of the banking act that all the authorized capital of a bank shall be represented by unqualified subscriptions not subject to redemption or cancellation save for the causes mentioned in sections 9717 and 9726. If, therefore, the right of redemption at a fixed time and place is to be considered as an essential attribute of preferred stock, these facts would tend to show that the general assembly did not intend that banks should have preferred stock. At least they establish beyond doubt that the legislature did not intend that any share of stock should be redeemable by virtue of any special contract entered into between a banking corporation and the subscribers or shareholders.

Section 8671, General Code, provides that:

"On the insolvency or dissolution of the corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities, the full payment of its par value, before anything is paid to the common stock."

This seems to be inconsistent with section 9751, which together with other sections provides for the winding up of a banking corporation. It contains the following language:

"* * * The remainder of the proceeds, if any, after the costs and expenses of such proceedings and all debts and obligations of the corporation are satisfied, shall be paid over to the stockholders of the corporation, or their legal representatives or assigns in proportion to the stock by them respectively held."

If then preference to other stockholders, in the event of the winding up of a corporation, is an essential attribute of preferred stock, these facts tend to show that the general assembly did not intend that a banking corporation should have preferred stock; at least they establish the fact that it was the legislative intention that all shareholders should be paid pro rata upon the winding up of the corporation from the assets remaining after the satisfaction of debts and the payment of costs.

There are minor inconsistencies as between section 8667, etc., and the provisions of the banking act applicable to the capital stock of banking corporations. The inconsistency is not complete to be sure. For instance, there is nothing in the banking sections inconsistent with the creation of preferred stock, the holders of which shall have the right to preferred dividends. I think, however, that it may be accepted as self evident that preference in dividends is but one of the attributes of what is ordinarly denominated preferred stock. While it is true that preferred stock is whatever a general corporation chooses to make it—that is to say the preference may be in payment of dividends, in the redemption at par, in the voting power, in payment upon dissolution or in all or any one of these things as the corporation chooses, yet it could scarcely be said that a corporation which was manifestly not intended to have the power to create voting preferences, redemption rights and dissolution preferences could have power to issue "preferred stock" in the full sense of the term.

Now, in the light of these facts, it appears to me that the silence of the banking sections with respect to preferred stock is to be regarded not as evidence of an intention, further evidenced by section 9714, General Code, that as to such stock banking corporations should have the same powers as general corporations. On the contrary these facts impress me as establishing beyond doubt the conclusion that the general assembly did not intend that banking corporations should have preferred stock.

But there are other facts not apparent upon the face of the related statutes which confirm this conclusion. In the first place it is well known that preferred stock in a bank is almost an unheard of thing. If it had been the usual thing for banking corporations to have preferred stock then the silence of section 9704 as to the kinds of stock which a bank might have might have been otherwise construed. Inasmuch as the request of the Spitzer, Rorick Trust Company is so novel, however, I think it may fairly be said that the legislature could not have had in mind the issuance of preferred stock by a banking corporation. And this inference is supported by the provisions of the statutes to which I have referred relating particularly to the cancellation of shares, the voting power of shareholders and the distribution of assets upon dissolution. These provisions were all enacted by a legislature, to the members of which, the idea that a bank should have preferred stock never occurred.

There is still another consideration, however, which impels me to the conclusion which I have reached. The old law still in force as to existing corporations, which provides for the organization of safe deposit and trust companies, expressly authorized the issuance of preferred stock by such corporations. See section 9838, General Code. The banking act of 1909 was passed in contemplation of this existing statute, and of the other statutes relating, for example, to savings and loan associations, collateral loan companies, title guarantee and trust companies and free banks. Such other statutes not only did not provide for preferred stock but contain provisions similar to those above quoted from the banking act of 1909 quite inconsistent with the idea of preferred stock.

It would seem, therefore, that in passing the so-called Thomas banking act, the legislature must have had its attention called to this very question, and that in the light of such a state of facts its silence with respect to preferred stock can only be regarded in the light of withholding from corporations to be created under that act the power to have such preferred stock.

I have read with interest the able opinion submitted to me by the Spitzer, Rorick Trust Company. These opinions all assume that there is nothing in the banking sections inconsistent with the idea of preferred stock. This assumption, however, is manifestly incorrect for reasons that I have already pointed out. Stress is also laid upon the point that public policy does not demand that corporations be denied the power to issue preferred stock. This is probably true. The question, however, is not whether or not public policy is opposed to the existence of the power, but rather whether or not public policy requires that the power be held to exist. If the power exists at all, it exists by implication, for section 9714 is not in itself an express authorization of the power. In seeking for implied meaning of statutes, non-existence of the rule of public policy *forbidding* the implication would seem to be of no assistance one way or the other. While, therefore, I agree with eminent counsel who have considered this matter upon the point that public policy is not opposed to the existence of the power to issue preferred stock in a banking corporation under the Thomas act, yet I feel constrained to remark that I know of no public policy which requires that the related statutes should be construed so as to confer the power upon such corporation. It seems to me that public policy is

quite immaterial in connection with this question. Corporations have such powers, and such only as are expressly, or by necessary implication, conferred upon them by statute. The policy of the state, with respect to corporate power, is then to be found in its statutes. The statutes under consideration, being statutes relating to the formation of banking corporations, contain several provisions inconsistent with the statutory power existing in favor of general corporations to issue preferred stock. Therefore, the existence of such power is to be denied, although an opposite holding might not affect the rights of depositors or other creditors.

For all of the foregoing reasons then, I am of the opinion that a banking corporation organized under the Thomas law of 1909 may not in the first instance have preferred stock, and may not acquire the right to issue such preferred stock by increasing its authorized capital stock.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

441.

BANKS AND BANKING—DEPOSITS IN LIQUIDATED BANK COVERED BY SECURITIES—POWER OF SUPERINTENDENT TO PAY DEPOSITS TO SAVE LOSS ON SECURITIES.

When there is on deposit in a bank undergoing liquidation, funds of a city which are secured to said city by bonds of a higher value than the deposits, the superintendent under authority given by act of May 10, 1910, *"to do such other acts as are necessary to preserve its assets and business" may pay such deposits and redeem the securities if by so doing he can prevent a loss to the bank which would occur by reason of the forced sale of said securities at a sacrifice.*

COLUMBUS, OHIO, October 31, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 3d, which is as follows:

> "The Guaranty Savings Bank & Trust Company of Mt. Vernon was closed by this department on July 29th. There is on deposit in this bank Mt. Vernon city funds amounting to approximately $60,000.00, secured by certain bonds belonging to the said bank. The city is in need of funds for payroll, pavment of interest on outstanding indebtedness and for the redemption of certain of its bonds matured upon August 1st.
>
> "In view of the likelihood of the securities pledged to the city being seized and sold to satisfy its claim, and the further likelihood of a sacrifice in value if this is done, I would like to inquire of you as to whether or not I have the right to satisfy the claim of the city and thereby secure the release of the securities pledged, as soon as I am able to realize upon the assets of the bank, or whether such claim of the city must stand and be paid under the same process as other depositors."

In a case of this kind, when there are sufficient funds on hand to pay a depositor, whose deposit has been secured by the bank pledging bonds or other security, belonging to it, with the depositor, and the bonds or securities so pledged are worth more than the amount due the depositor who holds them, and who has the right, in case of the failure of the bank to pay the deposit—to dispose of the said bonds and securities, thereby occasioning a loss to the bank, it is my opinion that, under section 742-2 of the act of May 10th, 1910 (101 O. L. 278), the first sentence of which is as follows:

> "Upon taking possession of the property and business of such corporation, company, society or association, the superintendent of banks is authorized to collect money due to such corporation, company, society or association, and do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. * * *"

you have the right and it is your duty to satisfy the claim of the depositor and obtain possession of the bonds or securities belonging to the bank, if by so doing you can prevent a further loss to the bank which would occur if the depositor sold said bonds or securities at a sacrifice in order to satisfy its claim.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

443.

BANKS AND BANKING—DUTY OF DIRECTORS TO MAKE REPORTS—PERSONAL LIABILITY—DUTY OF SUPERINTENDENT TO ENFORCE—STATUTORY PENALTIES.

Failure of directors of a bank to make a report of "examining committee" as provided in section 9736, General Code, is not within the penalty prescribed by section 7419, General Code, for failure to make certain reports. Such an act however, is a violation of duty on the part of a director which would make him liable for any loss suffered by reason thereof. It is the duty of the superintendent of banks furthermore, to enforce such duties and to remove those who violate them.

COLUMBUS, OHIO, October 31, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of October 28th, in which you request my opinion as to the following:

> "Section 741 of the General Code provides a penalty for the failure of a bank to make certain reports to this department. Please advise me as to whether or not in your opinion this penalty could be applied to a bank failing to make report of 'examining committee' as required by section 9736."

Section 741 of the General Code must be read in connection with section

737 as it is for the failure to make the reports required by section 737 of the General Code that a penalty was provided by section 741. Section 737 of the General Code is as follows:

> "Not less than four times during each calendar year each banking company, savings bank, savings and trust company, safe deposit and trust company, society for savings, or savings society, chartered or incorporated, under any law of this state, and every person or copartnership doing a banking business shall make a report to the superintendent of banks. Such reports shall be made at such times as required by the superintendent on forms prescribed and furnished by him, and, so far as possible, they shall be made on the same day on which reports are required from national banking associations by the comptroller of the currency."

Section 9736 of the General Code is as follows:

> "A committee of at least two directors or stockholders annually shall be appointed by the board of directors to thoroughly examine, or to superintend the examination of, the assets and liabilities of the corporation, and to report to the board of directors the result of such examination. A copy thereof attested and verified under oath by the signatures of a majority of such committee forthwith shall be filed with the superintendent of banks."

It will be readily seen that the report required by section 9736 is entirely different from any of the reports required by section 937 and, therefore, the penalty provided by section 741 cannot be inflicted for failure to make the report required by section 9736.

Section 9732 of the General Code is as follows:

> "Every director shall take and subscribe an oath that he will diligently and honestly perform his duties in such office, not knowingly violate, or permit to be violated, any provisions of this chapter, and that he is the owner in good faith of the number of shares of stock of the company required to qualify him for such office, standing in his own name, on its books."

This section requires every director of a bank to take the most solemn obligation known to law that he will *diligently and honestly perform the duties of his office and not knowingly violate, or cause to be violated any of the provisions of the chapter of the General Code governing the organization and powers of banks.*

Section 9736 of the General Code, quoted above, imposes the statutory duty upon directors of banks to appoint the committee specified therein, and it requires a copy of the report made by such committee to be filed with the superintendent of banks. This section is mandatory and if the directors of the bank fail to comply with it, they not only violate the oath which they have taken, but they also fail to comply with the positive provisions of the statute enacted in the interest of safety of all the depositors and stockholders of the bank. In my judgment, the directors who fail to perform these duties would be individually liable in case of loss to any stockholder of the bank by reason

of their neglect, either knowingly or unknowingly, to comply with the provisions of this section.

In addition to this, as the General Code casts upon you the duty of executing the laws of this state in relation to banks, it is your duty to see that these provisions of the statute are complied with, and upon a failure of the directors of any bank to obey your orders in this respect, then to institute proper proceedings against the said bank or against its offending directors to compel them to comply with the law.

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

445.

BANKS AND BANKING—LIMITATION OF LOANS—SECURITIES ENUMERATED.

A loan made upon the securities specified in section 9758, *General Code, is invalid, if by reason of its being in excess of* 20% *of the capital stock and surplus of a bank, or for any other reason it is made contrary to section* 9750, *General Code.*

COLUMBUS, OHIO, October 31, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 11th, in which you ask as follows:

> "Please inform me as to whether or not in your opinion a loan which is in an amount in excess of 20% of the capital stock and surplus of a bank and is secured by obligations enumerated in paragraphs b, c and d of section 9758, is an excessive loan within the meaning of section 9750 of the General Code. It is clear to me that there is no limit placed by the law upon an investment in the securities named, but it is not altogether clear that a loan secured by such securities is exempt from the 20% limit."

Section 9754 of the General Code (I take it that this is the section to which you refer instead of 9750) is as follows:

> "A bank doing business as a commercial bank, shall not lend, including overdrafts, to any one person, firm or corporation, more than twenty per cent. of its paid-in capital and surplus, unless such loan be secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent. of its value. The total liabilities, including overdrafts, of a person, company, corporation, or firm to any bank, either as principal debtor or as security or indorser for others, for money borrowed, at no time shall exceed twenty per cent. of its paid-in capital stock and surplus. But the discount of bills of exchange drawn against actually existing values, and the discount of commercial or

business paper actually owned by the person, company, corporation or firm negotiating it, shall not be considered as money borrowed."

It is clear to me that this section is purposely made as broad as possible so as to include in its prohibition *all loans*, whether made to persons, firms or corporations, regardless of the manner in which said loans are secured.

Section 9758 of the General Code, as amended 102 O. L., 173, is as follows:

"Section 9758. Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:

"(A) Personal or collateral securities.

"(B) Bonds or other interest bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the District of Columbia; also in bonds or other interest bearing obligations of any foreign government.

"(C) Bonds of interest bearing obligations of this or any other state of the United States.

"(D) The legally issued bonds or interest bearing obligations of any city, village, county, township, school district or other district, or political subdivision of this or any other state or territory of the United States and of Canada."

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

(I do not copy divisions (e) and (f) of this section as they have no reference to your inquiry).

In my opinion, this section does not in any way affect the limitations prescribed by section 9754, and in case any of the securities mentioned in section 9758 are offered as securities for a loan, that fact would not exempt the said loan from being classed as excessive under section 9754 if it exceeded in amount 20% of the paid-in capital and surplus of the bank making the loan.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 447.

BANKS AND BANKING—FOREIGN TRUST COMPANIES—POWER OF SUPERINTENDENT OF BANKS TO ISSUE CERTIFICATES.

Under section 9715, General Code, the superintendent of banks is empowered to issue certificates to foreign trust companies when they have complied with all legal requirements, with particular attention to those of section 9778, General Code.

COLUMBUS, OHIO, November 2, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of July 21st, which is as follows:

"It has been the practice of this department to issue certificates to foreign trust companies authorizing them to accept and execute

trusts in this state, in accordance with section 9778 of the General Code. The question has arisen as to whether or not this department has authority to issue such certificates, and if such deposit with the state treasurer as provided in said section 9778 is not sufficient without any action of this department. It was held by my predecessor, Mr. Seymour, that the superintendent of banks being charged with the execution of the banking laws of the state made it his duty to issue such certificates.

"Kindly render me an opinion on this question at your early convenience, and oblige."

Section 9778, General Code, provides as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid-in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

Section 178, General Code, provides for the issuance by the secretary of state of a certificate to a foreign corporation, authorizing it to do business in this state. This section is as follows:

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

You will note that by said section, banking corporations are expressly exempted; therefore, as it is the policy of this state not to permit foreign corporations to transact business in this state until they obtain authority from the proper source so to do, we must look elsewhere for this authority.

Trust companies are classed as banking companies, under the General Code (see section 9702), and, therefore, foreign trust companies would also come under this class.

Section 9715, General Code, is as follows:

"No such corporation shall transact business except such as is

incidental and necessarily preliminary to its organization, until it has been authorized by the superintendent of banks."

Clearly, under this section, no domestic trust company can transact business until it has been authorized so to do by the superintendent of banks.

Section 9778, above quoted, makes a definite requirement to be exacted from a foreign trust company before it can be authorized to do business in this state; and as section 711, General Code, which is as follows:

> "The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations."

definitely states your duties to execute the laws of the state relating to the companies named therein it seems to me that, taking all the above quoted sections together, you, as superintendent of banks, should issue these certificates when the requirements of the statutes have been met.

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

463.

BANKS AND BANKING—POWER OF SAVINGS BANKS TO INVEST IN MORTGAGE OR COLLATERAL TRUST BONDS OF NON-DIVIDEND PAYING COMPANIES—REVERSAL OF FORMER OPINION.

Under subdivision of section 9765, General Code, a savings bank may invest in bonds and notes of corporations regardless of their dividend paying qualities when such action is authorized by a majority vote of the entire membership of the board or by an affirmative vote of the executive committee of such savings bank.

COLUMBUS, OHIO, November 13, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On July 25th, 1911, you made the following request for an opinion:

> "Please render to me an opinion as to whether or not mortgage bonds or collateral trust bonds of any regularly incorporated company which has not paid dividends upon its capital stock, are legal investments for a *savings* bank?"

On September 12th, 1911, I answered your request and said therein:

> "Therefore, it seems clear that under the provisions of subdivision "a" of section 9765 and its direct reference to section 9758 mortgage bonds or collateral trust bonds of any regularly incorporated company

which *has not* paid dividends upon its capital stock, for at least four years, at the rate of at least 4% of its capital stock, are not legal investments for a savings bank."

Some time ago the law firm of Sirs Blandin, Rice and Ginn, of Cleveland, asked me to reconsider the former opinion upon the ground that I had read something into the statute that was not there, and that, therefore, the conclusion to which I had come in that opinion was wrong. On account of the views entertained by Sirs Blandin, Rice and Ginn, and their high standing as attorneys, both in respect to distinguished ability and high integrity, I have most carefully reconsidered the former opinion, copy of which I attach hereto for your convenience.

It may not be out of place to say that, although we are constantly overwhelmed with work, no opinion leaves the department unless after the most careful consideration and in case of doubt the entire office force is generally consulted. However, we are not inerrant. The most careful tribunals have sometimes to reverse themselves. Notwithstanding that our department has given out almost seven hundred opinions since January 9th, this is the first instance in which I find it necessary to reverse a former opinion, but I feel bound in duty so to do.

I have trespassed thus long in this opinion upon your valuable time in order to explain that it is with regret that the slightest error should creep into any opinion issued by this department.

Reverting now to the question, subdivision (e) of section 9756 is as follows:

"*Mortgage bonds* or *collateral trust bonds* of any regularly incorporated company, which has paid, for at least four years, dividends at the rate of at least four per cent. on their capital stock. Such loan shall not exceed eight per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order that any such securities which he deems undesirable be sold within six months."

The first paragraph of section 9765-a is as follows:

"A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following: (being subdivision "a" of section 9765)."

"The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. * * *"

It will be seen that up to this point, under subdivision (a) of section 9765, a savings bank may invest in mortgage bonds or collateral trust bonds of any

regularly incorporated company upon exactly the same terms as commercial banks. This would require as to mortgage bonds or collateral trust bonds that they shall have paid for at least four years' dividends at the rate of at least four per cent. on their capital stock. Such loans further shall not exceed eighty per cent. of the market or actual value of such bonds; and further the purchase of same shall have been authorized by the directors. This authority could be conferred by a majority of a quorum of a board of directors, and should a savings bank desire to proceed under subdivision (e) of section 9758, it would, of course, be governed by the limitations and restrictions of subdivision (e).

However, I believe this does not exhaust their power so far as bonds and promissory notes of the corporation are concerned. Corporations may proceed under subdivision (b) of section 9765 wholly independent of any provisions in section 9758. Subdivision (b) of said section 9765 is as follows:

> "Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations, *when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank.* * * *"

To invest in bonds and promissory notes of corporations under this subdivision, it will be noticed, requires an affirmative vote not of a majority of a quorum of the directors, but of a majority of the board of directors, or an affirmative vote of the executive committee of such savings bank. The authority behind bonds and promissory notes of corporations mentioned in subdivision (b) of section 9765 is not identical with the authority required to authorize a loan based on mortgage bonds or collateral trust bonds of subdivision (e) of section 9758.

I am, therefore, of the opinion that bonds without any further limitation or restrictions, provided they be of corporations, are legal investments for savings banks, provided they be purchased agreeably to subdivision (b) of section 9765, and in order that they be legal subjects of purchase, it is not necessary that they be the bonds of regularly incorporated companies which have paid dividends upon their capital stock.

I regret to come to this conclusion because I can hardly understand the legislative intent for requiring dividend paying qualities in one case and not in the other when the differences in the two provisions as to authorizing the purchase are practically immaterial. However, in interpreting a statute we must gather its meaning and not be governed too much by what is sometimes called "its spirit." This is well illustrated by what Judge Hitchcock says in the case of State ex rel. vs. Cincinnnati et al, 19 Ohio Reports, 197:

> "We may all agree as to the reading of the constitution, and generally as to its meaning, but when we come to talk of its spirit, it is a different matter. There is great danger that we shall conclude the spirit to be in accordance with our preconceived opinion or feelings of what it ought to be."

Therefore, permit me to conclude by advising that you be governed by this opinion henceforth upon the question at hand in lieu of the opinion of September 12, 1911.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

478.

BANKS AND BANKING—TRUST COMPANIES—STATUTORY REQUIREMENTS—CERTIFICATION OF BONDS, ETC.

A trust company is prohibited from certifying to any bond, note, or other obligation to evidence debt, received by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part within this state until it has complied with the requirements of sections 9778 and 9779, General Code.

COLUMBUS, OHIO, November 21, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Replying to your communication of November 6, 1911, wherein you state:

> "Please render me an opinion as to whether a trust company accepting a trusteeship under a mortgage and certifies to the bonds as being the correct bonds covered by the trust mortgage, shall be required to deposit cash or bonds with the treasurer of state as required by sections 9778-79-80.
>
> "This inquiry is made by a newly organized trust company which claims that there is no responsibility attached to the certificate of the said bonds."

Section 9778, 9779 and 9780 of the General Code provides as follows:

> "Section 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or transmitted to it by an individual, or court, until its paid-in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent on its common stock.
>
> "Section 9779. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as its continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposits as herein provided."
>
> "Section 9780. No such corporation, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning, property located wholly

or in part in this state without comply with the provisions of this and the two preceding sections. Any trust, deed or mortgage given or taken in violation of the provisions thereof shall be null and void."

The provisions of section 9780 seem to be plain and comprehensive and, in my opinion, a trust company authorized to accept and execute trusts, is prohibited from certifying to *any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning, property located wholly or in part in this state until it has complied with the provisions of sections 9778 and 9779, above quoted.*

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

481.

BANKS AND BANKING--SUPERINTENDENT OF BANKS—POWERS OF DEPUTY SUPERINTENDENT OF BANKS.

Special deputy superintendent of banks appointed under section 742-2, General Code, to act as agent to assist the superintendent in the duty of liquidation and distribution should not be employed as attorney for the superintendent, within the scope of his official duties.

Matters requiring the services of an attorney should under section 333, General Code, be referred to the attorney general, who may then authorize the special deputy so to act.

COLUMBUS, OHIO, December 2, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your favor of October 31st, 1911, which is as follows:

"Section 742-2 of the General Code provides as follows:

"'The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents to assist him in the duty of *liquidation and distribution.*'

"Please advise me as to whether or not, in your opinion, such duly appointed special deputy can also act as attorney for the department in such suits as may be brought for the purpose of protecting and preserving the assets of the bank in process of liquidation in his hands."

There is no provision of the General Code which would inhibit the person appointed by you as agent to assist in the duties of liquidation and distribution, as provided in section 742-2 of the Code, from also acting as attorney for you in any matters connected with the liquidation of the bank, on account of his acting as such agent, but I fail to find any provision of the General Code which

directly authorizes you to employ an attorney, although the first sentence of section 742-4, which is as follows, seems to *imply* that you have such authority:

> "Section 742-4. The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation."

I wish, however, to call your attention to the following sections of the General Code, namely; 732, 333 and 336:

> "Section 732. All suits or proceedings brought by the superintendent of banks under authority of law, or to collect any penalty or forfeiture, shall be brought in the name of the state upon his relation, and shall be conducted under the direction and supervision of the attorney general.
>
> "Section 333. The attorney general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime.
>
> "Section 336. If, in his opinion, the interest of the state require it, the attorney general may appoint special counsel to represent the state in civil actions, criminal prosecutions or other proceedings in which the state is a party or directly interested. Such special counsel shall be paid for their services from funds appropriated by the general assembly for that purpose."

In the absence of *expressed* authority, section 333 of the General Code would control. I would, therefore, suggest that in cases where it is necessary for you to have the services of an attorney in the liquidation of banks, or otherwise, you so report to me, giving me the name of the specially appointed agent or deputy whom you wish to act as deputy, so I can authorize him to act. His fees, of course, would be paid as provided by section 742-4 of the General Code.

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

498.

BANKS AND BANKING—INSOLVENT BANK—CREDITORS OF—INTEREST ON ACCOUNTS.

Creditors of a bank in process of liquidation by the state superintendent of banks, are entitled to legal interest on book accounts from the date of suspension of payment.

The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors.

COLUMBUS, OHIO, December 21, 1911.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 13th, in which you ask whether the creditors of a bank, which is in process of liquidation by your department, are entitled to interest on their claims at the rate of six per cent. per annum.

I think the following quotation from the opinion of Mr. Justice Matthews, in the case of Richmond et al vs. Irons et al, 121 U. S. 27, will answer your question:

> "In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors. * * *"

The point being decided in this case, in which the above quoted language was used by the court, was as to the stockholders' liability for interest, but the quotation expresses the view I take of this matter.

I note that you are very anxious to have this opinion at as early a date as possible, and I should have answered your request immediately, but when it was received I was so busily engaged in the preparation of the case involving the constitutionality of the act creating the state liability board of awards that it was simply impossible for me to consider any requests for opinions until now.

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

(To the Superintendent of Insurance)

A-219.

FIRE INSURANCE CORPORATIONS ORGANIZED PRIOR TO CONSTITUTION—POWER TO ADOPT EXISTING STATUTES—POWER TO AMEND ARTICLES OF INCORPORATION—OHIO FARMERS INSURANCE COMPANY.

Section 8732, General Code, giving corporations created before the adoption of the present constitution, the right to adopt the provisions of existing statutes under this title, extends such right to the adoption of those provisions only which are not inconsistent with the original charter of the corporation making the adoption. Therefore, the Ohio Farmers Insurance Company, chartered for the purpose of insuring farms against loss by fire by adopting section 9510, General Code, cannot acquire the power to conduct a marine insurance. The adoption of section 9556, however, which confers upon all fire insurance companies the right to insure against lightning, explosions, gas, dynamite, gunpowder, etc., extends such rights to aforesaid corporation.

Such corporation may acquire the right to engage in marine insurance only by amending its articles of incorporation, under section 8719, General Code.

COLUMBUS, OHIO, April 12, 1911.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 31st, 1911, requesting my opinion as to the power of the Ohio Farmers Insurance Company, under the provisions of its charter, and under the provisions of section 9510 of the General Code adopted by it; and also your letter from Mr. Elliott, containing the following statement of facts, upon which your request is based:

> "The Ohio Farmers Insurance Company of Leroy, Ohio, was incorporated and commenced business in 1848 under a special act of the general assembly of Ohio passed February 8, 1848, authorizing it to insure farmers' property against loss by fire, etc. At the annual meeting of the members of the company in January, 1911, a resolution was passed adopting sections 9510, 9511 and 9556 of the General Code of Ohio.
>
> "On the company applying for admission to do business in the state of New York the question was raised as to whether or not, by the adoption of section 9510 the company is not now authorized to do ocean marine insurance as well as fire.
>
> "The company has never done any business other than that of insuring against fire, etc., and has never claimed or sought the right to do any other class of business, and section 9510 was adopted only with a view that the company's charter would be amended by the adoption of this section only so far as to remove the charter restriction to insurance of farm property and permit it to insure all kinds of property against loss or damage by fire."

From this letter it will appear that this company was originally chartered in 1848, and consequently prior to the adoption of the present constitution, and

that it was chartered for the purpose of insuring farm property against loss by fire; that it has never done any business other than that of insuring against fire, and has never claimed or sought the right to do any other class of business, and that the only additional power sought by it by the adoption of section 9510 was the right to insure all kinds of property against loss by fire instead of being restricted to writing insurance upon farm property only.

The first subdivision of section 9510 of the General Code (which is the only subdivision necessary to consider in answering your inquiry) is as follows:

> "A company may be organized or admitted under this chapter to—
> "1. Insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, on land, water, or on a vessel, boat or whatever it may be."

Section 9556 of the General Code is as follows:

> "All companies organized for the purpose of insuring against loss or damage by fire, may insure against loss or damage by lightning, explosion from gas, dynamite, gunpowder, and other like explosions and tornadoes."

Section 8732 of the General Code expressly provides that a corporation created prior to the adoption of the present constitution, and now actually doing business, may accept any of the provisions of title 9, governing private corporations, and is as follows:

> "A corporation created before the adoption of the present constitution, and now actually doing business, may accept any of the provision of this title. When a certified copy of such acceptance is filed with the secretary of state, so much of its charter as is inconsistent with the provisions of this title is hereby repealed."

My opinion is that said section expresses its purpose plainly, and that it was passed for the purpose of giving corporations which were in existence prior to the passage of the general corporation act the right to adopt any of the provisions of the title applicable to it and to continue doing business as if incorporated under the new act, but that in no sense could it be considered as giving any corporation the power or authority, simply by adopting some provision of the title to obtain powers or rights inconsistent with the powers granted by its original charter.

Therefore, it seems to me that the Ohio Farmers Insurance Company by adopting section 9510 simply adopted so much of said section as was applicable to it, and was not inconsistent with its original charter, and therefore that in its adoption of said section, it simply acquired the power, "to insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes," as this is entirely consistent with its original charter and is perfectly proper.

And it is further my opinion that it cannot by adopting said section, even though it sought to do so, acquire the power to insure merchandise and other property in the course of transportation on land or water, in other words, marine insurance, as this would be inconsistent with its original charter. If

it sought to obtain this power the statutes provide how the same may be obtained, which would be by amendment of its articles of incorporation. See section 8719, General Code:

> "A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> "1. So as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public.
>
> "2. So as to change the place where it is to be located, or its principal business transacted.
>
> "3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.
>
> "4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

Now, it cannot possibly be held that the legislature intended to give a corporation organized prior to the adoption of the present constitution the power to change the purpose for which it was organized by simply adopting some provision of the corporation act, while corporations organized subsequently were required to proceed in a manner designated by statute.

Section 9556 of the General Code, which is as follows:

> "All corporations organized for the purpose of insuring against loss or damage by fire, may insure against loss or damage by lightning, explosions from gas, dynamite, gunpowder, and other like explosions and tornadoes."

in my judgment makes it conclusive that all the Ohio Farmers Insurance Company adopted when it adopted section 9510 was the first part of the first subdivision of said section, to wit: "insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning and tornadoes," and that said section 9556 definitely restricts companies organized for the purpose of insuring against loss or damage by fire to such purposes as therein expressed, and that to obtain the power "to make all kinds of insurance on goods, merchandise and other property in the course of transportation, on land, water, or on a vessel, boat or wherever it may be," if such power could be given to a company organized for the purpose of insuring against loss by fire (which I consider extremely doubtful) would require, at least, that the charter or articles of incorporation of said company be amended as provided by law.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

249.

INSURANCE ASSOCIATIONS, FIRE—ASSESSMENTS ON DEPOSIT—EFFECT OF LAW NOT RETROACTIVE—BUCKEYE FIRE INSURANCE ASSOCIATION AND CENTRAL FIRE INSURANCE ASSOCIATION.

Fire insurance associations organized under original section 9593, General Code, had the right to receive deposits in advance and make assessments upon such deposits. The amendment to section 9593, 101 O. L. 294, does not permit this right to associations organizing thereunder. The effect of the amendment is not retroactive however, and therefore does not take away such right from associations formed under the original section.

COLUMBUS, OHIO, May 11, 1911.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On January 28th, 1911, your predecessor, Hon. Charles C. Lemert, sent to this office the following communication:

> "I am enclosing herewith copies of reports of examination of the Buckeye Fire Insurance Association and the Central Fire Insurance Association of Cincinnati.
>
> "These associations were organized under section 9593 of the General Code. Will you please advise me in view of the amendment to section 9593 of G. C. as approved May 17th, 1910, whether these associations are permitted to receive deposits in advance and make assessments on and pay them from such deposits."
>
> * * * * * * * * * * * * * * *

In response to this inquiry one of my office force at that time, advised the superintendent of insurance verbally that under section 9593 of the General Code, the Buckeye Fire Insurance Association of Cincinnati, and other like associations, were not authorized nor permitted to receive deposits in advance and make assessments and pay them from the said deposits.

Accordingly, upon this advice, the superintendent of insurance refused to issue a license to the Buckeye Fire Insurance Association. No formal written opinion has been handed down in reply to this letter, and the matter has again been called to my attention. I have now given it careful consideration and I am of the opinion that the former advice given to the superintendent of insurance was wrong and inadvertently given upon the assumption that these associations were formed under section 9593, G. C., as it now stands, as amended in 101 O. L., page 294.

These companies were not organized under 9593 as it now stands, but they were organized under said section as it stood prior to the amendment. (See sec. 3686, R. S.)

The right to receive deposits in advance and make assessments as they have been doing under said section 3686, R. S., was questioned in the case State of Ohio vs. the Ohio Fire Insurance Association. That case was decided in favor of the said company by the circuit court of Hamilton county, and afterwards confirmed without report by the supreme court, the circuit court holding that the collection by the defendant corporation from its members of certain sums of money in advance of any loss it might sustain and assessments made therefor, whether done directly by the company or through a trustee, is authorized by section 3686.

Therefore, the court having decided that such companies have this right, under section 3686 under which they were organized, the only question to be determined is whether the amendment of May 18, 1910 (101 O. L. 294) abrogates this right. This act amending section 9593, G. C. (section 3686, R. S.), is as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owning insurable property in this state may associate themselves together for the purpose of insuring each other against loss by fire, and lightning, cyclones, tornadoes, or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any members of such association.
>
> "The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association, which shall require such assessments to be made directly and specifically upon the members and to be paid directly and specifically by them and not out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner except that any such association may borrow money for the payment of losses and expenses, such loans not to be made for a longer period than the collection of their next assessment; and such association may also accumulate a surplus from its assessment not exceeding $2 for each $1,000 of insurance in force, such surplus to be used in paying losses and expenses that may occur and if invested to be under the provisions of sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code.
>
> "Such associations may also insure farm buildings, detached dwellings, school houses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality; provided that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined to any particular kind or description of property may insure property classed as extra hazardous and located in any county or counties in this state."

It seems to me to be beyond question that this act as it now stands simply applies to companies organized under it subsequent to May 18, 1910. Nowhere in it do I find any inhibition by direct terms or by implication against companies organized under the section as it stood prior to the amendment from doing business as the court held they were authorized to do under said section. Therefore, it is my opinion that in the absence of such expressed or implied inhibition and in the absence of any attempt, expressed or implied, to make this amendment retroactive so as to reach companies organized under the section as it stood prior to the amendment, that it does not affect said companies and only applies to companies organized after May 18, 1910.

I, therefore, recommend that license issue to the Buckeye Fire Insurance

Association and the Central Fire Insurance Association of Cincinnati if this be the only reason that would prevent your department from issuing such license.

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

B 277.

INSURANCE COMPANIES—TRADING STAMP AND REDEMPTION BUSINESS—INDEMNITY CONTRACT—THE CONSUMERS REDEMPTION COMPANY.

The Consumers Redemption Company contemplated conducting a general trading stamp and reduction business under a method wherein the so-called stamps or coupons could not be redeemed until the death of the collector after the happening of which contingency the amount collected was to be paid to the person designated in the contract between the company and the collector.

Held, that the agreement constituted an indemnity contract and that the business was essentially an insurance business and therefore, subject to the terms of section 665, General Code, requiring compliance with the statutes.

COLUMBUS, OHIO, June 15, 1911.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On April 28th, 1911, your predecessor, Hon. Chas. C. Lemert, sent me a letter from Mr. Almer Thorp, Jr., of Cincinnati, Ohio, together with a synopsis of business proposed to be entered into in Cincinnati, Ohio, by the Consumers Redemption Company, and requesting my opinion as to whether the manner of transacting business by said company, as disclosed by the said synopsis, violates the insurance laws of this state. Mr. Thorp in his letter states that he wishes to know whether or not the business proposed would be an inusrance business under the purview of the laws of the state of Ohio. I herewith copy the portions of the synopsis of business proposed to be entered into by said company, which must necessarily be considered in answering the questions asked:

> "The purpose of this company briefly is to do a general trading stamp and redemption business upon approximately the same lines as those employed by other companies now in operation. There are certain details, however, which will vary from the plans generally in use by other and competing concerns.
>
> "The company proposes to sell to the public at large certain agreements or contracts in printed form which shall entitle the owner or holder thereof to the privilege of collecting the coupons or stamps of this company from dealers or merchants handling the same. This contract and its form will be more definitely described hereafter.
>
> "The company will depend for its profits not upon money obtained from the sale of these contracts but upon commissions or percentages paid the company by the merchant who is handling and dispensing the company's stamps or coupons. We wish to emphasize this point as it

may have a decided bearing upon the status of the company under the Ohio laws. The sole reason for placing a selling price upon the contracts distributed to the general public, is to give them an added intrinsic value and to obviate the risk of having the public toss them aside as something unworthy of notice, which probably would be the result attending a general and promiscuous distribution of the contracts from door to door at no cost to the public.

"The contract to be so disposed of will be printed with blank stubs attached, similar in form to an ordinary bond with interest coupons. The blank stubs upon these contracts are to be filled in by this company as hereinafter described.

"Those of the general public owning contracts of this company thereby acquire a right to secure from the merchants of whom they purchase certain coupons or stamps to the amount of the face value of their purchase, which stamps or coupons the merchant has previously procured from this company for the purposes of advertising. The merchants holding such stamps or coupons agree to pay to this company a certain per cent. upon the face value of all coupons or stamps delivered by him to the purchaser holding contracts of this company.

"Let us suppose that the contracts of the company are in the hands of consumers among the general public and the stamps or coupons in the stores of dealers. Let us now follow the process through. Let us understand at this point that no one but a holder and owner of one of the contracts of this company has a right to collect the coupons or stamps from the dealer and to present them to this company for redemption. The following is a synopsis of the contract to be sold to consumers:

" 'This company in consideration of the promises, etc., agrees that it will redeem the stamps or coupons of this company which the holder of this contract, whose name appears herein, has collected, in the following manner and under the following circumstances:

" 'That if, at the end of each month from the date of the contract the holder hereof or his agent shall present at the office of the company this contract together with the stamps or coupons collected by him during that month from dealers or merchants handling said stamps or coupons, this company will cause to be noted upon the appropriate stub of this contract the amount of the face value of said stamps or coupons collected by the holder hereof during that month, and upon the death of the owner of this contract, whose name appears herein, this company will pay to the person or persons designated by the owner and holder hereof such a sum of money as shall be represented by the amount of stamps or coupons collected during the twelve months immediately preceding his death, which amount shall have been noted by this company upon the appropriated stub of this contract.'

"Now let us watch the operation of a concrete case:

"Mr. A. is the purchaser of one of the company's contracts which gives him the rights hereinbefore enumerated. Mr. A. purchases his contract, let us say, upon June 1st, 1911, which date appears thereon. During the first month after he has purchased the same he procures from dealers, butchers, grocers, etc., the stamps or coupons of this company with his purchases. Suppose the face value of these stamps collected should aggregate an amount of $25.00 during the first month. On July 1st, Mr. A. brings his contract and the stamps of face value

of $25.00 to the office of the company, surrenders his stamps or coupons and has noted upon the stub of the contract for the month of June, the fact that he has collected $25.00 of stamps during that month. Suppose that he collects the same amount during each succeeding month up to October 1st, 1912, whereupon Mr. A. dies. The company will immediately pay to the person or persons named by him in his contract the amount of $300.00, which sum is the value of the stamps or coupons collected by Mr. A. for the twelve months immediately preceding his death.

"The contract mentioned above is not assignable nor will this company loan money upon the same or redeem stamps or coupons of the company in any other manner or under any other circumstances than herein stated."

Section 665 of the General Code is as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable therein have been complied with."

Therefore, the sole question to be decided is whether the proposed manner of transacting business by this company, as disclosed by the foregoing synopsis, is insurance, or whether the contract set forth substantially amounts to insurance. My opinion is that it does, and, therefore, that this manner of transacting business would come under the provisions of section 665 of the General Code and would be unauthorized unless said company were licensed under, and complied with, the laws of Ohio relating to life insurance.

Mr. May, in his work on Insurance, at the very beginning, defines the term (section 1, chapter 1, May on Insurance) as follows:

"Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

Judge Crew of the supreme court says, in delivering the opinion of the court in the case of State ex rel. vs. Laylin, Secretary of State, 73 O. S., at page 96:

"While we have in Ohio no general statutory definition of insurance, it has been repeatedly held by this court, in numerous cases, that the contract of insurance, is a contract of indemnity."

Mr. Vance in his work on Insurance, (chapter 2, page 42) in speaking of the nature of a contract of insurance says:

"The contract of insurance is characterized by the features possessed by other contracts * * *. The primary requisites essential to the existence and validity of every contract of insurance is the presence of a risk of actual loss. The insurer in all cases agrees to assume this risk, in return for a valuable consideration paid to him by the insured.

> Wherever such an actual risk exists, and that risk is assured by one of the parties to the contract, whatever be the form which the contract may wear, or the name which it may bear, it is in fact a contract for insurance."

The case of Commonwealth ex rel. Hensel, Attorney General vs. Philadelphia Inquirer, 15 Pa County Court Reports, page 643, is perhaps an apt illustration of the application of the definitions above set forth. The first two paragraphs of the syllabus of this case are as follows:

> "1. When a person is induced to buy a copy of a newspaper or when a subscriber makes his subscription, because of the offer (to pay a certain sum of money on the happening of a certain contingency) contained in each issue, all the elements of a contract of insurance are present.
>
> "2. The consideration, though small and though paid in part for the newspaper, and only in part for the insurance, is yet a real pecuniary consideration."

The facts in this case were, briefly: The Philadelphia Inquirer advertised that it would give five hundred dollars on a certain day to the legal heir of any one who met his death by accident, providing the coupon set forth in the advertisement, or a copy of the Inquirer containing it, be found on his or her person at the time of the accident which resulted in death, with his or her name signed in full, the offer to hold good between the hours of 2:30 a. m., March 14, 1892, and 2:30 a. m., March 14, 1893.

The attorney general brought quo warranto action against the Inquirer Company, alleging that it was unlawfully exercising a franchise not granted by its charter, namely: the making of contracts of insurance. The court in deciding this case say: (page 464):

> "If the transaction is closely analyzed it may doubtless be urged with some force that for any of the numerous promises which it makes in the issue of every day there is no additional consideration beyond the annual subscription price already paid or agreed upon, and therefore the insurance offered is a mere gratuity; but this applies only to subscriptions already existing, and with regard to any other of the promises made every day it certainly cannot be said. In the case of a purchaser who is induced to buy a single copy, or of a subscriber who makes his subscription because of the offer contained in each issue, it seems to us that all the elements of a contract of insurance are presented, namely: *a proposition to insure, an acceptance of that proposition, and a consideration which, though small and though paid in part for the newspaper and only in part for the insurance is yet a real pecuniary consideration.*"

I refer to this case for the reason that, though it is the decision of an inferior court, it is an extreme and apt case, and for the further reason of its succinct statement as to the essentials of a contract of insurance.

Therefore, taking the definitions above given and the application of the same to a concrete case, namely: The Pennsylvania case, and again applying them to the concrete case stated by Mr. Thorp (see statement of the same in the synopsis set forth in the first part of this opinion) it seems that the business

contemplated by said company clearly amounts to insurance, and that the contract is clearly a contract of insurance. Mr. Thorp in his statement of the concrete case under the method of transacting business proposed by the said company, says:

> "Mr. A. is the purchaser of one of the company's contracts, which gives him the rights hereinbefore enumerated."

As shown by this, there is a direct purchase by Mr. A. of a contract from the company, and by this contract the company obligates itself to pay the persons (beneficiaries) named by Mr. A. in his contract whatever sum is represented by the amount of trading stamps or coupons collected by Mr. A. during the twelve months immediately preceding his death. There is really a double consideration on the part of the company: first, the consideration it received from the actual sale of the contract in the first place, no matter how small the amount may be: second, the additional consideration of having a large number of its trading stamps used by reason of the inducement held forth by its offer to indemnify in case of the death of a person holding said stamps, which were collected during the twelve months immediately preceding his death. Further, each time that a holder of one of the contracts brings his stamps to the office of the company and surrenders his stamps and has noted upon the stub of the contract the fact that he has collected a certain amount of stamps there is a valid and subsisting contract upon the part of the company to pay a definite sum, namely: the amount noted upon the stub of the contract, in case of the death of the holder within twelve months. It seems to me that this is clearly a contract whereby the company, for a consideration, undertakes to compensate another if he shall suffer loss.

I return herewith the letter of Mr. Thorp to your department and the synopsis thereto attached.

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

A-291.

INSURANCE POLICIES—INSURABLE INTEREST OF CHURCH, COLLEGE, CORPORATION OR INSTITUTION IN LIFE OF BENEFICIARY.

A person may insure himself and make the policy payable to any one regardless of the insurable interest.

A person cannot insure another however, unless he has an insurable interest in the latter.

Under this rule the question whether or not a college, church, institution or a corporation may insure the life of individuals depends upon whether, under the circumstances, there exists at the time the policy is issued, a pecuniary interest or a valid and well founded expectation of benefit in behalf of the college, church, institution or corporation from the continuance of the life of the insured.

COLUMBUS, OHIO, July 10, 1911.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On April 22, 1911, your predecessor, Hon. Chas. C. Lemert, sent me the following request for an opinion:

"Certain life insurance companies doing business in Ohio are issuing policies on the life of an individual payable to a college, church, institution or a corporation. Has a college, church, institution or corporation, not being a creditor, such an insurable interest in the individual as to make such policies legal under the law?"

It is necessary in answering this request to subdivide the same as follows:

"1st. Would a policy of insurance taken out by an individual upon his own life and made payable in case of death to a college, church, institution or corporation, such college, church, institution or corporation not being a creditor, and the premiums on said policy being paid by the insured, be legal?

"2d. Would a policy of insurance taken out by a college, church, institution or corporation, upon the life of an individual, said college, church, institution or corporation not being a creditor of such individual, and the premiums on said policy being paid by such college, church, institution or corporation, be legal?"

My answer to the first question is, that in my opinion, such policy would be legal.

In the case of Eckel vs. Renner, 41 O. S. 232, the court held (at page 233) that:

"One who has obtained a valid insurance upon his own life, may dispose of it as he sees fit in the absence of prohibitory legislation, or contract stipulation. It is immaterial, in such case, that the assignee has no insurable interest in the life."

In the case of Ryan vs. Rothweiler, 50 O. S. 595, Judge Burkett says (at page 601):

"While a man may cause his own life to be insured for the benefit of a stranger, and the want of insurable interest in the stranger will not invalidate the policy, a policy taken out by a man for his own benefit on the life of a stranger would be void for want of insurable interest."

Vance on Insurance, page 127, clearly states the rule as to this class of policy:

"Life policies fall into two general classes. In one class are those taken out by the insured upon his own life, either for the benefit of himself or of his estate, in case it matures only at his death, or for the benefit of any person who may be designated as beneficiary; in the other are such policies as are taken out upon the life of another. In the first class of policies the question of insurable interest is of so little importance as to merit scant consideration. It is ordinarily said that every man has an insurable interest in his own life. It were more accurate to say that the question of insurable interest is immaterial when the policy is upon the insured's own life. The presence of an insurable interest is really required only as evidence of the good faith

of the parties, and it is contrary to human experience that a man should insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure payment of money, to some other, although instances of such gruesome fraud upon insurers are not wanting. Consequently it is uniformly held that the mere fact of a man's insuring his own life for the benefit either of himself or of another is sufficient evidence of good faith to validate the contract. It is not at all necessary that the person designated as beneficiary in such policies should have any interest in the life insured. It is true that such a beneficiary without interest will be subject to the same temptation to terminate unlawfully the life insured as if he himself had taken out the policy, and there are cases on record where such temptation has been yielded to, but the law considers this danger too slight for notice, since the selection of the beneficiary by the insured is, in ordinary cases, sufficient guaranty of the existence of such good faith and confidence between them as will sufficiently protect the insured.

"In fact in this class of policies, the indemnity feature of life insurance is so faint as to be scarcely traceable, and especially so where the policy is on the endowment plan, payable, after a certain period, to the insured. Such policies are little more than contracts of investment; and even where the proceeds of the policy are to be paid to another than the insured or his representative, the purpose of the agreement is chiefly for the investment and accumulation of the sums annually paid as premiums for the use of the designated beneficiary. Wherefore, in such cases, considerations touching indemnity and insurable interest may be disregarded."

It seems to be settled by the weight of authority, in this country at least, that, in the absence of fraud, when a person takes out insurance upon his own life and designates another as payee, the person as designated may maintain an action upon the policy without showing an insurable interest in the life of the insured; briefly, that in the absence of fraud a person may take out insurance upon his own life and have the policy made payable to any one. In addition to the authorities above cited as sustaining this proposition I cite Kerr on Insurance, page 679; Miller vs. Bowman, 119 Ind. 448; Olmstead vs. Keyes, 85 N. Y. 593; Insurance Company vs. Coshocton Glass Company, 13 C. C. (N. S.)229.

The answer to the second question is more difficult; in the first question the matter of insurable interest is of so little importance that it can be disregarded altogether for all practicable purposes; but in the second question the matter of insurable interest becomes all important. Vance on Insurance, page 129, states:

"But where one man assumes to insure the life of another the questions involved are strikingly different. To allow such insurances to be made by persons having no other interest in the continuance of the lives insured than springs from the prospect of making gain through their early termination would be intolerable. The circumtsances attending the making of the contract must be such as to prove the existence of a bona fide desire and an interest on the part of the insurer that the life insured shall continue during its natural term. The circumstances that give evidence of such a desire are said to constitute an insurable interest."

He further says, as defining when an insurable interest exists, that:

> "An insurable interest exists whenever the relation between the assured and insured, whether by blood, marriage, or commercial intercourse, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life of the insured, or of suffering detriment or incurring liability through its termination, or, * * * the policy of the law requires that the assured shall have an interest to preserve the life insured in spite of the insurance, rather than to destroy it because of the insurance."

Bliss on Life Insurance, section 21, defining insurable interest says:

> "The tendency of the American decisions, especially the more recent ones, is to hold that wherever there is any well founded expectation of, or claim to, any advantage to be derived from the continuation of a life, it is an insurable interest in that life, though there may be no claim that can be recognized in law or equity."

In the cases under consideration there is no relation by blood or marriage between the insured and the beneficiary, and the question as to whether there is an insurable interest on the part of the beneficiary would depend upon the relationship which the college, church, institution or corporation bore to the individual insured; that is, whether or not there is any well founded expectation of, or claim to, any advantage to be derived by the college, church, institution or corporation from the continuance of the life of the insured. It seems clear, and it is my opinion that in the case of a college or church, or institution, such college, or church, or institution would have an insurable interest in the life of a professor or preacher who served it with ability and credit, and whose services tended to increase the membership and the standing of such college, church or institution; or in the life of a member of the church, or an alumnus of the college, who by interest and donations were accustomed to and did give substantial aid to the church or college, which interest or aid would cease upon the death of such member or alumnus: but it is equally clear that a college or church or institution would not have an insurable interest in the life of a mere stranger not connected with it, and from the continuation of whose life it could have no expectation of any advantage, and from whom it received no benefit.

The question as to corporations has been passed upon by the circuit court of Ohio in the case of the Northwestern Mutual Life Insurance Company vs. the Coshocton Glass Company, 13 C. C. (N. S.) 229, where it is held that the corporation has an insurable interest in the life of one of its officers or employes from the fact that it has a pecuniary interest in the continuance of the life of such officer or employe, in that he alone had full knowledge of the business and was experienced in its conduct and was giving his whole time to its superintendence. I copy herewith the 4th and 5th paragraphs of the syllabus in this case, which clearly state the rule as to such insurance by a corporation of one of its officers and employes:

> "The right of a corporation to insure the life of an officer or employe of the corporation depends upon the conditions existing at the time the policy was issued and the good faith of the transaction.
>
> "Where a corporation has a pecuniary interest in a continuance of

the life of one of its officers or employes, due to the fact that he alone has a full knowledge of the business and is experienced in its conduct and is giving his whole time to its superintendence, and the corporation is obtaining credit by reason of the fact that its management is in his hands, and an application is made by him for a policy of insurance upon his life made payable to the company and the premiums upon which are to be paid by the company, an insurable interest is shown and the good faith of the transaction must be upheld; and in such a case the fact that the insured left the service of the corporation some time before his death occurred, and his executor is contesting the claims of corporation to the proceeds of the policy is not sufficient to defeat the title of the corporation thereto."

The circuit court has also held that a corporation has no insurable interest in the lives of members of its board of directors who are not indebted to it. See Security Mutual Life Insurance Company vs. the J. M. Schott & Sons Company, 11 C. C. (N. S.) 401.

It is, therefore, extremely difficult to lay down any hard and fast rule upon this subject; each cause must depend upon the particular state of facts existing when a policy is taken out; and if it is clear that at the time the policy is issued the college, church, institution or corporation has a pecuniary interest in the life of the insured, or a definite, valid and well founded expectation of, or claim to, any advantage to be derived from the continuance of the life of the insured, then there is an insurable interest in such life; otherwise, not.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

296.

NO RIGHT OF SUPERINTENDENT TO WITHHOLD PAY FROM INSPECTORS, AS SET OFF TO MONEYS ILLEGALLY DRAWN AS EXPENSES—REPORT TO ATTORNEY GENERAL.

Where the superintendent of insurance is possessed of information to the effect that certain deputy inspectors of building and loan associations under his control are liable for certain moneys illegally drawn by them for expenses, said superintendent may not withhold moneys now legally due such inspectors as a set off.

The liability is unliquidated and the moneys now due are liquidated, the two claims are separate and distinct, so that one could not be pleaded as a counter claim to the other, and the department's jurisdiction over the employe's pay ceases when payment has been made.

The parties liable should be advised to make report to the attorney general.

COLUMBUS, OHIO, July 15, 1911.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 14th, requesting my immediate opinion upon the following question:

"A number of deputy inspectors of building and loan associations have been found by the inspectors and examiners of state offices to be liable

to the state for certain moneys illegally drawn by them for expenses incurred in the performance of their duties. Some of these persons are still in the employ of the department of building and loan associations, and various amounts for salaries and expenses are now due them. Is it the duty of the superintendent of insurance to withhold vouchers for the salary and expenses now due these individuals until the amounts overdrawn by them have been recovered into the state treasury?"

I cannot hold as a matter of law that it is your *duty* to withhold the salaries now due and the expense money now lawfully due to the individuals in question until such time as they have made restitution of the amounts found due from them for illegal payments to them in the past. The claim of the state for such overdrafts is not liquidated, whereas the claim of the individuals against the state for salary is so far liquidated and due that an action in mandamus might in all probability lie to enforce the payment of any such claim. In such action, you as defendant, could not, on behalf of the state, set off the claim of the state. In other words, the two claims are entirely separate and distinct, and the claim of the state, in my judgment, could not be pleaded by way of counter claim to the several claims of the various parties, and of course could not in any event be relied upon as a set off.

I do not wish to be understood as recommending any particular course of action to you in the premises further than that the department's jurisdiction over an employe's pay ceases when payment has been made, and the question of refunder or reclaimer is one to go through the usual channels. However, you will permit me to suggest legally that I think it would be wise for you to request the parties affected, that are connected with your department, that it is their duty to report to the attorney general's office any reasons, if such exist, why they should not pay back the proper amount to the state treasurer.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

361.

BUILDING AND LOAN ASSOCIATIONS — "PROFITS" — "EARNINGS" — MONEYS DUE ON LAND CONTRACT BUT NOT COLLECTED.

As the word "earnings" in section 9673, General Code, means "profits" and as "profits" means the excess of the sale price of real estate over the original cost price, there can be no profit until the association has been actually reimbursed to full extent of the funds actually invested in a land contract transaction.

COLUMBUS, OHIO, September 15, 1911.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I am in receipt of the following communication from you:

"In his report of examination of the affairs of the West Side Building & Loan Association, of Hamilton, an examiner of this bureau advises, under the head of 'Real Estate Sold on Contract,' as follows:

> " 'It has been the custom of this association, where a parcel of real estate is sold on contract at a profit, to advance the asset value to the amount for which the parcel is sold and to credit the amount of profits to earnings. One parcel, No. 247, was sold at a profit of $155.24 and No. 1091 for a profit of $43.65. These amounts were credited to earnings and distributed.'
>
> "Will you kindly advise if this association is acting within its legal rights in treating this matter as above outlined prior to the time when the amount of 'profit' has been actually paid in to the company?"

As I understand the transactions referred to, this building and loan association, being the owner of a certain parcel of real estate in which it has invested a certain amount of its capital, sells said real estate upon contract; that is, I presume, a cash payment for part of the consideration, and notes secured by mortgage for the balance, and thereupon credits its earning account with the difference between the contract price for which the property was sold and the amount which the association had invested in it. In other words, the profit which would accrue to the association in case the purchaser fully completes the contract upon his part is immediately credited to the earning account as if the purchaser had paid all cash.

Section 9673 of the General Code is as follows:

> "After payment of expenses and interest, a portion of the earnings to be determined by the board of directors, annually or semi-annually, shall also be placed in the reserve fund for the payment of contingent losses, as hereinbefore provided, and a further portion of such earnings to be determined by the board of directors, shall be transferred as a dividend annually or semi-annually, in such proportion to the credit of all members as the corporation by its constitution and by-laws provides, to be paid to them at such time and in such manner in conformity with this chapter as the corporation by its constitution and by-laws provides. Any residue of such earnings may be held as undivided profits to be used as other earnings, except that such undivided profit fund at no time shall exceed three per cent. of the total assets of the association."

This section provides for the application and distribution of the earnings of building and loan associations and it refers to actual earnings, not to those which will accrue in the future. The word "earnings" as used in this section really means "profits," and "profit" as used in the transaction to which you refer must necessarily mean the excess of the sale price over the original cost of the real estate to the association, and there can be no profit until the association is actually reimbursed to the full extent of the funds invested in this transaction. Therefore, my opinion is that until the full amount which the association has invested in the real estate is repaid to the association there is no authority to credit the excess of the selling price over the original cost, to the earning account of the association.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 440.

POWERS OF BUILDING AND LOAN ASSOCIATIONS—REGULATION OF DIRECTORS NOT AUTHORIZED BY STATUTE—JEFFREY BUILDING, LOAN AND SAVINGS ASSOCIATION.

Inasmuch as the statutes do not confer upon building and loan associations the power to impose upon directors a regulation requiring all such to be employes of or in some way connected with specific company, section 7, article 6 of the constitution of the Jeffrey Building, Loan and Savings Association, attempting to make such a regulation is illegal.

COLUMBUS, OHIO, October 30, 1911.

HON. DAVID L. ROCKWELL, *Deputy Inspector Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your letter of October 25th, you ask my opinion as to the validity of section 7 of article 6 of the constitution of the Jeffrey Building, Loan and Savings Association which has been submitted to you for approval. Section 7 of article of the constitution of this association is as follows:

> "No one shall be elected to the board of directors of this association who is not an employe of, or directly connected with, the Jeffrey Manufacturing Company. If at any time a member of the board of directors leaves the employ of the Jeffrey Manufacturing Company, his position on the board becomes vacant and shall be filled as provided for in section 4 of article 6 of this constitution."

Section 9646 of the General Code is as follows:

> "Directors may be elected for any term, not less than one year nor longer than three years. If such term be longer than one year, it shall be so arranged that as nearly as may be, the term of office of an equal number of directors will expire each year."

Section 9647 of the General Code is as follows:

> "Such corporation shall have all the powers set forth in the following sections of this chapter."

There is no provision of this chapter (viz: chapter 1, division 4, title 9 of the General Code) giving a building and loan association authority to make any such regulation as that attempted to be made by the section of the constitution of this association above quoted. Therefore, unless this power be given by the general laws governing the organization and powers of corporations there would be no authority to make such requirement. The general sections applicable to directors of corporations are sections 8660 and 8661 of the General Code, which are as follows:

Section 8660, General Code:

> "The corporate powers, business and property of corporations formed under this title shall be exercised, conducted, and controlled

by the board of directors; or, if there is no capital stock, by the board of trustees."

Section 8661, General Code:

"A majority of such directors must be citizens of this state. All directors and executive officers shall be holders of stock of the company for which they are chosen, in an amount to be fixed by the by-laws, and trustees of corporations must be members thereof."

It will be seen from section 8661 that practically the only statutory requirements as to the qualifications of directors are,

First, that a majority of such directors must be citizens of this state, and,

Second, that all directors must be holders of stock of the company; and the corporation has the power to prescribe that a person must be the holder of a certain number of shares of stock before becoming eligible as a director.

It is impossible to construe any of the provisions above quoted so as to give a building and loan association the power to make such a requirement, as to directors, as that attempted to be made by this constitution, and nowhere in the General Code do I find the authority to make such a regulation.

My conclusion, therefore, is that this power, if it existed at all, would have to be given expressly by the statute, and that in the absence of such statutory authority this section of the constitution of this company is invalid.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

451.

BUILDING AND LOAN ASSOCIATION INSPECTORS—TRAVELING EXPENSES—DUTIES IN HOME CITY.

Examiners of building and loan associaions may make their headquarters where directed by their superior officers.

Traveling expenses of such officers are determined on common sense principles and include any expenses incident to their official duties which would but for such duties, not be encountered by them. Under this rule, certain traveling expenses may be incurred by an inspector while at work in the city of his headquarters.

COLUMBUS, OHIO, November 3, 1911.

HON. EDMOND H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 13th, which in full is as follows:

"On May 8th, 1911, you rendered an opinion to this department substantially to the following effect, as I interpret it:

"1. That the law does not prescribe that the examiners of building and loan associations shall reside in Columbus.

"2. That, therefore, such examiners while examining in their home towns are not entitled to traveling expenses.

"3. That such examiners not residing in Columbus are entitled to such expenses while examining associations in that city.

"Is my interpretation of your decision correct? If so, is an examiner while examining associations in his home town entitled to charge up as 'traveling expenses,' car fare, the payment of which is necessarily entailed in the discharge of his duties?

"It would seem to me that there should be no question that such expense is a legitimate charge, but a different impression seems to prevail as to the effect of your opinion."

I beg to state that you have correctly interpreted my opinion in the conclusion which you reach. It is simply a matter of good sense to hold, for instance, that an officer who has official headquarters designated either by law or by the valid orders of his superior, is not entitled to be reimbursed for meals and lodging at such headquarters or for traveling expenses incurred in going to and from from his residence to such headquarters. On the other hand it is equally clear that the mere fact that the office of such officer may be located in a certain city would not make it unlawful for him to be reimbursed for traveling expenses incurred in going out from that office to a distant place though within the home city. Such traveling expenses might include car fare, and even meals, but of course not lodging. Thus to make a practical application, if an examiner of your bureau has an office in the city of Cincinnati, which is designated by the chief inspector as his headquarters, is obliged in the course of his duty to go to a suburb of that city for the purpose of inspecting a building and loan association he ought to be reimbursed for his car fare going and coming. Under such circumstances he ought not to be allowed a noonday meal, for example, if he is accustomed when engaged in office work to take his noonday meal at a restaurant or club. If, again, his headquarters, as designated by the chief inspector is his home, and he ordinarily takes all of his meals there when engaged in inspection work, then if the making of an inspection in a part of the city too distant to enable him to return for his noonday meal or any other meal in the day necessitates an outlay on his part for such meal or meals he ought to be reimbursed for such outlay.

The whole matter is one, as already suggested, involving the application of common sense rather than any technical rule of law. Each case is to be determined by its own peculiar circumstances. In order to avoid confusion, however, it is my opinion that the chief inspector may, within the limitations of the law as defined in my previous opinion, prescribes rules for the government of the examiners in such matters.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

508.

INSURANCE—DEPOSIT A TRUST FUND—EXTRA—STATE POLICY HOLDERS.

Sections 9565 and 9373 of the General Code were not repealed by the amendment to section 656.

*The deposit with the superintendent of insurance in compliance with sections 9373 and 9565 of the General Code is a trust fund whose conditions and limitations were neither enlarged nor diminished by the amendment to section 656. Said deposit is absolutely "for the benefit and security of policy holders residing in the United States and it cannot be withdrawn until all debts and liabilities which the deposit is made to secure * * * are paid and extinguished."*

COLUMBUS, OHIO, December 27, 1911.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On account of pressure of work I find it necessary to defer giving you a full written opinion upon the question you submit to me as to whether or not you should be governed by the act of April 28, 1910, of the Ohio general assembly, found in year book 101, page 147 in reference to the delivery of securities that are deposited with the superintendent of insurance for the benefit of its policy holders residing in the United States by virtue of section 9565 but for your convenience I beg to advise that I hereby indicate the conclusions to which I have come after a careful study of the question involved and after several conferences with yourself.

The deposit referred to was made under section 9565, General Code, and therefore remains as a trust for the purpose which deposit was made, and regardless of the purpose of section 656, *supra.* it cannot have the effect of interfering with the rights of those interested which accrue by virtue of section 9565, General Code.

In concur fully in the conclusion to which you come and in your reasons in support thereof as contained in your letter of December 7, 1911, to Hon. Frank H. Hardison, insurance commissioner of Boston, Mass., a copy of which letter is hereto attached and made a part hereof.

A little later on I will give you an opinion at some length stating more fully my reasons in support of your conclusion, but my opinion as herein given is final as to this department upon the question involved. Your conclusion is not only, in my judgment, legally sound but morally correct as well.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

December 7, 1911.

HON. FRANK H. HARDISON, *Insurance Commissioner, Boston, Mass.*

MY DEAR MR. HARDISON:—Yours of the 5th inst. just received.

I have not yet received the opinion from our attorney general, referred to.

I fear that I did not make myself sufficiently clear in my former letter, as you did not seem to thoroughly understand my contention, and since you say that you, perhaps, will call the matter to the attention of your attorney general, even in the event that an opinion be rendered by our own, in line with

my views, I am going to take the liberty of trespassing my views again upon you, together with the reasons for the same, with a request that you will present them to your law officer, in the event that you ask for his opinion.

1. Section 9565, as well as section 9373, of course, were unrepealed by the amendment to section 656.

Under and by virtue of section 9373, in the case of life insurance companies, and of section 9565, in the case of companies other than life, the deposit with the superintendent of insurance is made and the trust imposed upon him, created. The conditions and limitations of that trust were neither enlarged nor diminished by the amendment of section 656.

The deposit is made not "nominally" as you say, but absolutely, under the terms of those sections, "for the benefit and security of policy holders residing in the United States," and can be made in no other way. This trust can never be discharged until all debts and liabilities which the deposit was made to secure, have been paid or extinguished, and so long as the sections relating to the method of making the deposit, and thus defining the terms of the trust, remain unchanged, any statute not purporting to amend such sections must be regarded as merely cumulative.

2. Section 656 does not undertake to change the manner in which the deposit referred to shall be made, but simply to establish the method in which such deposit may be withdrawn.

My predecessor and yourself seemed to assume that the language of that section permits of no other construction than that of an attempt to authorize a violation of the trust imposed by the other sections referred to.

As I said in my former letter, even if the language of the statute would admit of that construction only, it would be ineffectual for the purpose so long as the other statutes remain unrepealed; but

3. You will pardon me for saying that it seems to me that you entirely mistake the plain reading of the statute. Section 656 not only provides that before the superintendent shall permit a withdrawal of the securities, he shall be satisfied, by affidavits and examination, that all debts and liabilities due, or to become due, upon any contract or agreement made with any citizen or resident of the state of Ohio, are paid or extinguished, but in express terms it also provides that before he permits such withdrawal, he must be satisfied "that all debts and liabilities which the deposit was made to secure * * * are paid and extinguished."

Since our courts time and again have held that repeals by implication are not favored, and since it is clear that the deposits made under section 9373 and 9565 of the General Code are "made to secure all debts and obligations due or to become due to policy holders residing in the United States," as well as those resident of Ohio, section 656 must be considered as purely cumulative and as intending to provide that the superintendent of insurance shall not permit the deposit to be withdrawn until not only all obligations to policy holders residing in the United States (including those in Ohio) are extinguished—those being the "debts and liabilities which the deposit was made to secure"—but until all other debts and liabilities upon "any contract or agreement made with any citizen or resident of the state of Ohio are paid or extinguished."

Whether section 656 would be effectual thus to extend the condition of the trust deposit and to permit the superintendent of insurance to withhold the deposits until further obligations not strictly covered by the terms of the trust be extinguished, is, to say the least, an open question; although it might, and probably would, be contended that the deposit is to be regarded as made in view of all the statutes upon that subject.

Be that as it may, however, it is plain that the only sensible construction that can be placed upon these statutes, taken as a whole, so as not to make them absolutely contradictory, is the one I contend for. This construction does not do violence to the plain language of the statute, and it must be borne in mind that statutes *in peri materia* are to be construed as a whole and be made to harmonize, if such construction is reasonably possible, and that any other construction would make the sections referred to wholly conflicting and inharmonious.

Very truly yours,

SUPERINTENDENT OF INSURANCE.

(To the State Liability Board of Awards)

397.

APPROPRIATIONS—ADDITIONAL SUMS—EMERGENCY BOARD—NO PAYMENT OF SALARIES FROM CONTINGENT FUND.

Sections 40 *and* 41 *of the act of May* 31, 1911, *allowing the legislature* $25,000 *and* $100,000 *as respectively for the years of* 1911 *and* 1912 *for expenses in addition to salary of the board, were superseded by the act "to make sundry appropriations,"* 102 *O. L.* 194 *for* 1911 *and the act to make general appropriations* 102 *O. L.* 194 *for* 1912 *in which specific sums are appropriated for salaries of employes and other expenses, so that the latter acts provide for the only funds available for the use of the board.*

Funds in addition to those thus made available may be allowed under sections 2312 *and* 2313, *General Code, through the action of the emergency board, whenever such added expense is to be deemed necessary to carry out the intent of the legislature.*

Compensation or salary of assistants may not be paid out of the appropriation designated as "contingent expenses" as such fund refers solely to expenses of a temporary or incidental nature.

COLUMBUS, OHIO, September 28, 1911.

STATE LIABILITY BOARD OF AWARDS, *Columbus, Ohio.*

GENTLEMEN:—I have your letter of August 23d, 1911, which is as follows:

"The act entitled 'an act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards,' passed May 31st, 1911, and approved by the governor June 15th, 1911, provides in sections 40 and 41 thereof as follows:

"'Sec. 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1st, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of the members of such board.

"'Sec. 41. The expenses of such board in carrying out the provisions of this act shall be paid from January 1st, 1912, to January 1st, 1913, out of the general revenue fund of the state not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members.'

"On May 31st, 1911, the general assembly passed an act, entitled 'an act to make sundry appropriations,' which was approved by the governor June 1st, 1911, section one of which makes a detailed appropriation 'to be available to pay liabilities on and after February 16, 1911, as follows:

STATE LIABILITY BOARD OF AWARDS.

Salaries of members of board	$10,000 00
Salary of secretary	1,600 00
Salary of two expert stenographers at $1,200 00 each	1,600 00
Salary of actuary	1,600 00
Salaries of four assistant actuaries at $1,500 00 each	3,600 00
Traveling expenses	3,500 00
Contingent expenses	3,000 00
Furniture and carpets	1,200 00
Rent of offices	1,000 00
	$27,100 00

"On May 31st, 1911, the general assembly also passed an act entitled 'an act to make general appropriations,' which was approved by the governor June 14th, 1911, which carries the following appropriations available on and after February 16th, 1912, viz:

STATE LIABILITY BOARD OF AWARDS.

Salaries of members of board	$15,000 00
Salary of secretary	2,400 00
Salaries of two expert stenographers at $1,200 00 each	2,400 00
Salary of actuary	2,400 00
Salaries of two assistant actuaries at $1,500 00 each	3,000 00
Salary of chief clerk	1,800 00
Salaries of two clerks, at $1,200 00 each	2,400 00
Traveling expenses	5,000 00
Contingent expenses	4,000 00
Rent of offices	1,500 00
	$39,900 00

"Section 7 of the act to which reference is herein first made provides that :'The board may employ a secretary, actuary, *accountants, inspectors, examiners, experts,* clerks, stenographers and *other assistants* and fix their compensation,' etc., and section 37 provides that 'the board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 17,' etc.

"It thus appears that the general assembly in plain terms granted the state liability board of awards full power and direction to select such assistants as it might find necessary, and to fix their salaries and compensation, except as limited by the provisions of sections 40 and 41, of said act, while in the appropriation bills hereinbefore referred to, specific appropriations were made for the purposes therein designated, but any appropriation for 'accountants,' 'inspectors,' 'examiners,' 'experts' and 'other employes,' or for 'statistical and other information,' was entirely omitted.

"The foregoing statement suggests the following questions, which the members of the board desire to submit to your department for answer, in order that we may be properly guided in the execution of the duties devolving upon us:

"1. Are the sums of $25,000.00 and $100,000.00 respectively mentioned in sections 40 and 41 of said act appropriated and available for the expenses of the board?

"2. If so, are the specific and detailed appropriations contained in said appropriation bills inclusive of said amounts?

"3. If the first question be answered in the negative, is there any method by which funds in addition to said specific and detailed appropriations may be made available for the use of the board?

"4. In the event the last preceding question be answered in the affirmative, will such additional funds, if made available, be restricted to the purposes for which expenditures are authorized in said act, and for which no specific appropriations were made in said appropriation bills?

"5. Can any portion of the appropriation designated as "contingent expenses' be used for compensation of such assistants as the department may find it necessary to have, and for which no specific appropriation has been made?"

The act to which you refer is found in 102 Ohio Laws, page 524 et seq. Section 7 of said act is as follows:

"The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall first be approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board."

From this section it is clearly the intention of the legislature to give your board the power to employ a secretary, an actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, it being the intention of the legislature to give you the authority to employ such officers and assistants, etc., as might be necessary to properly carry into effect the provisions of said act.

The original act also gave you authority to fix the compensation of such employes, and sections 40 and 41 of said act which are as follows:

"Section 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board.

"Section 41. The expenses of such board in carrying out the provisions of this act shall be paid from January 1st, 1912, to January 1st, 1913, out of the general revenue fund of the state not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members."

indicate that it was the intention of the legislature to provide a general, or

lump fund, in addition to the salary of the members of your board, out of which fund all of the salaries of your employes as fixed by you, and all the expenses of your board, should be paid. But these sections while clearly indicating the intention of the legislature passing this act, was to allow your board twenty-five thousand ($25,000.00) dollars for said fund for the year 1911 and one hundred thousand ($100,000.00) dollars for the year 1912, did not make a specific appropriation of said amounts for said years, and, therefore, the acts of May 31st, 1911, to which you refer, being an act "to make sundry appropriations" 102 Ohio Laws 194, and an act to make "general appropriations" 102 Ohio Laws 393 having made specific appropriations for your board, as set out in your letter, must necessarily be held to provide the only funds now available for your use.

Therefore my answer to your first question: That the sums of twenty-five thousand ($25,000.00) dollars and one hundred thousand ($100,000.00) dollars mentioned in sections 40 and 41 of said act were not appropriated by the legislature and are not available for the expenses of your board.

The answer to your first question makes the answer to your second question unnecessary.

In answer to your third question as to whether funds in addition to the specific and detailed appropriations made in said appropriation acts can be made available for the use of your board my answer is yes, and I refer you to sections 2312 and 2313 of the General Code.

These sections are as follows:

> "Section 2312. There shall be an emergency board to consist of the governor, auditor of state, attorney general, chairman of the senate finance committee and chairman of the house finance committee, which board may authorize deficiencies to be made. The governor shall be president, and the chairman of the house finance committee shall be secretary of the board. The secretary shall keep a complete record of all its proceedings. The necessary expenses of the chairman of the senate and house finance committees, while engaged in their duties as such members, shall be paid from the fund for expenses of legislative committees, upon itemized vouchers approved by themselves, and the auditor of state is hereby authorized to draw his warrant upon the treasurer of state therefor.
>
> "Section 2313. In case of an emergency requiring the expenditure of a greater sum than the amount appropriated by the general assembly for an institution or department of the state in any one year, or for the expenditure of money not specifically provided for by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department, may make application to the board for authority to create a deficiency, or to expend money not specifically provided for by law. Such officer shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting of the board, and shall notify such officer of the time and place of the meeting, and request his presence. No permit shall be granted with the approval of less than four members of the board, who shall sign it."

And as section 7 of the act creating your board gives you specific authority to employ accountants, inspectors, examiners, experts and other assistants, and section 37 gives your board specific authority to make necessary expenditures to obtain statistical and other information to establish the classes provided for

in said section 17 of said act, and as the legislature absolutely failed to make any appropriation out of which to pay the salaries or compensation of said accountants, inspectors, examiners, experts, and other employes, or for paying the expenses necessary to obtain statistical and other information as provided by section 37, the question simply resolves itself into this:

If it is necessary in order to carry out the provisions of the act of May 31st, 1911 (102 O. L. 524) for your board to employ accountants, inspectors, examiners, experts and other employes, and to incur expense in obtaining statistical and other information necessary to the proper performance of the duties cast by law upon your said board, then, as the power to make each and all of these employments and incur this expense was given you by the legislature, and as the legislature utterly failed to make any appropriation for so doing, it seems to me that it is undoubtedly a proper subject to be brought before the emergency board, and that the emergency board upon being satisfied that such employments and expenditures are necessary to properly carry into effect the provisions of said act, and there is no appropriation available for the payment of the compensation and expenses to be incurred, should grant you authority to create a deficiency, or to expend money in such amounts as your statement to said board may show to be necessary.

Answering your fourth question I would say that the allowance to be made to you by the emergency board would be based upon a statement of the amounts you would necessarily need, and would probably be a specified sum as compensation for a specified employe, and a specified sum for a certain expense, and the funds which may be allowed to you by said emergency board would not necessarily be restricted to the purposes for which expenditures are authorized in said act, and for which no specific appropriations were made in said appropriation bills. In other words, if your board has found upon investigation that some item of expense not mentioned by the legislature in passing said act is necessary and essential to carry out the intention of the legislature as expressed in said act, then in my opinion the emergency board could make you an allowance for said purpose. This act establishes a new board in Ohio which undoubtedly will be of great benefit to all employes, as well as to employers, who take advantage of its provisions, and it would be impossible for any legislature to foresee every item of expense that would become necessary for the effective administration of such a law, and, therefore, the question to be decided is not whether a particular employe or item of expense was mentioned by the legislature when it passed the act, but whether such employe or such expense is necessary to properly carry into effect the intention of the legislature.

In answer to your fifth question my answer is that no part of the appropriation designated as "contingent expenses" can be used for compensation or salary for such assistants, as the department may find it necessary to have, and for which no specific appropriation has been made.

This would have to be brought before the emergency board and taken care of by it. Contingent expenses refer generally to expenses of a temporary or incidental nature.

Section 3 of the general appropriation act (102 O. L. 412) provides:

> "No bills for clerk hire, for furniture or carpets, or for newspapers shall be paid out of appropriations for contingent expenses;"

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Commissioner of Labor Statistics)

A 104.

EMPLOYMENT AGENCY — LICENSE — INDIVIDUAL DOING BUSINESS UNDER OTHER THAN HIS OWN NAME—FALSE AND FRAUDULENT NOTICE OR ADVERTISEMENT.

Licenses to conduct employment agencies may be issued to the person or to the firm or to the corporation doing business as an employment agency, and an individual person should not be licensed to do business in other than his individual name.

To license such a business under the name of "W. M. Polland, doing business as 'International Employment Bureau'" would be a violation of the spirit of section 892, General Code, providing against false or fraudulent notice or advertising.

COLUMBUS, OHIO, February 8, 1911.

HON. C. H. WIRMEL, *Commissioner of Labor, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication enclosing letter dated January 31st, signed by W. M. Pollard, as manager, in which he asks you to make out an employment agency license to him with a designation of "W. M. Pollard, doing business as "International Employment Bureau," and "The W. M. Pollard Booking Offices." You ask whether such license may be issued by you.

Section 886 of the General Code, relating to private employment agencies, provides that:

> "No person, firm or corporation shall open or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining a license from the commissioner of labor statistics, and paying to him a fee according to the population of the municipality as shown by the last preceding federal census. * * *"

Neither this section nor the following section relating to employment agencies permit the issuing of a license except to a person or to a firm or to a corporation, and it appears to me, as a matter of public policy, and as being within the contemplation of the statute, that the license should be made out to the person or to the firm, or to the corporation doing business as an employment agency, and that no individual person should be licensed to do business in any name other than that of his own individual name. Even if Mr. Pollard is personally conducting the two businesses referred to, and has the sole interest in each of such businesses, it appears to me that he would be violating at least the spirit of section 892 of the General Code, which provides that,

> "No licensed agency shall publish or cause to be published a false or fraudulent notice or advertisement, etc."

in case he was licensed as an individual to conduct an employment agency and conducted such agency under some business name other than his own personal name.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

272.

MEMBER OF THE GENERAL ASSEMBLY—OFFICE COMPATIBLE WITH TEMPORARY POSITION IN BUREAU OF LABOR STATISTICS.

As the situation does not come within any prohibition of the statutes, the constitution or any provision of general law, a member of the last general assembly may hold a temporary position in the bureau of labor statistics.

COLUMBUS, OHIO, June 16, 1911.

HON. C. H. WIRMEL, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 15th, in which you request my opinion upon the following:

> "Kindly advise me as to whether a member serving in the last general assembly is eligible to hold a temporary position in the bureau of labor statistics. The position applied for was not created by the recent general assembly."

and in reply I desire to say that section 19 of article 11 of the constitution of Ohio provides that:

> "No senator or representative 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."

Section 15 of the General Code provides:

> "No member of either house of the general assembly shall be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury. * * *"

In my opinion, a member of the general assembly is eligible to hold a temporary position in the bureau of labor statistics for the reason that the position, as cited in your letter, is not one which comes within the provisions of the sections of the constitution and of the General Code above referred to; said position being one that is temporary in its nature only, and for which there is no statutory fixed compensation, although compensation may be allowed for services performed.

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

430.

MATTRESSES—LABEL—STATEMENT OF QUANTITY, QUALITY, AND WHETHER "NEW OR SECOND HAND"—STATUTORY REQUIREMENTS.

Section 12798-2, *General Code. requires that all new mattresses be labeled with a statement: First, of the material of the "filling" used in the "manufacture" of such mattresses: second. whether such material is new or second hand in whole or in part: third, the quantity and quality or grade of each material used.*

COLUMBUS, OHIO, October 19, 1911.

HON. FRED LANGE, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR:—Your predecessor, Hon. C. H. Wirmel, submitted for my consideration section 2 of House Bill 579 to be found in 102 Ohio Laws 519, known as section 12798-2 of the General Code. He desired a construction of said section in order to ascertain what is necessary to be stated in the label provided for in said section in regard to mattresses.

The act in question is entitled "an act to provide for the branding and labeling of mattresses, and to provide against the use of insanitary or unhealthy materials in the manufacture of mattresses and to provide against the sale of mattresses containing such insanitary or unhealthy materials."

Section 1 of said act provides:

> "Whoever manufactures for sale, offers for sale, sells, delivers or has in his possession with intent to sell or deliver any mattress which is not properly branded or labeled as hereinafter provided, or which is falsely branded or labeled, or whoever uses, either in whole or in part, in the manufacture of mattresses any cotton or other material which has been used or has formed a part of any mattress, pillow or bedding, used in or about any public or private hospital, or in or about any person having infectious or contagious diseases, or whoever dealing in mattresses has a mattress in his possession for the purpose of sale or offers it for sale without a brand or label as herein required or removes, conceals or defaces the brand or label thereon, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than six months or both."

Section 2 of said act in part provides:

> "The brand or label required by the next preceding section shall contain in plain print in the English language a statement of the material used in the manufacture of such mattress, whether such materials are in whole or in part new or second hand, and the quantities and qualities of the material used."

The label provided for in section 2 must contain:

(A) A statement of the material used in the *manufacture* of such *mattresses.*

(B) Whether such materials are in whole or in part new or second hand.

(C) The quantity and quality of the material used.

As the law requires that the label must contain a statement of the materials used in the *manufacture* of mattresses, it is clear that such label is intended

to be used wholly upon new mattresses as manufactured, and not upon mattresses which are sold as second hand mattresses and not as new mattresses.

A. A statement of the material used in the manufacture of such mattresses.

The title of the act is to provide against the use of insanitary or unhealthy materials in the manufacture of mattresses and to provide against the sale of mattresses containing such insanitary or unhealthy materials.

The question arises at the outset as to exactly what materials used in the manufacture of mattresses are meant. Does it mean simply the materials which are used as a filler for such mattresses, or does it likewise include the ticking which surrounds the filler? In view of the well known fact that all new mattresses are covered with new ticking, and further in view of the fact that the purpose of the act is to provide against the sale of mattresses *containing* insanitary or unhealthy materials, I am of the opinion that the meaning of the word "materials" as used in the manufacture of such mattresses refers to the filler, and does not refer to the ticking surrounding such filler.

Each and every material used for a filler must be set forth in the label, but it is not necessary to set forth anything in reference to the ticking surrounding such filler.

B. Whether such materials are in whole or in part new or second hand.

This language is plain and requires that in naming each material which goes into the filler of a mattress, it must likewise be stated whether such material is wholly new, or whether a part thereof is new and a part thereof second hand.

C. The quantity and quality of the material used.

(1). The quantity.

A question has arisen as to how the quantity of the materials used in the manufacture of mattresses shall be stated.

I am informed that it is proposed by the manufacturers of mattresses to state the gross weight of the mattress and to state the quantity of the various materials used therein by percentage.

I am of the opinion that it would be perfectly proper to state the number of pounds of each material used in the filler of the mattress, or to state the gross weight of the mattress and give the percentage of each material used in the filler from which the exact quantity of each material used may be ascertained.

(2). *The quality.*

As I construe the word "quality" as used in said section 2 it is used in the sense which is ordinarily given it, to wit: the meaning of grade.

I have been informed by mattress manufacturers that it would be difficult for them to state the grade of each of the various materials going into the filler of a mattress, for the reason that the materials purchased by them as fillers are invariably purchased by sample and not by grade, and that to require the grade of each and every material going into the filler to be stated would be an unjust requirement.

Such manufacturers further state that they believe such provision as to quality only means quality in reference to whether the materials so used are new or second hand.

I am unable to give any assent to such a construction, for the reason that the language as used in said section 2 distinguishes between quality and whether the materials used are new or second hand.

I am further informed by such manufacturers that several of the materials used as fillers are all of one quality, and, consequently, have no commercially

known grade. In view of these facts such manufacturers claim that they should not be required to give the quality of each particular material used.

I am of the opinion, however, that the plain meaning of the law is that the quality, as ordinarily understood to mean grade, of each material must be stated. Of course, if the material so used has no gradation in the market a mere statement of the material so used would be all that is necessary; where, however, the material so used is commercially graded the grade thereof must be stated.

Summing up, therefore, I am of the opinion that the label used on a mattress should state:

(a) Each material used in the filler;

(b) The amount of each material either in pounds or by percentage, and the quality of each such material.

(c) If any of the materials used in the mattress are wholly new such fact must be stated; if any one is second hand such fact must be stated; if any one is in part new or in part second hand the amount of each must be stated.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Highway Commissioner)

148.

STATE AID—APPLICATION FOR SPECIFIC YEAR BY COUNTY COMMISSIONERS.

When the county commissioners in 1909 *applied for* 1910 *state aid and passed a resolution directing the specific use of such state aid to a particular road improvement which road improvement was abandoned and another road improved instead, and the commissioners have not during* 1910 *made application for* 1911 *state aid, said commissioners will not be entitled to a* 1911 *state aid, for the purpose of making the intended first road improvement.*

March 4, 1911.

HON. CLIFFORD SHOEMAKER, *Assistant Engineer, State of Ohio, Highway Department, Columbus, Ohio.*

DEAR SIR:—Under date of February 10th, you state:

> "The county commissioners of Pike county made application on December 7th, 1909, under section 31 of the state highway act, for the 1910 state aid appropriation to be used for pike repair. On January 13th, 1910, they applied on the regular form (hereto attached) for the improvement of the Jones Chapel road, under the provisions of section 1219 of the General Code.
>
> "After survey of the Jones Chapel road was completed, the commissioners decided not take up the improvement of that road, and on September 9th, 1910, they applied for the construction of the Columbus and Portsmouth road. This road was put under contract for construction, and the balance of the 1910 appropriation was used for repair, as provided in section 1219 of the General Code.
>
> "During the year 1910 the county commissioner did not apply for state aid for 1911, as provided in sections 1185 and 1218 of the General Code."

Attached to your inquiry is a certain resolution passed by the commissioners of Pike county at the regular session of December 7th, 1909, wherein the board states that it has made application on the *same day* as the resolution was passed for its portion of the 1910 state aid money and is desirous of using its part of *said* money in *construction* and the balance for repairs as provided in section 31 of the state highway law. This resolution was filed in your office January 13, 1910.

Also attached is a resolution passed by the county commissioners on the 20th day of December, 1909, *in pursuance of said resolution of December 7, 1909*, for the construction of said Jones Chapel road, which last resolution was filed with the state highway department on January 6, 1910.

You inquire whether the 1911 state aid appropriation can be used by the county commissioners of said county in the construction of the Jones Chapel road above mentioned, they having failed to apply during the year 1910 for the 1911 state aid.

It is my opinion that the resolution passed December 20, 1909, and filed in your office on January 6th, 1910, is to be considered in connection with the

resolution of December 7, 1909 (filed in your office January 13, 1910), and was for the purpose of using the 1910 state aid money in the construction of said Jones Chapel road and for no other purpose, and that, therefore, it cannot be considered as such an application as is provided for under section 1185, General Code.

Therefore, the commissioners of Pike county, not having applied for the state aid for 1911, are not entitled to the 1911 state aid appropriation under the Jones Chapel road application.

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

175.

SUFFICIENCY OF APPLICATIONS FOR STATE AID FILED IN PREVIOUS YEAR.

By reason of the amendment to section 1189, General Code, applications for state aid for highway improvements which have been filed in years prior to the year next preceding the year in which the appropriation for the purpose becomes available are sufficient basis for the approval of the highway commissioner.

COLUMBUS, OHIO, March 10, 1911.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am herewith replying to your communication of the 2d inst., in which you cite section 1185 of the General Code, and in reference to which section you make the following inquiry:

> "I would be pleased to be advised if such application must be filed during the year next preceding the year in which the appropriation becomes available, or whether applications made in previous years can be used."

It is the opinion of this department that applications made in previous years can be used and that applications need not be filed during the year next preceding the year in which the appropriations become available. We reach this conclusion by virtue of the amendment to section 1189 of the General Code, which said amendment was passed May 10, 1910 and is found in 101 O. L., page 286, Ohio Laws. Said amendment, as amended, reads:

> "* * * If the highway commissioner approves of the construction of a highway, he shall certify his approval to the application to the county commissioners *and applications not so approved shall remain on file and be available for future approval until withdrawn with his consent or disapproved by him.*"

Trusting that this answers your inquiry satisfactorily, I am,
Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

176.

CONTRACT BY STATE AND COUNTY FOR GRAVEL ROAD—RIGHT OF COUNTY TO MAKE SUPPLEMENTAL CONTRACT FOR ASPHALT.

Where the state and a county have entered into a contract for a gravel road, the county may enter into a supplemental contract with the same contractor, for asphalting the road, providing the former contract is not affected thereby.

COLUMBUS, OHIO, March 11, 1911.

HON. J. C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your favor of March 7th has been received. You state:

> "The state of Ohio and Darke county entered into a contract with Baker & Kinsely on the 30th day of September, 1910, for the construction of a gravel road in said county. The consideration in the contract was $2,849.90.
>
> "I have received a recent letter—copy of which is attached—stating that the commissioners of Darke county have entered into a supplemental contract with said contractors, providing for the treatment of said road with asphalt. The consideration of this supplemental contract is $1,645.20. They have asked my approval of their action and while I can see no reasonable objection to their making a better road if they so desire, I do not feel that it would be proper for me to formally approve what they have done but that it will be sufficient if I do not interpose an objection. It seems to me that in this way we would not waive any rights which the state may have in relation to this contract. Kindly advise me as to my duties."

The policy of the state is to improve the highways throughout the state and to procure therefor the best materials in this construction possible.

As you say in your letter that the supplemental contract entered into by the county commissioners of Darke county will result in a better road than that called for in the original contract, I can see no objection to the substitution of an asphalt bound road for a water bound road, provided the state incur no additional expense.

I agree with you that it would not be proper for you to formally approve the supplemental contract or in any way waive the rights which the state has in relation to the original contract.

If the road as completed shall be completed to your satisfaction, and be in every way in compliance with the terms of the original contract, except that it be asphalt bound instead of water bound, you would be justified in accepting it.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

B 223.

CONTRACTS BY STATE FOR PUBLIC IMPROVEMENTS—BANKRUPTCY OF CONTRACTOR—ASSIGNMENT OF CONTRACT TO ONE SURETY—CONSENT OF OTHER SURETY—DISPOSITION OF PROCEEDS OF ASSIGNED CONTRACT.

When a person who has contracted with the state becomes bankrupt, he may assign the contract to a surety on his bond, and the latter may complete the contract, be paid from the estimates due on the contract such loss as he may suffer by being compelled to take over the same, and be compelled to pay the balance to the trustee in bankruptcy of the former. Where the assignment is to but one of the sureties, however, a consent to the assignment should be procured from the other surety in order to avoid the possibility that a recognition by the state, of the assignment to the first surety would be taken as a release of the other surety.

COLUMBUS, OHIO, April 18, 1911.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state:

> "On the 25th day of August, 1910, J. P. Warnick, of Cadiz, Ohio, entered into contract with the state of Ohio for the construction of the Piedmont road, state highway "D" in Moorefield township, Harrison county, the consideration of the contract being $14,847.25. The time for the completion of this contract was five months from the date of letting, but as the time expired in the winter and the work was uncompleted, extension was granted to July 20, 1911.
>
> "I have received a letter from the attorneys of Mr. Warnick, dated April 8th, 1911, to the effect that Mr. Warnick has been forced into bankruptcy and that before going into bankruptcy he assigned to James O. Henderson, one of the sureties on the said contract, the contract for this road improvement.
>
> "I would be pleased to be advised if I can recognize this assignment, and in whose favor estimates shall be drawn."

It is a well established principle of law that sureties on the bond of a contractor are permitted, on the contractor's abandoning the contract, to take up the work and complete the contract in order to save themselves from loss.

It is also well settled that where such sureties on a contractor's bond complete the contract on his abandonment of it, they stand in the position of the owner of the property to which the contract relates to the extent at least that they are entitled to sufficient of the money to be paid on the contract to save themselves from loss on the contract of suretyship and to the money unpaid to the contractor at the time of his abandonment of it so far as necessary to reimburse them from any loss due to their sureties completing the contract.

The facts as stated by you, to wit: That the contractor has been forced to go into bankruptcy, and that before doing so assigned the contract to one of the sureties on his bond, would be an abandonment of the contract on his part. This would permit the sureties to go ahead and complete the same in order to save themselves from loss. As, however, the assignment of the contract was to but one of the sureties on the contractor's bond, and as a recognition of the

assignment of the contract might be construed as such a change of the sureties' contract as to release the other surety, I advise that before you recognize the said assignment you should require the assent of the other surety on the bond to the assignment thereof. Should the other surety assent to such assignment, it is my opinion that you may recognize it.

Upon receiving the assent of the other surety to such assignment and should you recognize the same, the estimates should be made out in favor of such assignee as surety on the original contract.

I assume you have paid and will pay only eight per cent. of the cost of the construction as the work progresses and that you will retain twenty per cent. thereof until completion of the work as provided under section 1211 of the General Code. When such work is completed you should pay to the surety who completes the contract only sufficient of said money as to reimburse him for any loss he may have suffered by reason of completing the contract and the balance should be paid to the trustee in bankruptcy for the benefit of the creditors of such original contractor.

As I understand the law, on the failure of the original contractor to perform the work the sureties may take hold and complete the contract in order to save themselves from loss, but they are not entitled thereby to derive any profit to themselves in so doing. It would, therfore, be perfectly proper for you to require the assignee of the contract to furnish you with sufficient bond to hold you harmless in paying to him the eighty per cent. of the cost of the remaining construction work upon your recognition of the assignment of the contract after receiving the assent of the sureties thereto.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 242.

APPLICATION FOR STATE AID—MAILED DEC. 20th BUT NOT RECEIVED BY STATE HIGHWAY COMMISSIONER PRIOR TO JAN. 1st—RELIANCE UPON AFFIDAVIT OF COUNTY AUDITOR.

The state highway commission may recognize an affidavit of a county auditor containing a statement that an application for state aid for a road improvement had been mailed by him in ample time to reach the commissioner on Jan. 1st in due course of the mails, and though such application was not received before Jan. 1st as required by section 1185, General Code, may act upon the same upon the strength of the aforesaid affidavit.

May 4, 1911.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your favor of April 20th you state:

> "I am in receipt of an affidavit in which W. A. Wooddell, county auditor, of Pike county says that about the 20th day of December, 1910, he forwarded the resolution of the commissioners of Pike county for the improvement of a road in said county by state aid.
>
> "This resolution was not received at this office and consequently is not in our files, and as the state aid law provides that applications

for aid in the construction of roads must be filed before January first of each year, I would be pleased to be advised if this resolution can be acted upon, under the circumstances, in the same manner as if it had been filed here at the proper time. A copy of the resolution accompanied the affidavit, and copies of the same are hereto attached."

Section 1185, General Code, provides in part as follows:

"The commissioners of a county may make application to the state highway commissioner for aid from an appropriation by the state for the construction and repair of highways. Such application shall be filed with the commissioner before the first day of January preceding the date when such appropriation becomes available."

It would appear from the affidavit of W. A. Wooddell, auditor of Pike county, that he duly forwarded to your department about December, 1910, the proper resolution of the commissioners of said county for state aid money. It would further appear from your letter that the same was not received, and consequently is not in your files. As the policy of the state is to encourage the building of good roads, and as it would appear from the affidavit of Mr. Wooddell that an application for state aid money had been so as in due course of mail to reach your office before January 1, 1911, I believe you would be well within your right should you recognize this resolution as filed before January 1, 1911, and grant said county its share of said state aid money.

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

C 257.

SUPERINTENDENT OF ROAD WORK BY ENGINEERS—INSPECTORS CANNOT PERFORM.

Section 1215, *General Code, intends that all superintendence of works of construction of roads shall be done by a competent engineer. Such superintendence may not be performed by inspectors.*

COLUMBUS, OHIO, May 23, 1911.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of April 27th, you inquire whether it would be proper for the state highway commissioner to employ inspectors to take charge of the work of construction of state aid roads, and you call my attention to section 1215 of the General Code, stating that it is the only provision for the superintendence of work on a state aid road to be found in the state highway law.

Said section 1215, General Code, reads as follows:

"The state highway commissioner shall use a competent engineer to make the necessary surveys and plans for a proposed highway improvement. Such engineer *may* also be employed to superintend the

work of construction of such improvement. Such person shall be compensated for each day employed in such service, not to exceed the amount allowed by law."

Section 1211, General Code, as amended 101 O. L. 286, provides in part as follows:

"Payment of the cost of construction of such improvement shall be made as the work of construction progresses, upon estimates made by the engineer in charge of the work when approved by the state highway commissioner."

While the state highway law imposes the duty of construction of roads under said law on the state highway commissioner, yet it is the duty of the commissioner to construct a road strictly in accordance with said law. Section 1215, above quoted, provides the manner in which the superintendence of the work of construction shall be made. Section 1211, above quoted, provides how payments for such work of construction shall be made. In each instance, it is clearly expressed that the superintendence of the work shall be done by a competent engineer and that the payment for the costs of such construction shall be made upon estimates of such engineer.

I am, therefore, clearly of the opinion that the state highway commissioner is not authorized to employ "inspectors" to superintend the work of construction, which you state to have been the opinion of my distinguished predecessor.

As I view the law the legislature intended that all superintendence of work of construction shall be done by a competent engineer and not by "inspectors."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

285,

INSPECTORS, MATERIALS AND COMPLETED ROAD WORK—ENGINEER TO INSPECT CONSTRUCTION—ASSISTANT INSPECTORS TO ENGINEER.

The state highway commissioner may employ inspectors to inspect materials and the work as done. The work of construction, however, must be superintended by an engineer and not by inspectors. This rule, however, does not preclude the highway commissioner from employing inspectors as supplementary to, and as assistants for, the engineer.

COLUMBUS, OHIO, July 3, 1911.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of June 28th, calling my attention to Senate Bill No. 165 creating a state highway department, which was passed by the recent legislature, and in reference to which you ask the following questions:

"Has the state highway commissioner the authority to appoint inspectors on any work arising under this act?

"May he fix their salary and may he be allowed to pay them their actual and necessary expenses?"

Section 6 of said act codified as section 1183, General Code, reads in part as follows:

"The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all highways, bridges and culverts which are constructed, improved, maintained or repaired by the aid of the state money."

Section 42 of said act codified as section 1215, General Code, reads as follows:

"The state highway commissioner shall use a competent engineer and assistants to make the necessary surveys and plans for a proposed highway improvement. Such engineer may also be employed to superintend the work of construction of such improvement, and shall be compensated for each day employed in such service, not to exceed six dollars per day, and actual expenses. All assistants shall receive not to exceed three dollars per day and actual expenses."

Said section 6 of the state highway law casts upon the state highway commissioner the general supervision of the construction of roads under said act, and by necessary implication must vest him with the power necessary for the proper fulfillment of his duties thereunder. He must see that the contracts entered into by him with the various contractors are fully carried out according to the plans and specifications, and if in order so to do, it becomes necessary to employ on said work inspectors whose duty it is to oversee the construction as it is being placed, it is proper for him so to do.

As I understand the duties of the inspectors, they are to see that the contract entered into is being fully complied with, in that the material used and work done be fully up to the standard required by such contract.

I am, therefore, of opinion since the law imposes the duty on the state highway commissioner to construct the roads for which state aid money is used, it would be proper for him to employ inspectors to look after the construction of said road and pay them a reasonable compensation therefor out of the state aid money apportioned to the county in which said road is being built.

As I view section 42, supra, of said act, it does not limit the power of the state highway commissioner to the employment of an engineer only on the work, as such engineer is to be employed for the purpose of *superintending* the work of construction, whereas the duties to be performed by the inspector is to inspect the materials or work as done.

In an opinion rendered by this department, bearing date May 23, 1911, I held that I was clearly of the opinion that the state highway commissioner is not authorized to employ inspectors to superintend the work of construction. I further advised in that opinion as follows:

"As I view the law the legislature intended that all superintendents of work of construction shall be done by a competent engineer and not by inspectors."

However, it was not intended thereby to interpret the law as denying to

the state highway commissioner the right to employ competent inspectors as supplementary to a competent engineer. The engineer is to do the necessary work of superintendence, while an inspector may be employed to examine and report to the engineer just as is being done. In other words, it is a matter for the determination of the state highway commissioner as to how long he may need the services of an engineer, and at just what time, and it is my judgment that he likewise has the right to employ inspectors for such duties as are appropriate, to the end that the cost of construction may thereby be reduced.

Trusting that I have made my position clear on this matter, especially indicating my views that no narrow policy is required of you when your purpose is to reduce the expense of construction, I beg to remain,

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

G 326.

STATE AID--APPLICATION BY COUNTY PRIOR TO ACT OF 1911—CONSENT OF HIGHWAY COMMISSIONER—LIMIT OF APPROPRIATION.

Under section 55 of the act of 102 Ohio Laws, 333, county commissioners who have made application for state aid for repair of roads in accordance with the former laws may obtain state aid for repair this year with consent of the highway commissioner as in previous years, provided the legislature has appropriated sufficient funds for the purpose.

COLUMBUS, OHIO, August 22, 1911.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of August 4th, wherein you state:

> "County commissioners who have made application (prior to January 1, 1911) for state aid in repair of roads in accordance with the old law, wish to know if they can get state aid for repair this year, to be used, with the consent of the state highway commissioner, as in previous years."

Section 55 of the act passed by the recent legislature and known as Senate Bill 165 (102 Ohio Laws 333) at page 348 reads as follows:

> "This act shall not affect pending actions or proceedings, or affect or impair any contract, application now on file, act done, or right accruing, accrued or acquired, or any penalties or forfeitures incurred prior to the time when this act or any section thereof takes effect, under or by virtue of the laws so repealed, and the same may be conducted or continued in the same manner and under the same terms and conditions and with the effect as though this act or any part thereof had not been passed."

Section 6309, General Code, in reference to revenues derived from registration fees of motor vehicles reads as follows:

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

Section 1218, General Code, provides:

"If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam or material of like quality, the county commissioners may make application to the state highway commissioner on or before January first of each year, for the amount of state funds apportioned to such county.

"Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so apportioned. *Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each such township or road district.* Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road."

The moneys received under section 6309, supra, are usually appropriated by the legislature without any restrictions whatever. The legislature usually in appropriating moneys for the state highway department *from the general fund* adds to such appropriation certain restrictions upon such department in the use of such money, and, therefore, the various acts appropriating such money must be consulted in order to decide whether there are moneys which can be appropriated under section 1218, General Code, supra, to go into the pike repair fund of the various counties.

As section 55 of the act passed by the recent legislature, 102 Ohio Laws 333, above set forth, specifically provides that such act shall not affect applications now on file, and that the same may be conducted and continued in the same manner and under the same terms and conditions with the same effect as though such act had not been passed, I am of the opinion that the county commissioners who have made application for state aid for repair of roads in accordance with the law existing prior to the enactment of the law set forth in 102 Ohio Laws 333, can get state aid for repair this year to be used with the consent of the state highway commissioner as in previous years, provided there are funds which have been appropriated by the legislature that can be used for that purpose.

In answering the above, I wish it distinctly understood that I do not pass upon the question as to whether or not county commissioners who have made application prior to January 1, 1911, for state aid in repair of roads in accordance with the old law are entitled to receive the same for repair this

year as of right irrespective of the consent of the state highway commissioner having been first obtained. As the question propounded by you does not reach this proposition I will not answer it until I receive a request for opinion thereon.

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

A 334.

CONTRACTS ON LEGAL HOLIDAYS—ADVERTISEMENT AND SALE OF STATE AID ROAD ON LABOR DAY, LEGAL—PRACTICE DEPRECATED.

While a proceeding to advertise and sell a state aid road on Labor day would be valid, the act is one to be deprecated as a violation of the sacredness of the day intended to be established by section 5977, General Code.

COLUMBUS, OHIO, September 1, 1911.

HON. CLIFFORD SHOEMAKER, *Deputy Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 22d, which reads as follows:

> "We would like to know if the proceeding would be legal to advertise and sell a state aid road on the 4th of September, 1911, which is Labor day."

Section 5977 of the General Code provides as follows:

> "The first Monday in September of each year shall be known as 'Labor day,' and, for all purposes, shall be considered as the first day of the week."

In Hastings vs. Columbus and Shufflin vs. Columbus, 42 O. S. 585, the supreme court held:

> "Publication of the preliminary and other ordinances, with respect to a street improvement, in a newspaper of general circulation, in accordance with the terms of the statute, is a valid and legal publication, although such newspaper is published only on Sunday."

and Judge Okey, in the opinion, uses the following language:

> "It follows from the foregoing, irresistibly and necessarily, that a summons or notice served by a sheriff, coroner or constable on Sunday, is in Ohio lawfully served. In saying so we do not intend to intimate that such officer ought, ordinarily, to make such service on Sunday, or that he would be guilty of any breach of duty whatever by declining to make such service on that day. Nor are we to determine whether the law is right or wrong. We have simply to inquire, what is the law? and having ascertained that, declare the result."

In the case of State vs. Thomas, 61 O. S. 444, Judge Williams, rendering the opinion, says: (pp. 465-466)

> "If it be conceded that the statute places Labor day in the same category with Sunday for all purposes, does it follow that a grand jury impanelled on that day is an illegal body without authority to thereafter hear evidence and find indictments? The distinctive principle established by the case of Bloom vs. Richards, 2 Ohio State, 387, is, that Sunday laws are mere civil regulations for the good of society, and not designed to enforce or require any religious observance of the day; and, that being penal in their nature, such laws will not be extended by construction beyond their plain import; so that, whatever act may be lawfully done on any other day of the week, is equally lawful on Sunday, unless its performance on that day is forbidden by statute. Our statute goes on further than to the prohibition, on that day, of common labor, the arrest of persons on civil process, the selling of intoxicating liquors, and certain shows, games and sports. It was held in that case that the making of a contract for the sale of land did not come within the prohibtion against common labor on Sunday, and the specific performance of such a contract made on that day was enforced. The case was thoroughly considered, and it is shown by Judge Thurman, in an opinion of great research, that the principles stated are maintained by the great weight of authority in this country, and that under constitutions like ours, an enactment could not be sustained whose purposes was simply to enforce the observance of Sunday as a religious duty."

From the foregoing expressions of the supreme court I am convinced that your inquiry should be answered in the affirmative and that it would be perfectly legal to advertise and sell a state aid road on the 4th day of September, 1911, which is Labor day. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

While it is held lawful under this department by virtue of the decisions to advertise and sell a state road on the 4th day of September, 1911, which is Labor day, the practice is one to be reprehended in virtue of the purposes of the statute.

The statute, section 5977, provides as follows:

> "The first Monday in September of each year shall be known as 'Labor day,' and for all purposes, shall be considered as the first day of the week."

Whatever might be tolerated with reference to private business sometimes growing out of necessity in respect to Labor day yet under the statutes it is entitled to all of the sacredness and dignity of Sunday so far as labor is concerned. The public not only in this state, but in this nation, are more and more each year joining in their tribute to the sacredness and dignity of labor, and it is especially befitting public departments of the state to observe in the fullness of the spirit of the statutes its entire intendment. This department,

however, earnestly recommends that the state highway department and all other departments of the state government should transact no business on Labor day, and further that all those under the direction and advice and control of said departments be likewise required to observe the same salutary rule.

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

363.

NATIONAL, COUNTY AND TOWNSHIP ROADS—NAMES AND CLASSIFICATION FURNISHED BY COUNTY COMMISSIONERS.

The one national road in this state has been released to the state.

A county road is one established as such by the county commissioners and lying wholly within the county; or under section 6916, "a road dedicated to the public use or operated and used for public use for more than twenty-one years as a public highway, and which commences in an established road and passes through and intersects with another established road."

A township road is one established as such by the township trustees and lying wholly within the township.

The county commissioners with the assistance of the county surveyor should be able to furnish information with regard to the classification of each and every road.

COLUMBUS, OHIO, September 15, 1911.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of July 22d, you ask for my opinion as follows:

> "I would deem it a favor if you will give us as soon as possible an opinion on a part of section 10 of the recently enacted state highway law (S. B. No. 165), stating clearly what constitutes a national, state, county and township road. We desire such opinion that we may send it to the county and township authorities and thus get a uniform classification of the roads."

In reference to a national road, I beg to state that there is but one national road in this state, which was a road constructed by the United States government, and subsequently released to the state. This road begins at Bridgeport, in Belmont county, and passes in a westerly direction through the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Clark, Montgomery and Preble county and leaves the state in the county line of Preble county after passing through Belfast in said county.

A state road is defined by Glauque in Ohio Road and Bridge Laws as

> "A state road is a road running into or through two or more counties."

which is the definition to be found in State vs. Treasurer of Wood County, 17 Ohio, 184.

A *county road* is defined by Giauque in Ohio Road and Bridge Laws as:

> "A county road is one established as such by the county commissioners and lying wholly within the county."

This definition is likewise taken from the case of State vs. Treasurer of Wood County, 17 Ohio 184.

I would likewise call your attention to certain other roads which have been declared to be county roads by virtue of section 6916, General Code, which reads as follows:

> "Roads of any width dedicated to the public use, or opened or used for public use, for more than twenty-one years as public highways, and which commence in an established road and pass to and intersect with another established road, shall be county roads and public highways. * * *"

You will observe that the essence of the description of the last mentioned county road consists in the absence of the word establishment. The road may lie wholly within a township or it may run through two or more townships, or through a township and a part of another, or through parts of two townships, and yet would be a county road, provided only that it be dedicated to the public use or opened and used for the public use for more than twenty-one years as a public highway, and which commences *in an established road and passes through and intersects with another established road.* This kind of a road generally arises from uses or dedication.

A *township road* is defined by Giauque as follows:

> "A township road is one established as such by the township trustees any lying wholly within the township."

The above definitions, I trust you will find sufficiently comprehensive for your purposes.

I think, however, that you will find that the county commissioners, with the assistance of the county surveyor, will be able from the statistics and information furnished by the township trustees, to specify exactly in what classification each and every road in the various counties belong.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

382.

ROAD IMPROVEMENTS—DUTY OF COMMISSIONER, TOWNSHIP TRUSTEES AND ROAD SUPERINTENDENT—EXPENSES—DAMAGES—VIEWERS—COUNTY SURVEYOR.

Section 3370, General Code, provides that a road superintendent shall be hired and employed for each road district by the trustees of each township.

Upon the filing with the commissioners of a petition for the laying out of a county road, viewers shall first be appointed to act as a jury to assess and determine the compensation for properties to be appropriated, and the surveyor shall survey the road, after which the viewers shall report and present the report for the approval of the commissioners. The survey and report shall be recorded.

The damages shall be paid partly from the county treasury and partly by the petitioners as the commissioners shall determine. Further than this, the commissioners shall make no expenditures.

Upon certification by the commissioners, to the trustees of the townships, the latter officials shall direct the road superintendent to construct and drain the road, who shall use the labor and funds at his disposal to complete the construction.

COLUMBUS, OHIO, September 21, 1911.

HON. CLIFFORD SHOEMAKER, *Deputy Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 16th, referring to me for my opinion thereon the letter addressed to you by Hon. Walter M. Beck, assistant prosecuting attorney of Columbiana county.

The questions presented by Mr. Beck are as follows:

> "1. Are road superintendents to be elected or appointed, under the present law?
>
> "2. Under what authority are county roads opened and constructed, and by whom is the expense of construction and opening paid?"

As to the first question I beg to state that section 3370 of the General Code is now in force, as found in 101 Ohio Laws 113.

It explicitly provides that "the trustees of each township shall employ and hire for each road district a suitable person * * * who shall be known as road superintendent." This provision seems to answer the question.

As to the second question I beg to state that the following sections outline the procedure for opening county roads:

Section 6861, General Code, provides for the filing of the petition with the county commissioners or the laying out of a county road. Other succeeding sections provide for the formalities incident to the filing of such petition.

Section 6867, General Code, provides for the appointment of viewers "who shall also be a jury to assess and determine the compensation * * * for the properties sought to be appropriated * * * and to assess and determine how much less valuable * * * the land or premises from which appropriation may be taken will be rendered by the opening and construction of the road." The section also directs the county surveyor to survey the road. The succeeding sections provide for the proceedings of the viewers and the surveyor.

Section 6879 provides for the report of the viewers. Section 6880 provides for the approval of the report and the record thereof, together with the survey and plat.

Section 6881 provides as follows:

> "Thenceforth, such road shall be a public highway, and the county commissioners shall issue their order to the trustees of the proper township or townships directing it to be opened. * * *"

Other provisons of the same chapter, especially section 6883, provide for the assessment of the damages. The latter section expressly stipulates that such damages shall be paid out of the county treasury, or partly out of the county treasury and partly by the petitioners for the road, as the commissioners may determine. No section of the chapter, however, authorizes the commissioners to incur any expense incident to the opening, laying out and establishing of the road other than the payment of damages and of the compensation for the land actually appropriated.

This silence of the statutes, together with the express language of section 6881, above quoted, lead to the conclusion that the county commissioners are not liable for the expenses of laying out, opening and constructing a county road. Said section 6881 seems to throw the burden of such expenses upon the trustees of the proper township or townships. This section, however, is to be read in connection with section 7137, which provides in part:

> "A road superintendent shall open or cause to be opened and kept in repair the public roads and highways which are laid out and established in his road district and remove or cause to be removed all encroachments by fences or otherwise and obstructions that are found thereon. * * *"

The succeeding sections of the chapter, of which this section is the first, prescribe in detail the powers and duties of the road superintendent in discharging the principal duty enjoined upon him thereby.

In view of these provisions it is my opinion that when the county commissioners have approved the report of the viewers, or reviewers as the case may be, and have determined that a county road which is petitioned for will be public utility, and have confirmed the assessment of damages and compensation made by the viewers or reviewers, their function with respect to the establishment of the road is discharged. They have thereby created a public way, but they have not constructed a public road. It then becomes their duty to certify the result of their official action to the township or townships. It then becomes the duty of the trustees to direct the road superintendent to proceed with the construction and drainage of the road. In the discharge of this duty the road superintendent may use the road labor under this control and any funds which may be available to him for expenditure.

This conclusion is not inconsistent with the provisions of the act of May 18, 1910, 101 O. L. 292, which act provides in effect that all county roads when built shall be subject to the jurisdiction and supervision of the county commissioners and that all township roads shall likewise be under the supervision of the trustees. The exact meaning of this act is not clear, but in my opinion it does not in any way alter the procedure for original opening up and construction of a county road.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

496.

HIGHWAYS--STATE HIGHWAY COMMISSIONER—APPLICATION FOR STATE AID BY COUNTY COMMISSIONERS.

Under section 1218, General Code, it is mandatory upon the state highway commissioner, upon application by the county commissioners of a particular county (such county not having asked for construction of improved roads by the state highway department), to pay to the county treasurer of such county the amount apportioned by the state highway commissioner to such county provided the county commissioners of such county provide a sum equal to the amount so appropriated.

COLUMBUS, OHIO, December 20, 1911.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Based upon my opinion to you under date of August 27th, you inquire under date of December 1st, whether it is mandatory upon the state highway commissioner to grant an application for state aid for repair, the application being filed prior to January 1st, 1911, and being made for the 1911 funds and otherwise being regular, or whether it is discretionary with the state highway commissioner.

Section 1185, General Code, provides that the county commissioners may make application to the state highway commissioner for aid from an appropriation by the state for the construction and repair of highways.

Section 1186 of the General Code provides that each application for state aid in the construction of an improvement of highways shall be accompanied by a properly certified resolution of the county commissioners.

Section 1189 of the General Code provides that upon receipt of an application the state highway commissioner shall determine whether the highway sought to be improved is of sufficient public importance to come within the purposes of this chapter.

The application referred to in section 1189, General Code, is as I construe the state highway law the application referred to in section 1186, General Code, to wit: an application for the construction of highways. This is more clearly shown by an examination of section 1190, General Code, immediately following said section, as it is provided that if the state highway commissioner approve the application he shall cause a map of the highway in outline and profile to be made, and cause plans and specifications thereof for telford, macadam or gravel roadway.

The sections following the above up to and including section 1217, General Code, deal, as I view it, exclusively with the construction of improvement of highways.

Section 1218, General Code, provides:

> "If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam or material of like quality, the county commissioners may make application to the state highway commissioner on or before January first of each year, for the amount of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on

the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each such township or road district. Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road."

The application therein referred to should properly be considered as the same as an application for repair under section 1185, heretofore referred to.

Said section 1218, General Code, provides that upon application being made thereupon to the state highway commissioner for the amount of the state funds apportioned to a county having permanent roads as therein provided for the amount so apportioned *shall be* paid to the county treasurer if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated, and that such appropriation and levy shall become a part of the pike repair fund of the township.

The provisions of such section as above indicated seem to make it mandatory upon the state highway commissioner if he has funds which under the wording of the various appropriations are applicable thereto, to pay such funds over to the county commissioners upon their application for such money to be used as part of the pike repair funds of the township.

The primary object of the state highway law is the construction and improvement of highways; but should a county not desire to have highways constructed in such county by the state highway commisisoner, the commissioners thereof may make application for such money to be paid over to the treasurer thereof to be used together with an equal amount provided by the county in the repair of improved roads as is provided in section 1218, General Code. If the township of such county has no improved roads it cannot use its proportion of such funds for any other purpose than the construction of improved highways in the manner provided in the state highway law. Such provision being found in section 1219, General Code.

By reason of the language used in section 1218, General Code, hereinbefore set out in full, I am of the opinion that it is mandatory upon the state highway commissioner upon application by the county commissioners of a particular county, such county not having asked for the construction of improved roads by the state highway department, to pay to the county treasurer of such county the amount apportioned by the state highway commissioner to such county if the county commissioners of such county provide a sum equal to the amount so appropriated.

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

(To the State Board of Health)

14.

MANDATORY DUTY OF COUNCIL TO MAKE APPROPRIATION FOR EXPENSES OF BOARD OF HEALTH—MANDAMUS.

It is mandatory upon the council to appropriate moneys sufficient to pay salaries legally fixed, and expenses incurred by the board of health, and this duty may be compelled by mandamus.

COLUMBUS, OHIO, January 12, 1911.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your communication of January 9th, 1911, making the following inquiry:

> "Has council authority to control the compensation fixed by the board of health by failing to appropriate for the use of the board a sufficient amount to pay the compensation as fixed by the board?"

Replying thereto I beg to submit the following opinion: Under section 4404 of the General Code it is mandatory upon council to establish a board of health.

Under section 4408 it becomes a duty of the board of health to appoint a health officer.

Sections 4411, 4431 and 4458 of the General Code provides for the appointment of certain officers and employes by the board of health; it is not mandatory upon the board of health to appoint officers and employes thereunder unless an emergency arises or if in their judgment it is necessary to do so.

Section 4451 of the General Code provides for the payment of expenses incurred by the board of health; this section I construe to be mandatory. If a health officer is employed under section 4408 or other officers and employes are appointed or employed under sections 4411, 4431 and 4458 and they render services it is mandatory upon council to make an appropriation or issue an order for the payment of services of such officer or officers or employes, and upon their refusal so to do, if there be no dispute about the bill mandamus will lie to compel them to so act, but the expenses of the board of health is subject to the restrictions of sections 3785 and 3786 of the General Code.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

23.

HEALTH OFFICER—POWER OF BOARD OF HEALTH TO APPOINT, CONTROL AND FIX SALARY—NO POWER IN COUNCIL TO REDUCE SALARY —DUTY OF COUNCIL TO APPROPRIATE MONEY FOR PAYMENT.

Under section 4412, the control of the health officer and the fixing of his salary is vested in the board of health, and the council not only has no power to reduce the salary but is obligated to appropriate sufficient sums to pay the salary fixed by the board.

COLUMBUS, OHIO, January 14, 1911.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 5th, 1911, addressed to my predecessor in office, Hon. U. G. Denman. You request my opinion upon the following state of facts:

> "The board of health under authority conferred by section 4412 of the General Code has appointed a health officer, and fixed his compensation at $45.00 per month. At the time of appropriation of money by council in July, the council attempted to reduce the compensation of the health officer to $35.00 a month by appropriating only enough to pay that amount. In the appropriation made during the present month, council has made another reduction which brings the compensation to $25.00 per month. These actions of council have been protested against by the local board of health.
>
> "I shall be glad to know if council has the authority to reduce the compensation of a health officer in this manner, or if, when the compensation has been fixed by the board of health, it is the duty of council to appropriate a sufficient amount to pay the compensation so fixed?"

In answer to your first inquiry my opinion is that council has no authority to reduce the compensation as a health officer in this manner. Section 4412 of the General Code is conclusive as to this, which section is as follows:

> "The board shall have exclusive control of its appointees, define their duties and fix their salaries, but no member of the board of health shall be appointed as health officer, nor shall a member of the board of health nor the health officer be appointed as one of the ward physicians. All such appointees shall serve during the pleasure of the board."

In answer to your second question my opinion is that it is the duty of council to appropriate sufficient funds with which to pay the compensation fixed by the board of health for the health officer, and that council can be compelled by mandamus to perform this duty.

In support of my opinion in answer to each of your questions I refer you to the case of State ex rel. Miller vs. Massillon, 14 Circuit decisions, p. 249. The court say on page 255:

> "It is not only mandatory upon the city council to create the board of health, but it is equally mandatory upon the board of health to create the office of health officer, and to fix his salary, etc. These are things

which the legislature of the state has required shall be done; and if they are done and the expenses have been incurred then what is the duty of council under section 2140, Revised Statutes? That they must make appropriation to meet this expense. There is no discretion in it, and it is not a subject of contract, but is a mandatory duty cast upon the board by the state, and we owe that duty to the state."

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

122.

TERM OF OFFICE OF VILLAGE HEALTH OFFICER—PLURALITY OF VOTES OF COUNCIL SUFFICIENT TO APPOINT.

A health officer appointed by the council for a definite term in place of the board of health, under section 4404, General Code, is a holder of a public office, under section 8, General Code, and remains in such office until his successor is elected and qualified.

As the statutes do not expressly require any special vote for the appointment of such official, a plurality of the councilmen's votes cast shall be sufficient.

COLUMBUS, OHIO, February 17, 1911.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your letter of the 13th inst., is received in which you state:

"Under the provisions of section 4404, G. C., council is authorized to appoint a health officer in place of the board of health, with the proviso that the appointee be approved by the state board of health. The section states that council shall fix the salary and term of office of its appointees. Please inform me if a person appointed under the provission of this section for a definite term, say, one year, would not continue to hold his office until his successor has been duly appointed and qualified? Such has been our position in regard to this position in past inquiries."

Section 4404 of the General Code provides:

"The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council, who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Section 8 of the General Code provides:

> "A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

A health officer appointed under the provisions of section 4404, General Code, is distinguished from a mere employment, for he has independent duties which are part of the sovereignty of the state, acting as a board of health might, had council appointed a board of health. This view is sustained by the case of State vs. Jenkins, 57 O. S. 415.

In view of the provisions of the sections above quoted I am of the opinion that a person so appointed for a definite term, since the council is authorized to fix the salary and term, would hold his office until his successor has been duly appointed and qualified.

You inquire further,

> "Must the appointee receive a majority of the votes of all members elected to council, or a majority of the quorum present?"

Since section 4404, General Code, does not prescribe any specific mode of electing the health officer nor declare what vote is requisite to such election, it is my opinion that a plurality of the votes cast, so long as a quorum is present, is sufficient to elect. The general rule is thus stated in McCrary on Elections, paragraph 197.

In the absence of any statutory provision expressly requiring the same, a plurality of the votes cast will be sufficient to elect. Also to the same effect in Cooley on Const. Lim., page 620, it is said:

> "Unless the law under which the election is held expressly requires more, a plurality of the votes cast will be sufficient to elect."

Our supreme court in the case of State ex rel. Attorney General vs. Anderson, 45 O. S. 196, has decided practically this same question.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

127.

SECRETARY OF STATE BOARD OF HEALTH—TERM OF OFFICE CONTRACTUAL—COMPENSATION—NOT A "PUBLIC OFFICER."

The secretary of the state board of health is not required to give bond nor take oath, nor are any of his duties to be classed as independent public functions delegated as a part of the sovereignty of the state. He is, therefore, not a "public officer" within the constitutional prohibition against change of term or compensation.

His term of office is a matter of contract between himself and the appointing power, i. e., the state board of health, and his compensation shall be fixed as provided by section 2250 at the rate of thirty-five hundred dollars per year.

February 23, 1911.

HON. JOHN M. HILL, *Member Ohio State Board of Health, Cincinnati, Ohio.*

DEAR SIR:—Through Dr. Frank Warner of Columbus, Ohio, one of the members of the state board of health, I have been requested to give an opinion as to the construction of section 1234 of the General Code as to the term of office of secretary of the board of health.

Section 1234 of the General Code is as follows:

> "The state board of health shall elect a secretary who shall perform the duties prescribed by the board and the provisions of this chapter. He may be removed from office for cause by a vote of a majority of the members of the board. The necessary traveling and other expenses incurred by the secretary in the performance of his official duties shall be paid by the state on the warrant of the auditor of state upon the certificate of the president of the board."

The question to be determined is whether or not the secretary provided for by said section is a public officer. If he is not an officer he would be classed as an employe, and it would be entirely unnecessary (unless the board deemed it wise to do so) to fix any time limit to his employment as he could be removed at any time.

There is no general rule which can be applied to determine whether a certain place or position is or is not a public office.

In the case of State vs. Jennings, 57 O. S. 424, the court say:

> "That the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state. * * * It is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virute of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of someone else."

And in 23 American and English Encyclopædia of Law 322, second edition, it is said:

> "There are numerous criteria which are not in themselves con-

clusive, yet which aid in determining whether the person is an officer and whether his employment is an office. Thus, a public officer is usually required to take an oath and frequently has to give a bond. Usually an officer is entitled to a salary or fees, but this is not necessary."

The secretary of the state board of health is not required to give a bond, nor is he required to take an oath. Therefore, the only remaining test is whether there is any public function delegated to him as a part of the sovereignty of the state; this also, it seems to me, must be decided in the negative. Section 1234 says:

"That he shall perform the duties prescribed by the board and the provisions of this chapter."

By the provisions of this chapter see section 1232. The secretary is given charge of the laboratory authorized by section 1241; and in reality his duties are practically all prescribed by the board that appoints him and there is no public function delegated to him as part of the sovereignty of the state.

Therefore, it would be clear that he is not a public officer were it not for the provision of section 2250 which provides an annual salary for the secretary of the state board of health at thirty-five hundred dollars. But this section does not necessarily mean that all are officers whose salaries are fixed by such provision, for the first sentence of the section is "the annual salaries of appointive state officers and *employes* herein enumerated shall be as follows."

Therefore, my opinion is, that the secretary of the state board of health is not a public officer and that section 1234 provides all that is necessary as to his term; that it is in the nature of employment, the duties of which are not fixed by statute, but is a matter of contract, and is to continue during the will of the contracting parties, and is not controlled by the constitution or statutes as to the duties of public officers. It might be held that no secretary could be elected for a longer period than one year, as the statutes seem to provide for an annual reorganization of the state board of health, but when a secretary is once chosen he would continue in his office or position until he be properly removed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

140.

SICK POOR—EXCLUSIVE JURISDICTION OF MUNICIPAL BOARD OF HEALTH TO CARE FOR—"PROPER AUTHORITIES"—CONTRACTS FOR MEDICAL RELIEF.

The board of health is given exclusive jurisdiction to care for sick poor of the municipality, under the statutes, whether said "sick poor" have infectious or contagious diseases or not.

If, however, the board of health has not exercised its discretion under section 4408, General Code, to appoint ward or district physicians possibly under section 3490, General Code, some other "proper authorities" might contract for medical relief as provided by these sections.

COLUMBUS, OHIO, February 27, 1911.

State Board of Health, DR. C. O. PROBST, *Secretary, Columbus, Ohio.*

DEAR SIR:—I have your letter of the 20th inst., requesting my opinion upon the following question:

> "The question has been raised as to the authority of the board of health, under the provision of sections 4408 and 4410 of the General Code, to appoint, with the consent of council, one or more physicians to care for the sick poor and other persons quarantined on account of having a contagious or infectious disease.
>
> "Will you please inform me if the authority above referred to gives to a local board of health exclusive jurisdiction to care for the sick poor within the corporation or whether there is a division of jurisdiction, the board of health caring only for persons having contagious or infectious diseases and some other municipal officer caring for persons in need of medical care who do not have a contagious or infectious disease? You will note the section 2115, R. S., from which the sections above mentioned originate specified that ward or district physicians may be appointed 'for the care of the sick poor.'" (95 O. L. 423.)

Section 3476, General Code, provides:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

Section 3404, General Code, provides for the appointment of a board of health by the council of a municipality.

Section 4408 provides in part:

> "The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

Section 4410 provides:

> "Each ward or district physician shall care for the *sick poor* and each person quarantined in his ward or district when such person is unable to pay for medical attendance, and for all persons sent from his ward or district to the municipal pest house when such persons are unable to pay for medical attendance."

Boards of health are vested with legislative and governmental powers, in the exercise of which proceedings of a most summary character are frequently necessary and permissible. Since the board of health is the municipal department to which all matters pertaining to its duties are referable, including caring for the "sick poor," and since they are by statute (see sections 4413 to 4476 inclusive) given almost plenary power to make and enforce all orders and regulations deemed necessary "for its own government, for the public health, the prevention and restriction of disease, and the prevention and abatement and suppression of nuisances," I can see no reason why its authority should be shared with some other department of the municipal government.

In the absence of statute to the contrary, and after full consideration of the chapter and statutes governing the duties of the boards of health, as also those treating of the poor laws, I am of the opinion that a local board of health has exclusive jurisdiction to care for the "sick poor" within the corporation, whether said "sick poor" have infectious or contagious diseases, or not.

While it is true that section 3490, General Code, provides in part that:

> "The trustees of a township, or the proper officers of a municipal corporation in any county, may contract with one or more competent physicians to furnish medical relief and medicines necessary for the persons who come under their charge under the poor laws, but no contract shall extend beyond one year,"

"the proper officers of a municipal corporation" where, under the provisions of law, a board of health has been duly appointed, would be the board of health. If in the discretion conferred by section 4408, as above quoted, the board had appointed no ward or district physicians, then possibly, the proper officers of a municipal corporation, other than the board of health might contract in the manner provided in section 3490 and the following sections. But after the board of health has appointed ward and district physicians with the consent of council, the duties prescribed in section 4410, General Code, to wit: caring for the sick poor and each person quarantined in the respective ward or district, and proper persons in the pest house, devolve exclusively upon the board of health, through its appointees.

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

153.

MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS FOR PURPOSES OF SEWERAGE ORDERED BY STATE BOARD OF HEALTH—DUTIES OF COUNCIL AND PENALTY FOR FAILURE—NO CONFLICT OF STATUTES.

When the state board of health has issued order under the statutes, to a municipality to install sewers and sewerage disposal, the council may proceed, under section 1259, *General Code, to issue bonds for such purpose to the amount of* 5% *of the tax duplicate without submitting the question of the issuance of such bonds to the electors.*

Officers of a municipality who fail to provide for water supply in accordance with the order of the board of health are liable for the penalty of five hundred dollars therein provided.

As section 1259 *deals with an altogether independent subject, it does not conflict with either section* 4471, *General Code, or sections* 3940, 3941, 3942 *and* 3948.

COLUMBUS, OHIO, March 7, 1911.

HON. JOHN H. KINKADE, *City Solicitor, Marysville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of March 3d, in which you submit the following and request my opinion thereon:

"The state board of health under the provisions of sections 1349, 1250 and 1251, General Code, has issued an order requiring the municipality of Marysville, Ohio, to install sewerage and sewage disposal.

"1. Can the council now proceed under section 1259 and issue bonds for the purpose of constructing sewers and sewage disposal as ordered by the state board of health to the amount of 5% of the tax duplicate, without submitting the question of the issuance of such bonds to a vote?

"2. Unless the councilmen act are they, under section 1260, liable to a penalty of $500 each?

"3. Does section 1259 conflict with section 4471 or sections 3940, 3941, 3942 and 3948, General Code?"

Section 1259, General Code, provides:

"Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. When so secured, or the bonds thereof have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for such purpose shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

With respect to the first question I am of the opinion that council has full power under the authority of section 1259 to issue bonds to the amount of five per cent. of the tax duplicate without submitting the question of the issuance of such bonds to a vote, for the purposes stated.

Section 1260, General Code, provides:

> "If a council, department or officer of a municipality, or person or private corporation fails or refuses for a period of thirty days, after notice given him or them by the state board of health of its findings and the approval thereof by the governor and attorney general, to perform any act or acts required of him or them by this chapter relating to public water supply, the members of such council or department, or such officer or officers, person or private corporation shall be personally liable for such default, and shall forfeit and pay to the state board of health five hundred dollars to be deposited with the state treasurer to the credit of the board. The governor and attorney general, upon good cause shown, may, in their discretion, remit such penalty, or any part thereof."

The object of the section is to enforce the provisions of law to insure a proper public water supply, and the officers failing to do their duty are subject to the penalty therein provided.

In my opinion there is no conflict either between sections 1259 and 4471, or 1259 and sections 3940, 3941, 3942 and 3948. Section 4471 provides:

> "For such purpose the council may use any funds raised and necessary therefor, and, in case no funds are available and no bonds have been authorized for such purposes and it becomes necessary to issue and sell bonds for such purposes, the question of issuing bonds of a municipality shall be submitted at an election therefor, conducted in the same manner as in case of the issue of other bonds of the municipality for specific purposes in excess of the legal limit. A majority of votes cast shall be sufficient to authorize the municipality to issue bonds under this section. The council shall not issue such bonds unless a majority of the qualified electors of the municipality voting are in favor thereof."

The purpose referred to in the section just quoted is the maintenance of a sanitary plant under section 4467, et seq. It is an entirely different subject than that provided for in section 1259, and in no manner conflicts therewith.

Likewise, sections 3940, 3941, 3942 and 3948 provide a limitation for bonds issued for the purposes mentioned in section 3939, but have no reference to, nor can they be held to be in conflict with the provisions of section 1259.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

238.

STATE INSPECTOR OF PLUMBING—NO AUTHORITY IN MUNICIPALITIES HAVING PLUMBING REGULATIONS—ENFORCEMENT OF REGULATION NOT MATERIAL.

A state inspector of plumbing, under provision of 101 *O. L.* 395, *section* 3, *may not exercise the powers of his office in a municipality wherein have been adopted regulations prescribing the character of the plumbing which may be installed regardless of whether or not provision is made for their enforcement.*

COLUMBUS, OHIO, May 3, 1911.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I beg to acknowleddge receipt of your letter of March 25th, asking my opinion as to whether the state inspector of plumbing may exercise the powers of his office in a municipality or other political subdivision wherein ordinances or regulations have been adopted by the proper authorities regulating plumbing or prescribing the character thereof, which said ordinance, however, contain no provision as to penalties for non-compliance therewith, or as to the executive authority which shall carry them into effect, and are consequently inoperative.

The position of state inspector of plumbing is created by virtue of the act of May 10, 1910, 101 O. L. 395, section 3, which provides in part that:

> "* * * Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted by the proper authorities regulating plumbing or prescribing the character thereof."

The powers of the inspector are such as to give rise to criminal action in case his orders are not complied with. (See section 14 of the act.)

In order that the jurisdiction of the inspector in a given community, if any, might be effectually exercised, it would be necessary for him, therefore, to be able successfully to prosecute persons who might disobey his orders. In such a prosecution the defendant would be entitled to all the protection accorded any defendant in a criminal action. Among the rules of law designed for the protection of such defendants, is that which applies the rule of strict construction to statutes of a penal nature.

I incline to the view, therefore, that the above quoted provision of section 3, which is so intimately related to section 14, and the other sections of the act, is not to be severable therefrom and must be strictly construed if, indeed, there is room for any construction whatever.

On the face of the provision the inspector's authority is not to be exercised in political subdivisions where ordinances regulating plumbing, or prescribing the character thereof, have been adopted. No express mention is made of the nature of these ordinances and resolutions nor as to their enforcement; it is sufficient if they have been adopted. It is probably true that in order to constitute a "regulation" within the full meaning of that word a legislative act must provide complete machinery for the enforcement of the command embodied in it. If the word "regulation" then were the only one used in the section there might be some warrant for concluding that a mere set of rules promulgated by local authorities, without any provision for the enforcement of such rules would

not constitute the "regulation" of a given subject-matter. However, under the statute, it is sufficient to exclude the jurisdiction of the state inspector if the local authorities have simply "prescribed the character" of the plumbing within a political subdivision. A provision prescribing the character of plumbing is one of different, and so to speak, weaker character, than a provision regulating plumbing. Such a provision need do no more than to define what shall constitute a proper and legal condition of plumbing in a given building and need not contain any method of enforcing its command.

While, therefore, I can imagine different cases in which under different facts, different answers would have to be given, I feel obliged, in view of the rule of strict construction heretofore alluded to, to advise you that the state inspector of plumbing may not exercise any authority in cities and villages in which the proper authorities have adopted codes of regulation prescribing the character of the plumbing which may be installed therein regardless of whether or not such regulations themselves provide a means for the enforcement thereof, and regardless further or whether or not any such provisions are in point of fact being enforced.

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

B 242.

POWER AND DUTY OF COUNCIL TO ESTABLISH BOARD OF HEALTH AND PROVIDE FOR ITS EXPENSES—NO POWER TO ABOLISH.

A council of a city cannot refuse the compensation of a health officer nor refuse to appropriate money to pay such compensation as fixed by the board of health.

It is mandatory upon the council to establish a board of health and once having established the same, it is without authority to abolish the same.

COLUMBUS, OHIO, May 4, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Beg to acknowledge receipt of your letter of March 4th, 1911, wherein you request an opinion from this department upon the following questions, viz:

> "1. Can a city council refuse the compensation of a health officer or refuse to appropriate the necessary money to pay said officer for his services, when determined by a board of health, or the state board of health?
>
> "2. Can a city council by any method abolish an established board of health?"

In answer to your first inquiry beg to advise, that a city council can in no way interfere with the compensation fixed by a board of health, or the state board of health, and it is mandatory upon said city council to appropriate the necessary money to pay the services of said health officer as determined by a board of health, or the state board of health, while in regard to the second, I

am of the opinion that a board of health having once been established and organized the city council is without authority to abolish said board or in any manner to interfere with said board in the conducting of its office.

Division V "Organization," subdivision I "Legislative," chapter XI "Board of Health," General Code, provides for the organization and defines the duties of boards of health, and in part is as follows:

> "Section No. 4404. Council of each municipality shall establish a board of health, composed of five members to be appointed by mayor and confirmed by council who shall serve without compensation and the majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable may appoint a health officer, to be appointed by the state board of health who shall act instead of a board of health and fix his salary and term of office. The appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health.
>
> "Section No. 4405. If a municipality fails or refuses to establish a board of health or appoint a health officer the state board of health may appoint a health officer therefor and fix his salary and term of office. Such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health, and his salary as fixed by the state board of health and all necessary expenses incurred by him in performing the duties of a board of health shall be paid and be a valid claim against such municipality.
>
> "Section 4406. The term of office of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: one to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year.
>
> "Section No. 4412. The board shall have exclusive control of its appointees, define their duties and fix their salaries, but no member of the board of health shall be appointed as health officer, nor shall a member of the board of health or a health officer be appointed as one of the ward physicians, all such appointees shall serve during the pleasure of the board."

These statutes are mandatory, and council must establish a board of health as provided by section No. 4404, General Code, council being thus required to establish a board of health, and having by ordinance complied with the provisions of this chapter and the board having been duly appointed and organized, must look to the general law of the state for their authority.

The board of health is such an office that it cannot be abolished by the city council after having been once established.

> "Where powers and duties of a public nature are required to be performed, by a law of the state, they fix the character of the individual authorized to perform them, and whether paid or not, he holds an office."
>
> State ex rel. vs. Kennon, 7 Ohio St. 547.

The board of health therefore being offices and deriving their authority from the general law of the state, which contemplates the general welfare and good health of the citizens of the state at large, and not for a particular district, a city council is without authority to abolish such board of health.

> "It is mandatory upon council to create a board of health, and it is mandatory upon a board of health to appoint a health officer and fix his salary, and the necessary appropriation to meet the expense must be made."
>
> State ex rel. vs. Massillon, 2 C. C. (N. S. 167).

Thus the city council being without authority to abolish a board of health is at the same time required to pay the necessary expenses to carry on the business of said board of health, and pay the salary of the health officer appointed by the board of health. Respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

B 360.

NUISANCES UPON STATE PROPERTY UPON LEWISTOWN RESERVOIR AND BUCKEYE LAKE—POWERS OF TOWNSHIP AND STATE BOARDS OF HEALTH.

Under section 3392, the board of health of the township is empowered to make orders and regulations as therein directed for the abatement or suppression of nuisances located upon state property and may enforce such orders and abate or remove such nuisances as provided under sections 4422 and 4423, General Code.

Under section 1237, General Code, the state board of health in cases of emergency, or when the local boards fail to do so, may abate such nuisance and charge the expense thereof to the localities which are guilty of such neglect.

COLUMBUS, OHIO, September 15, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your communication dated May 27th is received, in which you give the following statement of facts:

> "That complaint has been made to your board of the insanitary conditions about houses located upon state property around the Lewistown reservoir and Buckeye Lake; and also that as a rule the local boards of health for the respective townships in which said reservoirs aforesaid are located are loath to take action for the abatement of nuisances located on state property."

You request my opinion on the following questions:

> "a. What power the local health authorities would have for the abatement of nuisances under such circumstances?

"b. Whether the state board of health has authority to adopt general rules and regulations governing such matters as to the location, construction and cleaning of vaults, the disposal of garbage, house drainage, etc., for householders living on state property?"

In reply I desire to say in answer to your first inquiry that the only statute it is necessary to consider is section 3392 of the General Code, which provides that:

"The township board of health may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of all nuisances. * * *"

Under said section defining the powers of local boards of health I am of the opinion that the local health authorities in the townships in which said reservoirs are located may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances.

I am also of the opinion that under section 4420 the local board of health shall abate and remove all nuisances within its jurisdiction, and it "may by order therefor compel the owners, agents, assignees, occupants or tenants of any lot, property, building or structure to abate and remove any nuisance therein," and prosecute them for neglect or refusal to obey such order.

Under section 4422, General Code, it is provided that:

"When such order of the board of health is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending, or may elect to do and perform, by its officers and employes, what the offending party should have done. If the latter course is chosen, before the execution of the order of the board is begun, it shall cause a citation to issue, and be served upon the persons responsible, if residing within the jurisdiction of the board, but if not, shall cause it to be mailed by registered letter to such person, if the address is known or can be found by ordinary diligence, etc."

Section 4423, General Code, provides that:

"If the person or persons cited appear, he or they shall be fully apprised of the cause of complaint and given a fair hearing. The board shall then make such order as it deems proper, and if material or labor is necessary to satisfy the order, and the person or persons cited promise, within a definite and reasonable time, to furnish them, the board shall grant such time. If no promise is made, or kept, the board shall furnish the material and labor, cause the work to be done, and certify the cost and expense to the auditor of the county. * * * And if said amount shall be found by the auditor to be correct he shall place the same against the property upon which the material and labor were expended and shall, from the date of entry, be a lien upon the property to be paid as other taxes are paid."

It is plain to me that the statutes above quoted give ample authority to

local health authorities to abate nuisances under the circumstances as set forth in your statement of facts.

In answer to your second inquiry I desire to say that I am of the opinion that under section 1237 of the General Code, which defines the general powers and duties of the state board of health, your board has authority to adopt any special or standing orders or regulations covering such matters as to the location, construction and cleaning of vaults, the disposal of garbage, house drainage, etc., for householders living on state property, and for such other sanitary matters as it deems best to control by a general rule.

I might add that section 1237 provides in the latter part thereof that:

> "(The state board of health) may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

The original section granting the power last above referred to to the state board of health provided that your board had those powers when emergencies exist and the local board of health refused to act, etc.

It will plainly be seen that the codifying commission changed the word "and" to "or," which now makes it necessary to give a different construction to such part of said section: and as it is now found I am of the opinion that in case of the neglect of the local board of health to abate such nuisance as you refer to in your letter, that the state board of health would have the power and authority to take action under said section, and do the things which the local authorities neglected to do, although no emergency existed for the same.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 376.

STATE BOARD OF HEALTH—ABATEMENT OF NUISANCES—POWER TO COMPEL VILLAGES WITH REFERENCE TO WATER COURSES, DITCHES, ETC.—LITIGATION PENDING.

The power of the state board of health to compel a village to abate a nuisance connected with a water course being involved in pending litigation, abstinance from any action is advised until the determination of said legal proceedings.

COLUMBUS, OHIO, September 18, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 29th, in which you request my opinion upon the following question:

> "Has the state board of health authority to compel the village council in the village of Leipsic to enact and enforce an ordinance prohibiting the use of a storm sewer for domestic purposes as a means of abating a nuisance, said nuisance being the unsanitary condition of Hickey ditch at Leipsic, the result of using said storm sewer, which empties therein, for domestic purposes."

In reply thereto I desire to say that I have failed to answer your inquiry sooner for the reason that the question therein contained is now in litigation in the case of State Board of Health vs. City of Greenville, Ohio, pending in the supreme court of Ohio.

In my opinion, however, the only authority granted under the statute, whereby you could compel the village council of Leipsic to abate said nuisance would be that under section 1249, et seq, which provides for the investigation by the state board of health of any nuisance resulting from the discharge of any sewage or other waste into a stream, water course, etc., by any city, village or corporation, and give to said board, after proceedings therein provided, authority to compel a city, village or corporation to install works or means satisfactory to said board for purifying or otherwise disposing of such sewage or other waste, or to change or enlarge existing works in a manner satisfactory to said board.

Under section 6442, General Code, the word "ditch" as used in the chapter includes a drain or water course.

I am, therefore, of the opinion from the statement contained in your inquiry that Hickey ditch at Leipsic is a water course and the procedure necessary to abate said nuisance, resulting from the unsanitary condition arising from the empting of a public sewer of the village of Leipsic therein, being now in litigation, I would advise that your board take no action pending a final decision by our supreme court in said case.

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

379.

DISTRICT TUBERCULOSIS HOSPITAL—NO POWER IN BOARD OF TRUSTEES TO COMPEL PATIENTS TO REMAIN—CHARGE FOR TREATMENT.

When the commissioners of two or more counties form a joint board and establish a district tuberculosis hospital, they are permitted to admit to such hospitals persons who, upon proper investigation show need for treatment, and require them to pay not more than $3.00 per week for treatment. The authorities may not therefore, establish a rule requiring patients to remain any definite length of time.

COLUMBUS, OHIO, September 19, 1911.

Ohio State Board of Health, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of July 13, in which you make the following statement, to wit: Patients who are in indigent circumstances have been admitted to the district tuberculosis hospital at Lima without having been confined in the infirmary; that some four or five persons of this character have been admitted who have left the hospital at their discretion, without staying a sufficient length of time to be benefitted by the treatment, and you request my opinion upon the following question:

> "Can the trustees of the said district tuberculosis hospital establish a rule or regulation by which they can control such patients by keeping them in the institution for a sufficient length of time to determine if they will be benefitted by the hospital treatment and until discharged by the board of trustees?"

In reply to your question I desire to say that section 3148 of the General Code, which gives authority to the commissioners of any two or more counties, not to exceed five, to 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, provides that the same shall be in accordance with the purpose, provisions and regulations of certain preceding sections, namely: 3139 to 3147, inclusive.

Section 3145 of the General Code provides that infirmary directors shall investigate applicants for admission to the hospital for tuberculosis who are not inmates of the county infirmary and requires satisfactory approval that they are in need of proper care, and have pulmonary tuberculosis; and they may require of any applicant admitted, a payment of not to exceed $3.00 per week, or less sum as they may determine, for hospital care and treatment.

The authority to create a district tuberculosis hospital was given to two or more counties, not to exceed five, and was evidently the intent of the legislature in enacting said section, that in case said counties would avail themselves of the law, that the district hospital should take the place of a county hospital, and therefore I am of the opinion that said section just above quoted, viz: 3145, is the only provision regulating the admission of any applicant for admission to the hospital of the district for treatment therein, not inmates of the county infirmary, that being the case, such patients, therefore, as referred to in your letter are, evidently, those which come within the provisions and spirit of said section: and as the patient may be required to pay for the hospital care and

treatment while they would be there, they could only be subject to their own desire of remaining and not subject to any rules or regulations which may be formulated by the board of trustees of the said hospital. Such a patient would not be a ward of the state in any sense, and the only requirement that could be made by the board of trustees governing said patient would be such as would be adopted by the board to govern the conduct of the patient while remaining in said institution. To adopt an arbitrary rule of admission requiring a patient to consent to remain as long as the board of trustees might desire him to remain would be a rule which would abrogate the statutes providing for admission upon the payment of a fixed sum to be named by the infirmary directors, or the board that may fix the amount per week as provided in section 3145, and therefore be void.

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

399.

NUISANCE—DUST ON MUNICIPAL HIGHWAY THROUGH USE OF LIMESTONE—NO POWER OF BOARD OF HEALTH TO ABATE—GENERAL POWERS—INJUNCTION BY PRIVATE INDIVIDUAL.

There are no provisions of statutes enabling authorities to dictate the material which may be used in the construction of a road by the officers of a village.

Unless the raising of excessive dust from such a road by reason of the use of limestone in its construction is such an inconvenience as will seriously interfere with the health or comfort of the public, generally, the matter may not be remedied through the general powers, of the state board of health, nor through similar powers of the local health authorities.

Possibly the matter is of such a nature as may be enjoined by a private individual.

COLUMBUS, OHIO, September 29, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 29th, in which you state that complaint has been made to your board of a nuisance caused by the excessive amount of dust arising from the use of limestone on a highway through an incorporated village, excessive use of the road by automobiles and other vehicles giving rise to the dust of which complaint is made, and further, that the coating of limestone which was first put on the highway has been worn out and they are now resurfacing the same with limestone, and request my opinion upon the following question:

> "What authority would the state board of health or the board of health or other local authorities in the village have, to require the highway to be treated with oil or other substance, to prevent the nuisance complained of?"

In reply I desire to say that there is no restriction placed upon public authorities in the erecting or repairing of roads as to what material shall be

used, except where repair is made under direction of the state highway commissioner, in which case section 1214 of the General Code provides that, subject to the approval of the highway commissioner the county commissioners shall select the kind of material for the improvement of a highway. Further, there is no statute in this state making it mandatory upon the municipality or county to treat its highway with oil or other substance, to prevent the nuisance complained of, namely: the dust arising from the use of said highway. Section 3751 is a discretionary statute, providing that municipal corporations may treat with oil for the purpose of laying the dust or preserving the surface of streets, alleys, squares and public roadways.

The general power given to the board of health under section 4020 of the General Code, to abate and remove all nuisances within its jurisdiction, is broad and comprehensive. Nevertheless, I am of the opinion that, in order to become a nuisance, the thing complained of must be such as will seriously interfere with the health or the convenience of the public generally; and if the matter complained of in your letter does not come within this rule it is a matter for a private individual to enjoin the public authorities from using such material, as might become a nuisance to their individual property. I am further of the opinion that neither your board nor the local health authorities have authority to require that the highway be treated with oil or other substance to prevent the nuisance complained of.

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

401.

CESS POOLS—POWER OF STATE BOARD OF HEALTH TO DELEGATE LOCAL BOARDS TO INVESTIGATE—APPROVAL OF STATE BOARD OF HEALTH.

Since the legislature has not provided sufficient funds or assistance to enable the state board of health to personally investigate cess pools for the purpose of certifying their approval of the same, under 102 O. L. 724, *local boards may be delegated to make the investigations and the state board may base its approval upon written information submitted by the local boards.*

COLUMBUS, OHIO, September 30, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of August 1st, in which you state that your board has been receiving numerous inquiries in regard to the approval of cess pools as provided for in part 4, title 16 of the Ohio Building Code, 102 O. L., 724-725, and that in passing this act, the legislature made no appropriation to enable the board to employ a sufficient force to make a personal investigation of each case, and that it would be impossible to do this by the force provided by the legislature, and you request my opinion upon the following:

> "Would it satisfy the law if the state board of health adopted requirements for the proper construction and location of cess pools, and approve the same upon written information furnished by the local

health authorities, certifying that such requirements had been complied with?"

In reply thereto I desire to say that I see no legal objection to your board adopting such requirements for the proper construction and location of cess pools and delegate to the local authorities the power to inspect the same and certify to your board that the requirements have been complied with in relation to the said construction and location as provided by said law, and upon such report, your board may issue a written permission to so construct the same.

The said above quoted act provides that cess pools may be used only when written permission to that effect has been issued and therefore that would be an implied authority vested in your board to delegate to a local health board to investigate and report to your board a finding of the facts precedent to your board granting said permission. The legislature having failed to make sufficient appropriation for an investigation of each case by your board, there can be no legal objection to your following the above course.

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

C 405.

NUISANCE—MENACE TO PUBLIC WATER SUPPLY—POWERS OF VILLAGE AND TOWNSHIP BOARDS OF HEALTH.

The abatement of a nuisance resulting from a drain from a privy vault upon private property, which from its location acts as a menace to a public water supply, may be abated under section 12646, *General Code, by the village board of health or by the township board of health, under section* 4420, *et seq. The latter method, however, is recommended as preferable.*

COLUMBUS, OHIO, October 2, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 6th, in which you state that,

> "The state board of health has been asked to approve a public water supply for a village, the water supply being derived from wells located outside of the corporation limits. The approval of the water supply has been withheld until the local authorities have caused to be removed a drain from a privy vault on private property, which the board considers to be a menace to one of the supply wells. The owner of the property has refused to do anything to remove or change the drain."

and request my opinion upon the following question:

> "Has the board of public affairs or the local board of health, authority to cause the drain to be removed or corrected, and if so, what proceeding should be followed?"

In reply thereto I desire to say that section 12646 of the General Code defines various nuisances which are made offenses against the public health,

and among them is defined the offense of corrupting or rendering unwholesome or impure, a water course stream or water, and provides the penalty therefor.

In my opinion, under the statement of facts contained in your inquiry, the owner of the property maintaining the drain referred to, is guilty under the above quoted section of maintaining a nuisance, to wit: corrupting or rendering unwholesome, water which is used to supply the public water for a village, and could prosecuted by the local board of health under said section.

I am also of the opinion that under section 4420 of the General Code the board of health of the township in which said drain is maintained, would have the authority to abate and remove the same as a nuisance, and should follow the procedure set forth in section 4420, et seq.

Either one of the above mentioned remedies affords, in my opinion, the relief necessary in this case to abate said nuisance.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

ADDENDUM.

I would recommend the second of the foregoing mentioned remedies as the better one to pursue in order to bring about practical relief; and further, there is not any doubt in my mind but that the second remedy applies. Although I think section 12646 applies also by reason of the fact that the thing therein referred to in your question would constitute corrupting and rendering unwholesome and impure "water," yet the same is not wholly clear.

B 408.

BUILDING AND PLUMBING LAWS—STATE BOARD OF HEALTH MAY NOT ENFORCE IN MUNICIPALITIES HAVING BUILDING OR HEALTH DEPARTMENT—ADOPTION OF STATE CODE BY MUNICIPALITY—PUBLICATION OF ORDINANCE.

Though the state board of health is granted authority to enforce state building and sanitary plumbing laws, yet the act of 101 *O. L.* 395 *and the act of* 102 *O. L.* 586, *section* 1, *provide that such powers may not be exercised in municipalities having building or health departments.*

When council passes an ordinance adopting a plumbing code, such ordinance in accordance with section 4227, *General Code, must be published in full.*

When council adopts the state code and simply makes a few additions thereto, the additions must be published, but the statutory provisions need not be published unless council has set them out verbatim in the ordinance.

COLUMBUS, OHIO, October 4, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Under favor of June 16, 1911, C. O. Probst as secretary of your honorable board asked an opinion of this department upon the following:

> "On May 3rd, 1911, you submitted an opinion relative to the jurisdiction of the state plumbing inspector to the effect that he had no authority or jurisdiction in any city or village in which a plumbing ordinance had been adopted by the proper authority.

"Since this opinion was rendered, the legislature has passed the state building code giving the state board of health additional powers. Will you kindly inform me whether the passage of this act alters the opinion above referred to.

"Will you further inform me whether it is necessary for a municipality, which has not adopted a plumbing ordinance or regulations but wishes to adopt the state plumbing code as passed by the legislature, to advertise the state code full or will it be sufficient to simply advertise such additions to the state code as they propose to make?"

The opinion of May 3rd, 1911, referred to in the above inquiry held that "the state inspector of plumbing may not exercise any authority in cities and villages in which the proper authorities have adopted codes of regulation prescribing the character of the plumbing which may be installed therein regardless of whether or not such regulations themselves provide a means for the enforcement thereof, and regardless further whether or not any such provisions are in point of fact being enforced."

The part of the statute upon which the above opinion was based was part of section 3 of the act of May 10, 1910, 101 Ohio Laws, page 395, which part reads as follows:

"* * * Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted by the proper authorities regulating plumbing or prescribing the character thereof."

This section has not been amended.

Section 1 of the state building code, 102 Ohio Laws, page 586, provides:

"It shall be the duty of the state fire marshal or fire chief of municipalities having fire departments to enforce all the provisions herein contained relating to fire prevention.

"It shall be the duty of the chief inspector of workshops and factories or building inspector, or commissioner of buildings in municipalities having building departments to enforce all the provisions herein contained for the construction, arrangement and erection of all public buildings or parts thereof, including the sanitary condition of the same, in relation to the heating and ventilation thereof.

"*It shall be the duty of the state board of health or building inspector or commissioner or health department of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing.* But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

In order to construe this section it will be necessary to ascertain the meaning of the word "or" as used between the words "state board of health" and "building inspector," and also as used between the names of the other officers and boards mentioned.

Section 10213, General Code, provides:

"In the interpretation of part third, unless the context shows that

another sense was intended, the word "person" includes a private corporation; * * * 'and' may be read 'or,' and 'or' may be read 'and' if the sense requires it. * * *"

The above is the rule as laid down for part third of the General Code. The act under consideration is found in part fourth, the penal laws of the state. The rule of construction is more strict in the interpretation of penal laws.

Laughlin, J., on page 100 of the opinion in the case of Koch vs. Fox, 71 N. Y. App. Div. 92, says:

"* * * It will be observed that the municipal legislators have not used appropriate language plainly imposing this duty on both owner and contractor. They have used the particle or disjunctive conjunction 'or' which is ordinarily employed to indicate an alternative, as one or the other, but not both, of two or more persons or things."

In the case of Castor vs. McClellan, 132 Iowa 502, Bishop, J., on page 504 and 505, says:

"This must be true because the word 'or' marks an alternative and generally corresponds in meaning to the word 'either.' It signifies that one of two things may be done, but not both. Webster's dictionary. Century dictionary. 6 Words and Phrases 5009. * * *

"* * * Thus the word 'or' has been construed to mean 'and' and vice versa, and the power of the courts to do this in a proper case has never been questioned. But a proper case can arise only when from a reading of the act as a whole it becomes apparent that the word used was mistakenly used. * * * The general rule is, however, that words must be construed according to their natural meaning."

The rule is that if the sense requires it, or if it is apparent that it was inserted by mistake, then "or" may be read as "and." There is nothing to show that "or" was inserted by mistake, nor is it necessary in order to make sense that "or" be read as "and" in the statute. The word "or" appears between each of the officers or boards named and it must be concluded that it was intentionally used.

The word "or" therefore must be construed as having been used in its ordinary meaning. As used here it means one or the other but not two or more of the officers named.

The state board of health is granted authority and jurisdiction to enforce the state building code pertaining to sanitary plumbing throughout the state, but in municipalities having building or health departments this authority and jurisdiction is placed upon the building inspector, or commissioner, or upon the board of health of such municipality. In such cases the state board of health has no jurisdiction.

The powers of the state inspector of plumbing have not been extended to such municipalities by this act and the opinion rendered May 3rd, 1911, remains the proper construction of the law.

A further inquiry is to the advertisement of the state plumbing code when adopted by ordinance.

Section 4227, General Code, provides for publication of ordinances as follows:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of said notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

All ordinances coming within the provisions of the above section should be published in full. An ordinance adopting a plumbing code is one of general nature and requires publication.

The state plumbing code is effective throughout the state and requires no action of council. Council may make additions thereto not in conflict with any of the provisions of the state plumbing code.

The acts of the legislature are effective without publication. The additions which council makes to the state plumbing code must be published and the statutory provisions need not be published unless council unnecessarily insert in the ordinance the state plumbing code verbatim, or any part thereof.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General

A 411.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—EXISTENCE IN MUNICIPALITY SUPPLIED BY PRIVATE WATER COMPANY—POWER OF PRIVATE COMPANY TO POLICE WATER SHEDS—ENFORCEMENT OF HEALTH REGULATIONS—POWERS AND DUTIES OF TRUSTEES.

When a village has contracted with a private water company, said village should provide for a board of trustees of public affairs as stipulated for in section 4357, General Code.

The authority of the village to adopt rules and regulations for the protection of the quality of the water supply and to prosecute acts of contamination as provided in section 12784, General Code, rests in the board of trustees of public affairs.

Though no express statutory authority is granted to private water companies to protect its water supply against contamination by means of policing its water sheds, nevertheless there is no apparent objection to such a practice.

COLUMBUS, OHIO, October 5, 1911.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your letter of June 27th, enclosing a copy of letter sent to my predecessor November 1, 1910, which letter was as follows:

"An incoporated village not having any of the public utilities specified in section 4357 of the General Code has given to a private company a franchise for furnishing water for domestic and public use. The water company secures its supply from surface sources by damming the bed of

a small stream. A condition of approval of the supply by the state board of health requires the policing of the water shed in order to safeguard the quality of water supplied. The questions below asked have been raised by the attorney for the village and your opinion is respectfully requested.

"1. Has a village supplied with water by a private water company and without a water works, electric light plant, artificial or natural gas plant, the authority to provide for a board of trustees of public affairs?

"2. In the absence of a board of trustees of public affairs, when the water supply is furnished by a private company, what authority would a village have and in what body or officer would the authority lie to adopt rules and regulations for the protection of the quality of the public water supply and otherwise to prevent the contamination of the source of said public water supply as contemplated in section 12784 of the General Code?

"3. What authority, if any, has a private water company to police the water shed from which its supply is secured and how and by whom would prosecution be brought for contamination of the supply?"

and requesting me to give you my opinion on the questions raised in the letter, was duly received.

In reply, I desire to say in answer to the first question that section 4357 of the General Code provides as follows:

"In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 3981 of the General Code provides:

"A municipal corporation may contract with any individual or individuals or an incorporated company, for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares, and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation."

I take it from the inquiry that the village referred to has legally contracted with a private water company as provided by the above section, and that being the case, I am of the opinion that the village should provide for a board of trustees of public affairs as provided for in section 4357 of the General Code, supra.

In answer to your second inquiry, the first having been answered in the affirmative, I think that the authority of the village to adopt rules and regulations for the protection of the quality of the public water supply, and likewise to prevent contamination of the source thereof as contemplated in section 12784 of the General Code would rest in the board of trustees of public affairs.

In answer to your third inquiry I desire to say that there is no specific provision in the code granting authority to private water companies to police the water shed from which its supply is secured, but the jurisdiction of a municipal corporation to enforce the provisions of section 12784 would rest in the board of trustees of public affairs, and said board would have the authority to prosecute under said section. However, I can see no legal objection to a private water company at its own expense protecting its water supply from contamination or pollution by any individual or individuals.

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

D 412.

VILLAGES—POWER TO CONSTRUCT WATER WORKS—APPROVAL OF PLANS BY BOARD OF HEALTH—POLICE REGULATIONS.

Under section 1240, *General Code, a village may not proceed to construct a water works until the plans therefor have been submitted to and received the approval of the state board of health. Being a police regulation, the rule should be strictly enforced.*

COLUMBUS, OHIO, October 6, 1911.

HON. JOHN W. HILL, *Member State Board of Health, Cincinnati, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 24th, in which you state that the village attorney of the village of Bremen, Fairfield county, Ohio, has rendered an opinion that the village council of said village has a right to proceed with the construction of a new proposed water works, notwithstanding the state board of health has thus far been unwilling to approve the source of supply proposed, and request my opinion as to the legality of such action upon the part of the village council of said village, without the approval of the state board of health of the source of supply proposed being first had.

In reply thereto I desire to say that section 1240 of the General Code provides in part as follows:

> "No city, village, public institution, corporation or person, shall provide or install for public use, a *water supply* or sewerage system or purification works for a water supply or sewage, of a municipal corporation or public institution, 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."

Under the above quoted section it is mandatory for the village above referred

to, to first have the plans for the said proposed water works submitted to the state board of health and approved by it, before proceeding to construct the same, and should they fail to do so the council would be liable under said section for a violation thereof.

I am further of the opinion that any person could enjoin the construction of said water works, the injunction to be based upon the failure of the village to have first submitted the plans therefor to the state board of public works and secured the approval of said board upon said plans.

I am also of the opinion that said section 1240 is a police regulation and should be strictly enforced by your board.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Medical Board)

E 222.

ANAESTHETICS--RIGHT OF OTHER THAN PHYSICIAN TO ADMINISTER —QUESTION OF FACT.

The question whether the act of administering an anaesthetic is an act requiring technical skill, or an act of administering a drug for the cure or relief of a wound, disease, etc., or whether such is a mere ministerial act, is a question of fact.

If it is true as herein assumed that the first alternative is correct, then such act may not be performed by any other than a licensed physician, neither under the direction of a licensed physician nor by way of assistance to such non otherwise.

COLUMBUS, OHIO, April 14, 1911.

DR. GEORGE H. MATSON, *Secretary Ohio State Medical Board, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for opinion letter addressed to you by Dr. William Miller in which Dr. Miller inquires as to whether or not it is lawful in this state for a person who is not a registered physician to administer an anaesthetic under the direction of a qualified physician.

It is unnecessary for me to quote the section of the General Code which provides that no person shall practice medicine without having received a certificate from the state medical board, "The practice of medicine" is defined in section 1286 of the General Code, which provides in part as follows:

> "A person shall be regarded as practicing medicine * * * who * * * administers * * * for a fee or compensation of any kind, direct or indirect, a drug, or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease. * * *"

Section 1287 provides a number of exceptions to the definitions of section 1286, but persons administering anaesthetics are not included in the catalog of such exceptions.

The question you submit to me is in the last analysis a question of fact. Unless, however, I misapprehend the technical facts in the case, one who gives an anaesthetic "administers a drug" and if this is done for a compensation whether paid by the patient or not, and if it is done for the care or relief of a bodily infirmity, it unquestionably constitutes the practice of medicine or surgery.

From another viewpoint it would seem that the administration of an anaesthetic is a part of a surgical operation and under the law can only be performed by one qualified to perform the remaining steps in the operation.

The question still remains as to whether or not the function of administering an anaesthetic might be performed by an unqualified person under the personal direction of a qualified physician, and thus, in a sense, indirectly by the physician himself. It is perfectly clear that a person need not be qualified as a physician in order to be permitted under the law to perform some necessary services in connection with an operation under the direction of a physician or a

surgeon. Thus, any person may, under the surgeon's direction, arrange the instruments for him, or hand him such appliances as he needs. I do not, however, regard the administration of an anaesthetic as such an act as those described, unless I have a wrong impression of the nature of the act. It is the act of administering itself the doing of which requires technical knowledge and professional skill. That would be such an act as could not be, under the law, delegated to another by a qualified physician even though the person to whom it is delegated acts under the personal direction of the physician.

As I have already suggested, the question which you submit is more nearly a question of fact, requiring expert knowledge for its solution, than one of law and if the facts which I have assumed are incorrect, the legal conclusion to which I have been tending does not follow. If, however, they are correct, it follows that a person not a registered physician may not administer an anaesthetic under the supervision of a registered physician.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

387.

BOND OF TREASURER OF STATE MEDICAL BOARD—EXPENSE MAY BE PAID BY BOARD.

As section 1206, General Code, requires the treasurer of the state medical board to furnish bond, and as no compensation is provided for the duties of the treasurer, the board would be authorized to allow to such treasurer the expense of his bond.

COLUMBUS, OHIO, September 22, 1911.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—Under date of September 7th you state as follows:

> "Section 1266 of the General Code provides that the treasurer of the state medical board shall give a bond to the state in the sum of $10,000. It has been the custom of the treasurer to secure this bond from a bonding company for which a voucher signed by the president and secretary of the board was issued in payment therefor.
>
> "In view of the fact that the board is self sustaining and that the only funds available are those received from fees and fines, and that the treasurer receives no salary whatever for his services, is it not proper that the expense of this bond should be met by the board? The board unanimously approved the bill and order it paid."

Section 1263 of the General Code provides as follows:

> "The state medical board shall organize by the election of a president and a treasurer, who shall be members of the board, and a secretary, who shall be a physician in good standing in his profession. Each of the officers so elected shall serve for a term of one year, and the president and the secretary may administer oaths."

Section 1264 of the General Code provides as follows:

"Each member of the state medical board shall receive ten dollars for each day employed in the discharge of his official duties and his necessary expenses so incurred."

Section 1266 of the General Code provides as follows:

"The treasurer of the state medical board shall give a bond to the state in the sum of ten thousand dollars with two or more sureties approved by the board conditioned for the faithful discharge of the duties of his office. Such bond, with the approval of the board and the oath of office indorsed thereon, shall be deposited with the board and kept in its office."

Section 1263, *supra*, provides that the president and treasurer of the state medical board shall be elected from among the members of the board.

Section 1264, *supra*, provides the compensation for each member of the board.

Section 1266, *supra*, provides for the bond to be given by the treasurer.

As section 1266, *supra*, makes it mandatory upon the treasurer of the board to give a bond in the sum of $10,000, and as there is no provision in the statutes for the payment of any compensation to be paid such treasurer for his services as such, I am of the opinion that the board would be authorized to allow to such treasurer the expense of his bond in order that he may be put to no personal expense in the performance of his duties.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

388.

MEDICAL EXAMINATIONS—EDUCATIONAL REQUIREMENTS OF APPLICANTS—STATE MEDICAL BOARD CANNOT DISCRIMINATE AGAINST MEDICAL COLLEGES WHICH MATRICULATE UNQUALIFIED STUDENTS.

Under section 1272, General Code, an applicant may not be admitted to the state medical examinations without evidence of certain preliminary educational requirements including a certificate from a medical school of good standing.

It is not within the powers of the board, under the law, however, to refuse recognition to medical colleges which matriculate students without requiring the preliminary qualifications.

COLUMBUS, OHIO, September 22, 1911.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—Under date of September 9th you submit for my opinion the following:

"Certain preliminary educational requirements are enumerated in

section 1270 of the General Code of Ohio as being sufficient upon which to issue a certificate of preliminary education.

"Is it within the power of the medical board to demand that medical colleges, to receive recognition by the medical board, shall not matriculate students for the degree of M. D. unless their preliminary credentials are sufficient upon which to issue such certificate?"

Section 1270, General Code, provides as follows:

"The state medical board shall appoint an entrance examiner who shall not be directly or indirectly connected with a medical college, and who shall determine the sufficiency of the preliminary education of applicants for admission to the examination. The following preliminary educational credentials shall be sufficient:

"A diploma from a reputable college granting the degree of A. B., B. S., or equivalent degree;

"A diploma from a legally constituted normal school, high school or seminary, issued after four years of study;

"A teacher's permanent or life certificate;

"A student's certificate of examination for admission to the freshman class of a reputable literary or scientific college.

"In the absence of the foregoing qualifications, the entrance examiner may examine the applicant in such branches as are required for graduation from a first-class high school of this state, and to pass such examination shall be sufficient qualification. Such examination shall be held simultaneously in Cincinnati, Cleveland, Columbus, and Toledo, and the questions shall be uniform in such places. If the entrance examiner finds that the preliminary education of the applicant is sufficient, he shall, upon payment to the treasurer of the state medical board of a fee of two dollars, issue a certificate thereof, which shall be attested by the secretary of the state medical board.

"The applicant must also produce a certificate issued by the entrance examiner and a diploma from a legally chartered medical institution in the United States, in good standing, as defined by the board, at the time the diploma was issued or a diploma or license approved by the board which conferred the full right to practice all branches of medicine or surgery in a foreign county."

Section 1272 of the General Code provides as follows:

"If the state medical board finds that the applicant has obtained any one of the credentials necessary for admission to the examination, and his diploma is genuine and granted by a legally chartered medical institute in the United States in good standing as determined by the board, or that his license is genuine and confers upon him full right to practice all branches of medicine or surgery in the foreign country in which he obtained it and of a standard approved by the board, that the person named in the diploma or license is the person holding and presenting it and is of good moral character, the board shall admit such applicant to an examination."

By virtue of section 1272, *supra*, it will be noted that in order that an applicant may be admitted to the medical examination of the state it is

necessary that he obtain the preliminary educational credentials mentioned in section 1270, and that he likewise have a diploma of a medical school in good standing. If the applicant for the state medical examination has not the preliminary educational credentials provided for in section 1270 he must stand an examination before the entrance examiner as to his educational qualifications.

As I view section 1270 this examination before the entrance examiner may take place at any time prior to the examination for admission to practice medicine in this state.

You desire to know whether it is within the power of the medical board to demand that medical colleges, to receive recognition from the medical board, shall not *matriculate* students for the degree of M. D., unless their preliminary credentials are sufficient upon which to issue such certificate.

While it is true that section 1270 permits the board to define what is a medical institution in good standing, yet as I view such provision it means that the medical board shall inquire into such medical school and determine its standing from the course of study, the equipment and management generally of such school, but that it is not within its power to require that the school shall matriculate no one who has not a preliminary education equal to that of a graduate from a first-class high school of this state.

The law contemplates that at the time a person applies for admission to the medical examination he shall *at that time* have a diploma granted by a medical institution in the United States in good standing and a preliminary education equal to that of a graduate from a first-class high school in this state. To hold that it is within the power of the medical board to demand that medical colleges shall not matriculate students for the degree of M. D., unless their preliminary educational credentials are sufficient upon which to issue a preliminary educational certificate would be to pervert the intent of the legislature in that regard.

I am, therefore, of the opinion that it is not within the power of the medical board to place any such restriction upon a medical institution in defining the standing of such medical institution.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 271.

(To the Ohio State Dental Board)

LICENSE TO PRACTICE DENTISTRY—OHIO REQUIREMENTS—DIPLOMA FROM REPUTABLE COLLEGE.

A person may not be granted a license to practice dentistry in Ohio, without as a condition precedent thereto, satisfying the board, that he is twenty-one years of age, of good moral character and a graduate of a reputable dental college.

June 23, 1911.

Ohio State Dental Board, L. L. YONKER, *Secretary, Bowling Green, Ohio.*

DEAR SIR:—Beg to acknowledge receipt of your letter of June 22d, 1911, in which you enclose an application of George Frank Feuerstein, which application is as follows:

OHIO STATE DENTAL BOARD.

Application for Examination:

I hereby make application for examination for a license entitling me to practice dentistry in the state of Ohio as provided in the Revised Statutes thereof, and herewith enclose the required fee, twenty-five dollars ($25.00) payable to the secretary of the board.

Name of Applicant—George Frank Feuerstein.

P. O. Address—Columbus, O. County—Franklin.

The following information must be furnished under oath, by the applicant:

Name in Full—George Frank Feuerstein.

Date of Birth—May 14th, 1875.

State your preliminary education and where obtained, admitting you to a dental college—Parochial school and public.

How many years and where have you been engaged in the study of dentistry?—18 years. Cleveland, Toledo, Columbus.

Name of dental college from which you graduated and date of diploma—(No answer).

Have you been actively and legally engaged in the practice of dentistry in other states?—No.

Give particulars—(No answer).

Have you received a license from any state board of dental examiners, by examination, subsequent to receiving your dental degree?—No.

Give particulars—(No answer).

Of what dental societies, if any, are you a member?—None.

AFFIDAVIT.

State of Ohio)
County of Franklin) ss.

I, George Frank Feuerstein, being first duly sworn, state that I am the person referred to in the above application for license to

practice dentistry in the state of Ohio and that the statements therein contained are true in every respect.

(Signed) GEORGE FRANK FEUERSTEIN.

Subscribed and sworn to before me this 15th day of June, 1911.

(Signed) CHAS. AMBERT,

(Seal) Notary Public.

EVIDENCE OF GRADUATION.

(To be certified by the dean of secretary of the dental college.)

This is to certify that (No name) of..... has studied dentistry for three full academic years and that he was graduated from..... in the year.....

{Dean
..... {Secretary

Date.....

CERTIFICATE OF MORAL CHARACTER.

(To be signed by not less than two dentists in good standing).

This is to certify that we have personally known Dr. George Frank Feuerstein, for 6 years, respectively, and believe him to be of good moral character.

Name—W. N. Morgan.
P. O. Address—26 N. High St.
Graduate in the year 1891 of O. College D. S.
Name—Oscar Miesse.
P O. Address—Cay and High Sts
Graduate in the year 1895, O. College of D. S.

and request this department to furnish a written opinion as to the legality of said application and what, if any, rights the applicant may have.

In reply beg to advise that each person who desires to practice dentistry in the state of Ohio must obtain a license from the state dental board; this is required by section 1320 of the General Code.

> "Unless previously qualified as provided by law, no person shall practice dentistry in this state until he has obtained a license from the state dental board as hereinafter provided."
>
> Section 1320, General Code.

Each person who desires to practice dentistry must file a written application with the secretary of the state dental board and he must furnish satisfactory proof that he is at least twenty-one years of age, of good moral character and he must further present satisfactory evidence to the board that he is a graduate of a reputable dental college as defined by the board. These specific requirements in the application of each person who desires to practice dentistry within the state of Ohio are set forth in section 1321 of the General Code, which is as follows:

> "Each person who desires to practice dentistry within this state shall file with the secretary of the state dental board a written application for a license and furnish satisfactory proof that he is at least

twenty-one years of age, of good moral character, and present evidence satisfatcory to the board that he is a graduate of a reputable dental college, as defined by the board. Such application must be upon the form prescribed by the board and verified by oath."

Section 1321, General Code.

The application submitted contains no evidence of graduation and the applicant is required by this section of the statute to furnish satisfactory evidence as to his educational qualifications before he even is permitted to take the examination Unless the application for examination of the applicant contains satisfactory evidence of graduation or unless he present other evidence satisfactory to the board that he is a graduate of a reputable dental college he cannot be permitted to take an examination, unless the applicant comes within the exception of the law, where no examination is required as provided by section 1324 of the General Code.

"The state dental board may issue a license without examination to an applicant who furnishes satisfactory proof that he is a graduate from a reputable dental college of a state, territory or district of the United States, and holds a license from a similar dental board, under requirements equal to those of this state, or who, for five consecutive years next prior to filing his application, has been in the legal and reputable practice of dentistry in a state, territory or district of the United States and holds a license from a similar dental board thereof, if in either case the laws of such state, territory or district accord equal rights to a dentist of Ohio holding a license from the state dental board, who removes to, resides and desires to practice his profession in, such state, territory or district. No license shall be issued under this section unless authorized by an affirmative vote of all the members of the board present at such meeting."

Section 1324, General Code.

Passing upon the application hereinbefore set forth and which I assume is the only evidence of graduation that said board had before it in this specific case, beg to advise that the application does not comply with the statutes and the applicant should not be permitted to take an examation without first having submitted to your board satisfactory evidence that he is a graduate of a reputable dental college as defined by your board. Your authority in this matter is final and your right to pass upon the qualifications of an applicant has been established by the courts.

In the case of France vs. State of Ohio, 57 Ohio State, page 1, Williams, J., presiding, the court unanimously held that this class of legislation is not obnoxious to section 10, article 1 of the federal constitution and does not infringe upon privileges and immunities and therefore not obnoxious to section 1, article 4 of the state constitution.

From the application I note that the applicant claims to have been engaged in the study of dentistry for 18 years, but this fact alone does not qualify him to take an examination or to engage in the practice without an examination by your board and was so held in the case of State of Ohio ex rel. vs. the Ohio Medical Board, Judge Shauck presiding, passing mandamus upon the right of a physician to practice medicine, thoroughly discusses this phase of this question and the case holds that although a relator that practiced medicine for ten years, if when he entered into the practice he was engaging in the

illegal practice that this status could not be changed by the laws of time in number of years that a person illegally practices dentistry could not possibly qualify him for the legal practice of his profession.

A very similar question was again presented to the supreme court in the case of State ex rel. vs. Coleman, 64 Ohio State, page 399, where the court referring to their previous decisions upon this same subject announce the doctrine.

> "The writ of mandamus will not issue on the relation of a medical college to compel the state board of medical registration and examination to recognize the college as a medical institution in good standing nor to compel the board to issue certificates to practice medicine in this state to holders of diplomas from such college."
>
> State ex rel. vs. Coleman, 64 Ohio State, page 377.

Again we find a very similar question discussed and decided by the supreme court in State vs. Cravett, 65 Ohio State, 289, where the second syllabus is as follows:

> "One who has an established practice in the healing of diseases may be required to conform to such reasonable standard respecting qualification therefor as the general assembly may prescribe, having in view the public health and welfare."
>
> 64 Ohio State, 289.

A resume of those authorities and their application to the case now being considered beg to advise, that the state dental board before they can permit an examination of an applicant to practice dentistry in the state of Ohio, said applicant must present the educational qualifications which by statute are fixed as a diploma from a recognized dental school and unless such diploma be presented, said state dental board has no authority to permit said applicant to proceed with his examination.

After the application has been filed with the secretary, said board must be convinced that the applicant is twenty-one years of age, of good moral character and a graduate of a reputable dental college, otherwise they are not justified in permitting the applicant to proceed with his examination.

The application hereinbefore set forth not disclosing these conditions upon its face, the same is not in compliance with the law and until said applicant furnishes satisfactory proof to said board that he is a graduate of a reputable dental college he cannot legally receive at the hands of the Ohio state dental board the right to take an examination or a license to practice dentistry within the state.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

491.

DENTISTS — EXAMINATION — STATE DENTAL BOARD — APPLICANTS FOR LICENSE FROM OTHER STATES.

A license to practice dentistry cannot be granted without examination, unless by unanimous vote. The dental board under section 1324, *General Code, grants such license to one who has practiced for five years, and has received a license from a similar board in a state which extends similar courtesies to licensees of Ohio.*

COLUMBUS, OHIO, December 13, 1911.

DR. H. BARTILSON, *Member Ohio State Dental Board, 150 East Broad Street, Columbus, Ohio.*

DEAR SIR:—Under date of December 12th you have requested my opinion as follows:

> "Kindly render an opinion on section 1324, General Code. My understanding is, that an applicant from another state can be passed without examination under this section but with unanimous vote of the board. With examination, must consist of all defined in section 1322, General Code."

Section 1322 of the General Code provides:

> "An applicant for a license to practice dentistry shall appear before the state dental board at its first meeting after the filing of his application, and pass a satisfactory examination, consisting of practical demonstrations and written or oral tests, or both, in the following subjects: anatomy, physiology, chemistry, materia medica, therapeutics, metallurgy, histology, pathology, bacteriology, prosthetics, operative dentistry, oral surgery, anaesthetics, orthodontia and oral hygiene."

Section 1324 of the General Code provides as follows:

> "The state dental board may issue a license *without examination* to an applicant who furnishes satisfactory proof that he is a graduate from a reputable dental college of a state, territory or district of the United States, and holds a license from a similar dental board, under requirements equal to those of this state, or who, for five consecutive years next prior to filing his application, has been in the legal and reputable practice of dentistry in a state, territory or district of the United States, and holds a license from a similar dental board thereof, if in either case the laws of such state, territory or district accord equal rights to a dentist of Ohio holding a license from the state dental board, who removes to, resides and desires to practice his profession in, such state, territory or district. No license shall be issued under this section unless authorized by an affirmative vote of all the members of the board present at such meeting."

The provisions of section 1322, General Code, supra, provide the subjects in which an applicant for a license to practice dentistry must be examined,

and section 1323 of the General Code provides that he shall receive a license which shall be conclusive evidence of his right to practice dentistry in this state.

Section 1324, General Code, supra, provides for the issuance of a license without examination under the provisions therein stated, and that no such license shall be issued unless authorized by an affirmative vote of all the members present at such meeting.

I am of the opinion that the state dental board is without authority to issue a license except upon examination in the subjects enumerated in section 1322, General Code, supra, unless the applicant therefor comes within the provisions of section 1324, General Code, supra, and a license can then be issued only when authorized by an affirmative vote of all the members of the board present at the meeting.

Therefore, an applicant from another state cannot receive a license to practice dentistry in this state without passing an examination as required by the provisions of section 1322 of the General Code, supra, unless he comes within the requirements as set forth in section 1324 of the General Code, and unless a license is authorized to be issued to him by the affirmative vote of all the members of the board present at the meeting as provided in such section 1324, General Code.

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

(To the Ohio Board of Pharmacy)

A 268.

PEROXIDE OF HYDROGEN—SELLING IN ORIGINAL PACKAGE—"HOUSEHOLD REMEDIES."

Section 12707 specifies certain articles which may be sold in original packages and extending the privilege to "other similar articles." As the only common similarity possessed by the designated articles is their nature as "household articles" and as peroxide of hydrogen is a "household article," this same privilege may be extended to that article under the restrictions stated in the aforesaid statute.

COLUMBUS, OHIO, June 14, 1911.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN.—Under date of June 7th you have asked me for my opinion as to whether peroxide of hydrogen is included in the list of preparations mentioned in section 12707 that may be sold in the original package when compounded by a legally registered pharmacist and put up in bottles or boxes bearing the label of such pharmacist or wholesale druggist with the name of the article and directions for its use on each bottle or box.

Section 12707, General Code, provides in part:

> "The next two preceding sections shall not * * * prohibit a person from selling in the original packages, paregoric, essence of peppermint, essence of cinnamon, essence of ginger, hive syrup, syrup of ipecac, tincture of arnica, syrup of tolu, syrup of squills, spirits of camphor, number six, sweet spirits of nitre, compound cathartic pills, quinine pills, *and other similar preparations* when compounded by a legally registered pharmacist and put up in bottles or boxes bearing the label of such pharmacist or wholesale druggist, with the name of the article and directions for its use on each bottle or box."

The question to be determined is whether or not peroxide of hydrogen is to be included in the words "and other similar preparations" as used in said statutes. You state in your letter that peroxide of hydrogen is not similar in its toxic, medicinal or chemical properties to any of the preparations specifically set out in the statute, and you further state that such preparations as set out in said statute are not similar in their toxic, medicinal or chemical properties one to the other.

The term "other similar preparations" is very vague, and should be eliminated from the statute. Having been used in said statute it is necessary to give them some meaning if they are capable of being given any meaning.

I am informed by you that the preparations set out specifically in the statute as quoted above are what are known as "household remedies" and you state in your letter that peroxide of hydrogen has also become by general use a "household remedy." The preparations as set forth in the statute not being similar in their toxic, medicinal or chemical properties, but being similar only in that they are what are commonly known as household remedies, I construe the words "and other similar preparations" to mean such preparations as have

become household remedies, and, therefore, that peroxide of hydrogen might well be considered as embraced in the term "other similar preparations."

In coming to the foregoing conclusion I am controlled to no little extent by your statement that as a matter of fact the preparations specifically mentioned are not similar in either their toxic, medicinal or chemical properties, and that, therefore, "other similar preparations" must refer to household remedies.

I regret exceedingly my inability to answer you before the 19th, but it was impossible for me to do so.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

322.

PHARMACISTS—QUALIFICATION OF—EXPENSES OF BOARD, IN DETERMINING QUALIFICATIONS DEMANDED BY OTHER STATES, ALLOWED.

As it is necessary for members of the board of pharmacy to determine the qualifications required of pharmacists in other states and as such determination cannot be properly made without personal investigation, the expenses of making such investigation in other states may be legally allowed.

COLUMBUS, OHIO, August 11, 1911.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of August 7th, wherein you state as follows:

> "Mr. F. H. King, president of this board, has called my attention to a recent newspaper article in which you are quoted as saying that the expenditure of money by public officers upon any matter, which takes them outside of the state of Ohio, is illegal, and asks me to inquire if that is your ruling, and if it is to be applied literally to this office.
>
> "Section 1305 of the General Code provides that the board may register a person as a pharmacist without examination and issue him a certificate of such registration if he is legally registered as a pharmacist and holds a certificate of such registration under the laws of another state upon the following conditions:
>
> "Each applicant for such registration shall not be less than twenty-one years of age and be registered after examination in the state from which he holds a certificate; and, section 1306 provides that the standard of qualification and requirement as to competency in another state shall at least be as thorough as that established with the board of pharmacy of this state.
>
> "In order to determine the standard of qualification and requirement as to competency in another state the board in the past have appointed a committee, from the board members, to visit the state in question and report to them as to the requirements of the state in-

vestigated The committee so appointed charging up their expense for railroad fare and hotel bill to the board.

"If they are not permitted to charge up this expense for the investigation, as above stated, they hardly feel that they would be justified in incurring it, as it is a matter that is solely in the interest of applicants for registration in this state, and if these personal investigations are not made, we are at a loss to know how the standard of qualification, and requirement as to competency in another state can be ascertained, as we believe that personal investigation is the only way that we can ascertain these facts.

"I might state also that, under the law, members of the board receive five dollars for each day employed in the discharge of their official duties and their necessary expenses while engaged therein, but they have never charged the per diem, only the actual necessary expense incurred in the investigation."

Section 1305 of the General Code provides:

"The state board of pharmacy shall register a person as assistant pharmacist without examination and issue him a certificate of such registration if he is legally registered by examination as a pharmacist, and holds a certificate of such registration under the laws of another state. The board may register a person as a pharmacist without examination and issue him a certificate of such registration if he is legally registered as a pharmacist and holds a certificate of such registration under the laws of another state, upon the following conditions: Each applicant for such registration shall not be less than twenty-one years of age and be registered after examination in the state from which he holds a certificate."

Section 1306, General Code, provides:

"The standard of qualification and requirement as to competency in another state shall at least be as thorough as that established by the board of pharmacy of this state. The board shall not recognize certificates of registration granted by another state unless recognition is given to residents of this state holding certificates from its board of pharmacy."

As section 1306, General Code, declares that the standard of qualification and requirement as to competency in another state shall at least be as thorough as that established by the board of pharmacy of this state, it has placed a duty upon the state board of pharmacy to investigate and determine what the standard of qualification and requirement is in such other state. You state in your inquiry that personal investigation is the only way for your board to ascertain these facts, and that members of the board have never charged a per diem but only their actual necessary expenses incurred in investigating the standard of qualification and requirement as to competency established by other state boards of pharmacy.

I am, therefore, of the opinion that as such duty is so imposed by statute upon your board it is entirely legal for such board, through a committee appointed for such purpose, to visit the state in question to determine as to the requirements of such state, as you state that is the only way such require-

ments can be ascertained, and receive the actual necessary expenses incurred in such investigation.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 435.

PHARMACISTS—RENEWAL OF CERTIFICATE OF REGISTRATION—NECESSITY FOR RE-EXAMINATION—RECOGNITION BY OHIO OF CERTIFICATE OF NEW YORK—STATUTES NOT RETROSPECTIVE.

When a person legally received in 1887 *a certificate as registered pharmacist in Ohio, after due examination, and before the legal expiration of the certificate, removed to and practiced pharmacy in New York under a certificate of that state, he was not entitled, upon returning to Ohio, in* 1902 *to a certificate of registration in Ohio.*

The fact that New York does not recognize the registration certificate of Ohio, affords ample ground in the policy of the law as well as by express provision of statute, for Ohio to refuse to recognize such certificates of that state.

COLUMBUS, OHIO, October 24, 1911.

HON. FRANK H. FROST, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of July 15th you submitted for my consideration the following:

> "Am directed by the state board of pharmacy to ask you if, under the following circumstances, Mr. A is entitled to a re-registration as a pharmacist in this state. Mr. A's application for re-registration is verbal and accompanied by the following affidavit:
>
> " 'State of Ohio, Franklin County, ss:
>
> " 'A, being duly sworn, deposes and says that the board of pharmacy of Ohio issued to him, on December 15, 1887, a certificate as registered pharmacist, after due examination.
>
> " 'In September, 1890, he removed from the state of Ohio to the state of New York, where he at once engaged in the drug business. A certificate of registration by examination by the board of pharmacy of the state of New York, was granted to this affiant.
>
> " 'After practicing pharmacy in the state of New York until 1902, he returned to Ohio and engaged in the drug business. About two weeks after purchasing his store in Ohio, this affiant made application to W. R. Ogier, then secretary of the board of pharmacy of Ohio, to have his registration *renewed* in the state of Ohio, and was assured that the action would be taken.
>
> " 'Not hearing from the board, application was again made by this affiant in person in 1907 and the claims for registration were stated.
>
> " 'In February, 1909, application was again made to the board of pharmacy of Ohio, said application being presented to its secretary.
>
> .....
>
> " 'Sworn to before me and signed in my presence this 20th day of February, A. D. 1909.
>
> .....
>
> " 'Notary Public, Franklin County, Ohio.'

"And also by the certificate which he received from the state board of pharmacy of New York. Said certificate states that A was licensed as a pharmacist in the state of New York on the 26th day of February, 1901. The records of this office show that on December 15, 1887, a certificate as a registered pharmacist, after due examination, was issued to A. The life of said certificate was three years from the date thereof, and A failed to make application for the renewal of said certificate in the time specified by law.

"I have searched the records of the office carefully and failed to find any record for the renewal of the registration in 1902, as set forth in the affidavit. Mr. W. R. Ogier, the former secretary, informs me that Mr. A made a verbal application to him and that he, W. R. Ogier, informed A that under the law he was not entitled to re-registration.

"It is true that in 1907 A made an application to the board for re-registration, and said application was refused. A, being informed that the only way he could become registered was to apply for, and take the next examination, which he failed to do. I presume that the application for re-registration is based under section 1309 of the General Code, but this section was not in force at the time his certificate expired in this state, nor was it in force at the time he returned, as set forth in his affidavit. In addition, Ohio does not now, nor never did, exchange certificates with the state of New York, for the reason that New York does not give any recognition to the Ohio certificate, as required by said section."

"The board has no desire to withhold a certificate of registration from Mr. A, provided he is entitled to it, but as they construe the law, there is no authority given them to re-register a person under these conditions."

The law in effect at the time the state board of pharmacy issued to Mr. A a certificate as registered pharmacist after due examination is found in the 81 Ohio laws, page 61, passed May 20, 1884. So much of said law as is applicable to the facts under discussion is found in section 4407 of said law, on page 63 thereof, and reads as follows:

"Every registered pharmacist, or assistant pharmacist, who desires to continue the practice of his profession, shall, triennially thereafter, during the time he shall continue in such practice, on such date as said board may determine, pay to the secretary of said board a registration fee, to be fixed by said board, but which shall in no case exceed, if a pharmacist, one dollar, if assistant pharmacist, fifty cents, for which he shall receive a renewal of said registration."

It will be noted that the law as then in force required such registered pharmacist in order to renew his registration to pay a certain fee to said board *triennially* thereafter during the time he shall continue in such practice.

From the statement of facts contained in your letter it appears that Mr. A did not follow the provision above set forth. There is no provision in said law other than as above stated permitting a renewal of registration, and consequently, the certificate issued to Mr. A lapsed.

The said law mentioned above was amended on April 21, 1898, in 93 Ohio Laws 181. Section 4407 of this law provided:

"Every person now registered as a pharmacist or assistant

pharmacist under the laws of this state, shall be entitled to continue in the practice of his profession until his certificate of registration shall expire. Every registered pharmacist or assistant pharmacist, who desires to continue the practice of his profession in this state shall, within thirty days next preceding the expiration of his certificate, file with the board an application for a renewal thereof. If the board shall find that the applicant has been legally registered in this state, and is entitled to a renewal certificate, it shall issue to him a certificate duly signed by its president and secretary. If a registered pharmacist or assistant pharmacist fail, for a period of sixty days after the expiration of his certificate, to make application to the board for a renewal certificate, such person in order to again be registered, shall be required to proceed as in the case of original registration."

Section 4407 of the Revised Statutes as foregoing set forth continued in operation until April 26th, 1906, when it was again amended. Therefore, such section covered the period from April 21, 1898, to April 26, 1906.

From the statement submitted by you it appears that Mr. A claims to have made his application to the state board of pharmacy for a re-registration immediately upon his return to New York in 1902 to the then secretary of the board.

You further state that you failed to find any record of such application but are informed by the then secretary that a *verbal* application was made to him at that time. While I do not think a verbal application is such an application as would be sufficient in law, yet granting that it would be, and that it was duly made as claimed, the said application would be of no force or effect for the reason that at the time the same was made there was no provision of law as disclosed by an examination of section 4407 as in force at the time for the renewal of the certificate issued to Mr. A on December 15, 1887, which certificate had expired in 1890. Such law provided that if a registered pharmacist for a period of sixty days after the expiration of his certificate failed to make application to the board for a renewal thereof, he, in order to again be registered shall be required to proceed as in the case of original registration to wit: by submitting to an examination.

Said section 4407, R. S., was again amended in 98 Ohio Laws 207, on April 26, 1906, and such section, as amended, reads as follows:

"Every person now registered as a pharmacist or assistant pharmacist under the laws of this state, shall be entitled to continue in the practice of his profession until his certificate of registration shall expire. Every registered pharmacist or assistant pharmacist, who desires to continue the practice of his profession, shall, within thirty days next preceding the expiration of his certificate, file with the board an application for a renewal therof. If the board shall find the applicant has been legally registered in this state, and is entitled to a renewal certificate, it shall issue to him a certificate, duly signed by its president and secretary. The right to obtain a renewal certificate shall not be denied any person for a period of three years after his certificate of registration has expired, but if any registered person fails for a period of sixty days after the expiration of his certificate to make application for such renewal he shall then be required to pay to the treasurer of the board of pharmacy the sum of ten dollars in addition to the fee prescribed for the renewal of certificates. If a registered

pharmacist or assistant pharmacist fails for a period of three years after the expiration of his certificate, to make application to the board for a renewal certificate, such person in order to again be registered, shall be required to pass an examination. *Provided, however, that any person, who has been registered under the laws of this state and who has after the expiration of his registration continually practiced pharmacy in some other state under a certificate issued by authority of said other state, may, after said term of three years, obtain a renewal certificate on payment of twenty-five dollars to the treasurer of the board of pharmacy in addition to the fee prescribed for the renewal of certificates.*"

The provision of such law above italicized I hold not to be retroactive in its operation.

> "It is a well settled rule of construction that laws relate to the future and are not to be construed retrospectively, or to have a retrospective effect unless it shall clearly appear that it was so intended by the legislature, and unless such construction is absolutely necessary to give meaning to the language used."
>
> American and English Enc. of Law, 2d edition, vol. 6, page 939.

I, therefore, hold that the provisins of section 4407 as above italicized do not apply to Mr. A's case, in that his certificate had under prior law already lapsed, and it was as if no certificate had ever been issued to him.

Furthermore, from your statement of facts I do not find that Mr. A *continually practiced pharmacy* in New York under a certificate issued by authority of New York after the expiration of his registration, he having returned to this state, as you state, in 1902.

In other words Mr. A at the time of the passage of the amendment to section 4407 in April, 1906, had been engaged in the drug business in this state, and not in the state of New York for a period of three or four years, to wit: from 1902 to 1906. Consequently, he had not after the expiration of his registration in Ohio *continually practiced pharmacy* in some other state up to the time of his application in 1907 as set forth in your letter, and his application of 1907 was properly refused for that reason.

The above provision of section 4407 was again amended in 99 Ohio Laws on page 506, on May 9th, 1908, being section 73 of said act and which reads as follows:

> "If a registered pharmacist or assistant pharmacist fails to make application to the board for a renewal certificate within a period of three years from the expiration of his certificate, he must pass an examination for registration; except that a person, who has been registered under the laws of this state and after the expiration of his registration, has continually practiced pharmacy in another state under a certificate issued by its authority, may obtain a renewal certificate upon payment to the treasurer of the state board of pharmacy of twenty-five dollars in addition to the fee prescribed by law for the renewal of certificates."

Following the rule of construction before stated, I do not believe that said act has any retrospective operation, nor was such application made within three years from the expiration of certificate issued in 1887 to Mr. A.

Mr. A's application in February, 1909, was likewise properly refused for the reason stated for the refusal of his application in 1907.

The provisions of section 73 above stated was carried into the General Code, being section 1309 thereof.

I hold that as Mr. A did not know his certificate as provided by the law in effect as set forth in 81 Ohio Laws his certificate absolutely lapsed, and there being no provision in said law, nor in the law as found in 93 Ohio Laws, for a renewal thereof he would not be entitled under his alleged application of 1902 to a re-registration; that section 73 of the 98th Ohio Laws and subsequent enactments thereof are not retrospective in their operation, nor from the facts stated would Mr. A be entitled to the provisions thereof even should such law be so considered as retrospective in its effect, for the reason that he does not come within their provisions.

Therefore, I am of the opinion that Mr. A is not entitled to a *re-registration* as a pharmacist in this state, but that it is necessary for him to again present himself for examination.

Furthermore, I do not believe that Mr. A is or was at any time entitled to a certificate from this state *because of his having a certificate from the state of New York*. As stated in your letter, certificates have never been exchanged by Ohio with the state of New York, consequently there is no duty upon the state of Ohio to recognize a New York certificate.

The first enactment that I have been able to find which permits of registration of pharmacist without examination and the issuing of certificate of such registration to persons legally registered under the laws of another state is found in 93 Ohio Laws 183, which was passed April 21, 1898, and which provides in part as follows:

> "The standard of qualification and requirement as to competency in any state shall be at least as thorough as that established by the board of pharmacy of this state. The board shall only recognize certificates of registration granted by states wherein like recognition is given to persons resident of this state and holding certificates from the board of pharmacy thereof."

This provision of law has in substance been carried into the law ever since, and is now section 1306 of the General Code. This provision of law specifically requires that the board shall not recognize certificates from other states unless like recognition is given to Ohio certificates, and as you, in your statement of facts, have set out that the state board of pharmacy of New York has never reciprocated with the state board of pharmacy of Ohio, I hold that Mr. A is not entitled under said section to the granting of a certificate by your board.

In conclusion, therefore, I beg to state that under neither conclusion at which I have arrived is Mr. A entitled to a certificate of *re-registration* or *registration* without examination qualifying him to receive such certificate.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Veterinary Examiners)

288.

EXPENDITURES TO WARN AND PROSECUTE VIOLATORS OF THE LAW, UNAUTHORIZED.

There is no provision of law for the expenditure by the board, of funds, in its possession for the purpose of warning and prosecuting those who violate the law.

COLUMBUS, OHIO, July 7, 1911.

Ohio State Board of Veterinary Examiners, 3116 Spring Grove Ave., Cincinnati, Ohio.

GENTLEMEN:—Under date of May 29th you make the following statement:

> "The Ohio state board of Veterinary examiners has about $2,000.00 in its treasury, accumulated from fees obtained from applicants, examined by the board as prescribed by law. The receipts of the board are in excess of its expenses. The law does not impose upon the board the duty of warning and prosecuting those who violate the law but if not enforced the law will, of course, be without effect and of no value to the state. The board can create some respect for the law under which it operates and at least partly enforce it if it legally use the funds in its possession and above referred to for that purpose."

The law governing the state board of veterinary examiners is included in sections 1171 to 1177, General Code.

Section 1172 of the General Code reads as follows:

> "The state board of veterinary examiners shall meet in the city of Columbus during the months of April and July in each year. The board shall organize by the election from its members of a president, a secretary and a treasurer, who shall hold their respective offices for a term of two years, and until their successors are elected and qualified. The secretary shall keep an accurate record of the business transacted and of the certificates issued by the board. He shall pay to the treasurer the fees received from the applicants for examination, keep an accurate account of the moneys received and disbursed, and perform such other duties as the board may prescribe."

Section 1173 of the General Code reads as follows:

> "Each member of the state board of veterinary examiners shall receive three dollars for each day during the sessions of the board, and his necessary traveling expenses. Such compensation and expenses shall be paid by the treasurer of the board from the fees received from applicants for examination."

Section 1175 of the General Code reads as follows:

> "An applicant for such examination shall present himself at a

regular meeting of the state board of veterinary examiners, and pay five dollars for each examination. The fee shall accompany his written application and be paid to the secretary of the board previous to such meeting. One-half the amount of the fee shall be returned to the applicant if he fails in an examination, or if a diploma is accepted in place of an examination."

There is no provision in the law which imposes upon the board the duty of warning and prosecuting those who violate the law, or which permits any expenditure by the board or its officers of the funds in its possession for the enforcement of such law.

I am, therefore, of the opinion, that such expenditure cannot be made under the law as it now stands. If it is the desire of the board that it be authorized to expend the surplus in its treasury for such purpose it would be necessary that the law be so amended by the legislature as to permit of such expenditure.

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

390.

EXAMINATION HELD BY BOARD OF VETERINARY EXAMINERS AT OTHER THAN REGULAR MEETING ILLEGAL—RIGHTS OF RECEIVERS OF ILLEGAL CERTIFICATES.

The board of veterinary examiners can hold examinations only at regular meeting of the board, as a right or license cannot be acquired except as provided by statute. A certificate issued for an examination held at another date is invalid.

All applicants who have received such illegal certificates must be allowed to take another examination without extra cost.

COLUMBUS, OHIO, September 23, 1911.

DR. LOUIS F. COOK, *Secretary Ohio State Board of Veterinary Examiners, 3116 Spring Grove Avenue, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of August 3d, 1911, in which you state the following:

"The state board of veterinary examiners operating under section 1174 of the General Code requests your official opinion and advice on the following:

"1. Can the board legally hold special examinations—that is examinations other than the two regular examinations to be held in April and July as fixed by law?

"2. Is a certificate issued by the board after an applicant has passed such special examination valid?

"3. If certificates so issued are not valid what action should the board take relative to certificates that have been so issued?

"In explanation permit me to say that the board has conducted

four special examinations believing that it had a legal right to do so, and believing at the time that the best interests of the state demanded such action. What is said to be a copy of an opinion on these points by you to the prosecutor of Lorain county has just come to hand. From this it would appear that the board was in error."

In reply to your first question, section 1175 of the General Code provides as follows:

"An applicant for such examination shall present himself at a regular meeting of the state board of veterinary examiners and pay five dollars for each examination. The fee shall accompany his written application and be paid to the secretary of the board previous to such meeting. One-half the amount of the fee shall be returned to the applicant if he fails in an examination, or if a diploma is accepted in place of an examination."

Upon a careful examination I find there is no provision similar to the provision contained in said section 1175, supra, in these section of the General Code which govern the state medical board and the state dental board but on the contrary, those sections of the General Code which provide for examinations by the state medical board and the state dental board provide in substance that the said state medical board and dental board may hold, in addition to their regular meetings, such additional meetings deemed necessary by the said board. In this respect section 1175 of the General Code clearly limits the sfate board of veterinary examiners from holding special examinations by the use of the following language:

"An applicant for such examination shall present himself at a *regular meeting* of the state board of veterinary examiners * * *"

So, I am clearly of the opinion that the state board of veterinary examiners cannot hold special examinations.

Answering your second question, I am of the opinion that the state board of veterinary examiners have not the legal right to issue certificates to applicants who have passed a special examination for the reason that applicants for certificates to practice veterinary medicine and surgery must present themselves at a regular examination as required by the statute which I have cited above.

"In no case is the practice of medicine a property right."
(State vs. State Medical Board, 32 Minn., 324.)
"Nor is the right to practice medicine a vested right."
(Dent vs. West Virginia, 9 Sup. Ct. Rept., 351.)
"But the right to practice medicine is a valuable right and no one can, arbitrarily and without reason, be deprived of such right."
(State vs. Ottman, 6 Ohio Decisions, 266.)

The right to practice medicine or surgery is subject to state regulation and is in the nature of a right or franchise granted to the applicant applying therefor by the sovereign authority of the state as has been ably expressed by the supreme court in the following language:

> "The right to practice medicine has been so long and so universally subject to state regulations *that it might almost be said to be, not an absolute right, but a privilege or franchise.* Assuming, however, that it is an absolute right, it is conceded that it is subject to such reasonable regulations or conditions as the state in the exercise of the police powers may prescribe." (State vs. Marble, 72 O. S., 24.)

Inasmuch as the state has the undoubted right to regulate the practice of veterinary medicine and surgery and the manner in which such right, franchise or license to so practice shall be required, it necessarily follows that such right or license can be acquired only in the manner provided by the statute.

For the foregoing reasons, I am of the opinion that a certificate, issued by the board of veterinary examiners to an applicant who has passed the examination at a special session, is not issued in conformity with the statute and is, therefore, invalid.

In answer to your third question, I am of the opinion that while the certificates so issued are invalid, nevertheless all applicants who have received certificates after having passed a special examination should be given an opportunity to take the regular examination at the next regular session of the board, but that no charge should be made by the state board of veterinary examiners against such applicants so taking the regular examination for the reason that the applicants themselves are not at fault in the matter and they are equitably entitled to this consideration.

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

479.

EXAMINATION FOR VETERINARY—RIGHT OF APPLICANT TO INSPECT PAPERS AND RECEIVE COPIES.

Each applicant for an examination before the state board of veterinary examiners is entitled to see and inspect his papers and to know his grades, but is not entitled to a copy of his papers.

COLUMBUS, OHIO, November 29, 1911.

DR. LOUIS F. COOK, *Secretary State Board of Veterinary Examiners, 3116 Spring Grove Avenue, Cincinnati, Ohio.*

DEAR SIR:—I desire herewith to acknowledge receipt of your communication of the 22d, wherein you inquire as follows:

> "A great many applicants who failed to pass their examination before the state board of veterinary examiners demand from the board a copy of their papers together with the grade allowed in each branch. Some of the papers are unnecessarily lengthy, and so poorly written that an exact copy could be made only after close study and at the cost of much time. In some cases it would be impossible to make a correct copy at all.

"The secretary of the board receives only the per diem of $3.00 allowed by law. Two meetings a year are held and this means $6.00 a year for each member. No salary is allowed the secretary by the board. The routine work of his office requires an average of two hours' work daily.

"If all the requests, such as the above mentioned, must be complied with, the board will be put to considerable expense in employing the clerical help necessary.

"Kindly advise me whether such requests must and should be complied with."

I reply thereto I am of the opinion that when the applicant takes the veterinary examination and turns his paper over to the board of examiners, he has no further control over such papers. The papers are prepared by such applicant for the board of examiners, and after the same are marked and graded, I presume such papers are filed by the board of veterinary examiners for future reference in case it becomes necessary to refer to them. Each applicant has a right to see and inspect his papers after the same are marked and graded and is entitled to know the grade given him upon each subject upon which he is examined, but I am of the further opinion that he is not legally entitled to a copy of his papers.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Board of Embalming Examiners)

A 323.

LICENSE TO EMBALMERS—ANNUAL RENEWAL—NO POWER IN BOARD TO EXTEND TIME.

Section 1338, General Code, is mandatory in the respect that it requires the holder of a license from the board of embalming examiners to pay annually a fee of one dollar for the renewal of such license on or before the date fixed by the board and the board is devoid of any power to extend the time for the renewal of such license. A person who so fails to renew in the manner provided cannot legally be entitled to practice without examination.

COLUMBUS, OHIO, August 12, 1911.

HON. GEORGE BILLOWS, *Secretary of the State Board of Embalming Examiners, Akron, Ohio.*

DEAR SIR:—I herewith beg to acknowledge receipt of your communication of June 17, 1911, and wish to say as explanatory of the delay in answering the same, that such delay has been due entirely to the large number of matters to which this department has been required to give its attention. Your letter is as follows:

> "Owing to much absence from home and a large amount of pressing business, I was obliged to delay answer to the Schroyer correspondence to you, and by your office referred to me last month, and which I herewith return for further instructions. In explanation to same will say, that the by-laws adopted by the state board of embalming examiners for their government, in compliance with section 1338 in chapter 23 of the General Code of Ohio, provides that all embalmer's license holders shall pay each year to the secretary of the examining board on or before the first day of January each year, one dollar for the renewal of their license. Finding after being appointed a member of said board, that it was a habit of the secretary to receive payment for the renewal of licenses which were overdue from one to five years, and believing this to be in violation of the law, I appealed to Attorney General Denman, after being elected secretary in 1908, to give me his interpretation of the law, and his ruling thereon, when I was by him informed, that, the secretary or board was not authorized under the law, to accept payment and make such renewals of licenses after the first day of January specified in the by-laws as the date for such payment, and I have since endeavored to comply with said ruling, and so repeatedly informed Mr. Schroyer, for the return of which to me, I will thank you.
>
> "Respectfully submitted for further instructions."

In reply thereto I wish to say that section 1338 of the General Code (99 O. L. 508) provides as follows:

> "The state board of embalming examiners shall meet at least once each year at such time and place as it directs, but at least fifteen days' notice thereof shall be given. It shall organize by the election

of a president and a secretary from its members. The president shall serve for a term of one year and until his successor is elected and qualified. The secretary shall serve during the pleasure of the board, and shall perform the duties of secretary and treasurer. The board may adopt such rules and by-laws for its government as it deems proper, but three members of the board shall constitute a quorum. The president, or in his absence a president pro tem. is authorized to administer oaths."

You will note that the above quoted section provides in substance that the board of embalming examiners *may adopt such rules and by-laws for its government as it deems proper.*

Under date of March 4, 1909, my predecessor, the Hon. U. G. Denman, rendered an opinion wherein he construed said section 1338 of the General Code. I herewith quote in full the construction which Mr. Denman placed upon said section:

"(Question) 3. May the Ohio state board of embalming examiners under the last clause of section 3, chapter 15a, 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?

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

"Answering your third question, I beg to advise that section 3 of chapter 15a, 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 or 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."

Section 1338 of the General Code, which I have quoted above, clearly provides that the state board of embalming examiners may adopt such rules and by-laws for its government as it deems proper. Section 1343, General Code, provides that "the person to whom a license is issued shall register it with the board of health of the city, village or township in which he proposes to practice. He shall also display such license in a conspicuous place in his office, and annually thereafter on or before the date fixed by the state board to pay to the secretary thereof one dollar for its renewal."

Therefore, in conclusion, I heartily concur in the opinion rendered by my predecessor, which I have cited and quoted above, for the reason that the statutes in respect to the matter clearly set forth that any holder of a license to engage in the occupation of embalming shall, on or before the date fixed by the state board, pay to the secretary thereof, one dollar for its renewal.

I further concur in the opinion of my predecessor that it is not within the power of the board of embalming examiners to restore the license after failure to renew the same, except by an examination, and that the state board of embalming examiners has no authority by statute to extend the time for making such renewals beyond the date fixed in their by-laws.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State Board of Charities)

A 231.

CHILDREN'S HOME—LEGAL SETTLEMENT IN COUNTY FOR PURPOSE OF POOR RELIEF—OBLIGATION OF COUNTY—RIGHT OF REMOVAL OF DESTITUTE CHILD BY FOREIGN COUNTY.

Where a party who has had a legal settlement in "A" county, moves into "B" county and before the expiration of one year, the child of said party, because of destitute circumstances, is placed in a children's home in "B" county, such child has not acquired a legal settlement in "B" county and the trustees of the latter county may remove said child to "A" county and the authorities therein will be obliged to care for him.

April 28, 1911.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your letter of April 1st received. You state:

"I have received an inquiry from a trustee of one of our county children's homes concerning a situation which I shall describe below. As there are numerous occasions when such questions come up in our county children's homes, it seems to me that it would be wise to have an expression from you which may serve as a guide in the future until we may have some judicial interpretation of the provisions relating to children's homes and care of the poor. The case at issue is as follows:

"Last December a family moved from A county, in which they had a legal settlement, to B county. In January the husband abandoned his wife. Because of her destitute circumstances, she placed her children in the children's home of B county. The trustees of that home are demanding that the trustees of the children's home of A county shall receive these children, claiming that they have no legal right to care for them and that the settlement laws require the child to be cared for by A county. The trustees of the children's home of A county are resisting this claim on the ground that the family left with intentions to make their residence in B county."

And you inquire:

"In which county are these children eligible for public support in a children's home?"

Section 3077, General Code, et seq., authorizes the establishment of children's homes in various counties of the state.

Section 3089, General Code, provides as follows:

"The home shall be an asylum for children under the age of sixteen years, of sound mind and free from infectious or contagious diseases, who have resided *in the county not less than one year*, and for such other children under such age from other counties in the

> state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them."

Section 3094, General Code, provides that the trustees may remove any child who has become a charge upon the county and who has no *legal settlement* therein, to the county to which it belongs, and all the charges and expenses so incurred shall be paid by the county to which it belongs.

You state in your letter of inquiry that a certain family moved from a county which you designate "A" in which they had a *legal settlement* to another county which you refer to as "county B" and there the husband abandoned the wife, and the wife and family became public charges and the children were placed in the children's home of "county B," and the trustees of the children's home in the last named county are demanding that the trustees of the children's home of "A county" shall receive these children, claiming they have no legal right to care for them and that the settlement laws require the children to be cared for by "A county."

You will note in section 3088, General Code, it is provided that the home shall be an asylum for children under the age of sixteen years of age of sound mind and free from infectious or contagious diseases *who have resided in the county not less than one year, etc.*, and that section 3094 referred to above authorizes the trustees to remove any child from the home who has become a charge upon the county and who has no legal settlement therein to the county to which it belongs.

Section 3477, General Code, defines "legal settlement" as follows:

> "Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously 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 period of "legal settlement" as provided in section 3477, supra, corresponds to the time of residence that children must have in the county in which the home is situated under section 3089.

It is, therefore, my opinion that the children mentioned in your letter not having a legal settlement in "B county" and not having resided there for the period of one year that the trustees of the children's home of "A county" must accept and receive and take care of them.

Respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General.

250.

BOND OF CASHIER OF STATE BOARD OF CHARITIES—FORM PRESENTED.

Form of bond for cashier of board of state charities.

Form submitted by Mr. Shupe is applicable to a private employment but not for public office. A proper form is herein submitted.

COLUMBUS, OHIO, May 11, 1911.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 4th, enclosing bond executed by Ralph M. Shupe, principal, and the American Fidelity Company, as surety, to the state of Ohio. In your letter you state that Mr. Shupe has been appointed under the provisions of law recently enacted at the present session of the general assembly to the position of cashier for the board of state charities, and that the bond is proposed to be given by him in such capacity. You request my opinion as to its sufficiency.

I shall not attempt to quote the bond in full as the provisions are very lengthy; suffice it to say, that it is properly applicable to a private employment and in no sense to a public office. I cannot approve this bond as sufficient. I suggest that the bond be executed on forms prepared and kept in the office of the secretary of state. In the event that you are unable to obtain such a form I suggest the following as sufficient:

> "Know ye all men by these presents, That Ralph M. Shupe, as principal, and.....as surety, are held and firmly bound unto the state of Ohio in the penal sum of ten thousand dollars ($10,000) for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.
>
> "The condition of the above obligation is such that, whereas, the said Ralph M. Shupe has been duly appointed cashier for the board of state charities of the state of Ohio for the term of....years from and after the.....day of.....
>
> "Now, therefore, if the said Ralph M. Shupe shall faithfully perform the duties of his office as such cashier for such board of state charities and shall faithfully account for and pay over to his successor, or otherwise as provided by law, all moneys coming into his hands as such cashier then these presents shall be void, otherwise, they shall remain in full force and effect in law.
>
> "In witness whereof the said Ralph M. Shupe, as principal, has hereunto set his hand and seal, and the said.....as surety, by.....and.....thereunto duly authorized, has set its hand and affixed its corporate seal this.....day of.....A. D. 1911.
>
> .....
>
> .....
>
> ....."

I cannot approve any form of bond containing conditions other than those above expressed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State Board of Accountancy)

234.

TERM OF OFFICE OF MEMBER OF STATE BOARD OF ACCOUNTANCY—FILLING OF VACANCY.

By provision of section 1371, General Code, a member of the state board of accountancy serves until his successor is elected and qualified.

COLUMBUS, OHIO, May 1, 1911.

HON. J. H. KAUFMAN, *Secretary State Board of Accountancy, Columbus, Ohio.*

DEAR SIR:—Some time ago you requested my opinion upon the following:

> "Referring to the law providing for a state board of accountancy, enacted by the general assembly of Ohio at its session of 1908 (vol. 99, page 332), I wish to state that in accordance therewith, the term of a member of said board expired on May 21st, 1910. The governor has not appointed a successor.
>
> "Question. Is the member referred to a member of the board until his successor is appointed and qualified, or has there been a vacancy since said expiration?"

While it is true that section 2 of the act to establish an Ohio state board of accountancy, 99 O. L., page 332, provides in part that

> "* * * One member of such board shall be appointed for one year, one member for two years and one member for three years, and upon the expiration of their respective terms their successors shall be appointed for a term of three years. * * *"

and there is no provision in the act in terms providing that the members should serve until their successors are duly appointed and qualified, we find that the legislature in its last expression in the subject as found in section 1371, General Code, has fully taken care of the matter. Section 1371 of the General Code provides as follows:

> "Each year the governor shall appoint one member of the state board of accountancy who shall serve for a term of three years and until his successor is appointed and qualified. A vacancy in the board shall be filled by the governor by appointment for the unexpired term."

I am therefore of the opinion that the members of your board serve until their successors are duly appointed and qualified.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 328.

TERM OF OFFICE OF MEMBER OF BOARD OF ACCOUNTANCY—QUALIFICATION BY OATH OF OFFICE—NO RIGHT FOR ONE BOARD TO BURDEN SUCCESSOR WITH INDEBTEDNESS.

A member of the state board of accountancy serves until his successor is elected and qualified. A member has not qualified by mere filing of bond or by taking part in the organization of a board. By taking an oath of office, however, he is to be considered qualified.

As a general principle of law, in the absence of specific authority, a board or officer may not create indebtedness to be saddled upon its successor, and moreover as the board of accountancy is intended to be self sustainting, while it may with reasonable care incur liabilities in excess of the probable income of the year, the board may be restrained by proper proceeding, from acting arbitrarily or extravagantly in this regard.

COLUMBUS, OHIO, August 26, 1911.

HON. E. S. THOMAS, *Member Board of Accountancy, Cincinnati, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 25th, submitting for my opinion thereon the following:

> "On the 15th day of May, Governor Harmon appointed two members of the state board of acountancy, I being one of them. The new board organized on June 10th, although one of the appointees had not then received his certificate. Since that time he has decided to decline the appointment. In view of these facts, I would like to know whether his declination restores his predecessor to membership in the board.
>
> "Had the old board any right to create an indebtedness in excess of its income, to the detriment of its successor? If a board can anticipate the income for one year, it can do so for any number of years; thus depriving subsequent boards of the power to reimburse its members for actual outlays on account of traveling expenses, or to compensate them for their services.
>
> "Is there any requirement that the board maintain an office, or that the records be kept in Columbus?"

In answer to your first question I beg to state that Section 1371, General Code, specfically provides that:

> "Each year the governor shall appoint one member of the state board of accountancy who shall serve for a term of three years and until his successor is appointed and qualified. * * *"

The sole question presented by your first inquiry is as to whether or not the appointee in question qualified. The mere failure to receive a certificate of appointment would not, in my opinion, be material. The statute does not require any particular act of qualification, such as the filing of a bond, as a condition precedent to membership on the board of accountancy.

However by section 2 of the General Code, "Each person chosen or appointed to an office under the constitution or laws of the state * * * shall take an oath of office before entering upon the discharge of their duties."

If the appointee in question took the oath of office and then participated, as you state, in the meeting and organization of the board he would, in my opinion, have qualified for the position by so doing, and should he afterward resign there would be a vacancy in his office to be filled by the governor by appointment for the unexpired term as provided in section 1371, General Code. If, however, the appointee in question did not take the oath of office, then, in my opinion, he failed to qualify despite his participation in the organization of the board. His failure to qualify by virtue of section 1373 above quoted, would have the effect of prolonging the incumbency of his predecessor, who would in that case retain his membership on the board until his successor be appointed and qualified.

Answering your second question I beg to state that the statutes relating to the state board of accountancy are silent as to the right of the board to create an indebtedness in excess of its income. Section 1378 of the General Code provides that the expenses of the board shall be paid from fees collected under this chapter and that in no case shall the expenses of the board be a charge against any fund of the state.

The intention is manifest, therefore, that the revenues of the state board of accountancy shall constitute its sole support.

Section 12923 of the General Code prohibits state officers from creating deficiencies in appropriations made by the general assembly, and this section does not, of course, apply to the expenditure of moneys received by the state board of accountancy.

It is a general principle of law that in the absence of specific authority a board or officer may not bind its or his successor by the creation of an indebtedness.

This principle is to be applied with very great caution, and subject to very many exceptions.

I am satisfied, however, that it applies in the case you submit for the reason that it is the manifest intention of the law that the state board of accountancy be self supporting, and if one board should be permitted to incur liability in excess for a given year, one of two results will occur; either the state board of accountancy must be obliged to go out of business, so to speak, or it would have to apply to the general assembly for an appropriation, which the law specifically forbids.

I am, therefore, of the opinion that while within the given year the state board of accountancy may lawfully in the exercise of reasonable care create a deficiency and incur liability in excess of the probable income of the year, yet when the board acts arbitrarily, unreasonably and extravagantly and thus attempts to saddle upon its successors a debt which will seriously impair the effectiveness of their administration, such action would be unlawful, and might be restrained by appropriate proceedings.

In answer to the third question, I beg to state that there is no enactment of law that the board maintain an office or keep records in Columbus.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Board of Agriculture)

283.

SHOW LICENSE FEES—PAYMENT BY COUNTY TREASURER TO CREDIT OF AGRICULTURAL FUND—DUTY OF STATE AUDITOR AS TO FEES FORMERLY NOT CREDITED.

Section 6377 of the General Code obligates the treasurer of a county, at the time of making his August settlement, to account for all moneys received as show license fees, under section 6374, General Code, and pay one-half of such funds upon the draft of the auditor of state into the state treasury, to the credit of the agricultural fund.

The auditor of state shall pay all moneys received as such fees since the enactment of section 6377 in 1882, to the credit of the agricultural fund as therein provided.

COLUMBUS, OHIO, June 29, 1911.

HON. A. P. SANDLES, *Secretary Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your favor of June 28th as follows:

> "Section 6377, General Code, provides that show license fees shall be credited to the state agricultural fund.
>
> "The auditor of state has credited same to the general revenue fund.
>
> "The law was enacted 1882. Should the auditor transfer this to agricultural fund, as provided by law?
>
> Please advise
> Thanks
> Health
> Success
> Respectfully."

In reply I beg to advise that section 6377 of the General Code provides as follows:

> "Money paid into the treasury of a county, under the provisions of this chapter, shall be appropriated, one-half to the state agricultural fund and one-half to the general county fund. The treasurer of such county, at the time of making his August settlement each year with the auditor of state, shall account for such money, and pay into the state treasury, upon the draft of the auditor of state, one-half thereof, to be placed to the credit of such agricultural fund."

Under this section it is the duty of the treasurer of each county, at the time of making his August settlement each year with the auditor state, to account for all money received by him as license fees under section 6374, General Code, to pay into the state treasury, upon the draft of the auditor of state, one-half of such fees, to be placed to the credit of the agricultural fund. I understand from your letter that the auditor of state has failed to so credit

the money paid in by county treasurers under said sections to the agricultural fund, but has credited the same to the general revenue funds.

This law was enacted in 1882, and as the provisions are plain, the auditor of state should now transfer all money paid into the state treasury as license fees under section 6374 to the state agricultural fund as provided in section 6377.

Perfectly welcome
Health
Long life
Success
Prosperity.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

320.

FREE TRIP TO OHIO STATE FAIR—AGE OF BOYS—"BETWEEN FIFTEEN AND TWENTY."

A farmer boy who is over fifteen years of age or under twenty on the date of August 19, 1911, *will not be entitled to the free trip privileges to the Ohio state fair.*

COLUMBUS, OHIO, August 9, 1911.

HON. A. P. SANDLES, *Secretary Department of Agriculture, Columbus, Ohio.*

MY DEAR MR. SANDLES:—I beg to own receipt of your esteemed favor—always esteemed and always favors—of the 9th inst., wherein you inquire as follows:

> "Enclosed herewith information circular reference boys' free trip to Ohio state fair.
>
> "Your attention is directed to rule 2, page 2, which reads as follows:
>
> "'Boys to be of good character, between the ages of 15 and 20 years.'
>
> "Grave and serious controversies have arisen in many counties as to the proper interpretation of the true meaning and intent of 'between the ages of 15 and 20 years.'
>
> "Some of the boys a few days past the maximum and a few days under the minimum insist that they are eligible and claim that the nearest birthday should govern, while those boys clearly within the age limit are disposed to argue that no one is eligible if he is one day over twenty or one day under fifteen.
>
> "Since over two thousand boys will be involved in this contest, as well as old folks, preachers, teachers, grangers, politicians, congressmen, sisters, cousins, aunts, Christians and sinners, it is absolutely necessary that the legal department of the state of Ohio suspend all other business and diligently apply its intellectual powers to properly

interpret the constitution, statutes, judicial decisions, past, present and future, that in anywise pertain to this matter.

"In order to avoid heated arguments and perhaps pugilistic exercises on the part of ambitious young Americans, I would advise that you use all diligence possible to hasten your final conclusions upon the issues thus made up.'

I am interested in your question as to what is meant by "between the ages of 15 and 20 years." Don't you remember when you were between these ages, especially when you were clustering about twenty? Just now I am inquired of whether you were clustering about the age of twenty, or twenty were clustering about you. I note you also advise that there will be involved old folks, preachers, teachers, grangers, politicians, congressmen, sisters, cousins, aunts, Christians and sinners. You don't really think there are any sinners among the farmers, do you? I always thought that they were all Christians.

The legal department of the state in accordance with your request suspended all business as suddenly as the street cars stop in the midst of a Hibernian parade in New York in order to inquire, investigate, consider and determine the rights of the boys, some of whom have "Sandles" and perhaps others have not.

I don't blame the old folks, and the preachers, the teachers, the grangers, the politicians, the congressmen, sisters, cousins, aunts, Christians and sinners for wanting to come to Columbus when a state fair is to be given under the patronage, favor, auspices, encouragement, work, efficiency, glory and renown of Put Sandles of Ottawa. It might be a good idea if some of the wives would come too.

After looking over the judicial decisions from the Pandects of Justinian to the proposed "Dean law," and especially after wading through the discussions growing out of the constitutional convention of Ohio of 1851 and the discussions that are to take place in the constitutional convention of 1912, this department has arrived at the conclusion that a farmer boy is unforunate that will be under fifteen on August 19, 1911, or that will be over twenty on that day. Under all the circumstances, and although a democrat believing in strict construction we will have to leave out the hour of birth and submit that to the determination of the head of the department of agriculture for investigation amongst the mothers, leaving out the old folks, preachers, teachers, grangers, politicians, congressmen, sisters, cousins, aunts, Christians and sinners.

I congratulate the boy that was born in the Augustan period that brings him within the "Sandlesian" age, to wit: upwards of fifteen on the glorious day of August 19, 1911 and under twenty.

Thanks
Health
Success
Wealth
Prosperity and may you get every vote hereafter for governor of Ohio of the eighty-eight "agricolas" who were born when the moon was right.

Sincerely yours,

TIMOTHY S. HOGAN,
Attorney General.

F 468.

OFFICES COMPATIBLE—LECTURER AT FARMER'S INSTITUTE MAY BE A MEMBER OF GENERAL ASSEMBLY—"EMPLOYE"—"OFFICER."

A lecturer at a farmer's institute appointed and compensated by the Ohio state board of agriculture is not an officer but a mere employe and therefor is not within the constitutional prohibtion against holders of public or state offices, becoming a member of the general assembly.

COLUMBUS, OHIO, November 17, 1911.

HON. A. P. SANDLES, *Secretary Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 1st, wherein you inquire as follows:

> "Please advise if there is any legal objection to the Ohio state board of agriculture appointing and compensating a member of the Ohio legislature, as farmer institute lecturer."

In reply thereto I desire to say that section 4 of article II of the constitution of Ohio provides as follows:

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

The question presented by you is whether or not a lecturer at a farmers' institute, appointed and compensated by the Ohio state board of agriculture, is an officer coming within any of the provisions of section 4, article II of the constitution, above quoted. In my opinion, such lecturer, so appointed by the Ohio state board of agriculture, is not an officer at all; he is merely an employe. There is, therefore, no legal objection to the Ohio state board of agriculture appointing and compensating a member of the Ohio legislature as a farmer institute lecturer.

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

(To the Ohio Agricultural Experiment Station)

A 304.

COUNTY EXPERIMENT FARM—PROCEDURE FOR ESTABLISHMENT—DUTIES OF BOARD OF CONTROL TO VISIT COUNTY—APPROVAL OF BOARD—NECESSITY FOR MONEY IN TREASURY FOR THE PURPOSE.

Under section 1165-7, General Code, after the procedure provided for has been complied with, it is necessary for the board of control to visit the county and assist in the selection of a farm to be used therein for agricultural experiment purposes.

The act of approving the purchase of such land may be made, however, in any place where the whole board happens to be legally assembled.

No action may be taken toward the establishment of such farm by the board of control until the funds for the purpose have been deposited in the county treasury and the board of control notified by the county commissioners of the action taken by them.

COLUMBUS, OHIO, July 26, 1911.

HON. CHARLES E. THORN, *Director Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 13, 1911, and I wish to say that the delay in answering your inquiry has been due entirely to the large number of requests which this office has received for consideration. In your communication you inquire as follows:

> "We find that some of the county officers are in doubt as to the interpretation of the clause in the county experiment station law which requires the approval of the majority of both the board of control of the experiment station and the board of county commissioners for the purchase of land. The point is whether it is necessary for the board of control to take this action in the county where the land is to be purchased, or whether the action may be taken in their ordinary places of business and a certified copy sent to the auditor of the county where the land is to be bought. Your opinion on this point is desired.
>
> "I have informal notice that the commissioners of Clermont county have taken the necessary steps for the establishment of a county experiment farm, their action having been ratified by vote of the people last fall, and that they have issued and sold bonds to the amount of $12,000 for the establishment of such a farm. Our board has no official notice of this action, but I learn unofficially that the money has not been deposited in the county treasury, and a citizen of the county has requested that your attention be called to the matter."

In reply to your inquiry, section 1165-1 of the General Code provides in what manner county experimental farms may be established, as follows:

> "In order to demonstrate the practical application under local conditions of the results of the investigations of the Ohio agricultural

experiment station, and for the purpose of increasing the effectiveness of the agriculture of the various counties of the state, the commissioners of any county in the state are hereby authorized and empowered to establish an experiment farm within such county as hereinafter provided for."

Section 1165-2 provides for what purposes a county experimental farm may be established as follows, to wit:

"The experiment farms established under this act shall be used for the comparison of varieties and methods of culture of field crops, fruits and garden vegetables; for the exemplification of methods for controlling insect pests, weeds and plant diseases; for experiments in the feeding of domestic animals and in the control of animal diseases; for illustration of the culture of forest trees and the management of farm woodlots, and for the demonstration of the effects of drainage, crop rotation, manures and fertilizers, or for such part of the above lines of work as it may be practicable to carry on."

Section 1165-3 provides that upon the filing of a petition with the county auditor, etc., the county commissioners shall submit to the voters of the county a proposition to establish an experimental farm within such county, as follows:

"Upon the filing of a petition with the county auditor signed by not less than five per cent. of the electors, based upon the vote for governor at the last preceding election, residing within the county, the commissioners of such county shall submit to the qualified electors of such county a proposition to establish an experiment farm within such county, and to issue notes or bonds for the purchase and equipment of such farm, such proposition to be voted upon at the next general election following the receipt of the petition by the commissioners. Notice of the intention to submit such proposition shall be published by the county commissioners in two newspapers of opposite poltics printed and of general circulation in said county, for at least four weeks prior to the election at which the proposition is to be voted upon, together with a statement of the maximum amount of money which is is proposed to expend in the purchase and equipment of such farm."

Section 1165-4 provides for the form of ballots, as follows:

"The county auditor shall file a written request with the board of deputy supervisors of elections asking for the preparation of the necessary ballots, which ballots shall be separate and apart from all other ballots, and which ballots shall have printed thereon "Tax for experiment farm—yes;" "Tax for experiment farm—no." The result of such election shall be ascertained by the board of deputy supervisors of elections and the result thereof certified to the county auditor."

Section 1165-5 provides for the tax levy as follows:

"If a majority of the electors voting on such proposition in the county, are in favor of establishing such experiment farm, then the

commissioners of the county shall levy a tax on all the taxable property in such county as listed for taxation on the county duplicate, which levy shall not exceed one-fifth of one mill on the dollar of taxable property of the county in any one year, nor shall the aggregate of all levies for such purpose exceed two mills on the dollar."

Section 1165-6 provides for the issue of bonds by the county commissioners:

"To anticipate the collection of the tax authorized by this act and the use of the money to be raised thereby, the commissioners are hereby authorized and required to issue the notes or bonds of their county, such notes or bonds to bear interest at a rate not to exceed six per cent. per annum, and not to run to exceed ten years, and not to be sold for less than their par value, and the proceeds of the sale thereof shall be deposited in the county treasury, to be applied by the commissioners to the purchase and equipment of an experiment farm, containing eighty acres or more, as hereinafter provided for."

Section 1165-7 provides for the purchase of such experiment farm as follows:

"When the funds provided for in this act are deposited in the county treasury, the commissioners shall notify the board of control of the Ohio agricultural experiment station of their action, on receipt of which notice it shall be the duty of the said board of control to visit the county and assist in the selection of a farm to be used for the purpose specified in this act, provided that no farm shall be purchased except with the approval of the majority of said board of control and also of a majority of the board of county commissioners of the county."

In answer to your first question, section 1165-7 clearly provides that it is the duty of the board of control of the Ohio agricultural experiment station, upon the receipt of notice of the deposit of funds for establishing such an experimental farm—to visit such counties and assist in the selection of a farm to be used for such purposes; and further provides that such farm shall not be purchased except upon the approval of the majority of said board of control and of the board of county commissioners of the county in which said farm is to be located. It is certainly not necessary for the board of control to take this action in the county where the land is to be purchased. Under the statute, section 1165-7, you will notice it is provided that on receipt of which notice it shall be the duty of the said board of control to visit the county and assist in the selection of a farm to be used for the purpose specified in this act, provided no farm shall be purchased *except* with the approval of the majority of the said board of control and also the majority of the board of county commissioners.

I do not think the place or location of the action of the board is a matter at all material, provided the whole board and their secretary are present. The action can be taken either at the regular office of the board or at any place where the board and their secretary may be.

I am of the further opinion, under the provisions of the sections cited above that the board of control has no legal right or authority to take any action toward the establishment of county experimental farms until the funds for the establishment of such farms have been deposited in the county treasury,

and said board of control notified of such action upon the part of the board of county commissioners.

I believe that I have fully answered your inquiries, and beg to remain,

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

F-326.

AGRICULTURAL EXPERIMENT FARMS—PLAN OF PROCEDURE OF MIAMI COUNTY COMMISSIONERS—BOND ISSUE—APPROPRIATIONS—BOARD OF CONTROL.

The action of the county commissioners of Miami county in purchasing, and paying for, with the approval of the board of control, a farm for the establishment of a county experiment farm is within the statutes and in every sense, legal.

The board of control may furnish an approximate itemized estimate of the cost of the buildings, stock and general equipment needed. If they approve this estimate, the commissioners may appropriate the necessary funds to the board of control, out of the residue of the fund raised by bond or note issue under section 1165-6, General Code. The board of control may then expend this appropriation and report to the commissioners at the end of the year.

The same procedure may be applied to funds appropriated for annual maintenance under the provisions of section 1165-6, General Code.

COLUMBUS, OHIO, August 22, 1911.

MR. CHARLES E. THORNE, *Director Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry of May 20th, 1911, in which you inquire as follows:

> "I am instructed by the board of control of this station to request your advice on the mode of administering the funds provided for under the law authorizing the establishing of county experiment farms, namely: Sections 1165-8 and 1165-12 of the General Code of Ohio.
>
> "The commissioners of Miami county have proposed the following plan: The farm having been purchased and paid for by the commissioners, with the approval of the board of control, the board of control will furnish an approximate itemized estimate of the cost of the buildings, stock, implements and other equipment needed. If this estimate meets the approval of the commissioners they will appropriate the necessary funds to the board of control, out of the residue of the fund raised under authority of section 1165-6, in amount sufficient to cover this estimate, which the board of control will expend, reporting to the board of commissioners at the end of the year.
>
> "In a similar manner the funds required for annual maintenance, provided for under section 1165-8, will be treated.
>
> "Does this plan meet your approval?"

In reply to your inquiry I desire to say that section 1165-6, as amended

by the 1910 session of the legislature, provides for the issuing of bonds by county commissioners for the purchase and equipment of an experiment farm, and is as follows:

> "Sec. 1165-6. To anticipate the collection of the tax authorized by this act and the use of the money to be raised thereby, the commissioners are hereby authorized and required to issue the notes or bonds of their county, such notes or bonds to bear interest at a rate not to exceed six per cent. per annum, and not to run to exceed ten years, and not to be sold for less than their par value, and the proceeds of the sale thereof shall be deposited in the county treasury, to be applied by the commissioners to the purchase and equipment of an experiment farm, containing eighty acres or more, as hereinafter provided for."

Section 1165-8 of the General Code, as amended by the 1910 session of the legislature, provides for the equipment of such experiment farm, and also provides for the maximum appropriation that may be made by the county commissioners, and is as follows, to wit:

> "Sec. 1165-8. The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control of the experiment station for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between said commissioners and the board of control of the experiment station."

Section 1165-9 of the General Code, as amended by the 1910 session of the legislature, provides for the management of all such experimental farms, and is as follows, to wit:

> "Sec. 1165-9. The management of all experiment farms established under authority of this act shall be vested in the director of the Ohio agricultural experiment station, who shall appoint all employes and plan and execute the work to be carried on, in such manner as in his judgment will most effectively serve the agricultural interests of the county in which such farm may be located, the director and all employes being governed by the general rules and regulations of the board of control of said experiment station."

It appears from your inquiry that the county commissioners have already purchased and paid for the farm with the approval of the board of control, and I desire to say that inasmuch as said farm has already been purchased, and that the county commissioners have also made the proper appropriation for the same, I am unable to find any statute which prohibits or prevents the board

of control from expending the funds so appropriated by the county commissioners.

I am furthermore unable to find any statutory law which prohibits the board of control from expending the funds required for the annual maintenance of such experimental farm, as provided by section 1165-8, cited above.

Therefore, it is my opinion that inasmuch as the plan of the Miami county commissioners, as set forth in your inquiry, is not prohibited by statute, and that it would be legal for the board of control to expend the funds as therein set forth, and, this being my conclusion, the plan proposed, as set forth in your inquiry, meets with my approval. I am,

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

417.

DEEDS AND ABSTRACT OF TITLE OF CERTAIN LANDS IN MONTGOMERY COUNTY PROPOSED TO BE PURCHASED FOR EXPERIMENT FARM—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, October 10, 1911.

HON. W. H. KRAMER, *Bursar, Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—You have submitted to this department, for an opinion thereon, an abstract of title to certain lands in Montgomery county, which it is proposed to purchase for an experiment farm. I have carefully examined this abstract and shall discuss only the more important defects shown therein.

The mortgage given by Joel O. Shoup to John Stump, trustee(No. 8), was not released on the records as to the land described in this abstract. Said mortgage refers to a deed from the Twin Creek Railroad Company to said Shoup, which does not appear of record. Both of these errors, I believe, are cured by lapse of time.

The deed from Mary E. Anthony to John F. Jacobs fails to disclose whether grantor was married. An affidavit should be procured covering this point. If she was married, and her husband is still living, a quit-claim deed should be obtained from him.

There are no deeds of record from the grantees in Nos. 23 and 24 to the grantor no No. 25.

Errors of description occur in Nos. 23, 24, 25, 26, 27 and 28. No. 29 appears to have been given to correct all of these defects.

The estate of Geo. P. Loy does not seem to have been administered, but a part of the real estate described in this abstract was sold by partition proceedings. The petition contains the allegation that the persons therein named are all heirs of said George P. Loy. As almost fifty years have elapsed since this transaction occurred, the failure to have administration of said estate is not now material.

The deed from Julius L. Stewart to Lewis Huber (No. 38) is defective in two respects, namely: (1) the spelling of the grantor's name in the granting clause differs from that in the habendum clause and signature; and (2) there is but one witness to the deed. I am not inclined to attach much importance

to the first defect, for the reason that the grantee's name in No. 37, and the signature of grantor in No. 33 are practically identical. If possible, however, an affidavit should be procured to correct this The second defects above noted is corrected by the provisions of the act of 1911, found in 102 O. L. 461.

The name of the grantee in No. 40 is spelled *Shuter*, and that of the grantor in No. 41 is spelled *Schuder*. The description of both deeds is the same and I believe that this defect is not material at this time.

The deed from John H. Huber et al. to Charles F. Huber recites that the grantors and grantee therein, are all the heirs at law of Lewis Huber, deceased. No administration was had of the estate of said Lewis Huber; and as this is of comparatively recent date, an affidavit should be procured covering this situation.

The mortgages, Nos. 52 and 53, remain uncanceled on the records, but in my opinion, action thereon is barred by the statute of limitations.

The taxes due June 20, 1911, are unpaid, and the taxes for the year 1911 are a lien. These should be paid before a deed is executed.

An examination should also be made for liens in the United States district and circuit courts.

When the above mentioned errors are corrected I am of the opinion that upon the execution of a proper warranty deed, by the present owner, the state will acquire a good and sufficient title to the real estate in question.

I am returning herewith the abstract submitted to me.

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

431.

COUNTY EXPERIMENT FARMS—DUTIES OF COMMISSIONERS AND BOARD OF CONTROL IN MAKING APPROPRIATIONS.

For the purposes of the payment of wages of laborers employed on an experiment farm, and for the supplies and materials necessary for the conduct of such farm, the county commissioners, under section 1165-8, *General Code, may appropriate any money in the county treasury out of the general fund, not otherwise appropriated (provided such appropriation does not exceed* $2,000 *annually), as may be agreed upon between the county commissioners and the board of control.*

COLUMBUS, OHIO, October 19, 1911.

HON. CHAS. E. THORNE, *Director Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 10th, in which you inquire as follows:

> "We desire your advice on the following point relating to the providing of funds for the support of county experiment farms, under section 1165-8 of the General Code of Ohio:
>
> "May the county commissioners appropriate for the maintenance of the experiment farms, as defined in the latter part of section 1165-8, any money in the county treasury not otherwise appropriated?"

In reply thereto, I desire to say that section 1165-8, General Code, to which you refer, provides as follows:

> "The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control of the experiment station for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, *together* with a *sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season.* The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purchase of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between said commissioners and the board of control of the experiment station."

By virtue of the provisions contained in the above quoted section, I am of the opinion that the county commissioners can appropriate any money in the county treasury, out of the general county fund, not otherwise appropriated, for any of the purposes enumerated in said section 1165-8, as follows: the payment of wages of laborers employed in the management of such experiment farms, and for the purchase of supplies and materials necessary for the conduct of such experiment farms (provided, of course, such appropriation does not exceed $2,000 annually), as may be agreed upon between the county commissioners and the board of control of the experiment station.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Chief Examiner of Steam Engineers)

A 290.

BOARD OF BOILER RULES—CHIEF EXAMINER OF STEAM ENGINEERS—CHIEF INSPECTOR OF BOILERS—EXTRA COMPENSATION—TIME OF QUALIFICATION OF MEMBERS OF BOARD.

The provisions of statute providing for the performance by the chief examiner of steam engineers, of the duties of chairman of the board of boiler rules and chief inspector of boilers, and authorizing extra compensation for the same, are not in conflict with the constitutional inhibition against change of compensation during term of office.

The chief inspector is at liberty to give bond at any time after June 14, 1911, and will be qualified as soon as bond is given.

The department of boiler rules will be open as soon as the members of the board are appointed and qualified, and their salaries shall begin from the date of qualification.

COLUMBUS, OHIO, July 8, 1911.

HON. W. E. HASWELL, *Chief Examiner of Steam Engineers, Columbus, Ohio.*

DEAR SIR:—On account of the great pressure of business in this office during the past few weeks I have been unable to answer your inquiry of June 16th until now.

You ask for my opinion as to House Bill No. 248, which provides for the inspection of steam boilers and establishes in your office a department to be known as the "Board of Boiler Rules," to consist of the chief examiner of steam engineers, who shall be chairman of the board, and four members to be appointed by the governor, and which also provides that the chief examiner of steam engineers shall be chief inspector of steam boilers. Your inquiry is as follows:

> "Will you kindly give me your opinion as to what date the bond of the chief inspector shall be filed, the new state department opened, and the salary of the various officials, including the chief inspector, as named by said law, shall begin?"

This act is quite lengthy and in answering your inquiry it is unnecessary to here copy it in full, and I shall only refer to the sections which must be necessarily considered in giving you an answer.

Section 1 of the act is as follows:

> "There is hereby established in the office of the chief examiner of steam engineers, a department to be known as the board of boiler rules, to consist of the chief examiner of steam engineers, who shall be chairman of the board, and four members to be appointed by the governor, with the advice and consent of the senate, within thirty days after the passage of this act, one member to be appointed for the term of one year, one member for two years, one member for three years, and one member for four years, and, as their terms expire, the governor shall appoint a member for four years. Vacancies shall be

filled by appointment by the governor for the unexpired term. One of the persons so appointed shall be an employe of the boiler using interests; one shall be an employe of the boiler manufacturing interests; one shall be an employe of the boiler insurance interests; and one shall be an operating engineer; or the governor, if he deems the same advisable, may make such appointments from any class of citizens."

Section 9 is as follows:

"In addition to the duties heretofore imposed upon him by law, the chief examiner of steam engineers shall be the head of the department of the board of boiler rules and chief inspector of steam boilers. He shall appoint an assistant chief inspector of steam boilers, and such other inspectors, under conditions hereinafter provided, as he may deem necessary, together with such number of clerks, one of whom shall act as the clerk of the board of boiler rules, as may be approved by the governor; and he may incur such other expenses as may be necessary to an efficient administration of said department. He shall pay all moneys received into the state treasury, to the credit of the general revenue fund, accounting monthly to the auditor of state for all moneys received and paid. His necessary office and traveling expenses, together with those of his employes in the discharge of their official duties, and the traveling expenses of the members of the board of boiler rules, shall be allowed and paid out of the state treasury upon itemized vouchers presented to the auditor of state, who shall issue his warrant upon the treasury therefor. All appointments shall be subject to the approval of the governor."

Section 10 is as follows:

"The chief inspector of steam boilers shall give a bond payable to the state in the sum of five thousand dollars, with surety to be approved by the governor, conditioned upon the faithful performance of his duty. Like bonds shall be given in the sum of two thousand dollars to be approved in the same manner by the assistant chief inspector and by each general inspector of steam boilers."

Section 22 is as follows:

"The members of the board of boiler rules, other than the chairman thereof, shall each receive an annual salary of one thousand dollars. The clerk of the board of boiler rules shall receive an annual salary of eighteen hundred dollars. The chief examiner of steam engineers, for his services as chairman of the board of boiler rules, and as chief inspector of steam boilers, shall receive an additional annual salary of twelve hundred dollars. The assistant chief inspector of steam boilers shall receive an annual salary of three thousand dollars. The general inspectors, provided for in this act, shall each receive an annual salary of eighteen hundred dollars. Clerks and office employes provided for in this act shall receive such compensation as may, with the approval of the governor, be fixed by the board of boiler rules."

I presume the language used in section 22, viz: "the chief examiner of

steam engineers, for his services as chairman of the board of boiler rules, and as chief inspector of steam boilers shall receive an additional annual salary of twelve hundred dollars," has raised the question in your mind as to whether or not this is an increase of your salary as chief examiner of steam engineers during your term of office, and is therefore inhibited by the constitution, and that this is the principal reason why you request my opinion.

You will note in section 1 that this bill creates a distinct and separate department from the department of examiner of steam engineers, and by section 9 it imposes additional duties upon you as head of the department of the board of boiler rules, and as chief inspector of steam boilers. Section 22 provides for the salary to be paid to the chairman of the board of boiler rules and chief inspector of steam boilers. It might be held that if the legislature had passed this act as it stands with the exception of section 22, and had made no provision for any extra compensation, then it would be presumed that the legislature intended you to perform the extra duties cast upon you by this act for the compensation already provided for you as chief examiner of steam engineers. But it is plain from section 22, taken in connection with the other sections I have referred to, that the legislative intent was not only to cast new and independent duties upon you, but also to compensate you for the same. This is not prohibited by the constitution, and it is only just that it should be paid.

A case almost exactly in point is cited by Mr. Throop in his work on public officers, section 468, viz:

> "Where the legislature enacts a statute, imposing upon the attorney general the duties of a member of the board of examiners, and he performs them, a statute awarding him a compensation for the performance of such duties, in addition to his salary as attorney general, is not within a constitutional prohibition of the increase or diminution of an officer's compensation because this was not a duty pertaining to his office."

And he cites in support of this proposition the case of Love vs. Baehr, 47 California 364.

My opinion, therefore, is that you are entitled to the salary provided by this act for the additional duties and services as chairman of the board of boiler rules and chief examiner of steam boilers.

Your next question is as to what date the bond of the chief inspector shall be filed.

This act became a law on the 14th day of June, 1911, and by virtue of it you became chief inspector of steam boilers, and under section 10 of the act were required to give bond to the state in the sum of $5,000. No time is fixed within which this bond should be given, therefore you are at liberty to give bond at any time after June 14, 1911, and as soon as the same is given and approved you would be qualified as chief inspector of steam boilers and entitled to your salary from that date.

The next question is as to the date upon which the department created by this act shall be open.

Section 1 of the act begins "There is hereby established in the office of the chief examiner of steam engineers a department. * * *" There is no other provision as to when the department shall be open, except the provision that the four members of the board of boiler rules are to be appointed by the governor within thirty days after the passage of the act. As the act was passed

on the 31st day of May, 1911, then the department should be opened as soon as the members of the board are appointed and qualified.

Your next question is as to the time when the salary of the various officials provided for by this act, including the salary of the chief inspector, shall begin.

These salaries would begin from the date upon which the various officials qualified, that is in the case of those required to give bond from the date of the furnishing and approval of the bond: in the case of those not required to give bond, the salary would date from the date of the appointment.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Chief Inspector of Mines)

38.

USE OF PARAFFINE AS ILLUMINANT IN MINES ILLEGAL—SPECIFIC GRAVITY—STATUTORY REQUIREMENTS.

Since paraffine wax reduced to a liquid state is a mineral oil and contains no animal or vegetable oil and since its specific gravity exceeds twenty-four degrees Baume scale measured as required by section 974 of the mining laws it cannot be sold and used as an illuminant for open lamps.

COLUMBUS, OHIO, January 18, 1911.

MR. GEO. H. HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your communication under date of January 14th, requesting opinion on the provision contained in section 974 of the general mining code, received. You inquire:

> "Does paraffine wax reduced to a liquid state and used as an illuminant comply with or is it used contrary to the requirements of section 974?"

Section 974 of the mining laws of Ohio, relating to illuminating oil for mines, is as follows:

> "(Composition of illuminating oil for use in mines.) No person, firm or corporation shall compound, sell or offer for sale for illuminating purposes in any coal mine, any oil other than oil composed of not less than eighty-four per cent. of pure animal or vegetable oil, or both, and not more than sixteen per cent. pure mineral oil. The gravity of such animal or vegetable oil shall not be less than twenty-one and one-half, and not more than twenty-two and one-half degrees Baume scale, measured by Tagliabue or other standard hydrometer, at a temperature of sixty degrees Fahrenheit; the gravity of such mineral oil shall not be less than thirty-four, and not more than thirty-six degrees Baume scale, measured by Tagliabue or other standard hydrometer, at a temperature of sixty degrees Fahrenheit, and the gravity of the mixture shall not exceed twenty-four degrees Baume scale, measured by Tagliabue or other standard hydrometer at a temperature of sixty degrees Fahrenheit."

This law was framed with the idea in view of protecting the health of miners by eliminating the use of petroleum products for illuminating purposes in mines. The answer to your inquiry—does paraffine wax reduced to a liquid state and used as an illuminant comply with, or is it used contrary to the requirements of the section referred to—depends upon the constituent elements of, or rather the composition of paraffine wax reduced to a liquid state. Paraffine wax reduced to a liquid state is a mineral oil, and contains no animal or vegetable oil; this fact alone, under the provisions of section 974, just quoted, would make it unlawful for any person, firm or corporation to sell or offer it for sale for illuminating purposes in any coal mine in the state of Ohio;

and the use of the same by any person or person for illuminating purposes in mines, is prohibited by section 975 of the mining laws; however, sections 974 and 975 of the mining laws, relating to the composition of oils for illuminating purposes, etc., apply to the sale and use of oil used in lamps for *open* lights only.

The sale and use of paraffine wax reduced to a liquid state, for illuminating purposes in mines, would be prohibited for another reason. Section 974 of the Ohio mining laws, provides that the specific gravity of the mixture shall not exceed twenty-four degrees Baume scale, measured by Tagliabue or other standard hydrometer at a temperature of sixty degrees Fahrenheit. As reported to me by your department, the gravity of paraffine oil is thirty-four Baume scale; therefore, the use of paraffine wax reduced to a liquid state would be prohibited for that reason also.

I am of the opinion that paraffine wax reduced to a liquid state, cannot be sold or used as an illuminant in mines for *open* lamps, because it does not come up to the requirements of section 974 of the mining laws of Ohio.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

48.

MINING LAWS—POWERS AND DUTIES OF CHECK WEIGHMAN—MINE INSPECTOR.

A check weighman, selected by miners and employed at their own cost, shall have the powers specified in section 970 of the mining laws, which do not include, however, the right to actually weigh the coal.

Section 910 of the mining laws empowers such check weighman as the "duly authorized representative of the miners" to require the district mine inspector to test the mine scales.

COLUMBUS, OHIO, January 21, 1911.

HON. GEO. H. HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your favor of January 18th, asking for the opinion of this department as to the duty of check weighman, and a construction of section 970 of the mining laws of Ohio, received.

Section 970 referring to check weighmen for miners is as follows:

> "The miners employed at a mine where the earnings of such miners depend upon the weight of coal mined, may, at their own cost, designate or appoint a competent person as check weighman, who, at all proper times, shall have full right of access to and examination of the scales, machinery or apparatus used at such mine to determine the correct weight of coal mined, and whose duty it shall be to see the coal weighed and to make correct record of such weights. Not more than one person, however, on behalf of the miners collectively shall have such right at the same time."

Under the section just quoted, the miners employed in any mine where

the earnings of such miners depend upon the weight of coal mined, may, at their own cost designate or appoint a competent person as check weighman. A check weighman selected by the miners, under authority of this section, has access to an examination of the scales, machinery or apparatus used in such mine, to determine weights. He has a right to see the coal weighed and to make a record thereof; but he does not have the right to weigh the coal or interfere in any manner with the weighing apparatus.

You also inquire as to whether a check weighman can require the district mine inspector to test the mine scales. This last question is answered by referring to section 910 of the mining code of Ohio, where it provides that, the district inspector of mines, upon the written request of the duly authorized representative of the miners, owner, lessee, agent, etc., shall be required to test the accuracy of the scales at any time, and post in the weigh house a certificate provided by the chief inspector of mines, certifying the condition of the scales; provided that such test be made at a reasonable time without unnecessary interference with the use of the scales.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Inspector of Oils)

A 412.

OIL INSPECTION—DOMESTIC AND EXTRA STATE OILS—FEES—COLLECTION.

Sections 860 and 865, General Code, contain provisions which require all oils whether manufactured in this state or not, to be inspected and that the fees for such inspection shall be a lien on the oils so inspected. The charge for such fees shall be made against the owner of the oil, and the collection of the same may be made by civil suit or by enforcement of the lien.

COLUMBUS, OHIO, October 6, 1911.

HON. W. L. FINLEY, *State Oil Inspector, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of May 16th, 1911, in which you submit to me for my opinion the following, to wit:

> "I invite your attention to the enclosed correspondence and respectfully request your advice as to my duties in the premises.
>
> "Am I right in insisting upon the payment of inspection fees by non-residents of this state on petroleum products shipped into the state? If so, what steps shall I take in making this collection?
>
> "In an opinion rendered to my predecessor in office by your predecessor, bearing date of February 23, 1909, the question herein raised is dealt with in a general way. But the correspondence herewith provides a specific instance in which to apply the law and I hesitate until I shall hear from you."

In reply to your inquiry, section 865 of the General Code provides as follows:

> "Gasoline, petroleum-ether or similar or like substances, under whatever name called, whether manufactured within the state of not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils or his deputies. Upon inspection, the state inspector or a deputy shall affix by stamp or stencil to the package containing such substance a printed inscription containing its commercial name, the word 'dangerous,' date of inspection and the name and official designation of the officer making the inspection. For such inspection, the state inspector or his deputy shall receive the same fees as for inspection of oil, which shall be paid into the state treasury as herein provided for other fees. Such fees shall be a lien on the gasoline, petroleum-ether or similar substance so inspected. For such inspections, deputy inspectors shall receive the same fees and shall make monthly report of such inspections, as provided herein for the inspection of oils. Whoever sells or offers for sale any gasoline, petroleum-ether or similar or like substance not stamped as provided in this chapter shall be fined not more than one thousand dollars or imprisoned in the county jail not exceeding twenty days, or both."

Section 860 of the General Code provides:

> "Oil intended for sale for illuminating purposes within this state, as defined herein, shall be inspected within this state. When consigned to a distributing station in tank cars, oil shall be inspected at the refinery where manufactured, if located in this state, or at the distributing station to which it is consigned, at the discretion and direction of the state inspector. When inspection is made, the inspector or his deputies shall deliver to the owner, or his agent, a certificate of inspection which, in addition to the word 'approved,' shall set forth the car initials and number, the date of inspection and the official signature of the officer making the inspection. Such certificate shall be attached to the car containing the oil so inspected, or be delivered to the owner or his agent at the distributing station, as directed by the state inspector, and the oil may then be transferred to a storage or receiving tank from which illuminating oil is distributed to consumers or dealers."

The latter section refers to and applies to the oils to be used for illuminating purposes, and the former section refers to and applies to all oils to be used for other purposes than illuminating purposes. In my judgment the two sections are and form part of the police regulations of the state and a fair interpretation of them means that all oils, whether manufactured in this state or not, shall be inspected, and section 850 of the General Code further provides that the fees for inspection shall be a lien on the oils so inspected. I am of the opinion that you are right in insisting upon payment of the inspection fees by non-residents of the state; although in the specific instance that you cite, I believe and I am of the opinion that the Toledo Disposal Company is the owner of the said oils, and is therefore the proper concern to charge for the inspection of the said oil, for the reason that from the correspondence you submitted, that company (the Toledo Disposal Company) seems to be the owner from, and even prior to, the time that said oil came into the state.

I am further of the opinion that you could enforce the collection of your fees for inspecting said oil against the Toledo Disposal Company in either of the two cases, to wit: either by suit against the said company for the respective fees or by enforcing the lien which you are given by the statutes and selling the oil and retaining out of the proceeds your fee for inspecting the same, together with all costs, and then turning over the balance, if any, to the Toledo Disposal Company.

I believe that I have fully answered your inquiries, and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Supervisor of Public Printing)

330.

GENERAL ASSEMBLY—LEGISLATIVE MANUAL OF RULES AND MEMBERSHIP—BOOK FORM—POWERS OF SUPERVISOR OF PUBLIC PRINTING—NO PAYMENT FROM APPROPRIATION FOR STATE PRINTING.

As section 754, General Code, providing for the classes of printing which come within the province of the department of public printing, in its reference to legislative manuals confines the work of the department to "pamphlets" and as the legislative manual, containing the rules, membership, powers, etc., of the general assembly, in accordance with 102 O. L. 753, must be made in book form the same may not be prepared by the aforesaid department.

As no appropriation was specifically made for said manual, its expense may not be met from the appropriations for state printing.

COLUMBUS, OHIO, August 31, 1911.

HON. E. A. CRAWFORD, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department a verbal request for an opinion as to whether you are authorized to have printed and paid for from your appropriation for state printing, a legislative manual as provided by Senate Joint Resolution 24, vol. 102, O. L., 753. Said resolution reads as follows:

> "*Be it resolved by the general assembly of the state of Ohio*: That the assistant clerk of the senate and the assistant clerk of the house of representatives be and they are hereby authorized and directed to prepare and have printed in book form, bound in cloth, five thousand copies of a legislative manual, fifteen hundred copies for the use of the senate and thirty-five hundred copies for the use of the house of representatives. To defray the expense connected with the preparation and revision of such manual the assistant clerk of the senate and the assistant clerk of the house of representatives shall receive five hundred dollars each, payable from the contingent funds of the senate and house upon vouchers signed by the speaker of the house and the president of the senate, and such officers are hereby authorized and directed to sign vouchers for said amounts upon the completion of such manual. The manual shall contain the joint rules of the 79th general assembly, the rules of the senate and the house of representatives, together with a list of the members and the standing committees of each house; section of statutes, state and federal, relating in any way to the powers and duties of the general assembly, and such other matter as those charged with the preparation of this book may deem appropriate."

Section 754 of the General Code defines the printing that may be done through your department into seven classes, the first four of which relate specifically to the printing of the legislative department of the state government. Said section, in so far as it relates to the question under consideration, reads as follows:

"The printing for the state shall be divided into seven classes and shall be let in separate contracts as follows:

"First Class. Bills for the two houses of the general assembly, resolutions and other matters ordered by such houses or either of them to be printed in bill form

"Second Class. The journals of the senate and house of representatives, and reports, communications and other documents which form a part of the journals.

"Third Class. Reports, communications and other documents ordered by the general assembly or either house thereof or by the executive departments, to be printed in pamphlet form, not including the bulletins of the agricultural experiment station.

"Fourth Class. General and local laws and joint resolutions."

From a careful reading of the foregoing it is clearly apparent that such legislative manual does not fall within either the first, second or fourth classes of state printing, and if it is to be printed through your department the authority therefor, if any exists, must be sought in class three. I invite your attention particularly to the wording of class three, which is as follows:

"Third Class. Reports, communications and other documents ordered by the general assembly or either house thereof or by the executive departments, *to be printed in pamphlet form*, not including the bulletins of the agricultural experiment station."

You will notice that the printing provided for in the last quoted provision is expressly limited to matter "to be printed in pamphlet form." It remains to be seen whether the legislative manual is a *pamphlet*.

A "pamphlet" is, described by Webster's dictionary as "a small book consisting of a sheet, or a few sheets, of paper, stitched together but not bound." And by Century dictionary, "a printed work consisting of a few sheets of paper attached together, but not bound; now, in a restricted or technical sense, eight or more pages of printed matter * * * stitched or sewed with or without a thin paper wrapper or cover."

The resolution above recited provides that such manual shall be "printed in book form, bound in cloth," etc. It is, therefore, very clear that such manual is not to be printed in pamphlet form, or in other words, it is not a pamphlet within the meaning of the foregoing definitions.

The legislature could have made an appropriation for this purpose, but I am nowhere able to find a specific appropriation therefor. In the absence of such an appropriation and for reasons heretofore given, I am constrained to hold that the expense of printing such legislative manual may not be paid from your appropriation for state printing.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

337.

REQUISITIONS FOR PRINTING BY STATE BOARD OF HEALTH, THE INSPECTING OF WORKSHOPS AND FACTORIES AND THE LIABILITY BOARD OF AWARDS—CODE IN PAMPHLET FORM.

Requisitions upon the department of public printing for the printing in pamphlet form of the code pertaining respectively to the state board of health, the inspector of workshops and factories, and the liability board of awards, must be recognized and complied with by provision of section 754, General Code, with respect to "documents ordered by the executive departments to be printed in pamphlet form."

COLUMBUS, OHIO, September 2, 1911.

HON. E. A. CRAWFORD, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—This department begs leave to own receipt of your letter of August 18th, containing a request for an opinion as follows:

"Requisitions have been made upon this department for the printing, in pamphlet form, of the code pertaining to the following boards:

"State board of health.

"Inspector of workshops and factories.

"Liability board of awards.

"Wil you be kind enough to furnish an opinion as to our responsibility of fulfilling these requisitions?"

Section 754 of the General Code provides as follows:

"The printing of the state shall be divided into seven classes and shall be let in separate contracts as follows:

"First Class. * * *

"Second Class. * * *

"Third Class. Reports, communications and other documents ordered by the general assembly or either house thereof, or by the *executive departments*, to be printed in pamphlet form, not including the bulletins of the agricultural experiment station."

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

I take it that it will not be seriously contended that any of the departments named in your inquiry, to wit: the state board of health, the inspector of workshops and factories and the liability board of awards, are not *executive departments*. The above quoted part of section 754 of the General Code provides for the letting of a contract for the printing of such reports, communications and other documents that may be ordered by the "executive departments," to be printed in pamphlet form.

This, beyond doubt, recognizes the right of the executive departments to make the order or requisition, and it has been the custom, I understand, since the institution of the department of public printing, to accede to such requisitions.

I am, therefore, of the opinion that, in view of the statute herein quoted, the construction that has always been placed upon said statute by successive state supervisors of printing, which is in conformity to the policy that demands that the work of the various departments be aided and accelerated in every

legal manner, requires me to hold that not only are you justified, but in duty bound, to fulfil these requisitions so long as the report, communication or other document ordered to be printed by such executive department is to be printed in pamphlet form.

This department, under the ruling of a former attorney general, as to a similar inquiry referring to the board of health alone, held practically that the printing of said board of health must be under the supervision of the state supervisor of public printing. (Attorney General's Report, 1908, page 224.)

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Pardons)

B 304.

APPLICATIONS FOR PARDON AND COMMUTATION OF SENTENCE—MURDERERS IN FIRST DEGREE—APPLICATION OF STATUTE.

Section 12399, *General Code, applies only to application for pardons and has no reference to "commutation sentence" and the restrictions therein provided with reference to murderers in the first degree do not affect in any way applications for commutation of sentence.*

COLUMBUS, OHIO, July 26, 1911.

HON. PHILIP ROETTINGER, *Member State Board of Pardons, Cincinnati, Ohio.*

DEAR SIR:—Your communication of July 20th received, in which you request my opinion upon the following question, viz:

> "Whether section 12399 of the General Code applies to an application for commutation of sentence, or whether it is limited to the granting of a pardon."

In reply thereto I will say that I am of the legal opinion that said section 12399 of the General Code does not apply to an application "*for commutation of sentence.*"

Section 90 of the General Code provides as follows:

> "Each application for a pardon, commutation of sentence or reprieve of a person convicted of a crime shall be made to the state board of pardons, etc."

Section 11 of article III of the constitution of Ohio provides that:

> "He (meaning the governor) shall have power after conviction, to grant '*reprieves*,' '*commutations*,' and '*pardons*' for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law, etc."

Section 94 of the General Code provides:

> "Applications for the pardon of any person convicted of an offense and sentenced to punishment, or for the *commutation of such sentence*, shall be made in the manner and under the restrictions hereinafter prescribed."

"Commutation" in its legal sense means the

> "Substitution of a less for a greater penalty or punishment."

"Pardon" in its legal sense means,

> "The remission of the penalty imposed."

In view of the distinction between a pardon and a commutation of sentence and that the legislature has separately provided for each, and further provided in section 12399 for a restriction of the powers of the board of pardons relative to the granting of the same in a murder in the first degree case, I am of the opinion, as above stated, that said section does not apply to an application for commutation of sentence and that your board could not recommend a pardon to the governor in any such case, except upon proof of innocence established beyond a reasonable doubt.

I am also of the opinion that in order that your board might make a recommendation for a commutation of sentence the application must be for such and not for a pardon.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio Board of Administration)

271.

CONTRACTS FOR SUPPLIES FOR VARIOUS INSTITUTIONS—RULES FOR COMPETITIVE BIDDING—PROVISIONS FOR INTERVAL FROM AUGUST 15th TO TIME OF EXECUTION OF BOARD'S RULES—EXECUTORY CONTRACTS AND RATIFICATION OF BOARD—EMERGENCY PURCHASES.

Under the provisions of the act creating the board of administration, it has no authority to parole inmates of the respective institutions under its control until after August 15th, 1911.

The act provides that the present authorities at the head of the respective institutions shall cease to exercise their powers on August 15, 1911, and that the board of administration shall contract for supplies, etc., of such institutions only by competitive bidding under such rules as the board shall adopt: therefore during the interval between August 15th and such time as the board will require to provide rules and means for their purchase, such supplies, etc., may be procured only by resort to the two means following:

First. Under section 17 of the act, the board may authorize the managing offices to make "emergency" purchases for such period, and

Second. By agreement, the present authorities may make executory contracts for such supplies which may be ratified by the board after August 15, 1911.

COLUMBUS, OHIO, June 16, 1911.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have received your request for my opinion upon the following questions:

> "First. What power or right has the board to consider paroles of inmates of state institutions specified in section 6 of an act entitled 'an act to create a board of administration,' etc., passed A. D., 1911, prior to August 15, 1911, if any?
>
> "Second. Section 17 of the said act above referred to, provides that said board 'purchase all supplies needed for the proper support and maintenance of the said institutions specified in the said act, by competitive bidding, under such rules as the board may adopt,' etc."

Section 38 of the said act provides:

> "On and after August 15, 1911, boards of trustees, boards of managers, and building commissions, as the case may be, of the institutions named in section four hereof shall have no further legal existence except that the aforesaid boards and commissions within five days after said date, shall complete their services by examining and ordering paid all approved liabilities contracted by them. The board shall not be liable on any contracts made by any board or commission after the enactment of this act, except for permanent construction and to supply temporary needs during the interval to August 15, 1911. Full records of all existing contracts shall be submitted to the board by said bodies

on their retirement from office. The office of each steward or financial officer of said institutions shall terminate on August 20, 1911."

Section 39 of the act provides:

"To give the board adequate time to prepare the necessary details no part of this act relating to said board shall take effect until August 15, 1911, except sections two, three, four, five, six and seven, but this act shall be in full force and effect from and after said date, when the board shall assume all of its duties. Salaries of the members and necessary employes shall be allowed from the organization of the board and they shall be allowed such expenses as are incurred thereafter in the discharge of their duties, on the approval of the board of itemized accounts therefor."

There being no provision made in the act for the purchase of supplies for the maintenance of the state institutions therein designated from August 15, 1911, the date said board assumes all of its duties until the said board has ample time to purchase supplies for the same by competitive bidding as provided by section 17 of the said act; and such being the case, what are the rights and powers of the board under the said act in relation to the supplies for the said institutions during such time or interval?

In answer to your first question I beg to state that in view of the fact that the respective boards or managers and trustees of the various penal and reformatory institutions not being abolished until the 15th day of August, 1911, as provided by section 38, and the further fact that the board of administration is not empowered to act as a legal board until August 15, 1911, in relation to the duties other than those specified in the first seven sections of the act referred to, it is my opinion that your board will have no authority to act in relation to paroling of prisoners or inmates of the respective institutions until after August 15, 1911.

In answer to your second question, I desire to say that there are two ways in my opinion by which your board might legally meet the emergency referred to in your second question, namely:

First. Section 17 of the said act which provides for the purchase of supplies needed for the proper support and maintenance of the said institutions therein specified, by competitive bidding by such rules as the board may adopt, etc., and the latter part of the said section provides, "that it may reject" (referring to your board) "any and all bids and secure new bids, if for any reason it is deemed for the best interest of the state to do so, but it may authorize the managing officers of any of the institutions to purchase perishable goods and supplies *for use in cases of emergency*, in which the managing officers of the institutions requiring the same shall certify such facts in writing and the board shall record the reasons for such purchase." And the said latter proviso seems, by a liberal construction of this act, to meet the ends of securing the operation of said institutions under the said act as it was doubtless the intent of the legislature to meet such an emergency as your board is confronted with at the inception of its administration; and I believe that your board under the said proviso has the legal authority to authorize the respective managing officers of all the institutions to purchase all perishable goods and supplies for use in their respective institutions sufficient in amount for the demands thereof until your board will have had ample time to adopt such rules for competitive bidding for furnishing supples needed in the said institutions as provided in section 17 of the said act.

Second. I am of the opinion that legally your board has authority to meet said emergency referred to in your second question by authorizing the respective superintendents or managing officers of the said institutions prior to August 15th, 1911, to contract for supplies and necessaries needed in each institution over which they have control, sufficient to give your board ample time to promulgate such rules as may be necessary under said section 17, to carry on the purchasing of supplies and necessaries by competitive bidding, which may be for the ensuing quarter, and have them contract upon the condition that such contracts will be executory and by so doing your board may legally ratify said contracts after August 15, 1911, at which time your said board comes into full legal existence and authority.

While there is a provision in section 38 of the said act which says that, "the board shall not be liable on any contracts made by any board or commission after the enactment of this act, except for permanent construction and to supply temporary needs during the interval to August 15, 1911," I am, nevertheless, of opinion that the intent of the legislature in enacting the proviso in section 17 above referred to, authorizing the board to authorize the managing officers of any institution to purchase perishable goods and supplies for use in cases of emergency, was to meet the very emergency referred to in your second question, and as the state must provide for its wards, and that the latter clause of section 1 of the said act provides that *this act shall be liberally construed to these ends*, either of the two ways suggested may be adopted by your board and in my opinion would be sustained legally.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General

444.

"POLITICAL SUBDIVISIONS"—COUNTIES, SCHOOL DISTRICTS, TOWNSHIPS, MUNICIPALITIES—POWER OF BOARD OF ADMINISTRATION TO COMPEL PURCHASE OF SUPPLIES FROM THE BOARD—RIGHT OF BOARD TO MANUFACTURE AND SELL STONE.

"Political subdivisions" as comprehended in the act creating the board of administration, are counties, townships, school districts, and municipalities, all of which are branches of the general administration of the state policy, under the control of and exercising only powers delegated by the legislature.

Under section 14 and 15 of said act, the board of administration is empowered to compel all such divisions and all state institutions, within the scope of their legal powers to purchase all supplies from the board.

The county commissioners and municipal officers can be compelled to purchase crushed stone for road improvements from the state quarries, and also to compel boards of education to purchase school desks and other school supplies from the board.

Under 102 O. L. 106, section 2, the board is authorized to manufacture and produce crushed stone and dimension stone and engage in the sale of the same in the open market.

COLUMBUS, OHIO, October 31, 1911.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of July 28, 1911, in which you request my opinion upon the following questions:

"1. What interpretation is to be placed on the term 'political divisions,' as contained in sections 14 and 15 of the act creating the Ohio board of administration?

"2. How far do the powers of the board extend under said sections?

"3. Can the board compel county commissioners and municipal officers to purchase crushed stone from the state stone quarry when the same is needed by them in the construction of roads, streets, etc., location and convenience, of course, being taken into consideration?

"4. Can the board compel boards of education to purchase from the state, school desks, furniture and such other school supplies as may be manufactured by the state?"

In answer to your first question, I think the term "political divisions" as used in said act means in its legal sense:

(a) Counties of the state which have been legally defined by the supreme court of Ohio as necessary organizations for political purposes, under the government of the state. Beait, et al. vs. Commissioners of Williams County, et al., 18 Ohio, 16.

(b) Townships which are defined by our supreme court as mere subdivisions of the state for political purposes; as mere agencies of the state in the administration of public laws. 46 O. S. 96.

(c) School districts which have been defined by our supreme court as mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws. State vs. Powers, 38 O. S. 58.

(d) Municipal corporations which have been defined by our supreme court as agencies or instrumentalities to which the general assembly, vested with legislative power of the state, delegates a portion of its governmental power, in order to meet those local wants of the people in cities and villages, for which state laws make only general provision, leaving a more particular provision to local council. 41 O. S. 159.

In its common, as well as it legal meaning, a political division of a state may be defined as one which has, principally, for its object, the administration of the government, or to which the powers of government or a part of such powers have been delegated. Counties, townships, school districts and municipalities are created exclusively with a view to the policy of the state at large, for the purpose of political organization and civil administration in matters of finance, education, provisions for the poor, military organization and the general administration of justice.

All of the powers and functions of the county, township, school district and municipality have a direct and exclusive reference to the general policy of the state, and are, in fact, but branches of the general administration of that policy. In short, the legislature has from the beginning had under its control these divisions of the state, granting to them all of the powers that they possess, limiting and extending such powers as the benefit of their inhabitants separately or the interest of the state at large require.

The act creating your board shows clearly that the legislature in passing it, and the governor in approving the same, recognized or intended to recognize the term "political divisions" in its common acceptation.

The act also contemplated the furnishing of such articles as your board might be prepared to furnish to the state, to any political division of the state, as above enumerated, and the public institutions thereof.

Under the cases above cited, I am of the opinion that the term "political

divisions," as used in section 14 of said act, includes counties, townships, school districts and municipalities.

In answer to your second question I am of the opinion that your board has the legal power and authority under said sections 14 and 15 of said act to compel all state institutions, the state and the political divisions thereof, heretofore enumerated, namely: counties, townships, school districts, and municipalities, to purchase articles needed or to be purchased by them; subject, however, to the proviso in section 15 of said act, for the reason that the above political divisions are public agencies of the state, and vested by it, of its own sovereign will, with their particular powers, to assist in the conduct of local administration and the execution of its general policy, with no power to decline the functions devolving upon them, or to perform them in any other mode than that prescribed by the legislature.

In answer to your third question I am of the opinion that your board can compel county commissioners and municipal officers to purchase from the state, crushed stone which is manufactured at the state stone quarry, under and by virtue of the act passed May 2, 1911, 102 O. L., 106, subject to the provisions of section 15 of the act.

In answer to your fourth question I would say I am of the opinion that your board can compel boards of education to purchase school desks and other school supplies as may be manufactured by the state, from your board.

In addition to the above, I might add that your board is authorized under said act, passed May 2, 1911, 102 O. L. 106, under section 2 thereof, to manufacture and produce crushed stone and engage in the sale of the same, and dimension stone, in the open market.

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

B 467.

EFFECT OF SUSPENDED SENTENCE TO STATE INSTITUTION—CONTROL OF MANAGERS OF INSTITUTION—COST OF DESCRIPTION AND PICTURE OF DEFENDANT NOT PAYABLE FROM STATE TREASURY.

As there is no authorization in the statute for such action, a sheriff may not draw from the state treasury the expenses of obtaining photographs and descriptions of parties convicted of crime whose sentence has been suspended.

When a person has been sentenced to an institution and such sentence suspended, the effect is to place such person under the control of the managers of the institution subject to the same rules applicable to paroled prisoners.

COLUMBUS, OHIO, November 16, 1911.

The Ohio Board of Adminstration, Columbus, Ohio.

GENTLEMEN:—Your communication dated November 3rd, 1911, received, wherein your enclose a letter addressed to your board by the superintendent of the Ohio State Reformatory, Mr. Leonard, and in which he recommends that your board authorize him, as superintendent of the reformatory, to have photographs made and descriptions filled out by the sheriffs of the respective counties where suspended sentences have been given to parties convicted of

crime under the probation laws, and have this expense made a part of the regular cost bill in the said cases and paid from the state treasury on the warrant of the state auditor as provided for the regular cost bills. You ask my opinion as to whether this can be legally done, and I desire, in answer thereto to cite to your board, section 2210, et seq., of the General Code, which provides that when a sentence to the penitentiary or reformatory has been imposed, but execution thereof has been suspended and the defendant placed on probation, the effect of such order of probation shall be to place the defendant under the control and management of the board of managers of the institution to which he is sentenced (that now being your board) *and he shall be subject to the same rules and regulations as apply to prisoners paroled from such institutions.*

Section 13709 of the General Code provides:

> "When it is the judgment of the court that the defendant be placed upon probation and under the supervision of the penitentiary or the reformatory, the clerk of such court shall forthwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reasons therefor, and certify them to the warden of the penitentiary or to the superintendent of the reformatory, to which the court would have committed the defendant but for the suspension of sentence."

And section 13710 of the General Code provides:

> "Upon entry in the records of the court of the order for probation provided for in the next preceding section, the defendant shall be released from custody of the court *as soon as the requirements and conditions required by the board of managers have been properly and fully met.*"

I have carefully examined the provisions of the code relative to the fees and expenses to which a sheriff is entitled in criminal matters and find no provision for the expense of taking photographs of defendants whose sentences have been suspended by the respective courts sentencing them under the probation laws above referred to.

I am, therefore, of the legal opinion, that recommendation of superintendent Leonard of the state reformatory, which accompanies your letter, could not be legally put into force and thereby have a sheriff or the respective sheriffs draw from the state treasury expenses in obtaining photographs and descriptions of parties convicted of crime whose sentences have been suspended, because the same is not authorized by the General Code.

Very truly vours,

TIMOTHY S. HOGAN,
Attorney General.

488.

LONGVIEW HOSPITAL—STATE INSTITUTION—POWERS AND DUTIES OF BOARD OF ADMINISTRATION.

Longview hospital was founded in Hamilton county and by means of funds raised by local taxation upon the property in that city.

The state board of administration has nothing to do with the control thereof, but must appropriate a definite amount for its maintenance.

COLUMBUS, OHIO, December 12, 1911.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Your communication dated November 20, 1911, in which you ask me to advise you upon the following:

> "What is the exact relationship of the board of administration towards the Longview hospital of Cincinnati, Ohio?

was duly received and I have carefully examined all the acts of the general assembly relative to said institution and find the following:

An act of the general assembly passed April 10th, 1856, Ohio Laws, vol. 83, page 235, and the following acts amendatory thereto, to wit:

(a) Ohio Laws, vol. 54, page 25, passed March 10th, 1857.

(b) Ohio Laws, vol. 56, page 174, passed April 5th, 1859.

(c) Ohio Laws, vol. 58, page 152, passed February 27th, 1861.

(d) Ohio Laws, vol. 75, page 93, passed April 5th, 1878.

The last act above referred to was sections 722 to 751, inclusive, of Bates' Revised Statutes, or sections 2004 to 2034, inclusive, of the General Code, and in full force and effect both now and at the time of the passage of the act creating your board, (102 O. L., 211); none of said sections of the General Code just referred to having been repealed by the said act. (See repealing clause of said act, section 41, 102 O. L., page 223.)

It will be necessary to examine the act creating your board, and chapter 9, division II, title V of the General Code, sections 2004 to 2034, inclusive, to determine the exact relationship of your board to said Longview hospital.

After a careful examination of said acts and sections of the General Code referred to, the following facts are found to exist:

(a) That the Longview hospital was erected at the expense of Hamilton county, Ohio, and not the state.

(b) That the county of Hamilton was created a separate district for lunatic asylum purposes.

(c) That the said asylum should and was supported by funds derived from taxes raised by the county of Hamilton and of appropriations made by the state for the support of the curable lunatics in said asylum, etc.

(d) That the control and management of said Longview hospital was given to a board of directors.

The Longview hospital *is not "a state institution."*

The supreme court of Ohio in the case of James F. Chalfant, et al. vs. the State ex rel., 37 Ohio State, 60, so held, and also held that under the acts of the general assembly, that Longview asylum was founded by Hamilton county

from funds raised by local taxation on the property in that county and all property belonging to that institution was owned by the county, and that the provisions of the act of April 5, 1878 (75 O. L., 93), providing for the appointment of directors of the asylum otherwise than by the governor, is not in conflict with section 2 of article VII of the constitution of Ohio.

This same section, then, construed by our supreme court is still in full force and effect, being section 723, Bates' Revised Statutes, section 2005 of the General Code.

It is evident that the legislature in passing the act creating your board (102 O. L., 211) recognized the fact that said asylum is not a state institution under the then existing laws and said decision, for in section 4 which provided for your board's assuming the management and control of the institutions of the state it did not include the Longview hospital, and I am of the legal opinion that your board has nothing to do with the management or control of said institution either as to officers, employes or rules and regulations governing the same.

Section 38 of the act creating your board did not terminate or abolish any office of the Longview hospital but only those institutions enumerated in section 4 of said act.

There remains but one question for me to advise your board upon relative to this institution, namely, "what the powers and duties of your board are under section 33 of the said act and section 2033 of the General Code."

Section 33 of the said act makes it mandatory upon the state to assist in the maintenance of said Longview hospital and in making estimates for the maintenance of the institutions under the control of your board that it shall include a *suitable amount therefor* and makes it *mandatory* upon your board to apportion a proper allowance for said hospital *out* of the money appropriated for the maintenance of state institutions.

Coming now to the duties of your board in relation to apportioning the proper allowance out of the amounts appropriated by the general assembly for the Ohio board of administration on and after February 16, 1912 (102 O. L., 407), I desire to say that in making the appropriations for the fiscal year on and after February 16th, 1912, the legislature divided the same into three classes as provided by section 31 of said act creating your board, as follows:

1. Maintenance.
2. Ordinary repairs and improvements.
3. Specific purposes.

and appropriated $3,399,330.00 for maintenance to be apportioned as provided by law.

Section 33 of the said act provides specifically in what division or class of appropriations the said Longview hospital should participate, namely, "maintenance" and no other. The legislature did not repeal nor amend section 2033 of the General Code which provides as follows:

> "The hospital (Longview hospital) shall be supported, and the salaries of its officers paid, from a fund consisting of moneys which may come into the treasury of the county, from whatever source, applicable to the support of insane person in the county, and of appropriations, from time to time, made by the state for the support of this hospital, which appropriations for the other hospitals for insane of the state, as the population of Hamilton county bears to the population of

the state, exclusive of such county, as ascertained by the federal census immediately preceding the making of the appropriation."

It is evident from a careful reading of section 33 of the act creating your board and section 2033 of the General Code that it was the intent of the legislature to provide for the assisting of the *maintenance* of said hospital by the state, and clearly the intent that your board should in apportioning the proper allowance out of the total moneys appropriated for the maintenance of state institutions to be guided by the provisions of section 2033 of the General Code, namely that the amount shall bear the same proportion to the appropriations for other hospitals for insane of the state, as the population of Hamilton county bears to the population of the state, exclusive of such county, as ascertained by the federal census immediately preceding the making of the appropriation, and my legal opinion is that effect.

Section 33 also provides in part:

> "In all matters relating to the expenditure thereof (meaning the money apportioned to said asylum) the board shall have the same powers as in like institutions."

Your board having adopted a system of accounting and payment of vouchers in conformity to the act as to other institutions, I do not deem it necessary to advise you further as to the proposition of the method or mode of expenditures relative to Longview asylum as the statute is so plain on the said subject.

I have endeavored to fully give your board the exact status of said institution as relates to the powers and duties of it over the same and should you desire any further information thereon, I would be pleased to give it to you.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

494.

BOARD OF ADMINISTRATION—NO POWER TO LEASE LANDS FOR OIL AND GAS WELLS.

The board of administration has no legal power to grant leases of state lands under its control for the purpose of drilling oil and gas wells.

Powers of the board are limited to the duties and incidents of management of institutions under its control.

COLUMBUS, OHIO, December 18, 1911.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of November 25th, in which you request my opinion upon the following question:

> "Has the board of administration power to grant leases of the state's lands under its control, for the purpose of drilling for oil and gas?"

The act of the legislature establishing your board, 102 O. L., 211, sets forth

in section 1 thereof the intent and purposes of the act. Said section 1 provides in part as follows:

> "The intent and purpose of this act are:
>
> * * * * * * * * * * * * * * *
>
> "To secure by uniform and systematic management, the highest attainable degree of economy in the administration of the state institutions consistent with the objects in view: * * *"

Section 8 of said act provides as follows:

> "The board on its organization shall succeed to and be vested with the title and all rights of the present boards of trustees, boards of managers, and commissions of and for said several institutions in and to *land*, money, or other property, real and personal, held for the benefit of their respective institutions, or for other public use, without further process of law, but in trust for the state of Ohio. Said several boards of trustees, boards of managers, and commissions now charged with duties respecting the institutions above named shall on and after August 15, 1911, have no further legal existence and the board is hereby authorized and directed to assume and continue, as successor thereof, the *construction*, control and management of said institutions, subject to the provisions of this act."

Section 16 of said act provides as follows:

> "The board or the several managing officers under its direction, shall determine and direct what lands belonging to said institutions shall be cultivated, the crops to be raised, and the use to be made thereof, with power to distribute the products among the different institutions. * * *"

It is apparent from a careful examination of the act creating your board, and of the General Code, that there is no statutory provision granting to your board the power to sell or lease any of the lands under your control, or being held by your board in trust for the state. The only officers or board authorized, under the General Code, to lease land is the state board of public works; and their authority is granted with the proviso that no land lease or sale of canal or state lands shall be made except upon the written approval of the governor and attorney general. Said provision relates to canal lands only.

It was evidently the intention of the legislature in creating your board, to vest you with the management of the institutions referred to in said act, and to give you all the powers necessary, either enumerated or implied, to carry into effect the proper management of said institutions.

I am of the opinion that you are without authority to lease any of the lands of the respective institutions under your control, for the purpose of drilling oil and gas wells, not only for the reason that there is no power delegated to your board by the legislature for said purpose, but that you are only to hold said lands in trust for the state of Ohio, and exercise such supervision over them as is necessary in the way of cultivation, or applying the use and purpose of said property to that end.

The state of Ohio is vested with the title to all lands owned by it, and can only be deprived of the title, or the same be leased, by act of the legis-

lature, either by legislative act or by delegating that power to some officer or board of the state; and the legislature not having delegated any such power to your board I am of the opinion that you are without authority to lease any of the lands connected with any of the institutions under your supervision, for the purpose specified in your communication, or for any other purpose. Your board being vested with a trust estate, and having the authority to manage said institutions, as provided in the act creating it, is limited therein to the extent that it can only do such acts in relation to the real estate connected with the respective institutions, and to which said lands are contiguous, as are incidental to the proper management thereof.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Board of Arbitration)

A 260.

POWERS, DUTIES AND PROCEDURE OF BOARD—NO BOND FOR MEMBERS—GENERAL STATUTORY PROVISIONS.

A review of the general powers, duties and method of procedure of the state board of arbitration as set out in the statutes.

There is no provision in the statutes for the giving of bond by members of the board.

COLUMBUS, OHIO, May 27, 1911.

HON. D. H. SULLIVAN, *Member State Board of Arbitration and Conciliation, Columbus, Ohio.*

MY DEAR SIR:—In compliance with your request, I herewith submit the following. The matters and things pertaining to the state board of arbitration and conciliation are found in vol. 1, title 2, division 2, chapter 14 of the General Code, in sections 1059 to 1078 inclusive.

Section 1059 provides for the appointment of the state board by the governor, one member of which shall be an employer, or selected from an association representing employers of labor; one an employe or an employe selected from a labor organization and not an employer of labor, and the third person shall be appointed upon the recommendation of the other two appointees. If the two appointees do not agree within thirty days, the third person shall be selected by the governor.

Section 1060 provides that the term of each member shall be three years and until his successor is appointed and qualified.

Section 1061 has to do with the organization of the board, the selection of one of its members as chairman and another member as secretary. Also the establishment of such rules of procedure as the governor may approve.

Section 1062 fixes the compensation of the members and the expenses of the board, to wit: five dollars each for each day of actual service and his necessary traveling and other expenses. The chairman of the board shall certify the amount due each member each quarter and on presentation of such certificate to the auditor of state a warrant for the amount so certified shall be drawn.

Section 1063 provides:

> "When a controversy or difference, not involving a question which may be the subject of an action or proceeding in a court of this state, exists between an employer and his employes, upon application as hereinafter provided, and as soon thereafter as practicable, the state board of arbitration and conciliation shall visit the locality of the dispute, make careful inquiry into the cause thereof, hear all persons interested therein who come or are subpoenaed before it, and advise the respective parties what, if anything, ought to be done or submitted to by either or both such parties to adjust the dispute."

Section 1064 provides:

> "If the state board of arbitration and conciliation fails to bring

about an adjustment of such differences, it shall immediately make a written decision thereon. This decision shall at once be made public, be recorded in a proper book of record to be kept by the secretary of the board, and a short statement thereof published in its annual report. The board shall also cause a copy of the decision to be filed with the clerk of the county or city in which the business is carried on."

Section 1065 provides:

"An application to the state board of arbitration and conciliation may be made by one or both of the parties to a controversy. It must be signed by the employer or by a majority of his employes in the department of business in which the controversy or difference exists, or by the duly authorized agent of either or both parties. If an application is signed by an agent claiming to represent a majority of such employes, the board must be satisfied that the agent is duly authorized in writing to represent such employes, but the names of the employes giving the authority shall be kept secret by the board."

Section 1066 provides:

"The application shall contain a concise statement of the grievances complained of, and a promise to continue in business, or at work, in the same manner as employed at the time of the application until the decision of the board, when such decision is rendered within ten days from the date of the application. A joint application may contain a stipulation that the decision of the board under it shall be binding upon the parties to the extent so stipulated, in which case the decision to such extent may be made and enforced in the court of common pleas of the county from which such joint application is presented, in like manner as upon a statutory award."

Section 1067 provides:

"Upon the receipt of the application, the secretary of the state board of arbitration and conciliation shall give public notice of the time and the place for the hearing thereof, unless both parties to the controversy join in the application and present therewith a written request that no public notice be given. When such request is made, notice shall be given to the parties interested in such manner as the board orders, and at any time during the proceedings the board may give public notice, notwithstanding such request. If the petitioner or petitioners fail to perform the promise made in the application, the board shall proceed no further therein without the written consent of the adverse party."

Section 1068 gives the board authority to subpoena witnesses and to require the production of books or papers containing the record of wages earned or paid in any department involved in a controversy. Subpoenas may be signed and oaths administered by any member of the board.

Section 1069 provides what officers are authorized to serve subpoenas and fixes the compensation therefor; also gives the board power and authority to maintain and enforce its orders at its hearings and obedience to its writs of

subpoena similar to powers conferred by law on the court of common pleas for like purposes

Section 1070 provides for a local board of arbitration and conciliation and the manner of their selection.

Section 1071 fixes the powers and jurisdiction of these local boards and provides that a copy of their decisions shall be forwarded to the state board.

Section 1072 fixes the compensation of members of these local boards. The fees are three dollars for each day of actual service not exceeding ten days for any arbitration if approved in writing by the commissioners of the county, or council or the proper officer of a city shall be paid from the county or city in which the controversy exists.

Section 1073 provides that a mayor or probate judge of any county shall notify the state board when a strike or lockout is seriously threatened or has actually occurred and also that whenever knowledge of such strike or lockout comes to the state board by such notice or otherwise, the board shall enter into communication with the employer and employes involved.

Section 1074 provides:

> "In either case named in the preceding section, if practicable, the state board shall endeavor to affect an amicable settlement between the employer and his employes, otherwise it shall endeavor to persuade them to submit the matter in dispute to a local board of arbitration or to the state board. If it deems it advisable the state board may investigate the cause of such controversy and ascertain which party thereto is responsible for its existence or continuance. It may make and publish a report with a finding of the cause or causes and the party or parties responsible therefor. If no settlement or arbitration is obtained because of the opposition of one of the parties to the controversy, an investigation and publication shall be made if requested by the other party. For the purposes named in this section the board shall have the same powers as are conferred upon it when an application is made as provided in the preceding sections."

Section 1075 fixes the fees and mileage of witnesses and provides that the state board shall certify the amount due each witness and the auditor of the county in which the controversy exists shall issue his warrant for the amount so certified. The expense of a publication authorized by the provisions of this chapter shall be certified and paid in the same manner.

Section 1076 provides that if a strike or lockout extends to several counties the expenses not payable from the state treasury shall be apportioned among and paid by the counties in such manner as the state board directs.

Section 1077 provides:

> "The term 'employer,' as used in the provisions of this chapter, shall mean an individual, a co-partnership, or corporation employing not less than twenty-five persons in the same general line of business in this state. The term 'employes' shall mean not less than twenty-five persons directly involved in a controversy or difference. Several employes co-operating with respect to any controversy or difference shall be included in the term 'employer' and the term 'employe' shall include aggregations of employes of several employers so co-operating."

The final section—1078—provides for the making of the annual report to the governor.

I do not find anywhere in the statutes any provision for giving of bond by members of this board.

Trusting that this fully answers your request and assuring you that at any time I will be pleased to explain further or be of any assistance as I can to you, I am,

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

A 414.

SECETARY OF BOARD—DUTY TO PUBLISH ANNUAL REPORTS OF PREDECESSOR.

The secretary of the state board of arbitration is obliged to have published annual reports of his predecessors for former years which have not been published, but which have been compiled and are ready for the printer.

COLUMBUS, OHIO, October 7, 1911.

HON. D. H. SULLIVAN, *Secretary State Board of Arbitration, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 11th, in which you inquire as follows:

> "A question of information. Mr. Joseph Bishop, ex-secretary of the state board of arbitration, did not have his reports for 1909 and 1910 published, although the reports are compiled ready for the printer. Am I required by law to have those reports printed?"

In reply thereto, section 1078 of the General Code provides that the state board of arbitration shall make an annual report to the governor of the state, as follows, to wit:

> "Each year the state board of arbitration and conciliation shall make a report to the governor containing such statements, facts and explanations as will disclose its methods and work with such suggestions as to legislation conducive to the adjustment of disputes between employers and employes as it deems proper."

Section 1064, General Code, provides and briefly sets out what matter shall be contained in such annual reports, as follows, to wit:

> "If the state board of arbitration and conciliation fails to bring about an adjustment of such differences, it shall immediately make a written decision thereon. This decision shall at once be made public, be recorded in a proper book of record to be kept by the secretary of the board, and a short statement thereof published in its annual report. The board shall also cause a copy of the decision to be filed with the clerk of the county or city in which the business is carried on."

Such reports of the state board of arbitration are not only of great importance to the people of the state generally; but may also be of great aid to the people of the state in the adjustment and arbitration of future disputes between employers and employes. The decisions of the board of arbitration, in its annual reports, would be an aid both to the state board as well as to local boards of arbitration, just as the reported decisions of the court are an aid to the various courts of our state in solving questions between litigants.

Such reports would undoubtedly have a tendency to lessen the probability of disputes arising between employers and employes; and inasmuch as the statutes seem to provide that the decisions of the state board of arbitration shall be published (as provided in section 1064, General Code, supra). I am of the opinion that the reports of the state board of arbitration for the years 1909 and 1910 should be published; and inasmuch as said reports have not been published, you are required by law to have the same published.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Officers of the Various State Institutions)

(To the Girls' Industrial Home)

123.

TRAFFIC OVER COUNTY ROADS—HAULING OF COAL FOR HOME – STATUTORY REGULATION—WEIGHT OF LOAD AND WIDTH OF TIRES.

The authorities of the home may lawfully convey their coal to the institution over a county road provided the restrictions of section 7459, General Code, with reference to weights of loads and width of tires have been complied with.

COLUMBUS, OHIO, February 17, 1911.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—In your favor of the 15th inst., you state the following:

> "The road leading from this home to the nearest railroad point, is three and one-fourth miles long, and is almost impassable for heavy hauling.
>
> "This road, I understand, belongs to the state, and the commissioners, being unwilling to fix it, in the absence of proper appropriation from the state, makes it so it is practically impassable.
>
> "The road leading from the home to Hyatts station is four and one-fourth miles, and is a good pike, owned and kept up by Delaware county. The commissioners will probably object to this home hauling its coal from Hyatts station.
>
> "*Query*: It being impossible for us to haul it over the dirt road from the home siding, can the commissioners legally prevent us from hauling this coal over the pike which belongs to the county, and which extends from Hyatts station to the home?"

Section 7459 of the General Code provides:

> "No person, firm or corporation in a county having free or toll macadamized, graveled or stone roads, shall transport over such roads, in a vehicle having a tire of less than three inches in width, a burden, including weight of vehicle, of more than thirty-four hundred pounds. The county commissioners shall constitute a board of directors for their respective counties, with power to prescribe the increased gross weight in quantity greater than thirty-four hundred pounds that may be carried, including weight of vehicles, in vehicles having a width of tire three inches or upwards, and cause such regulations to be recorded in their journal."

It is my opinion, therefore, on the facts submitted, that, provided you comply with the provisions of the above section, the county commissioners cannot legally prevent you from hauling your coal over the pike which belongs to the county and which extends from Hyatts station to the home.

Should they object to your doing so, kindly advise me of the fact, stating the nature of their objections.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

219.

BOXWELL EXAMINATIONS IN DELAWARE COUNTY — RIGHTS OF INMATES OF GIRLS' INDUSTRIAL HOME—LEGAL RESIDENCE IN COUNTY.

Inmates of the Girls' Industrial School not being legal residents of Delaware county may not take the Boxwell examinations in said county unless they were committed to the home from Delaware county in the first instance.

COLUMBUS, OHIO, April 12, 1911.

MR. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

MY DEAR SIR:—I am in receipt of your communication of which the following is a copy:

> "I think it unnecessary to discuss in this letter the temporary residence in Delaware county of the inmates of this institution.
>
> "It is well known that they have been committed from the various counties of our state and are confined here in a state institution.
>
> "We now have a class from our seventh and eighth grades that desire to take the Boxwell examination in Delaware next Saturday, April 15, 1911.
>
> "There seems to be a hesitancy on the part of the school examiners of Delaware county to give diplomas to those who succeed at this examination.
>
> "The examiners are willing to give the grades; but, as I stated above, are unwilling to issue diplomas and they assign their reason for this action that it is unfair for the township (Concord) in which this institution is situated to stand the expense of giving these graduates the high school education as provided such graduates by law.
>
> "You can readily understand that it is not the intention for any girl here to be further educated at the expense of Concord township, and we would be willing to sign an agreement whereby this expense would be eliminated insofar as it relates to this township or to Delaware county.
>
> "The giving of diplomas to these girls acts as an incentive, not only to secure better discipline but better education as well.
>
> "I would ask that you kindly render an opinion to Prof. H. L. Main, of Delaware, Ohio, so that he may understand what can be done in this matter.
>
> "I desire that these girls be given diplomas like other girls and I will waive any rights that regular Boxwell graduates of this township might have under the statute."
>
> * * * * * * * * * * * * * * *

In substance your inquiry is, Can the girls of the Delaware Industrial Home take the Boxwell examination, and provided they can take such examination, are they entitled to a diploma?

As you suggest in your communication, the girls in your institution are not legal residents of Delaware county or of Concord township of such county.

They are sent to same by virtue of section 2107 of the General Code which provides as follows:

> "When a resident citizen files with the probate judge of his county his affidavit, charging that a girl above the age of nine years and under the age of sixteen years, who resides in such county, has committed an offense, punishable by fine or imprisonment, other than imprisonment for life, or that she is leading a vicious or criminal life, the judge shall fix a time not more than five days from the filing of the affidavit for hearing the complaint, and issue a warrant to the sheriff of the county, or some other suitable person, commanding him to bring such girl before such judge at his office at the time fixed for hearing. At the same time he also shall issue an order in writing, addressed to the father of the girl, if living and a resident of the county, and, if not living or so resident, then to her mother, if living or so resident, or if there is no father or mother so resident, then to her guardian if so resident, and, if not, then to the person with whom the girl resides, requiring such father, mother, guardian or other person to appear before him at the hearing. The judge may continue the proceedings from day to day and issue necessary subpoenas for witnesses."

By reason of that section, the girls are, at the time they are sent to the home, residents of the county from which they are sent and legally remain residents of such county by virtue of section 2122 of the General Code wherein provision is made that such girls may be discharged and returned to the said county from which they are sent.

Section 7740 of the General Code provides:

> "Each board of county school examiners shall hold examinations of pupils of township and special districts in the subjects of orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States including civil government, and physiology. Two such examinations must be held annually, one on the third Saturday in April and one on the second Saturday in May, at such place or places as such board designates."

Said section means legally that such examination is for the benefit of legal residents of the county and therefore the girls at the Girls' Industrial School, not being legal residents of Delaware county, are not legally entitled to take such Boxwell examinations.

As you request, I am sending a copy of this opinion to Professor H. L. Main, Delaware, Ohio, so he may understand what may be done in the matter.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

327.

DISMISSAL OF INMATE — CHANGE OF AGE REQUIREMENT — EFFECT UPON COMMITMENT UNDER FORMER REQUIREMENT.

A girl committed to the industrial home under the old law which provided for dismissal upon the attainment of the age of eighteen, may not be detained after that age under the present law providing for dismissal upon the attainment of twenty-one years of age.

COLUMBUS, OHIO, August 24, 1911.

MISS CHARLOTTE DYE, *Chief Matron, Girls' Industrial Home, Delaware, Ohio.*

DEAR MADAM:—Your communication dated August 7, 1911, in which you request my legal opinion upon the following question:

> *"As to the legality of holding inmates in your institution, who were committed under the old law which gave them their liberty when they arrived at the age of eighteen years."*

was duly received, and in reply I desire to say that section 2112 of the General Code (section 773 of Bates' Revised Statutes), as it now stands was passed April 23, 1904, and provided in part as follows:

> "A girl duly committed to the home shall be kept there, disciplined, instructed, employed and governed under the direction of the trustees, until she is either reformed or discharged or bound out by them according to their by-laws, *or has attained the age of twenty-one years.*"

Prior to the amended law as above quoted the same provided that a girl could only be retained in the home *until she had attained the age of eighteen years.*

Under the above quoted section prior to April 23, 1904, any girl committed to your institution could not be detained after she had attained the age of eighteen years, although she become eighteen years of age after the amendment making the age limit twenty-one years of age.

Any girl who had been detained under the old law until eighteen years of age could not be recommitted to your institution as the law governing admission or eligibility of girls to your institution provides that any girl under the age of sixteen years and above the age of nine years, and therefore, any girl detained in the home until she was eighteen years under the law prior to the amendment above quoted could not after being discharged be recommitted, and any detention of a girl committed under the old law after she become eighteen years of age would be illegal.

Very respectfullyy,

TIMOTHY S. HOGAN,

Attorney General.

448.

MEDICAL CERTIFICATE NOT NECESSARY WITH COMMITMENT—PRACTICE ADVISED.

The statutes do not make it necessary for a medical certificate to accompany a commitment to the Girls' Industrial Home. Such a practice would be commendatory, however, and its adoption is advised.

COLUMBUS, OHIO, November 2, 1911.

MISS CHARLOTTE DYE, *Chief Matron, Girls' Industrial Home, Delaware, Ohio.*

DEAR MADAM:—Your communication, dated October 30th, in which you state:

> "On Friday last, a girl was received into the institution from Montgomery county, and her commitment papers contained no doctor's certificate. Upon asking for it I was told that a communication had been received from your office to the effect that it is not necessary to have a medical certificate to accompany the commitment. We have been notified of no such ruling. It seems very necessary to me that a medical certificate accompany the commitment of any girl brought to this institution, for reasons which are obvious."

was received, and in reply I desire to say that I have made no such ruling as referred to in the first part of your communication, but I have construed the statutes providing fees for physicians testifying in hearing before the probate judges, relative to girls committed to your institution and held that a physician so testifying shall receive the ordinary witness fee and nothing more.

Section 2108 of the General Code provides as follows:

> "At the time named in the order, the probate judge shall hear the testimony provided before him in the case. *If it appears to his satisfaction that the girl is a suitable subject for the industrial home,* he shall commit her thereto, and issue his warrant to the sheriff of the proper county, or to some suitable person to be appointed by him, commanding him to take charge of the girl, and deliver her without delay to the superintendent of the home."

Under the said section just quoted, I am of the legal opinion that the probate judge should and has the right to examine a physician or physicians for the purpose of determining the suitability of the girl to become a ward of your institution. I can find no provision in the law relative to commitment papers providing for a medical certificate to accompany said commitment papers to your institution, but it is my opinion that for the good of the institution that rule should be adopted, and to that end I will co-operate with you and with the board of administration in carrying it out. However, I might add that there being no provision compelling a probate judge to have a medical certificate issued and accompany commitment papers, should they absolutely refuse and the commitment papers show, as I apprehend they all do, that the party committed to your institution is a suitable person, then the law technically would be carried out.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio Penitentiary)

6.

NO POWER IN BOARD TO PRISONERS TO GIVE CREDIT FOR "LOST TIME" SERVED ON FORMER SENTENCE.

COLUMBUS, OHIO, January 11, 1911.

Hon. Board of Managers, Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—We have been requested to give an opinion as to the jurisdiction of the board of managers to give credit for lost time served on a first sentence to apply on a second sentence which a prisoner is now serving.

It is the opinion of this department that the board of managers have no jurisdiction or right to give a prisoner credit for lost time served on a first sentence and apply it on a subsequent sentence, but each sentence must take care of itself; and the statutes authorizing deduction for "good time," etc., apply only to the sentence which the prisoner may be serving.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

16.

PRISONER AS WITNESS—ORAL TESTIMONY ONLY IN COUNTY OF IMPRISONMENT—NATHAN BORMAN.

Under section 11517, *General Code, a prisoner can be produced as a witness for oral examination only in the county in which he is imprisoned. In all other cases, his testimony may be taken only by deposition.*

January 13, 1911.

HON. T. H. B. JONES, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication dated January 13, 1911, in which you seek the opinion of this department upon the following question, to-wit:

> "Whether or not a prisoner confined in the Ohio penitentiary can be taken by legal process or agreement to any county in the state other than Franklin to testify in any cause before any court of this state (in civil matters).

After a thorough investigation of the law it is my opinion that section 11517 of the General Code which provides as follows:

> "By order of a court of record a person confined in prison in this state may be required to be produced for oral examination as a witness in a case or matter in the county where he is imprisoned, but in all other cases his examination must be by deposition,"

fully settles the inquiry made by you in the negative. The law also provides for the taking of a deposition where a prisoner is confined in a penal institu-

tion, and the only provision of the law where a prisoner can be taken from your institution for the purpose of testifying in any case or matter is in criminal cases before the grand jury or the trial of an indictment in counties of this state, whereupon it is your duty, upon order of the court, to produce said prisoner at the place and time of trial or the meeting of the grand jury designated in the order of the court. Therefore, you will have to refuse absolutely to permit Nathan Borman, No. 39410, now confined in your institution in the Ohio penitentiary, from going to Cuyahoga county, or being taken to Cuyahoga county to testify in a civil case.

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

50.

PRISONER SERVING SEPARATE SENTENCES FOR SEPARATE OFFENSES —APPLICATION OF "GOOD TIME" AND PAROLE REGULATIONS.

When a prisoner has been sentenced to one year for each of two separate offenses, with a stipulation that the second sentence was to begin at the expiration of the first, the sentences may not be combined and considered as a two-year sentence for the purpose of applying parole and "good time" regulations. Each sentence shall stand for itself, with respect to such purposes.

January 23, 1911.

HON. T. H. B. JONES, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your letter of January 19, 1911, received. You inquire as follows:

> "A prisoner is sentenced by the court to serve a certain sentence for a certain crime in one case and another certain sentence for another crime in another case with the understanding that the second sentence is to begin at the expiration of the first.
>
> "Can the sentences be added together and the prisoner serve them in one lump sum under one number or serve them separately under different numbers, beginning the second after he has served the first and been discharged upon the records?
>
> "For instance: John Smith is sentenced to serve one year for burglary and larceny in one case and one year for burglary and larceny in another case with instructions from the court that one sentence is to begin after the expiration of the other. If he serves a two-year sentence (one and one), he gets credit for 144 days good time under our present schedule, while if he serves two one-year sentences he gets credit for 120 days, or 60 days for each one. You will thus see it makes a difference of 24 days in this case and much more of a difference in other cases where the sentences are greater. See time card enclosed.
>
> "We have been entering the men for the first sentence and at its expiration entering them under a new number for the second. This

makes them second termers, ineligible for parole. We now find that in former years they were often entered by summing the sentences which allowed them to be finally discharged as first termers and made it possible for them to be paroled while serving their term. You will thus see the importance of the question to us and our reason for desiring it settled beyond a doubt.

"At the time the prisoner arrives here we receive separate commitments for each case, with a notation on one that its sentence is to begin at the expiration of the other."

It is my opinion that it is clearly the intention of the statute that deductions for good time as authorized by section 2163 of the General Code applies to each separate sentence; that is, when John Smith is *sentenced* to serve *one year* for burglary and larceny under authority of section 2163, the board of managers, for good behavior, are authorized to deduct sixty days from his sentence. He is serving only a term of one year under the order of the court; he is also convicted on another case at the same term of court, and sentenced for a term of one year, sentence to begin at the conclusion of the first sentence. This is also a *sentence for one year* and he woud be entitled to deduction for sixty days for good behavior under this sentence. The sentence is made by the court. Smith was not sentenced for two years by the court but he was sentenced for one year in each case. Consequently his deductions for good time are governed by paragraph one of section 2163.

Section 2166 provides that a person serving a sentence in the penitentiary for two or more separate offenses, where the term of imprisonment for a second or further term is ordered by the court to begin at the expiration of the first and each succeeding term, may have his sentence terminated as provided by law.

Respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

255.

PRISONER SENTENCED TO INDEFINITE TERM—POWER OF BOARD TO RELEASE—FORMER SENTENCE.

Under section 2160, General Code, the board of managers is empowered to conditionally or absolutely release a prisoner confined in the penitentiary under a general or indefinite sentence, after he has served the minimum time provided for his offense, and provided such release is not incompatible with the welfare of society.

The board may take into consideration the circumstances connected with a former imprisonment for the purpose of forming an opinion as to whether or not such release is a menace to society.

COLUMBUS, OHIO, May 20, 1911.

Board of Managers, Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 10th, in which you request my opinion as follows:

"On July 13, 1910, one Albert Kayser was received at the Ohio peni-

tentiary from Lucas county for burglary and larceny to serve an indeterminate sentence as per enclosed commitment paper.

"Has the board of managers authority to fix the sentence of this prisoner, it having been reported on many sides that the sentence is an illegitimate one because of the fact that Kayser had served in a penal institution prior to the time of this sentence?"

Section 2160 of the General Code provides that the board of managers shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment and their arrest and return to custody within the penitentiary. It further provides that a prisoner shall not be released conditionally or absolutely unless in the judgment of the managers there are reasonable grounds to believe that his release is not incompatible with the welfare of society. The last clause of said section provides that a prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum term provided by law for the crime of which he was convicted; and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense.

It is my opinion that your board has no right to fix the sentence of a prisoner as that authority and power is vested in the court; but under the section above referred to I am of the opinion that in this and any other case where the prisoner is confined in your institution under a general or indefinite sentence your board has the right to conditionally or absolutely release said prisoner at any time after he has served the minimum term provided by law for the crime of which he was convicted, provided you are of the opinion or have reasonable grounds to believe that said prisoner's release is not incompatible with the welfare of society.

I may add that I am also of the opinion that in arriving at a decision of the question as to whether or not the release of a prisoner under such sentence would not be incompatible with the welfare of society, your board has the right to go into any matters relative to a prior imprisonment in any penal institution or to secure any and all information from whatever source it may be obtained in order to enlighten your board so that it might arrive at a just and proper conclusion.

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

A 271.

PRISONERS SERVING AS WITNESSES IN SPECIAL CASES — WITNESS FEE NOT ALLOWED—FEES FOR WITNESSES "UNDER SUBPOENA" ONLY.

As the statutes providing for the payment of witness fees, relate solely to witness "under subpoena" and as prisoners in the penitentiary who serve as witnesses in special cases are not served by subpoena, no witness fees can be allowed to them.

COLUMBUS, OHIO, June 16, 1911.

HON. T. H. B. JONES, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your letter of May 10th, in which you state that during the trial of the different persons at Newark, Ohio, in connection with the "lynching"

cases there, the state has had occasion to call three prisoners confined in your institution to that city to testify, and that they were refused witness fees for so testifying, and requesting my opinion as to *whether or not persons confined in your institution and taken therefrom to courts in the state to testify in criminal cases are entitled to fees*, was duly received, and in reply thereto desire to say that section 3014 of the General Code provides that:

> "Each witness attending * * * under * * * subpoena before the court of common pleas, * * * in criminal causes, shall be allowed the following fees * * *."

and the procedure defined in sections 13665 to 13667 inclusive as to how the testimony of a prisoner confined in a penal institution in this state may be obtained is a special one. Its processes are exclusive and the fees therein provided for are the only ones which may be paid. The witness in such a case attends not by virtue of the *subpoena*, but because he is in the custody of the officer therein designated. Under section 13665, General Code, the subpoena is issued and directed to the warden of such penitentiary, or superintendent or keeper of such workhouse or prison, commanding him to bring the person named therein before the court. By virtue of section 13667, General Code, the expenses of the officer in transporting him (the prisoner) to and from such court, including compensation for the guard or attendant of such prisoner not exceeding the per diem salary of such guard for the time he was kept from the penitentiary, should be allowed by the court and taxed and paid as other costs against the state. These seem to be all of the provisions with reference to the subject.

In view of the fact that the sections above referred to do not provide any witness fees for the prisoner who is to testify, and that section 3014 of the General Code only provides fees for witnesses attending *under subpoena*, my opinion is that there is no legal authority for the payment of witness fees to prisoners who may be taken from the penitentiary to testify in criminal cases in any county in this state.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 312.

PRISONER — INELIGIBILITY FOR PAROLE ON ACCOUNT OF FORMER SENTENCE FOR FELONY—LAW NOT RETROSPECTIVE.

A prisoner serving a term in the penitentiary for a felony, who has convicted of a felony twenty-eight years ago and sentenced at that time to one year in the penitentiary and who for that offense served five days in the penitentiary from which place he was transferred to Lancaster, is ineligible to apply for parole under the terms of section 2169, General Code.

A prisoner who was confined, however, at the time this section of the Code was passed, would not be prejudiced thereby.

COLUMBUS, OHIO, August 1, 1911.

Board of Managers, Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 21st, in which you submit the following state of facts, viz:

> "One, Morris Collins, was convicted of grand larceny and sentenced to serve one year in the Ohio penitentiary twenty-eight years ago. He was confined in the penitentiary five days and then transferred to Lancaster. He is now serving three years in the penitentiary for the commission of another felony and wishes to make application for parole."

and ask my opinion as to whether or not said prisoner under said statement of facts is eligible to be paroled by your board under the provisions of section 2169, General Code.

In reply I desire to say that said section is by its terms applicable only to prisoners who have not previously been convicted of a felony and served a term in a penal institution. From the facts submitted in your letter Morris Collins, the prisoner desiring to make application to your board for parole under said section had previously been convicted of a felony and sentenced and confined in the Ohio penitentiary for the commission of the same prior to the crime for which he is now incarcerated. A careful reading of the statute leads me to the opinion that this prisoner is disqualified to be paroled. Having been convicted for a felony, sentenced to the Ohio penitentiary and later transferred under the law to the Boys' Industrial School at Lancaster, makes his case amenable, the same having occurred before the second conviction and imprisonment was had. The natural and obvious meaning of the language of the statute seems to be that the person must have been previously convicted of a felony for which he previously served a term of imprisonment.

In the case referred to in your inquiry the prisoner was convicted and evidently fully served his term under the first sentence and is now serving a distinct and separate term under sentence for another crime.

I am also of the opinion that the provisions of said section relative to the parole of prisoners have no application to any prisoner, who at the date of the passage of said Code section was under sentence for a definite term of imprisonment in the penitentiary, having been previously convicted of a felony or having served a term in a penal institution.

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

B 436.

PAROLE OF PRISONER—NECESSITY FOR APPLICANT TO BECOME EMPLOYED—RULE OF BOARD.

There is no statutory requirement that a prisoner applying for parole have some one to employ him. Where such rule is one which the board has adopted under its authorized power, a departure therefrom is possible only by amendment to the rule.

COLUMBUS, OHIO, October 25, 1911.

HON. GEORGE U. MARVIN, *Parole Clerk, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 16th, enclosing a letter from E. S. Wertz, relative to the requirements of the board of

administration in regard to the paroling of one, Mr. Slutz, now confined in the Ohio penitentiary.

In reply I desire to say that section 2169, General Code, provides that the board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted, and not previously convicted of a felony, and not having served a term in a penal institution, etc., may be allowed to go upon parole outside the buildings and enclosures of the penitentiary. Full power is conferred upon the board to enforce such rules, but the concurrence of every member is necessary for the parole of a prisoner.

There is no statutory requirement that a person applying for parole have some person agree to employ him; and such rule is evidently one of those adopted by the board of managers or the present board of administration, its successor, for the granting of parole, and, hence, there can be no legal question raised for me to decide in the premises.

In answer to your inquiry I would say that the only way in which the applicant could be paroled, if there are no exceptions to the rules and regulations now in force, would be for the board of administration to so amend this rule. Under the present rule the applicant, in my opinion, would be obliged to have an employer sign the employment agreement. However, I can see no reason for such rule where a person confined in the penitentiary and subject to parole is a property owner or an employer of men himself.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State Universities)

(To the Ohio State University)

185.

MECHANIC'S LIEN LAW—NOT APPLICABLE TO STATE OR ITS INSTITUTIONS—SUBCONTRACTOR.

The mechanic's lien law is not by its terms or otherwise, made applicable to the state or its institutions and therefore the trustees of the university need not recognize a sworn statement filed by a subcontractor, against a party engaged in a contract for switch construction with the university.

COLUMBUS, OHIO, March 21, 1911.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You inform me that a contract was entered into some time ago by and between the board of trustees of the Ohio State University and a certain partnership for doing the grading required for the construction of a spur track or a switch from the Hocking Valley Railroad to the coal bins of the Ohio State University; that a balance is now due the said contractor, which balance, the trustees desire to pay over and have the matter closed up; but that the trustees have recently been served with what purports to be a sworn statement of an alleged subcontractor who claims to have performed work under the said principal contractor upon the improvement referred to, and to be entitled to have a part of the balance due the principal contractor retained by the board under the provisions of sections 8324 and 8325 of the General Code. Upon the above statement of facts you have requested my opinion as to the duty of the board to withhold the payment of any portion of the balance due the principal contractor by virtue of the alleged subcontractor's lien.

This department has been of the opinion that neither of the sections of the General Code above referred to authorized the perfecting of a mechanic's or subcontractor's lien as against the state or any of its institutions. This view of the law has been followed in other states by courts of last resort under similar statutes, and in this state by the common pleas court of Greene county in the case of State ex rel. vs. Morrow, et al., decided September 8, 1910, but not reported so far as I am informed.

The reasoning of all the decisions is, that in statutes like the one at hand the state must be specifically mentioned and that where reference is made to "public improvements" and "public authorities" such phrases must be deemed to refer to the officers of subdivisions of the state, which said subdivisions are themselves capable of being sued. In other words, such statutes will not be held applicable to state institutions and to the state itself except when the language clearly refers to the state.

For this reason I advise that the board of trustees of the Ohio State University is not obliged to retain money due the principal contractor under the circumstances above set forth.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

273.

CONSTRUCTION OF LIBRARY BUILDING—BOOK STACKS—APPROPRIATIONS FOR "CONSTRUCTION" AND "EQUIPMENT"—QUESTION OF FACT—PLANS AND ESTIMATES.

The question whether the book stacks in the library are of such a nature as to form a part of the "construction of the building" so as to be estimated and paid for out of the fund for that purpose, or whether they are to be considered as and paid from the fund for "equipments" is largely a question of fact. If it is true that the foundation of such stacks must be built in the concrete floor construction, such foundation at least may be provided for from the appropriation for "construction."

At any rate, the plans and estimates may be drawn for such purposes and the work completed and the estimates paid when the respective appropriations become available.

COLUMBUS, OHIO, June 20, 1911.

DR. W. O. THOMPSON, *President Ohio State University, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of two letters from you under date of June 19th, in which you state the following facts: The trustees of the Ohio State University have in process of construction a library building. In 1910 the general assembly appropriated $125,000.00 toward the construction of this building, the total cost of which was to be $250,000.00. At its last session, in 1911, the general assembly provided for the completion and equipment of this building as follows: In an act entitled, "An act to make appropriations for the last three quarters of the fiscal year ending November 15, 1911, and the first quarter of the fiscal year ending February 15, 1912," the sum of $100,000.00 toward the completion of the building was appropriated.

In an act entitled "An act to make appropriations for the last three quarters of the fiscal year ending November 15, 1911, and the first quarter of the fiscal year ending February 15, 1912," the sums of $25,000.00 toward the completion, and the sum of $50,000.00 for the equipment of the building were appropriated.

Section 2 of the act last above described provides in part that "the moneys appropriated in the preceding section (in which the specific appropriation in question was included) shall not be in any way expended to pay liabilities or deficiencies existing prior to February 15, 1912."

The most important item of equipment of the library building is the book stacks, which are fixtures of a permanent nature so embedded in the floors of the building as to require as a practical proposition that the foundations thereof be constructed at the time the floors are laid. In the judgment of the architects, it is necessary that this be done and that the plans for the equipment of the building be now drawn and approved so that so much of the same as affects the manner of the construction of the floors of the buildings may be provided for at this time, and so that the construction of the entire building may proceed in an orderly manner.

If the plans for the stacks and othed like permanent equipment are not now drawn and approved and if so much of the construction of such permanent equipment as affects the construction of the building itself is not completed at the time the building is completed, great inconvenience and considerable expense will, in the judgment of the architects, ensue. As a matter of fact, it will be practically impossible to proceed with the completion of the building itself unless the plans for the permanent equipment are made and approved, and unless

so much of the same as affects the construction of the building itself is installed as the construction of the building proper proceeds.

You request my opinion as to whether or not, in view of the inclusion of the entire appropriation for equipment in what is popularly termed "the 1912 appropriation act" and particularly in view of the above quoted provision of section 2 thereof, the board of trustees of the university may now lawfully cause to be prepared and approved the plans for the equipment, and cause to be installed so much of the same as necessarily affects the construction of the building itself.

So far as the law in the case is concerned, it is clear in my opinion that by virtue of the above provisions of section 2 of the 1912 appropriation act, if for no other reason, the trusteen of the university are without power to incur any expense for the installation of equipment in the library building prior to February 15, 1912; in other words, as you put it in your letter, the fund for equipment purposes does not become available until that date.

The question, however, is not purely one of law; a question of fact is presented, namely, as to whether or not under all the circumstances the book stacks are in whole or in part items of equipment purely. It would seem—though I cannot, of course, express an opinion upon this point, as it is a question calling for the application of expert knowledge—that if the foundations for the stacks must be installed as a part of the floors of the building, such foundations are to be regarded for all purposes as parts of the floors and not as things separate therefrom.

While you do not so state in your letter, I am informed that the floors of this building are to be of concrete and that it is absolutely essential that they be so prepared as to receive the stacks; or, in other words, that the stack foundations shall be inserted in the floors at the time the latter are laid. If this is the case, it would follow, of course, that once they are inserted in the floors, these foundations are inseparable from the floors and become part of them.

If my assumptions are all correct, in fact, I think it would follow as a conclusion of law, that the stack foundations must be regarded not as equipment, but as an item of original construction.

If the stack foundations are to be regarded as an item of the original construction then, of course, they may be installed at the present time as the building progresses, and the money appropriated for building purposes may lawfully be applied in their installation.

The only difficult problem in connection with your question is as to whether or not the preparation of the plans for the book stacks, which is an item of expense which must be defrayed out of one or the other of the appropriations above referred to, shall be paid for out of the appropriation for the general construction or out of that for the equipment. In my judgment, it would be best to divide this work and to have detail plans made at this time for the foundations only, so that the work of drawing the complete plans and preparing the complete specifications for the superstructure of the stacks may be deferred until after February 15, 1912. In matters of this sort, however, it is not necessary to be too technical. I see no real objection to having complete plans and specifications for the book stacks drawn at this time and to paying a part only of the expenses of preparing such plans out of the appropriation for the general construction; the remainder of the expense of preparing the plans and specifications and the expense of installing the superstructure of the stacks could then with perfect propriety be paid after February 15, 1912, out of the appropriation for equipment.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

302.

ABSTRACT OF PREMISES IN CENTER TOWNSHIP, FRANKLIN COUNTY, OHIO—LISLE'S SUBDIVISION—DEFECTS AND OMISSIONS.

The state may contract to pay taxes and assessments on real estate only through the general assembly or officers duly authorized. Such covenant should be omitted therefor, in a deed to the university and the purchase price so adjusted as to compensate the vendor for assuming such burdens.

COLUMBUS, OHIO, July 21, 1911.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have examined the abstract of title of the following described premises in Center township, Franklin county, Ohio, being the south half of lot No. 12 of J. O. Lisle's subdivision as shown on plat book No. 5, page 431, recorder's office, Franklin county, Ohio; and the deed from William J. Green and wife to the state of Ohio for said premises executed July 17, 1911, and I find that the premises stand charged for taxation on the grand duplicate of Franklin county in the name of William J. Green.

Many defects are disclosed by the abstract in the early history of the title to these premises. It appears, however, by section 12 of the abstract that Robert Lisle acquired title to the premises including those under consideration in the year 1823, and that he apparently occupied the same until the year 1862, at which time he died testate, having devised the south half of the premises owned by him, and including those under consideration to his grandson Jeremiah Lisle. This person may fairly be presumed to be the Jeremiah O. Lisle whose title to the premises under consideration was divested by the court proceedings shown at section 22 and succeeding sections of the abstract and in particular by the deed of Charles A. Pearce, sheriff, to William J. Green, executed August 11, 1911, and shown at section 29 of the abstract. The identity of these two parties is, I think, sufficiently clear to obviate the necessity of an affidavit on this point.

I have carefully examined the abstract of foreclosure proceeding to which I have referred and in particular the order of subdivision and sale issued by the court in the course thereof. In my judgment the same are in all respects regular and the said sheriff's deed vested in William J. Green a good and perfect title to the premises under consideration. I find no present encumbrances to be disclosed by the abstract. William J. Green is shown by section 43 of the abstract to have become liable for the sum of $13.72 as costs upon a default judgment taken by him but this liability, in my opinion, has not become a lien upon the premises while in his possession in so far as the abstract shows the facts applicable thereto.

No examination has been made for liens arising from suits in courts of the United States.

The last half of taxes for the year 1911 and all assessments falling due and payable after December 20, 1911, are expressly assumed by the grantee; the taxes for the first half of the year 1911 and the assessment due on December 20, 1911, are to be paid by the grantor.

There being no encumbrances upon the property under consideration, and taxes and assessments being fully accounted for by the recitals of the deed, I

am of the opinion that a proper deed from William J. Green and his wife would vest in the state of Ohio a good and perfect title to the above described premises.

The deed submitted to me is regular in all respects save one, viz: The state of Ohio as the grantee of the deed is represented in the covenant clause as agreeing to pay certain taxes and assessments. The state may covenant or contract only through its general assembly or its officers thereunto duly authorized. I suggest that this portion of the covenant be stricken from the deed; that the grantor assume all the taxes for the year, and that the purchase price be adjusted so as to compensate him for such additional expenditure as he would incur thereby.

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

435.

UNIVERSITY BOILERS NOT EXEMPTED FROM INSPECTION.

The legislature has expressed its intention in section 1058-7, General Code, to subject all boilers to inspection except those expressly exempted in the act, and as the boilers of the Ohio State University are not so excepted, they are subject to the provisions of this section.

COLUMBUS, OHIO, October 23, 1911.

HON. CARL E. STEEB, *Secretary of the Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry of September 16, 1911, in which you ask as follows:

> "Our attention has been called to an act of the last legislature for the inspection of steam boilers, as contained in House Bill No. 248.
>
> "The university would be pleased to have a ruling from the attorney general as to whether or not the boilers of the Ohio State University, both in its power house and laboratories, must be inspected as outlined in the above mentioned act."

In reply to your inquiry I desire to say that House Bill No. 248, to which you refer, created the board of boiler rules and provides for the inspection of boilers. Section 1058-7 of the General Code (section 2 of the said act) sets forth and states just what boilers are required to be inspected, as follows:

> "On and after January 1, 1912, all steam boilers and their appurtenances, except boilers of railroad locomotives, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water, gas and oil, and portable boilers used for agricultural purposes, and in construction of and repairs to public roads, railroad and bridges, boilers on automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagrations, boilers carrying pressures of less than fifteen pounds per

square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressure in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. All shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

I infer that your chief purpose in making the inquiry is to determine whether or not the university is required to permit an inspection of any of its property on the theory that it has exclusive control of its own affairs. I have before me now the question of whether a municipal corporation may, through ordinance, assume for any purpose jurisdiction over property of the state—a question of supreme delicacy. However, the principles applied in the determination of that have no relation to the question you ask me.

The legislature itself is speaking directly through House Bill No. 248, and thereby authorizing the inspection of all steam boilers described in the bill. It will embrace all the steam boilers within the state, with the exceptions therein specifically named, regardless of whether such boilers be the property of the state of Ohio. As to the character of the boilers named in the exceptions, this is a question of fact the answer to which, I assume, will give you no trouble inasmuch as your engineer can give you the information.

Trusting that I have answered your inquiry, I beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio University)

277.

ABSTRACT OF PROPERTY OF G. H. BUSH, LOCATED IN ATHENS, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, June 26, 1911.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to a certain tract of land situated in the village of Athens, Athens county, Ohio, and bounded and described as follows, to-wit:

> "That portion of inlot No. 12 beginning 41 feet from the northeast corner of said lot on the east line thereof and being the south line of F. L. Preston's lot; thence south 56 feet along the east line of said inlot No. 12; thence west 36 feet and 7 inches; thence north parallel to the east line of said inlot No. 12, 56 feet to the south line of Fred L. Preston's lot; thence east 36 feet and 7 inches to the place of beginning."

I find that Georgia Hall Bush has a good and perfect title in and to said property subject to the interest therein already owned by the president and trustees of the Ohio University.

Said title is unincumbered excepting by current taxes amounting to $6.52; taxes for the year 1911 amount undetermined and possibly municipal and other special assessments and pending suits and judgments in the circuit court and districts courts of the United States for which, so far as disclosed by the abstractor's certificate no examination has been made.

The incumbrances and possible incumbrances herein before alluded to do not seriously affect the title sought to be conveyed to the Ohio University by deed of Georgia Hall Bush, and I therefore advise that the same be accepted.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

278.

ABSTRACT OF PROPERTY OF FRANK P. McVAY, LOCATED AT ATHENS, OHIO.

COLUMBUS, OHIO, June 26, 1911.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to a certain tract of land situated in the village of Athens, Athens county, Ohio, and bounded and described as follows, to-wit:

> "Beginning 104.62 feet north of the southwest cornor of inlot No. 12 in the said village of Athens, Ohio; thence north 28 feet to the north side of the south curve of the alley running east and west; thence east parallel to the south line of said inlot No. 12, 81 feet; thence south 28

feet parallel to the west line of said inlot No. 12; thence west to the place of beginning."

I find that Frank P. McVay has a good and perfect title in and to said property subject to the interest therein already owned by the president and trustees of the Ohio University.

The mortgage of Frank P. McVay and wife to Ulrica D. Pierce, trustee, is an incumbrance upon the said premises and arrangement should be made to remove the same.

With this exception said title is unincumbered excepting by current taxes amounting to $13.50; taxes for the year 1911, amount undetermined, and possible municipal and other special assessments and pending suits and judgments in the circuit and district courts of the United States for which, so far as disclosed by the abstractor's certificate, no examination has been made.

The incumbrances and possible incumbrances hereinbefore alluded to do not seriously affect the title sought to be conveyed to the Ohio University by deed of Frank P. McVay, and I therefore advise that the same be accepted.

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

279.

ABSTRACT OF PROPERTY OF STELLA McGRATH MOORE, LOCATED AT ATHENS, OHIO.

COLUMBUS, OHIO, June 26, 1911.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to a certain tract of land situated in the village of Athens, Athens county, Ohio, and bounded and described as follows, to-wit:

"That portion of inlot No. 12 beginning 70 feet north of the southwest corner of inlot No. 12 on the west line thereof; thence east parallel with the south line of said lot No. 12, 118.8 feet to the east line of said inlot; thence north on the east line of said inlot 15.4 feet; thence west parallel to the south line of said inlot No. 12, 36 feet and 7 inches; thence north parallel with the west line of said inlot No. 12, 19 feet; thence west parallel to the south line of said inlot 81 feet to the west line of said inlot; thence south 34.4 feet to the place of beginning."

I find that Stella McGrath Moore has a good and perfect title in and to said property subject to the interest therein already owned by the president and trustees of the Ohio University.

Said title is unincumbered excepting by current taxes amounting to $9.00; taxes for the year 1911, amount undetermined, and possible municipal and other special assessments and pending suits and judgments in the circuit court and district courts of the United States for which, so far as disclosed by the abstractor's certificate, no examination has been made.

The incumbrances and possible incumbrances hereinbefore alluded to do

not seriously affect the title sought to be conveyed to the Ohio University by deed of Stella McGrath Moore, and I therefore advise that the same be accepted.

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

507.

ABSTRACT OF PROPERTY LOCATED AT ATHENS, OHIO—TAXES FOR 1911 A LIEN.

COLUMBUS, OHIO, December 27, 1911.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—I have carefully examined title and abstract presented to me to one hundred and fifty-two feet off the north end of inlot 457 in the village of Athens, Athens county, Ohio. Such examination discloses that the taxes for the year 1911 amounting to $60.00 is a lien upon said premises, and that other than the above lien title to said property is clear, free and unincumbered, and upon the discharge of said lien the president and trustees of Ohio University will, by the deed set forth on page 49 of said abstract, acquire a good and sufficient title in fee simple to said premises.

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

(To the Board of Trustees of the State Normal Schools)

(To the Board of Trustees of State Normal School, Kent, Ohio)

B-317.

EXPENSES OF TREASURER'S SURETY BOND—NO COMPENSATION FOR TREASURER OF BOARD.

As there is provision to the effect that the board of trustees of a state normal school shall serve without compensation and as the treasurer is to be chosen from among the members of the board, that official may not be allowed compensation for his services.

The expense of the surety bond required of such treasurer could be allowed out of funds appropriated for the reasonable expenses incurred by the board in the performance of its official duties. No appropriation for such purpose has been made, however.

COLUMBUS, OHIO, August 8, 1911.

HON. JOHN A. MCDOWELL, *Trustee, State Normal School, Kent, Ohio, Ashland, Ohio.*

DEAR SIR:—Under date of July 12th you state:

> "I am writing for information desired by the board of trustees of the State Normal School, Kent, Ohio. We wish to know if the board has authority to pay the insurance fee for an indemnity bond for the treasurer of the board, out of the funds appropriated by the legislature. If not, is the treasurer entitled to a fee for handling the funds?"

The act under which your board of trustees was appointed is found in 101 Ohio Laws, page 320. Section 4 of said act says:

> "Each board of trustees shall organize immediately after its appointment by the election from its members of a president, a secretary and a treasurer. The treasurer, before entering upon the discharge of his duties shall give bond to the state of Ohio for the faithful performance of his duties, and the proper accounting for all moneys coming into his care. The amount of said bond shall be determined by the trustees, but shall not be for a less sum than the estimated amount which may come into his control at any one time. * * * They (the trustees) shall serve without compensation other than the reasonable and necessary expenses while engaged in the discharge of their official duties. * * *"

As the laws of Ohio permit the giving of surety company bonds in place of personal bonds, and as the members of the board of trustees are required to serve without compensation other than their reasonable and necessary expenses, and as the treasurer of such board is required to give bond, I am of the opinion that such bond may be considered as a reasonable expense of the treasurer in the discharge of his official duties, and that, therefore, it may be paid out of any funds appropriated by the legislature to cover the expenses of said board.

Section 1 of House Bill No. 112 (102 O. L. 57) passed by the recent legislature, appropriated fifty thousand ($50,000) dollars *for the erection of suitable buildings on the site selected for the normal school to be located at Kent, in the northeastern part of Ohio.* Section 1 of House Bill No. 617 (102 O. L. 391) passed by the last legislature, appropriated fifty thousand ($50,000) dollars "For

construction at Kent," and section 1 of House Bill No. 566 (102 O. L. 411), passed by the last legislature, appropriated fifty thousand ($50,000) dollars "For construction at Kent." I do not know of any appropriation that was made to cover the reasonable and necessary expenses of the trustees. There being no appropriation so made, it follows that there is no fund out of which the same can be paid.

In reference to your inquiry as to whether the treasurer is entitled to a fee for handling the funds, I desire to say that as the law enjoins upon the trustees that they serve without compensation other than their reasonable and necessary expenses, and as the law further provides that the treasurer shall be chosen from among the members of the board, I am of the opinion that the treasurer is not entitled to a fee for handling the funds.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Board of Trustees, Bowling Green Normal School)

A 326.

DUTY OF CITY TO CARE FOR SEWERS FROM NORMAL SCHOOL BUILDING UPON CHANGE OF SEWERAGE SYSTEM—CONTRACT FOR SUCH PURPOSE VOID—POWER OF BOARD TO INCUR CLERICAL EXPENSE—EXPENSES OF BOARD IN VISITING MODEL BUILDINGS—SALARY OF SUPERINTENDENT OF BUILDINGS AS EXPENSE OF CONSTRUCTION.

The sewers from buildings which are to be erected by the board of trustees of Bowling Green Normal School are to be connected with the present sewerage system of the city. Should the city change the sewerage system, it will be obliged to care for all sewers drained into the present system and a contract entered into between the city and the aforesaid board for such express purpose would be both useless and void for want of power.

The board is to be allowed all necessary expenses incurred in the exercise of their official duties and out of appropriations made for this purpose, may be allowed expenses for necessary clerical help.

Provisions for an appropriation for this purpose, however, are not to be found.

Out of any money so appropriated, the board could incur and be allowed expenses for the purpose of visiting model school buildings, to obtain information as an aid in the adoption of plans for contemplated buildings.

The salary of a superintendent of buildings during construction, may be allowed out of the appropriation made for "construction" of said buildings.

COLUMBUS, OHIO, August 18, 1911.

HON. D. C. BROWN, *Secretary, Board of Trustees, Bowling Green Normal School, Napoleon, Ohio.*

DEAR SIR:—Under date of July 15th you have submitted to me for opinion the following questions:

"(1) As to the title to the property to be turned over to your board.

"(2) As to the sewage system in the city of Bowling Green.

"(3) Whether the board of trustees can employ clerical help to aid it.

"(4) As to whether or not your board can be allowed expenses for trips for purpose of investigating model school buildings."

(1) In answer to your first question, as above stated, to-wit: In regard to the title to the lands which are to be turned over by the city of Bowling Green, being about eighty-two and five-tenths (82.5) acres, I beg to state that an abstract of title of such lands was submitted to me, and I indicated to the abstractor what deeds and other documents I would require in order to pass the title to the several lots. As yet I have not heard anything further in regard thereto.

(2) In answer to your second question in reference to the sewage system of the city of Bowling Green which you state drains into an open ditch, and

concerning which you understand there has been some complaint, you have asked me whether a contract can be entered into between your board and the city council, should a new sewage system be adopted to take care of the sewage from the buildings of the normal school to be established. As I understand it, the sewers from the buildings which you are to erect will be connected with the present sewage system of the city of Bowling Green. Such being the case, I do not see the necessity of any contract between your board and the city in reference to the disposal of the sewage of said city as the city would be compelled by law to take care of all the sewage that drains into its present sewer system upon the establishment of a new system.

Furthermore, I do not believe that it would be within the power of the council of said city to enter into any such contract, and consequently any such attempted contract would be null and void and of no force or effect.

(3) In reference to whether the board of trustees can employ clerical help to aid it, I beg to state that as the members of the board are allowed by virtue of the provisions of the act found in 101 Ohio Laws, 320, their reasonable and necessary expenses while engaged in the discharge of their official duty, I am of opinion that in the discharge of such official duties they are fully authorized to employ such clerical help as may be necessary in the performance of their official duties, said sum to be paid out of any appropriation that may have been made to cover the expenses of said board.

I do not find, however, that the legislature has appropriated any money for such purposes.

(4) As to whether or not your board can be allowed expenses for trips for purpose of investigating model school buildings preparatory to adopting plans for the erection of the buildings under the charge of your board, I beg to state that it is my opinion that as the board is directed under said 101 Ohio Laws, 320, to erect *suitable* and substantial buildings on the site selected by the commission appointed to select the site, the board, or a committee thereof, would be fully authorized as one of the necessary and reasonable expenses incurred in the discharge of their official duties, to pay for such expenses out of any moneys that may be appropriated to meet the expenses of the board.

Mr. J. E. Collins has submitted to me under date of August 2d two further questions, to-wit:

As to whether under the appropriations made by the last legislature of $150,000.00, being $50,000 appropriated, 102 Ohio Laws, page 57, "For the erection of suitable buildings on the site selected for the normal school to be located at Bowling Green," and $50,000.00 "For construction at Bowling Green" by act found in 102 Ohio Laws, 391, and the last $50,000.00 "For construction at Bowling Green" by act found in 102 Ohio Laws, page 411, can be used for the payment of salary of the president, and

Secondly, as to the salary of the superintendent of the buildings and grounds, who is also to do the local clerical work for the board.

In regard to the first question above stated I herewith hand you copy of an opinion rendered by me to the board of trustees of the Kent Normal School which I think will fully answer such question.

In regard to the second question above stated I am of opinion that the salary of the superintendent of buildings and grounds may well be considered as a part of the expenses of construction of said buildings, if I understand correctly that the superintendent of buildings is the person who is to superintend the actual building while being built, and may come out of the appropriation for the construction of such buildings. If I am wrong in this, and the superintendent of buildings and grounds refers to a person who is to superintend the

same after the construction of such buildings, I am of opinion that as the board of trustees is authorized to do any and all things necessary for the proper maintenance and continuous operation of said normal school that such superintendent may be appointed under such provision, but as there has been no appropriation made to meet the expenses of the school when completed, there would be no fund out of which said superintendent could be paid.

Trusting that the above fully covers the various questions you have submitted, I am,

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Institution for Feeble-Minded)

A 316.

PER CAPITA CHARGES TO COUNTIES LIMITED TO ACTUAL COST—DUTY TO RECEIVE PUBLIC CHARGES AND PERSONS COMMITTED BY PROBATE COURT.

The Institution for Feeble-Minded may not charge against the respective counties for inmates received therefrom, a greater sum than the actual per capita cost of such to the institution even though the county infirmary estimates a higher per capita cost.

The trustees of the institution may not receive as inmates of the custodial departments, persons over the age of fifteen whose parents are able, or whose estate is sufficient to support them except upon due commitment from a probate judge, after proper proceedings, and a certificate from medical witnesses to the effect that such person is feeble-minded and of inoffensive habits.

COLUMBUS, OHIO, August 7, 1911.

DR. E. J. EMERICK, *Superintendent Institution for Feeble-Minded Youth, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of copy of an opinion addressed to you by Hon. W. H. Miller, assistant attorney general, on August 31, 1910, and copies of communications addressed to you by Hon. F. M. Sayre, auditor of Franklin county. In connection with these papers you submit for my opinion thereon the following questions:

> "1. What is the measure of the authority of the superintendent of the Institution for Feeble-Minded Youth to charge against the several counties the cost of supporting persons over the age of fifteen years in the custodial department of the institution, in cases in which the per capita cost at the institution is less than that at the county infirmary?
>
> "2. May the trustees of the institution receive, as inmates of the custodial department, persons over the age of fifteen years whose parents may be able, or whose estate may be sufficient, to support them?"

In connection with the first question it seems that the auditor of Franklin county has been advised by the prosecuting attorney of that county that the superintendent of the institution may not charge against the county a sum greater than the actual per capita cost to the institution, of persons over fifteen years of age, in the custodial department thereof; so that, if the per capita cost of maintaining inmates at the institution is less than the per capita cost of maintaining persons at the infirmary, the latter could not be made the measure of the financial officer's draft against the county. Through the courtesy of the prosecuting attorney I have been furnished with a copy of the opinion of his department to the county auditor. Upon careful consideration I am inclined to agree with the prosecuting attorney. While section 1898, General Code, appears to authorize the trustees and superintendent in the exercise of discretion to charge any sum not exceeding the per capita cost to the county for supporting inmates in its county infirmary against such county, yet the statute is fairly susceptible of both suggested constructions. There being, then, some ambiguity in the section I am of the opinion that the same ought to be

resolved in accordance with the manifest intention of the general assembly in enacting said section 1898, which is to make the custodial department of the institution self-supporting.

With respect to your second question I beg to state that section 1901 of the General Code provides that:

> "The trustees shall receive as inmates of the custodial department, feeble-minded children, residents of this state, under the age of fifteen years, who are incapable of receiving instruction in the common schools of the state, and adults of the same class, over this age, *who are public charges.* * * *"

Section 1902, the meaning of which is not entirely clear, provides:

> "Feeble-minded adults of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as govern admission to the state hospitals for the insane."

Section 1903 provides in part as follows:

> "* * * the probate judge shall state whether or not such person has an estate of sufficient value, or a parent or parents of sufficient financial ability, to defray the expense, in whole or in part, of supporting such person in the institution, * * *"

Section 1904 provides in part that:

> "In accepting an application for the admission of a person, the trustees shall fix the amount * * * to be paid for such support, * * *"

The italicized portion of section 1901 would seem to be somewhat inconsistent with the provisions of sections 1902, 1903 and 1904 as above quoted. That is to say, by the plain provisions of section 1901 it is made the duty of the trustees to receive as inmates of the custodial department, such adults of the class named, over the age of fifteen years, *who are public charges.* If this section stood alone, there would be no doubt that the trustees would have no authority to admit as inmates of this department, persons over the age of fifteen years whose means, or the means of whose parents, were sufficient to support them. On the other hand, however, sections 1902, et seq., seem to authorize legal commitment to the institution of certain feeble-minded adults whose means are sufficient wholly or in part to pay for their support at the institution. These seemingly conflicting provisions may be reconciled it seems to me, as follows:

The trustees are empowered to accept without legal commitment persons over the age of fifteen years, incapable of receiving instruction in the common schools, who are public charges. For such admission the formalities prescribed in section 1901 are sufficient. On the other hand, the trustees must admit into the custodial department, feeble-minded adults committed by proceedings under sections 1903, et seq., General Code, if the trustees are satisfied that they are of such inoffensive habits as to make them proper subjects of classification and discipline in the institution. But the trustees neither have authority, nor may

they be compelled, to admit into the custodial department, persons over the age of fifteen years who are not public charges, and who are not sent to the institution upon formal commitment. That is to say, the trustees may not receive adults who are not public charges upon mere application papers indorsed by the probate judge. Such persons must be received, if at all, only after affidavit is filed with the probate judge, witnesses are subpoenaed, a hearing is had, and a certificate signed by two medical witnesses duly qualified, to the effect that the subject of the inquest is feeble-minded and of inoffensive habits.

I herewith return the papers submitted to me.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 392.

ADOPTION OF METHOD OF COUNTY INFIRMARIES FOR CALCULATION OF PER CAPITA COST OF INMATES—RULES FOR ADMISSION OF INMATES—"PUBLIC CHARGES"—COMMITMENT BY PROBATE COURT.

In determining the per capita cost of inmates for the purpose of certifying a charge to the county from which such inmates come, the superintendent of the institution for feeble-minded should adopt the same standards of calculation as those employed in ascertaining such per capita cost, by infirmary directors in the respective counties.

Feeble-minded persons over fifteen years of age, who are not public charges, may be admitted to the institution only upon commitment by a probate judge after proper proceedings, with a certificate of medical witnesses to the effect that the person is feeble-minded and of inoffensive habits.

A "public charge" may be admitted upon application. Persons having means of support, however, are not "public charges" within the meaning of the statute.

COLUMBUS, OHIO, September 25, 1911.

DR. E. J. EMERICK, *Superintendent Institution for Feeble-Minded, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of two letters from you under date of August 18th, requesting my opinion upon the following questions:

> "1. In ascertaining the per capita cost at the institution for feeble-minded for the purpose of determining the amount chargeable against the county for each person over the age of fifteen years in the custodial department of the institution from said county, in cases in which the per capita cost at the institution is less than that at the county infirmary, should the superintendent take into consideration the entire cost of maintenance, including the book value, so to speak, of products of the farm maintained in connection with the institution, or should said per capita cost of maintaining such inmates at the institution be determined solely by the amount shown by the report of the board of state charities, which said amount is based exclusively upon the amount heretofore drawn from the state treasury for the support of the institution?

"2. May feeble-minded persons over fifteen years of age who are not public charges be admitted on application to the institution?"

Your questions involve the application of my opinion of August 7th to you.

Answering your first question I beg to advise that in my judgment the per capita cost of maintaining inmates at the institution should be ascertained as nearly as possible by the same rule as the per capita cost of maintaining persons in the county infirmary is ascertained. I think that it is true as a general rule that most, if not all of the county infirmaries of the state, are situated upon farms which are operated in connection with them. If in a given case the products of such infirmary farms are taken into consideration at their book value in ascertaining the per capita cost of supporting inmates as reported to the board of state charities, then, for purposes of comparison, the superintendent ought, in determining the amount chargeable against such a county, to take into consideration the same elements. Inasmuch as the amount chargeable against each separate county is a distinct problem in itself, and inasmuch as under my former opinion, the superintendent is limited to charging the amount of the actual per capita cost of maintaining inmates in the institution, it is my judgment that it is incumbent upon the superintendent to apply the same rule in each case to the ascertainment of what constitutes the per capita cost of maintaining inmates in the institution as that employed by the infirmary directors or the superintendent in ascertaining the per capita cost of maintaining persons in the county infirmary. This may of course result in establishing different sums as the per capita cost of maintaining inmates in the institution for use in determining the amounts chargeable against different counties and seems on its fact to be a violation of uniform rule. In reality, however, it is the only way to secure a uniform method of operation.

Answering your second question I beg to state that in my opinion of August 7th I held that persons of the class to which you refer can only be admitted to the institution by commitment by a probate judge after witnesses are subpoenaed, the hearing is had and a certificate is signed by two medical witnesses duly qualified, to the effect that the subject of the inquisition is feeble-minded and of inoffensive habits. Persons who are public charges may be admitted upon simple application, but when a person has an estate sufficient to provide for him, or parents able to care for him, he is not a "public charge" within the meaning of the phrase as used in the statute.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Hospitals)

(To the Dayton State Hospital)

145.

DUTY OF STATE AUDITOR TO HONOR VOUCHER DRAWN FOR MEMBERSHIP IN HOLSTEIN-FRIESIAN ASSOCIATION—REGISTRATION OF CATTLE OF INSTITUTION.

When a voucher, in payment for a membership in an association entitling the member to registration of cattle belonging to the state hospital is drawn by the superintendent, and approved by the steward and board of trustees of the hospital, such voucher should be honored by the auditor and paid for from the appropriation for current expenses.

COLUMBUS, OHIO, March 3, 1911.

A. F. SHEPARD, M. D., *Superintendent Dayton State Hospital, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 30th, and in apology for the delay which has ensued in answering the same, wish to state that the pressure of business in this department has been such as to prevent prompt attention to correspondence during the past few weeks.

In your letter you state that the auditor of state, on advice of a member of this department, has refused to pay a voucher for $25.00, drawn by you and approved by the steward and board of trustees of the Dayton State Hospital, for membership in the Holstein-Friesian Association. You request my opinion first, as to whether this bill may properly be paid out of the appropriation for current expenses of the Dayton State Hospital, and further as to whether the auditor of state may lawfully refuse to honor a voucher approved by the proper officers of a state institution in a matter of this kind.

Answering your second question first, I beg to state section 243 of the General Code provides that:

> "The auditor of state shall examine each claim presented for payment from the state treasury, and, if he finds it *legally due* and that there is money in the treasury duly appropriated to pay it, he shall issue * * * a warrant on the treasurer of state for the amount found due * * *. He shall draw no warrant on the treasurer of state for any claim *unless he finds it legal* * * *."

The partial appropriation bill, passed by the last session of the general assembly, 101 O. L., 18, contains the following item:

> "DAYTON STATE HOSPITAL.
>
> "Current expenses, receipts from clothing, miscellaneous receipts and ..... $40,000.00"

Section 3 of the bill, however, provides in part that:

> "No expenses of officers of any benevolent * * * institution for attending any state, interstate or national association or conference shall be paid from the appropriations of such benevolent, * * *

institution, unless the authority to attend such association or conference is granted at a meeting of the board of trustees or managers of such institution, upon a written resolution, adopted by the board, which shall state the purpose, time and place of such meeting of such association or conference, and the reason the attendance at the same is deemed necessary and advisable, and said resolution, if adopted, shall then be submitted to the governor for his written approval, and, if he does not approve the same, the expenses for attending such association or conference shall not be paid from the appropriations of such benevolent * * * institution, * * * such institutions * * * shall be subject to inspection by the auditor of state; and it shall be the duty of the auditor of state to see that these provisions are complied with, * * *"

It is clear from the above quoted provisions of section 3 that the authority generally imposed upon the auditor of state by section 243, General Code, above quoted, is amplified and made specifically applicable to the Dayton State Hospital, by the provisions of the appropriation law.

With respect to your first question, I beg to state that I am informed that when the matter was first presented to this office, the voucher, payment of which was refused, seemed, on its face, to indicate that the association mentioned therein was an association such as those enumerated in section 3 of the act above quoted and, the voucher not being accompanied by a certificate of the approval of the governor, it was thought best to refuse payment of the same. Your letter, however, while not on its face disclosing the exact nature of the association, has lead me to cause inquiry to be made as a result of which I am satisfied that membership in the Holstein-Friesian Association is not governed by the provisions of section 3 of the appropriation law above quoted. It seems that, while the institution is styled an association, the object of the expenditure is really to obtain registration for a herd of cattle owned by the institution, and membership in the association does not imply any obligation to attend conferences. The registration of the cattle owned by the institution is a matter of policy, rather than of law, and is not prohibited by any provision of the appropriation law above cited.

I am, therefore, of the opinion, upon full consideration of the question, and upon the information that I have secured, that the auditor of state may lawfully honor the voucher submitted to him by you, and above referred to and described.

I am transmitting a copy of this letter to the auditor of state for his guidance.

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

(To the Columbus State Hospital)

189.

CONTRACT FOR COAL AT SLIDING PRICE—LIABILITY OF STATE HOSPITAL FOR ADVANCED PRICE.

Where a coal company enters into a contract with a state hospital which contract stipulates for a sliding scale price based upon the rise and decline of market price, and the company after a rise in coal, neglects to place the advanced price upon bills rendered and later sends bill for the difference between the bill presented and the advanced price; held that the equity was with the company and that the hospital should allow the difference.

COLUMBUS, OHIO, March 22, 1911.

HON. W. P. MILLER, *Financial Officer, Columbus State Hospital, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the contract entered into by you on behalf of the Columbus State Hospital on February 1, 1910, with the Columbus & Hocking Coal & Iron Company, together with a letter addressed to Mr. A. L. Thurman, receiver of said the Columbus & Hocking Coal & Iron Company by the general manager of said company, containing what I assume to be a correct statement of facts as follows:

> "We entered into a contract with the Columbus State Hospital, a copy of which is attached hereto, on February 1, 1910, to furnish them with their requirements of coal for the ensuing year, on a basis of $1.75 per ton f. o. b. cars, Columbus, Ohio, for steam lump coal.
>
> "In this contract appears the following clause: 'All the prices named in this contract are based on the present pick mining rate on lump coal of ninety cents per ton, shall advance, or decline, as said mining rate may advance or decline during the life of this contract.'
>
> "On April 1, 1910, a contract was entered into between the United Mine Workers and the coal operators of Ohio, wherein the price of pick mined coal advanced from ninety cents per ton to ninety-five cents per ton, and of course this being true, we were, and are entitled to an increase on all coal sold under the contract after April 1, 1910, of five cents per ton.
>
> "It appears that our accounting department did not exercise our right to bill at the advanced price of $1.80 per ton f. o. b. cars, Columbus, Ohio, until February 1, 1911, when invoice covering the advance was rendered for all coal shipped from April 1, 1910, up to and including January 31, 1911, as follows:
>
> "12,891.25 tons at $0.05 per ton, equals $644.56. On February 28, 1911, invoice was rendered for shipments during the month of February, 1911, as follows:
>
> "914.70 tons, at $1.80 per ton, $1,646.46. The latter invoice being billed at the advanced price."

Without expressing any opinion as to the right or advisability of your entering into any contract calling for a sliding scale of prices, and assuming it it to be a fact that the price of pick mining was advanced on April 1, 1910, from 90 cents to 95 cents, as stated, and further assuming that all other conditions have been met by said Columbus & Hocking Coal & Iron Company, and

that the amount of coal furnished is correctly stated, it is my opinion that the equity of the case is with the said the Columbus & Hocking Coal & Iron Company. The mere fact that said company did not bill the coal to you at the advanced price at the time the price of pick mining was advanced would not relieve your institution from the obligation to pay such advanced price under the contract.

I would, therefore, advise that the difference in price between $1.75 and $1.80 on the coal shipped during the life of the contract, after the increased price for pick mining went into effect, should be paid.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

C 222.

RECORDS OF STATE HOSPITAL OPEN TO PUBLIC INSPECTION—NO DUTY TO SUPPLY COPIES.

Records of state hospital are public and may be inspected by one having a pecuniary interest therein or desiring to promote justice thereby.

A person is not entitled to a copy but may himself make copies of such records.

COLUMBUS, OHIO, April 17, 1911.

DR. C. F. GILLIAM, *Superintendent Columbus State Hospital, Columbus, Ohio.*

DEAR SIR:—I am informed by Hon. H. J. Booth, attorney at law of this city, who represents the defendant in two cases which were brought against one of his clients because of injuries received by one John Kelly, who was a patient in your institution, that you desire my opinion as to your right to allow him to inspect the records in our office, as such superintendent, which relate to said John Kelly and also as to your right to permit him to make copies of them.

In my view of the law, the papers relating to patients in your institution are public records, because of the fact that the state hospital is a public institution, maintained at public expense. Such records, being public records, are open for inspection to any one who shows that he has a pecuniary interest in such records, especially when it appears that it will be in furtherance of justice to permit such inspection. The right of inspection includes the right to make copies of such records. I do not think, however, that it is your duty to make certified copies of such records, as there is no provision of law that I can find which authorizes you so to do.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Sanatorium)

82.

POWER OF INSTITUTION TO EMPLOY PATIENTS AND EX-PATIENTS—ALLOWANCE FOR BOARD, LAUNDRY, ETC.

Patients at the sanatorium may be employed at indoor work as their condition permits and be allowed for board, room and laundry as compensation therefor.

Ex-patients may be employed so long as they are properly distributed among the counties in accordance with section 1823, *General Code.*

January 30, 1911.

DR. C. B. CONWELL, *Superintendent Ohio State Sanatorium, Mt. Vernon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 11th, in which you request my opinion as to whether you may lawfully employ a patient of your institution, whose condition is such as to permit such employment, as a stenographer and allow for compensation board, room and laundry only, and as to whether you may employ ex-patients at any time after their discharge in such capacity as their capabilities may admit, compensating them at the regular rate allowed for such services as fixed by the board of trustees under authority of law.

With respect to your first question while sections 2069 of the General Code authorizes the superintendent, with the approval of the trustees, "to provide suitable outdoor employment for patients and allow such compensation for work done as they deem proper, not to exceed $5.00 per week in any case, to be deducted from the weekly charge for residence at the sanatorium," this provision does not of itself prohibit the employment of a patient at indoor work when his condition in the judgment of the superintendent and trustees permit such work to be done by such patient to the extent to which it is allotted to him. The power to allow board, room and laundry in payment of such services is sufficiently conferred in my opinion by the general clause under section 2066. Upon the nomination of the superintendent the trustees may appoint employes for the proper conduct of the sanatorium and fix the compensation of each not exceeding the maximum prescribed by law.

In respect to the second question I beg to state that employes may be selected from ex-patients without violating any provision of law so long as they are properly distributed among the counties of the state as required by section 1823 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

E 394.

COUNTY COMMISSIONERS—EXPENSE OF TUBERCULAR PATIENTS.

The county commissioners have been granted no statutory authority to provide for expenses of tubercular patients from their county at the Ohio State Sanatorium.

COLUMBUS, OHIO, September 26, 1911.

HON. C. B. CONWELL, *Superintendent Ohio State Sanatorium, Mt. Vernon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your request for an opinion upon the following question:

> "Will you please name the reference and quote the authority which grants the county commissioners privilege to provide for the cost at the state sanatorium of tubercular patients from their respective counties?"

After an exhaustive search of the statutes relating to the powers and duties of county commissioners with respect to tuberculosis hospitals I am unable to find any authority which grants the county commissioners the power to provide for the expenses of tubercular patients from their respective counties at the Ohio State Sanatorium.

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

(To the Boys' Industrial School)

F 222.

WITNESS FEES FOR INMATES—FEES FOR GUARDS CONDUCTING INMATES TO TRIAL—CIVIL AND CRIMINAL CASES—OUTSIDE COUNTIES.

An officer of the Boys' Industrial School who is ordered to conduct an inmate to appear as a witness in a civil case in the county in which said institution is located, cannot receive any fees for such services for the reason that there are no statutory provisions for the same. The contrary is true, however, with regard to such services in criminal cases.

The inmate may receive ordinary witness fees for testifying in such cases. When the case is tried outside of the county of the institution, however, the testimony of inmates must be taken by deposition.

April 14, 1911.

MAJOR F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication which was received some time ago, and wish to explain that the delay in answering your inquiry has been due to the large volume of inquiries which this department has received for consideration, and although I have made an effort to do so, I have not been able as yet to get caught up with the work in this department.

In your communication you submit the following inquiry for our consideration:

> "Please advise what fees are due an officer and inmate of this institution when they are ordered to appear in a civil court, the inmate appearing as a witness, the officer accompanying him, necessitating travel and other expenses."

While your inquiry is in respect to fees due an officer and inmate of your institution when they are ordered to appear in a civil court, I am, nevertheless, going to cite the statutes which bear upon the question of fees for the officer and inmate of the penitentiary, workhouse or prison when such inmate is required to testify in criminal matters.

Section 13665 of the General Code provides as follows:

> "When it is necessary to procure the testimony of a person imprisoned in the penitentiary, a workhouse or prison, on the trial of an issue upon an indictment, or upon a hearing before a grand jury, the court of a judge in vacation may order a subpoena to be issued, directed to the warden of such penitentiary or superintendent or keeper of such workhouse or prison, commanding him to bring the person named therein before the court."

Section 13666 of the General Code provides:

> "The warden, superintendent or keeper, upon receiving such subpoena, shall take such witness, or cause him to be taken before such

court, at the time and place named in such subpoena, and hold him until he is discharged by the court. When so discharged, he shall be returned, in the custody of such officer, to the place of imprisonment from which he was taken and the officer may command such assistance as he deems proper for the transportation of such witness."

Section 13667 of the General Code provides:

"When such witness is in attendance upon a court, he may be placed in the jail of the county. The expenses of the officer in transporting him to and from such court, including compensation for the guard or attendant of such prisoner not exceeding the per diem salary of such guard for the time he is kept from the penitentiary, shall be allowed by the court and taxed and paid as other costs against the state."

The above sections were originally enacted in 1873 and appear in 70 O. L., 78, and said sections were amended in 1898, 93 O. L., 224, so as to cause section 13667 of the General Code (section 7292 Bates' Revised Statutes) to read as it at present stands on the statute books.

Prior to the date of the last mentioned amendment, to-wit: on March 25, 1885, this department rendered the following opinion:

"COLUMBUS, OHIO, March 25, 1885.

"B. J. MCKINNEY, ESQ., *Chief Clerk of Auditor of State.*

"DEAR SIR:—In reply to your favor of the 24th inst., I have to say:

"1. In my opinion, a convict in the penitentiary who is brought before a court to testify in a criminal case, in pursuance of sections 7290 and 7291, Revised Statutes, is not entitled to any fees or mileage, for the reason that the special statutes upon this subject make no provision for such allowance.

"2. Neither is the officer who transports such prisoner from the penitentiary to the court, entitled to receive any per diem or other compensation for his services in that behalf. Section 7292 provides merely that the expenses of the officer in transporting the prisoner to and from the court shall be allowed by the court and taxed and paid as other costs against the state."

I concur in that opinion in respect to said section as it read prior to the last amendment thereof. It seemed to be the intent of the legislature to cure the defect existing in the original enactment so as to provide, in addition to the expenses of the officer in transporting such inmate to and from court, for compensation for such guard or attendant, but not to exceed the per diem salary of such guard for the time he is kept from the penitentiary, workhouse or prison.

The above sections apply only in criminal matters, and prior to the last amendment of said sections the officer was not legally entitled to receive any fees or mileage for his service in taking a convict before a court to testify in criminal matters.

Turning to the sections which apply in civil matters, section 11517, General Code, provides as follows:

"By order of a court of record, a person confined in prison in this

state, may be required to be produced for oral examination as a witness in any case or matter in the county where he is imprisoned; but in all other cases his examination must be by deposition."

Where an inmate of a prison or benevolent institution is ordered to appear in court in a civil matter under charge of an officer, and there is no statutory provision for the payment of any fees to the officer, by analogy of reasoning, if such officer was not entitled to fees in a criminal matter prior to the last amendment of said section 13667 of the General Code as cited above, and there being likewise no statutory provisions for fees of such officer in respect to taking such inmate before a civil court, it is my conclusion that an officer of your institution is not entitled to fees where such inmate appears in a civil court under charge of the proper officer.

As to the other branch of your inquiry, to-wit: What fees are due an inmate of your institution when ordered to appear in a civil court, I am of the opinion that by virtue of section 11517, cited above, such inmate cannot be taken into a court outside of the county where he is imprisoned, but that in such event his examination must be by deposition as therein provided.

Section 3012 of the General Code provides:

"Each witness in civil causes shall receive the following fees: For each day's allowance at a court of record, to be paid on demand by the party at whose instance he is summoned, and taxed in the bill of costs, one dollar, and five cents for each mile from his place of residence to the place of holding such court, and return:"

I therefore take it and am of the opinion that said section clearly means that whenever such inmate does appear in any civil cause in the county wherein he is confined he shall receive therefor the fees as provided in said section which clearly says:

"Each witness in civil causes shall receive the following fees. etc.,"

I trust that this answers your inquiry.

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

(To the Ohio State Reformatory)

75.

REPORTS TO GOVERNOR BY OHIO STATE REFORMATORY—REPEALS BY IMPLICATION—REPORTS AS CORRECTIONAL INSTITUTION.

Section 1871, General Code, provides for reports to the governor by correctional institutions and since its amendment in 1908 includes reports from the Ohio State Reformatory. Section 2148, General Code, expressly requires a report to the governor from the Ohio State Reformatory.

Repeals by implication are not favored and as the reports required by these statutes are not identical, the institution will be obliged to comply with the provisions of both statutes.

COLUMBUS, OHIO, January 26, 1911.

MR. C. H. HUSTON, *Secretary, Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your letter of December 19th, addressed to this department was mislaid for a time. I regret that this misfortune has occasioned some delay in replying thereto.

You request my opinion as to whether the board of managers of the Ohio State Reformatory shall make biennial reports to the governor, as for a correctional institution under section 1871, or make annual reports to the governor as for a "penal institution" under section 2148, General Code.

Section 1871, General Code, provides, in part, as follows:

> "After the close of the fiscal year next preceding the regular session of the general assembly, the board of trustees or managers of each benevolent and correctional institution shall make a report to the governor. * * *"

Section 2148 of the General Code is in the chapter relating to the Ohio State Reformatory; it provides that

> "The board (of managers of the Ohio State Reformatory) shall make to the governor an annual report of its transactions * * *."

It would seem that it is not intended that the managers of any one institution shall make both of these classes of reports. Inasmuch as section 2148, above quoted, in turn, applies to the board of managers of the Ohio State Reformatory, the question would seem to be easily answered. You point out, however, that it has been the understanding of the board of managers of the reformatory that that institution should not properly be classed as a "penal institution" but that its object, being reformatory, it is rather to be considered a correctional institution within the meaning of section 1871 quoted.

While this view of the character and scope of the institution known as the Ohio State Reformatory is undoubtedly correct as evidenced by a consideration of section 2136, General Code, which provides that

> "The discipline to be observed in the institution shall be reformatory

> and the board of managers shall employ such means for reformation or improvement as may be expedient."

yet, for the purpose at hand, this fact is not conclusive.

Section 1871, General Code, was originally section 645, Revised Statutes. This section was amended as pointed out by you by the act of May 9, 1908, 99 O. L., 324. Such amendment contains some evidence of a legislative intent to enlarge the scope of the section and to make it applicable to institutions to which it was formerly inapplicable. Originally, section 645, Revised Statutes, was included in the chapter relating to trustees of benevolent institutions; the first section of that chapter was section 634, Revised Statutes, which provided that:

> "Both the control and management of the state benevolent institutions, including the Boys' Industrial School and the Girls' Industrial Home, are under a board of five trustees for each institution, etc. * * *."

Original section 645 referred then to the boards of trustees of the benevolent institutions of the state, and of two institutions which might properly be deemed correctional. However, all the institutions, to which the original section 645 related, were managed by boards of trustees, not by *boards of managers*. The amendment of 1908 then in addition to providing for biennial instead of annual reports, further amended original section 645 by inserting the words "board of managers." As you point out this phrase in connection with the phrase "correctional institution," it could designate no institution in the state excepting the Ohio State Reformatory. It was therefore proper for the board of managers of the reformatory to make biennial reports required by the present section 1871 of the General Code from and after its amendment in 1908.

It does not, by any means, follow, however, from the foregoing that the board of managers of the Ohio State Reformatory are no longer required to make an annual report under present section 2148, General Code. This section was originally section 2 of the act of April 24, 1891, entitled "An act to change the name of the intermediate penitentiary to that of the Ohio State Reformatory, and to organize and govern the same." Such section 2 provided in part that:

> "The managers shall * * * make an annual report thereof (referring to the financial transactions of the institution) to the governor on or before the 15th day of November of each year; and in said annual report the board shall give a classification of all the prisoners, show their ages, term of sentence, offense committed, etc. * * *"

This section has never been repealed unless it was repealed by implication by the above cited amendment of section 645, Revised Statutes. In my opinion, such a repeal by implication was not effected. It is well settled that repeals by implication are not favored and will not be unheld unless a later act is so irreconcilably inconsistent with an earlier one that both cannot stand. This is not the case with respect to the two acts now under consideration. As you suggest, it is not at all clear that the two reports are the same and the assumption herein above made, that it would not seem reasonable that one institution should be required to make both reports must be abandoned in face of the explicit provisions of the two statutes. Without burdening this opinion with a full quotation of the lengthy section 1871, suffice it to say that it contemplates

a full and detailed report of the fiscal transactions of the board required to make it, and to that extent it is similar to the report required to be made under present section 2148 of the General Code.

Section 2148, however, requires in addition to such items:

> "A classification of all prisoners, their acts, terms of sentences, offenses committed, causes of crime, habits, education, industrial training and pursuits and such other information and recommendations as the board deems proper for the information of the governor and the general assembly."

It is apparent, therefore, that the two reports are far from being the same.

In view of the fact that the General Code, as adopted by the general assembly, applies the term "correctional institutions" only to the Boys' Industrial School and the Girls' Industrial Home, only there is some foundation for holding that the board of managers of the Ohio State Reformatory are not within the contemplation of section 1871 above. Be that as it may, however, it is clear that such boards of managers must comply with sections 2148 above quoted. It is, therefore, my opinion, that in order to comply with what seems to have been the intent of section 1871 in its original form, the board of managers of the Ohio State Reformatory should make such biennial reports as are therein provided for; and that they must make an annual report to the governor as provided in section 2148.

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

(To the Commissions)

(To the Columbus Centennial Commission)

280.

APPROPRIATION ACT — LEGISLATIVE INTENT TO RECOGNIZE EXISTENCE AND AUTHORITY OF COMMISSON.

The act appropriating the sum of $25,000 *for the "Columbus Centennial Commission" expresses the legislative intent to recognize the legal existence of that committee and its authority to draw warrants to be issued by the auditor on the state treasurer.*

COLUMBUS, OHIO, June 27, 1911.

MR. L. M. BODA, *Secretary Columbus Centennial Commission, Southern Theater, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my opinion the following question:

> "Is the Columbus centennial commission, appointed in pursuance to a joint resolution of the general assembly passed March 9, 1909, a legal commission now in existence, and as such authorized to spend the amount of $25,000.00 appropriated by the seventy-ninth general assembly (Senate Bill No. 107) for the purpose of carrying on said celebration referred to in the said act?"

and in reply to your inquiry I desire to say that in order to answer the question submitted by you it is necessary to take the joint resolution and the act appropriating the said amount of $25,000 in conjunction and construe them together.

The joint resolution conferring the power to appoint your commission specifically set forth therein the duties of the commission, viz: To investigate the question of a befitting celebration for this occasion and report its findings to the governor who, in turn, would present them to the next regular meeting of the general assembly with such recommendations as in his opinion seemed best.

The act of the seventy-ninth general assembly appropriating the sum of $25,000.00 (Senate Bill No. 107) provided in section 1 that, out of money in the treasury, not otherwise appropriated, the sum of $25,000.00 for the use of *"The Columbus Centennial Commission,"* appointed under the joint resolution adopted March 9, 1909, in preparing and carrying out plans for the celebration, in the year 1912, in the city of Columbus, of the one hundredth anniversary of the permanent location of the seat of government of the state. And section 2 provided that "said sum hereby appropriated shall be paid out of the treasury upon the warrant of the auditor of state, on the treasurer, on proper vouchers signed by the president and secretary of the Columbus centennial commission, which vouchers shall contain itemized statements of accounts, properly verified."

The legislature, by the enactment of the law above referred to, recognizes your commission as a legal existing centennial commission, and the joint resolution authorizing the appointment of your board did not contain any clause specifying the life of your commission, but only the duties thereof, and in view of the said fact, and of the rule that in order to give proper construction to any

resolution or act of the general assembly—it is the *intention of the legislature* that is to be taken into consideration—I am of the legal opinion that your commission is a legally appointed body and that the appropriation was legally made, and the act itself so specific and clear as to the intent of the legislature to provide said sum to be used by your commission for the purposes specified, that there can be no doubt of your legal existence as a commission and authority, through your president and secretary, to demand that warrants be issued by the auditor of state on the state treasurer as in said act specified.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio River Sanitary Commission)

B 356.

ACTUAL EXPENSES OF SECRETARY—FAILURE TO MAKE APPROPRIATION.

The resolution providing for the Ohio river sanitary commission provides that actual and necessary expenses shall be paid.

As there has been no appropriation made, however, the commission may not allow the secretary his expenses except in anticipation of a future appropriation by the legislature for the purpose.

COLUMBUS, OHIO, September 12, 1911.

HON. EDWARD E. CORN, *President Ohio River Sanitary Commission, Ironton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 2d in which you ask whether the Ohio river sanitary commission may appoint a secretary who is not one of the members of the commission and pay his expenses—not his compensation—out of the funds available for the use of the board.

The Ohio river sanitary commission was created by joint resolution, 99 O. L., 637. This resolution provides that the "actual and necessary expenses" of the *persons* constituting the commission shall be paid. It is binding upon the conscience of the legislature only as no appropriation is contained in the joint resolution, nor could an appropriation be made in this manner. The authority, if any, of the Ohio river sanitary commission to expend money would be found in an act of the general assembly appropriating money for the use of the commission. I do not find that any money has been appropriated for this purpose. It seems to me that as a strict matter of law the commission has no right to spend any money at all, or rather to bind the state by any expenditure it may make. It would be proper, however, for the commission to anticipate favorable action by the legislature and for the members and secretary of the commission personally to incur any expense which they might see fit to incur in connection with their work, subject, so to speak, to the approval of the general assembly.

If I have overlooked an appropriation act I should be glad to have my attention called to it.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Perry's Victory Centennial Commission)

429.

APROPRIATIONS FOR "SITE" AND FOR "EXPENSES" AND THEIR APPLICATION—ASSISTANCE TO INTERSTATE BOARD.

The legislature made a specific appropriation of $5,000 *for the purchase of a site for the Perry centennial celebration and another appropriation of* $25,000 *for the "expenses" of the commission. The actual expense of condemnation proceedings and general costs in procuring the site was* $15,227, *which through donations from the board of trade was reduced to* $6,402. *Held:*

First—That the term "expenses" was broad enough to permit of paying from the appropriation for that purpose, the excess costs of procuring the site over and above the amount specifically appropriated for the purpose of procuring a site.

Second—The commission could not draw, for the expense of procuring a site, from the appropriation for "expenses" however, until the full amount of the appropriation for the "site" has been exhausted.

Third—The commission may not from the appropriation for "expenses" contribute to the funds in the hands of the treasurer of the interstate board for the reason that such action would effect a diversion from the purposes of the appropriation.

COLUMBUS, OHIO, October 18, 1911.

HON. WEBSTER P. HUNTINGTON, *Secretary Perry's Victory Centennial Commission*
331 *Federal Building, Cleveland, Ohio.*

DEAR SIR:—I have your letter of September 18, 1911, requesting my opinion upon the following propositions:

"Proposition No. 1. The awards and costs in our condemnation proceedings at Port Clinton aggregated $15,227. The commissioners had agreed to pay for the property before the suit was brought the sum of $8,825. At our late meeting, the board of trade of Put-in-Bay generously tendered the cash representing the difference between the awards and the amount which we had offered, this difference being $6,402, which is ready to be paid over.

"The commissioners wish to pay their share of $8,825 from our various appropriations as follows: From the appropriation of $5,000 by the seventy-ninth general assembly exclusively for a site, $4,500. From the appropriation of the seventy-ninth general assembly of $25,000, in the general appropriation bill, the sum of $4,325, under your ruling as given in the Hayes matter that this appropriation is for the general expenses of the centennial celebration and memorial. We wish to draw only $4,500 from the site fund of $5,000 at the present time, because we assume that by leaving a balance in this fund our power to condemn property will continue under the act.

"Proposition No. 2. At our recent annual meeting, at the suggestion of the finance committee, the commissioners representing Ohio, Pennsylvania and Wisconsin voted to withdraw $5,000 each from their several appropriations and place the total of $15,000 under bond in the hands of our treasurer general, Hon. A. E. Sisson, who is the auditor general of Pennsylvania, as a general expense fund. This measure is

adopted in order that the general expenses may be equally divided between the states having already made appropriations, so that the state of Ohio will no longer continue to advance all of the funds for promotion and current expenses. Other states will join in making up the same general fund as their appropriations are made, and such part of the fund of $250,000 already appropriated by congress, as may be necessary, will be added when the certificate of its availability is made to the secretary of the treasury of the United States by the United States commissioners.

"We therefore wish to make three vouchers at the present time as follows:

"First: A voucher of $4,500 from the site fund of $5,000, appropriated by the seventy-ninth general assembly, payable to Lawrence C. Rupp, probate judge of Ottawa county, Ohio.

"Second: A voucher of $4,325, from the appropriation of $25,000 by the same general assembly, under the terms of the item 'To be disbursed by the Ohio Commissioners of the Perry's Victory Centennial,' payable to Lawrence C. Rupp, probate judge of Ottawa county, Ohio.

"Third: A voucher of $5,000 from the appropriation of $25,000, last named, payable to, or to be endorsed over to, A. E. Sisson, treasurer general of the interstate board of the Perry's victory centennial commissioners.

"I hope you will advise me at your earliest convenience whether these funds may be drawn upon as aforesaid and that you will notify the auditor of state of your decision at the same time."

Senate Bill No. 77, passed May 2, 1911, 102 Ohio Laws, 103, is entitled "An act to provide for the purchase of a site for the Perry's victory centennial celebration at Put-in-Bay, Ohio."

Section 1 of this act provides as follows:

"That there be and is hereby appropriated out of any moneys in the state treasury, to the credit of the general revenue fund, not otherwise appropriated, the sum of five thousand ($5,000) dollars, for the purchase of a site for the Perry's victory centennial celebration, to be held at Put-in-Bay, Ohio, in the year 1913, to be disbursed by the Ohio commission of the Perry's victory centennial."

House Bill No. 566, being the act to make general appropriations, passed May 31, 1911, 102 Ohio Laws, 373, at page 391, makes the following appropriation for the Perry's victory centennial commission of Ohio:

"Expenses Perry memorial and centennial celebration at Put-in-Bay, to be disbursed by Perry's victory centennial commission of Ohio ..... $25,000.00."

The answers to all of your questions depend upon the construction to be given the acts making the above appropriations. I note in proposition one that while the legislature appropriated only five thousand ($5,000) dollars to be used in purchasing a site for the Perry's victory centennial celebration, the amount necessary to be expended to obtain the site selected by your commission, including the costs of condemnation, amounts to $15,227.

The first question that arises is whether the specific appropriation for the purchase of the site being insufficient, the additional amount, or any part of the same, required to purchase said site, can be paid out of the general appropriation of $25,000.00.

In making this second appropriation the legislature limited it to "Expenses Perry memorial and centennial celebration at Put-in-Bay."

Section 2 of this act provides:

> "That the moneys appropriated in the preceding section shall be available to pay liabilities incurred on and after February 16, 1911, but shall not in any way be expended to pay liabilities or deficiencies existing prior to February 16, 1911, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated, as aforesaid."

The specific appropriation in this act being for expenses it becomes necessary to decide whether the amount necessary to be expended over and above the five thousand ($5,000) dollars appropriated by Senate Bill No. 77 can be classed as an expense of "the Perry memorial and centennial celebration at Put-in-Bay."

> "The word 'expense' may be defined as the disbursement of money."
>
> Words and Phrases, vol 3, p. 2590.

> "The word 'expense' means expenditure, outlay, disbursement of money."
>
> American and English Enc. of Law.

Therefore, as this term is so broad and in order to erect a memorial on Put-in-Bay island, it is necessary to have a site upon which to erect the same, were it not for the specific appropriation made by the act found on page 103 in 102 Ohio Laws, undoubtedly the costs of said site could be included under the head of "expenses" of this memorial. It has been suggested, however, that the legislature, having made a specific appropriation, to-wit: Five thousand dollars, said five thousand dollars is the only fund which can be used for said purpose, and the second appropriation of twenty-five thousand dollars for expenses cannot be drawn upon for any part of the sum required to be paid for the site. In my opinion this does not necessarily follow. The word "expenses" as used by the legislature being so broad my opinion is that as it is necessary to pay for said site an additional sum in excess of said $5,000, said excess may properly be paid from the appropriation of $25,000.

My conclusion as to this is made the stronger because the amount which your commission is to pay for said site is the compensation awarded by a jury in an action brought to appropriate said property, and the act providing an appropriation of five thousand dollars to be used in paying for such site gave your commission power and provided the manner in which you should proceed to appropriate the real estate to be chosen by your board on Put-in-Bay island as a site for the Perry's victory memorial. It is so clear that all of the expenses incurred by way of costs in this appropriation can be paid out of the fund appropriated for expenses that I deem it unnecessary to further refer to this branch.

Further referring to your statement in your first proposition that you wish

to pay "From the appropriation of $5,000 by the seventy-ninth general assembly exclusively for a site. $4,500," my opinion is that as the amount assessed by the jury as compensation for the real estate appropriated by you as the site for the memorial amounts to more than $5,000, that you must use the entire $5,000 appropriated by the legislature for this purpose, before you can draw from the appropriation made for expenses. In other words, the appropriation made for expenses does not become available for the expenses of obtaining a site, until the specific appropriation made for that purpose is exhausted.

As to your second proposition my opinion is that there is no authority for your commission to withdraw five thousand dollars from the appropriation made for expenses of the memorial and centennial, now in the state treasury, and place the same in the hands of the treasurer of the interstate board as a part of the general expense fund as outlined in your letter. This would be using and paying out part of said appropriation not for the purpose specified in said act, but for another purpose, namely, withdrawing from the treasury and using to constitute part of another fund which would not be under the control and disbursed by the Perry's victory centennial commission of Ohio. This cannot be done.

My opinion, therefore, as to the issuance of the three vouchers enumerated by you, is as follows:

1. This voucher should be for the sum of five thousand ($5,000.00) dollars instead of the sum of four thousand and five hundred ($4,500.00) dollars mentioned in your letter.

2. This voucher should be for the difference between five thousand ($5,000.00) dollars and the amount which your commission is to pay on account of the awards made by the jury in the condemnation cases.

Except as to the amount your specifications as to these vouchers are correct.

3. The vouchers here referred to cannot be issued.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Judicial Officers)

(To the Probate Judge)

A 215.

JUVENILE DELINQUENTS--EXPENSES FOR TRANSPORTATION TO RELATIVES OUT OF STATE NOT ALLOWED.

The statutes do not authorize the payment from the county treasury of the expenses of transporting juvenile delinquents to relatives outside of the state.

Section 1682 *authorizing expenses in such cases is confined to the transportation of such children to institutions or citizens within this state.*

COLUMBUS, OHIO, April 8, 1911.

HON. S. L. BLACK, *Probate Judge, Columbus, Ohio.*

MY DEAR JUDGE:—I acknowledge receipt of your letter received sometime ago wherein you state:

> "We have in the custody of the juvenile court of this county two young girls, aged fifteen and eight years respectively. Their father is dead. Their mother is a white woman, but claims to have married a colored man of the lowest type. The children were found in an alley in this city living with their mother and this colored man in a very low-down colored boarding house. We have taken the children away from their mother.
>
> "We are now in correspondence with relatives of the children in Paintsville, Ky. The relatives are anxious to have the children, and desire them sent back. We would like very much to send them back, as we believe after a careful investigation it would be the best thing for the interests of the children.
>
> "Query: Can we under the provisions of the juvenile court law of Ohio, pay the expenses of these children back to their relatives in Kentucky?"

I am thankful to you for calling my attention to the sections of the Code applicable and have given them due consideration.

Section 1653 of the General Code provides:

> "When a minor under the age of seventeen years is found to be dependent or neglected, 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 willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been accredited as hereinafter provided. When the health or condition of the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge."

I am of opinion that the provisions of the section just quoted are exclusive as to whom the care of such child may be committed, to-wit: The institutions named therein, or "some reputable citizen of good moral character." Inasmuch as section 1643 of the General Code provides that such child coming into the custody of your court continue for all necessary purposes of discipline and protection a ward of the court until he or she attains the age of twenty-one years.

I am constrained to believe that the institutions spoken of in section 1653 as also the "reputable citizen" to whom the commitment can be made, must have their domicile within the confines of this state.

Section 1682 of the General Code provides:

> "Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

The provisions for the payment of costs of transportation for such children seems to be limited to the "*places*" to which they have been committed. Since section 1683 states "This chapter shall be liberally construed * * *" I am inclined to the view that the costs of transportation of such children to the different institutions to which they may be committed, or to the residence of the reputable citizen provided for in section 1653, where it is necessary to send them to such citizen, may be paid for from the county treasury as provided in said section 1682.

I can well understand that it undoubtedly would be for the best interests of the children in the case you mention to have them sent back to their relatives in Kentucky. Still there may be cases where it would be best for the welfare of delinquent children to send them to relatives in foreign lands, but aside from the necessity under the law of retaining them within the jurisdiction of your court, I do not think that the legislature intended to foist upon the county any chance of having to meet the expenses of foreign travel. I trust that this fully answers your inquiry.

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

(To the Justice of the Peace)

282.

TOWNSHIPS "CIVIL" AND "ORIGINAL SURVEYED"—FILLING OF VACANCY IN BOARD OF TRUSTEES OF CIVIL TOWNSHIP BY JUSTICE OF PEACE.

Sections 3181-3191, *General Code, deals with the trustees of "original surveyed townships" provided for by the ordinance of* 1787, *which trustees may be appointed under these statutes for the trusts relating to such townships.*

The trustees of "civil townships," however, are governed by section 3262, *General Code, which provides for the filling of a vacancy in such board by a justice of the peace holding the oldest commission or by the oldest of several justices holding commissions of equal age.*

COLUMBUS, OHIO, June 29, 1911.

HON. OSCAR REDDING, *Justice of the Peace, West Toledo. Ohio.*

DEAR SIR:—I am in receipt of your favor of the 22d inst., wherein you ask me as to who has the power to fill a vacancy in the board of trustees caused by the death of one of its members, and you call my attention to sections 3186 and 3262 of the General Code.

Section 3186 applies solely to a vacancy occurring in the office of trustee or treasurer of what is known as trustees of original surveyed township.

Section 3262 applies only to civil township.

There is a difference between an original surveyed and a civil township. The original surveyed township was laid out in accordance with the ordinance of May 20, 1787, passed by congress, subdividing the territory northwest of the Ohio river into townships six miles square each, beginning at the Ohio river running due north to Lake Erie. In such townships the United States reserved lots numbered eight (8), eleven (11), twenty-six (26) and twenty-nine (29) for future sale, and reserved lot number sixteen (16) of each said townships for the maintenance of public schools within said townships. See volume 1, United States Laws, page 563.

Later on lot number twenty-nine (29) was reserved in each township for the purposes of religion. These are the townships that are known as the original surveyed townships, and for the purpose of carrying out the trust in relation to lots numbered twenty-nine(29) and sixteen (16), trustees may be appointed under sections 3181 to 3191 inclusive, and in reference to it, as I have stated, section 3186 provides for the filling of vacancies in the office of trustees.

Such township is not what we ordinarily know as a township, though the territory of each may be co-extensive. What is usually designated as a township in our laws is the civil township, which is treated of under title II, division 2 of the General Code, and which is governed by a board of township trustees.

Section 3262 of the General Code provides:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall

appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

It is my opinion, therefore, that a vacancy occurring in the board of trustees of a civil township is to be filled for the unexpired term by the justice of the peace holding the oldest commission.

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

(To the Common Pleas Judge)

350.

ADDITIONAL JUDGE OF SEVENTH JUDICIAL DISTRICT—COMMENCEMENT AND EXPIRATION OF TERM—CONSTITUTIONAL PROVISION—SPECIAL LEGISLATIVE PROVISIONS.

To effect the purposes of the amendment, article XVII of the constitution requiring common pleas judges to be elected in the even years and fixing for these officials a six-year term of office, the act of 98 O. L., 119, *was passed which extended "existing" terms of such judges as expired in even numbers of years to the first day of January of the succeeding odd numbered year. Such act expressly excludes its operation, however, from affecting terms of office fixed by special acts of the seventy-seventh general assembly.*

Inasmuch therefore as the act providing for an additional judge for the seventh judicial district together with the judgeship thereby created, had been repealed by act of April 18, 1904, *and was therefore not in "existence" leaving only the "term" of the existing incumbent which was to expire July* 6, 1908, *the act of* 98 O. L., 119, *aforesaid, does not extend the term of said incumbent.*

And as the act recreating such additional judgeship was passed by the "seventy-seventh general assembly," and as this act was passed after the act of 98 O. L. 119, *aforesaid, and the additional judgeship therefore not in "existence" at this time, the commencement of the term of such additional judgeship is therefore not affected by act of* 98 O. L. 119.

The act recreating such judgeship, however, in 98 O. L. 148, *and also section* 1532, *General Code, as amended, governs in its provision that such term shall commence at the expiration of the term of the abolished judgeship (July* 6, 1908), *and continue for six years therefrom under article XVII, which applies to all judgeships created after its passage.*

COLUMBUS, OHIO, September 8, 1911.

HON. D. W. JONES, *Common Pleas Judge, Marietta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 29th and I hasten to give it early attention. You state that you are the incumbent of an office of common pleas judge, created by the act of the general assembly, found in 98 O. L., 148. You ask when your present term expires, and when your successor will be elected. In this connection you call my attention to the act found in 98 O. L. 119-120, to section 1532, and to the same section as amended, 102 O. L. 51.

The first act to which you refer, creates, as you state, an additional common pleas judgeship in the seventh judicial district for the first subdivision thereof. Section two of said act provides as follows:

> "The first election of said additional judge herein provided for shall be held at the general election on the first Tuesday after the first Monday in November, 1906, and his term of office shall begin at the expiration of the term of the incumbent judge of said subdivision who was elected and is now serving * * * to-wit: on July 6, 1908, at which time said term ceases and is terminated by repeal under the act of April 18, 1904."

Your statement of facts supports the recital of section 2. That is, you state

that there was formerly an additional judge, the act providing for which was repealed in 1904, and that the term of office of the then incumbent expired on July 6, 1908.

The act found in 98 O. L. 119, is entitled "An act fixing the terms of judges of the court of common pleas, prescribing when they shall be elected and extending certain of their terms, so as to effect the purpose of section 1, article XVII of the constitution." Section 2 of said act provides as follows:

> "The existing term of office of any judge or additional judge of said court which would otherwise expire in any even numbered year * * * shall be and is hereby extended to the first day of January of the odd numbered year next succeeding such expiration, and the incumbent of said office at the time when such existing term would otherwise expire shall hold the same until the expiration of said term as so extended; subject to all the provisions of the constitution or laws. * * *
>
> "Provided that nothing contained in this act shall affect the terms of office or extensions thereof fixed by any special act passed by the seventy-seventh general assembly."

Clearly, as you suggest, this act did not extend the tenure of office of the judge holding under the repealed act of 1904. At the time the general assembly passed the act of March 22, 1906, that judgeship was out of existence, except only that the incumbent was entitled to serve out his term.

Does section 2, as above quoted, apply to the term of office commencing on July 6, 1908, as provided by the act of March 22, 1906? In my opinion it does not. There are two very good reasons for so holding. In the first place, the proviso of section 2 would seem aptly to apply to the term in question. The term commencing on July 6, 1908, is a term "fixed by a special act passed by the seventy-seventh general assembly." The legislature has expressly declared in the proviso referred to that it did not intend that its extension provision should affect any such term of office.

In the second place, section two applies only to existing terms of office. The term of office commencing on July 6, 1908, did not "exist" on March 22, 1906. In fact, it might seriously be questioned whether or not the general assembly had any power at all to extend terms that did not exist at the time of its session in 1906. Article XVII, of the constitution, adopted in 1905, expressly conferred upon the legislature the power to "so extend existing terms of office as to effect the purposes of section one of this article."

This power, however, while liberally construed in a sense, is nevertheless essentially subject to strict construction in that the terms of office of common pleas judges, for example, are fixed by the constitution, and to extend such terms, so fixed, beyond the period so fixed, would be prima facie a violation of the constitution which would have to be justified by the plain language of that instrument itself.

Inasmuch, therefore, as the judgeship which you now occupy was created after the adoption of article XVII of the constitution, inasmuch as it did not "exist" at the time of the passage of the act of March 22, 1906, and inasmuch further as its term was "fixed by special act passed by the general assembly" I am of the opinion that it was not extended by the act of March 22, 1906, to January 1, 1915.

But while section 2 of the act of March 22, 1906, did not at the time of its

passage apply to your position I am of the opinion that section 1 of that act would so apply. That section provided in part as follows:

> "Every judge or additional judge of the court of common pleas hereafter elected shall hold his office for six years (the constitutional term) *commencing on the expiration of the term of his predecessor as fixed by law* * * * and shall be elected at the election for state and county officers next preceding the commencement of his said term."

This language of section 1 of the act of 1906 was, as you state, omitted from the General Code. Instead section 1532 of the Code provided that "each judge of the court of common pleas shall be chosen in an even numbered year and hold his office for six years commencing on the first day of January following his election." This section was amended, 102 O. L. 51, so as to read as follows:

> "Each judge of the court of common pleas shall be chosen in an even numbered year and hold his office for six years commencing after the expiration of the term of his predecessor as fixed by law."

This language is substantially that of section 1 of the act of 1906.

This amendment was in my judgment unnecessary. The act of 1906 has never been repealed and is still the law. The Code of 1910 is justly entitled a "general" code. Its provisions are intended to set forth rules applicable generally through the state. Special cases are excluded from it and left in the appendix which is not yet printed. You have yourself discovered that the act of 1906 was not repealed by the repealing clause of the General Code, either by its session law designation or by the number given to it in Bates' Annotated Statutes.

It is a general principle of statutory construction that the adoption of a code has no *implied* repealing effect. That is to say, where an express repeal is made the same is effective--although even here verbal changes are presumed not to involve changes of substance. But where an existing law is not repealed and a part of its subject-matter is included in a general code the part left out of the general code remains the law.

I think there is no doubt as to the correctness of this principle. The action of the last session of the legislature was then a mere excess of caution.

For the foregoing reasons then, I am of the opinion that the law at all times applicable to the judgeship which you hold was and is that your successor's term of office shall commence at the expiration of your term, and that he shall be elected at the election for state and county officers next preceding the expiration of your term.

To recapitulate, then, it is my opinion that your term of office was not extended by the act of March 22, 1906; that it will expire on July 8, 1914; that your successor must be elected at the general election for state and county officers in the year 1912 and will take office on July 6, 1914.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Prosecuting Attorneys)

1.

COUNTY INFIRMARY DIRECTORS—CONTRACTS FOR MEDICAL SERVICES —ADVERTISEMENT AND BIDS.

Section 2546, General Code, requires county infirmary directors to advertise for bids for medical services and limits such contracts to one year.

When the directors advertised for bids and made a contract for the year ending July 10, and after said July 10 re-engaged the same services for the balance of their term without advertising for bids, such engagement is illegal.

But inasmuch as the contract was made in good faith, and the county has received the benefit, payment by the county is recommended.

COLUMBUS, OHIO, January 2, 1911.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I have your letter of December 31st in which you submit to me for an opinion the following state of facts and questions arising thereunder:

"The county infirmary directors on July 10, 1909, after advertising for bids contracted for medical services for one year or until July 10, 1910, and at the expiration of the advertised year, contracted for the same medical services for the same price for the balance of the year 1910, the life of the present board, and said board of infirmary directors allowed the bill for medical services, for the balance of the year 1910, at the same rate as had been fixed and paid as advertised, and the county auditor has refused to pay the bill for medical services for the balance of the year from July, 1910, upon the ground that he claims it illegal to allow and pay for medical services for the county infirmary board without advertising.

"Question 1. Does section 2546 of the General Code of Ohio require county infirmary directors to advertise for bids for medical services?

"Question 2. Under the state of facts as above set forth is it legal and proper for the auditor to pay a bill for medical services from July 10, 1910, the balance of the year, after the county infirmary directors have contracted and allowed the bill at the same rate as above stated and have received the medical services?"

Section 2546 of the General Code provides:

"Infirmary directors may contract with one or more competent physicians to furnish medical relief and medicine necessary for the persons of their respective townships, who come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the directors reserving the right to reject any or all bids. The physicians shall report quarterly to the infirmary directors on blanks furnished by the directors, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the direc-

tors. The directors may discharge any such physicians for proper cause."

The section above quoted authorizes the infirmary directors to contract with a physician for medical services but prescribes that the contract shall not be for a longer term than one year. Therefore, under the state of facts submitted, the contract entered into by the infirmary directors on July 10, 1910, was a new contract, and to come strictly within the provisions of the statute such contract must have been given to the lowest competent bidder. The section does not specifically provide for advertising, but it is clearly the meaning of the statute that the infirmary directors shall give notice in some way for bids, for the reason that it would be impossible for them to receive competitive bids from competent physicians unless the matter was brought to their attention by some sort of a notice. Under the statute, inasmuch as it is not provided in what way the notice shall be given, I am of the opinion that any reasonable notice will be sufficient. The infirmary directors may advertise in a newspaper, distribute circulars or personally notify the physicians who would be competent bidders under the statute.

The circuit court of Huron county, in the case of J. F. Miller et al., vs. the Board of Infirmary Directors of Huron county, in construing section 975, Revised Statutes, section 2546 of the General Code, said:

> "It contains the limitation that said contract shall be given to the lowest competent bidder and it seems to contemplate no other form of entering into a contract with physicians by the infirmary directors than submitting the matter to competition and award to the lowest responsible bidder."

I am, therefore, of the opinion, replying to your first question, that section 2546 of the General Code of Ohio does require, by implication, the infirmary directors to give reasonable notice in some way for bids for medical services, although the manner in which the notice shall be given is not covered in any way by the section.

Replying to your second question under the state of facts presented the medical services were contracted for by the infirmary directors in good faith and under the same conditions as the contract had previously been legally made for the year next preceding their new contract. The evident intention of the directors was to provide for medical care for the infirmary inmates of Lawrence county for the remainder of the term of the directors then in office. The county has received the services and, owing to the existing state of facts and in the absence of fraud or collusion, the services ought to be paid for. In the future, however, contracts must be made for not more than one year and awarded to the lowest competent bidder after reasonable notice has been given to those who might wish to submit their bids and who would be competent bidders under section 2546 of the General Code.

The contract of July 10, 1910, is not technically binding on the county, but inasmuch as the contract was made in good faith, without fraud or collusion, and the services have been rendered, under the contract, I recommend that the county pay for the services so rendered.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

8.

FORM OF CONCLUSION OF INDICTMENTS—CONSTITUTIONAL PROVISION.

COLUMBUS, OHIO, January 11, 1911.

MR. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 5, 1911, inquiring as to the proper form for conclusion of indictments under the General Code. I do not understand that the General Code made any change in the averments required in the formal parts of indictments and you will be safe in following section 20 of article 4 of the constitution which provides, "All indictments shall conclude 'against the peace and dignity of the state of Ohio.'"

I do not regard it as essential to make the other averments you refer to.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

9.

POOR RELIEF—ISSUE OF BONDS FOR—BONDS FOR REPLENISHING POOR FUND.

Bonds for the real purpose of replenishing the poor fund cannot be issued under section 2434, General Code, which provides for bonds "for the relief and support of the poor."

COLUMBUS, OHIO, January 11, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Clermont County, Batavia, Ohio.*

DEAR SIR:—I have your letter of January 9th, in which you state that:

> "The infirmary fund in Clermont county is overdrawn to the extent of $7,000.00, and the estimated amount of taxes to be derived for the year 1910, which taxes will be distributed in February and August, 1911, will not equal this amount."

You request my opinion as to whether, under section 2434 of the General Code, the commissioners of Clermont county can issue bonds to borrow money to replenish this fund under the theory that they are borrowing money for relief and support of the poor, as set forth in section 2434, General Code.

It is my opinion that bonds cannot be issued by the commissioners, under the facts above detailed, under section 2434 of the General Code, as that section provides, among other things, that such bonds may be issued "for the relief and support of the poor," while, in fact, these bonds, if issued, would be for the purpose of replenishing the poor fund, which has been overdrawn, and would not be for the purpose provided by the statute.

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

10.

TAXES AND TAXATION — INTOXICATING LIQUORS — NO POWERS IN PROSECUTING ATTORNEY OR TREASURER TO SETTLE OR COMPROMISE TAXES.

The prosecuting attorney or treasurer is not authorized to compromise or settle for reduced amounts, claims for taxes due under section 6080, General Code, for traffic in intoxicating liquors.

COLUMBUS, OHIO, January 11, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—You have submitted to this office, for a legal opinion concerning the same, the following question:

> "Where the amount due under section 6080 of the General Code has been placed on the tax duplicate against the real estate in which such traffic is carried on and an action having been brought by the county treasurer to collect the same, has the prosecuting attorney of such county any right or authority to make settlement of any such claim out of court for less than the amount named in section 6072 of the General Code?"

The law specifically provides what the tax shall be and how it shall be collected, giving no authority to the prosecuting attorney or treasurer to accept less or compromise with the party against whom said tax is levied, therefore my opinion is that you have no authority to settle or compromise any such case.

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

11.

SCHOOL DISTRICTS—BOND ISSUES—FORMAL REQUIREMENTS—NECESSITY FOR AUDITOR'S CERTIFICATE THAT MONEY IS AVAILABLE.

By virtue of section 5660, General Code, the board of education of a school district cannot enter into a $100,000 contract for school buildings without a certificate that the amount is in the treasury. The board may, however, let the contract in distinct sections for less amounts of money and issue bonds for each such contract after completion of former sections.

COLUMBUS, OHIO, January 12, 1911.

MR. O. W. KERNS, *Attorney, Van Wert, Ohio.*

DEAR SIR:—Your communication of recent date, stating:

> "We have a school district in this county that voted to issue one hundred thousand dollars of bonds, for the purpose of erecting and

equipping a new school building. The board of education desires to issue these bonds in installments of from twenty-five to fifty thousand dollars and thus save paying interest on full amount of one hundred thousand dollars for a long time before they could use the money."

And inquiring:

"Can the board enter into a contract without a certificate that the money is in the treasury for the full amount of the contract and then issue the bonds from time to time as the work progresses and the money is needed for paying the contractor?"

Replying thereto I beg to submit the following opinion. Section 5660 of the General Code provides that:

"The commissioners of a county, the trustees of a township and the board of education of a school district shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolutions or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

The only exceptions thereto are found in section 5661 of the General Code, which is as follows:

"All contracts, agreements or obligations and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers and other school employes of boards of education."

In view of the above, I am of the opinion that the board cannot enter into the contract mentioned without a certificate that the money is in the treasury for the full amount of the contract, and cannot issue the bonds from time to time as the work progresses and as the money is needed for paying the contractor as it does not come within the exceptions provided in section 5661 of the General Code. However, if you can let the contract into sections of from $25,000 to $65,000 and complete each section before another section is let, you could arrange to issue the $100,000 bonds as you suggest.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

12.

$1,000,000 LIMITATION UPON DEPOSIT IN PUBLIC DEPOSITORY.

COLUMBUS, OHIO, January 12, 1911.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your letter of December 21, 1910, addressed to my predecessor, Hon. U. G. Denman, has been referred to me. You state that there is a dispute between the bankers and treasurer of your county as to the amount of money that can be deposited in any one bank as a depository after the law providing for a public depository has been complied with.

I beg to advise you that by the act of the legislature passed May 10, 1910, found in volume 101 O. L., page 353, it is provided that no bank or trust company designated as a depository shall receive a larger deposit than one million ($1,000,000) dollars.

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

13.

TOWNSHIP BOND ISSUES FOR ROAD IMPROVEMENTS—VOTE OF ELECTORS—CHANGE OF LAW LIMITING AGGREGATE OUTSTANDING BONDS, BETWEEN PETITION AND ELECTION.

Inasmuch as the petition for a vote of the electors upon the question of issuing bonds for township road improvements is a part and parcel of the election proceedings, when such petition is filed under a law limiting the total outstanding bond issue to $50,000, an election held in consequence of such petition will not be deemed to authorize an outstanding bond issue of $100,000 by reason of the fact that the law was amended so as to authorize that amount during the term intervening between the filing of the petition and advertisement of notice, and the time of the election.

COLUMBUS, OHIO, January 22, 1911.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—In your letter of January 11th you state that at an election held April 11th, 1908, people of Poland township, Mahoning county, Ohio, voted in favor of improving the township roads under the provisions of sections 4686-1 to 25 of the Revised Statutes; that prior to April 10, 1908, section 4686-17, Revised Statutes, provided that "the aggregate amount of the bonds of any township, at any one time outstanding, shall not exceed $50,000;" that by the act of 99 O. L., 102, approved April 10, 1908, such section 17 was amended by raising such $50,000 limit to $100,000.

You ask whether on the basis of such election, April 11th, 1908, the trustees of Poland township may issue bonds up to the limit of $100,000.

Section 4686-1, Revised Statutes, provides that:

"The trustees of any township in this state shall, when the peti-

tion 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 4686-2 provides that upon presentation of the petition provided for in section 4686-1:

"The township trustees shall cause notice of said election to be published in two newspapers in general circulation, if such are printed in said township, for at least ten days, and shall also cause hand bills announcing the same to be posted at the usual places of holding elections, at each precinct in such township at least ten days previous to such election."

It appears from the above that the petition provided for in section 4686-1 was presented to the township trustees and the notice provided for in section 4686-2 was published and posted prior to the approval of the act of 99 O. L., 102. It was therefore the intention of those petitioning and the understanding of the electors of the township prior to April 10, 1908, that the total amount of bonds which were to be issued upon an affirmative vote at the election held in pursuance of such petition should not exceed in the aggregate amount $50,000, as provided by section 4686-17.

If, therefore, it were claimed that an affirmative vote of such election authorized the issuance of bonds of the amount of $100,000, such claim could be sustained only in case the act of 99 O. L., 102, in its affect amended the petition filed and the notice of election published, or, in case the election of April 11th may be considered absolutely independent of the petition or the publication of notice prior to such election.

It appears to me that a presentation of the petition provided for in section 4686-1 and the publication of notice as provided for in section 4686-2 are a necessary part of the proceedings authorizing the issuance of bonds and that they are inseparable from the election. It is not the election merely but rather the entire proceedings prior to and including the election that authorizes the issuance of bonds.

Since, therefore, the petition was filed and notice thereof given prior to the act of 99 O. L., 102, and since such petition and notice related to the issuance of bonds not exceeding an aggregate of $50,000, I am of the opinion that the election of April 11, 1908, authorized the issuance of bonds in an aggregate amount not exceeding $50,000, and that no such election under the above provisions of the Revised Statutes could authorize the issuance of bonds in an amount authorized by the act of April 10, 1908, unless the filing of the petition, the publication of notice and all necessary legal steps prior to an election upon this question were completed subsequent to the approval of the act of 99 O. L., 102.

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

17.

INFIRMARY DIRECTORS—POWER AFTER RESIGNATION TO BE APPOINTED SUPERINTENDENT OF THE INFIRMARY—APPLICATION OF STATUTORY RESTRICTIONS TO "APPOINTIVE" AND "ELECTIVE" OFFICIALS.

Section 1843, General Code, placing limitations upon the powers of certain officials of certain state institutions, to hold employments or to appoint relatives to such employments applies only to "appointive" officials and therefore an infirmary director who was "elected" and has resigned from his position is not prohibited from obtaining the position of superintendent of the infirmary within a year after his resignation.

As such appointments are against the general policy of the statutes, however, they should be made with caution.

COLUMBUS, OHIO, January 13, 1911.

HON. LYMAN B. CRITCHFIELD, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—In your letter of January 7, 1911, receipt of which we acknowledge, you ask whether section 1843 of the General Code, which is as follows:

> "No trustees, commissioner, manager or director of a benevolent, correctional or penal institution of the state or of a county shall be eligible to the office of superintendent or steward, as an employe of such institution during the term for which he was appointed, or within one year after his term expires, nor shall any officer or employe of such institution be related by blood or marriage to him."

applies to the following statement of facts which you state exist in your county, viz:

> "One of our county infirmary directors who was elected in November, 1910, to take his office on the first Monday of January, 1911, for a period of two years, was duly commissioned, gave his bond and took the oath of office. He resigned his office on the third day of January, 1911, his resignation was accepted, and his successor was appointed, commissioned, gave his bond, took his oath, and is now acting.
>
> "The infirmary director who resigned is an applicant for the appointment of superintendent of the infirmary in our county, said appointment to be made by the board of infirmary directors.
>
> "The question arises, Is he eligible to the appointment of superintendent of the infirmary at this time?"

Section 1843, quoted above, in my opinion only applies to officials who have been appointed.

There seems to be a clear distinction in Ohio between officials who are appointed to office and those who are elected. In the case of State vs. McCollister, 11 Ohio Rep., page 46, the court say on page 52:

> "The constitution of the state contemplates two different modes of conferring office, one is by appointment, the other by election."

And again on page 53 the court say:

> "But the framers of the constitution unquesionably understood that

there was a difference in filling an office by *appointment* and by *election*, and where either of these words are used in a statute law under that constitution, this court ought not, unless for strong powerful reasons, to give to the word a different meaning from that which it plainly imparts, as used in that instrument."

In this case the court construed the statute prohibiting a citizen of the state from holding by *appointment*, at the same period of time, more than one certain specified office, and the court held that the defendant in said case holding two of said offices by election, and not by appointment, was not within the prohibition of said statute. Therefore, it seems clear that the legislature has clearly said in section 1843 that said section shall apply only to persons who have been appointed to office, as the words "or elected" have been omitted from this section.

This construction is further strengthened by sections 12910 and 12911 of the General Code providing penalties for officers interested in contracts, and in each of said sections the language is, "whoever, holding an office of trust or profit by election or appointment," showing that the legislature distinctly recognized the two classes of offices, and included both in these sections.

Therefore I am of the opinion that the infirmary director you refer to having been elected to an office, and not appointed, does not come under the inhibition of section 1843.

It is further my opinion, however, that appointments of this character are in reality contrary to the spirit of the laws of Ohio, and should only be made when there is no doubt that such appointment will be for the best interest of the public.

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

18.

BOARDS OF EDUCATION—DUTIES AND POWERS TO REFUSE OR ADMIT CHILDREN TO SCHOOLS AFTER SESSION OPENED—AGE LIMITS.

The board of education is not vested with any power to refuse admission to pupils who have attained the age of six years, during the session of a school term.

COLUMBUS, OHIO, January 13, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—You have submitted to this department for a legal opinion thereon, the following question, to-wit:

"Whether or not a board of education of an incorporated village has the legal authority to refuse to admit pupils, who become six years of age in the middle of the school term after the holidays, to the first grade."

Upon careful investigation it is the opinion of this department that under section 7681 of the General Code, which provides:

"The schools of each district shall be free to all youth between

six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home located in such a school district, at the discretion of the board of education, etc."

there is no power given to the board of education in any district to refuse the right of admission to any pupil of school age to enter such school upon becoming of said lawful age.

Further under section 4705 of the General Code the board or boards of education have the statutory authority to make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools, but it does not give authority to the board of education to make any rule which will deprive a student of the proper school age, under said section above referred to, admission to said school.

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

25.

BOARDS OF EDUCATION—VOTE OF ELECTORS ON BOND ISSUE—CANVASS OF VOTE AND DECLARATION OF RESULTS BY BOARD.

When an election is held by a village school district upon the question of issuing bonds for school building purposes, it is proper for the judges and clerks of election to make the returns to said board of education, and for the board to canvass the vote and declare the result.

January 14, 1911.

HON. JAMES F. BELL, *Prosecuting Attorney Madison County, London, Ohio.*

DEAR SIR:—I am in receipt of your favor of January 11, 1911, requesting my opinion upon the following statement of facts:

"On October 18, 1910, at a regular meeting, the board of education of the London village school district, under section 7625 of the General Code, passed the following resolution:

"'*Resolved*, By the board of education of London village school district, Madison county, Ohio, that it is necessary for the proper accommodation of the schools of said district, that a new high school building be erected, and equipped and other school buildings be improved, that it will require eighty thousand ($80,000.00) dollars, to make said improvement, that the funds at the disposal of said board, or that can be raised under the provision of sections 7629 and 7630 of the General Code of Ohio, are not sufficient to accomplish said purpose and that a bond issue is necessary, it is therefore further

"'*Resolved*, That an election be held in said school district on the the question of issuing bonds, in the sum of eighty thousand ($80,000.00) dollars for the purpose herein specified on the 6th day of December, 1910, and that the clerk of the board be directed to forward a copy of these resolutions to the deputy state supervisors of elections and

request said supervisors to provide election supplies and conduct said election, and that the clerk be also directed to publish the notices of said election as provided by law.'

"Said resolution was duly certified to the board of deputy state supervisors of elections of this county, which board provided the election supplies.

"The notice of said election was duly published and the election held on said 6th day of December, 1910.

"The returns of said election were made by the judges and clerks of each precinct to the clerk of said board of education, as provided for in school elections under section 5120 of the General Code.

"On December 19, 1910 (being the second Monday after said election), said board of education held a meeting and canvassed the vote and declared the result of the election, which was in favor of the bond issue.

"The board of education is now up to the point of passing a resolution to issue and sell the bonds."

Your first question is:

"Was it right for the judges and clerks of election to make the returns to said board of education, and for said board to canvass the vote and declare the result?"

My answer to this question is "Yes."
Your second and third questions are as follows:

"Should the returns have been made to the deputy state supervisors of elections of this county, and the canvass made by them and the result certified to the board of education?

"If the former method, which was followed, is wrong, is there any remedy now for the erroneous proceeding without holding another election?"

That you may know my reason for answering your questions as I have done, I inclose you herewith a copy of my opinion rendered this day to Hon. John W. Zeller, State Commissioner of Common Schools of Ohio, upon the exact point upon which you request information.

I wish to express to you my appreciation of the lawyer-like manner in which you prepared your statement of facts and request for an opinion in this case. When an important question, such as this is, is presented in such a clear and comprehensive manner our investigation is greatly facilitated.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

26.

OFFICES INCOMPATIBLE, VILLAGE COUNCILMAN AND MEMBER OF BOARD OF EDUCATION—EFFECT OF INTEREST OF COUNCILMAN IN LICENSE TO FERRY BOAT BY COUNCIL.

A membership on the school board is within the statutory prohibitions against a village councilman holding "any other public office or employment" and a councilman who retains such membership forfeits his position on the village council.

The fact that members of the council are interested in a "license" granted by the council to a ferry boat is not within the prohibitions of section 4213 against interest in any "contract" of the village.

January 16, 1911.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your communication of January 11, 1911, received. You state that at the November election in 1909 George Smith and Ed. Smith were elected members of the council of the village of Proctorville, Ohio, and at the same November election in 1909 George Smith was elected as a member of the board of education in said village of Proctorsville; both of said Smiths qualified and are holding the offices for which they were elected. You also state that the said George Smith and Edward Smith own a steam ferry boat which operates between said village of Proctorville and Guyandotte, W. Va., and by law must obtain a franchise from the village council of Proctorville during their said term of office as councilmen. You inquire first can a person hold the offices of member of council and member of the school board at the same time, and if not, what effect does the above section have upon the separate offices. I beg to call your attention to the provisions of the General Code relating to that matter, which is as follows:

> "Every member of council shall be an elector of the city, and shall not hold any other public office or employment except that of notary public or state militia."

By the provisions of the General Code the section just quoted applies to villages as well as to cities, and that section specifically provides that a member of council may hold no other public office or employment except the ones enumerated in the General Code.

I am therefore of the opinion that George Smith cannot hold the two offices named, and if he desires to remain in council he must resign as member of the school board, or if he desires to remain a member of the school board the office of councilman held by him is vacated.

Question two of your inquiry is as follows:

> "What effect does holding and obtaining a ferry license under sections 3640, 3641 and 3642 of the General Code by the said George Smith and Edward Smith have upon the qualifications of said Smiths as councilmen of said village of Proctorsville, under section 4218 of the General Code of Ohio?"

Section 4218 of the General Code provides that no member of council shall hold any other public office or be interested in any contract with the village.

Any member who ceases to possess any of the qualifications herein required, or remove from the village, shall forfeit his office. The section last named expressly provides:

> "That no member of council shall be interested in any contract with the village."

The question that now presents itself is a ferry license issued under the authority of sections 3640, 3641 and 3642 of the General Code by the council of the village of Proctorville to George Smith and Edward Smith a contract within the meaning of the section just quoted, an interest in which would forfeit the right of George Smith and Edward Smith to hold the office of councilmen?

The supreme court of Ohio, 1 O. S., 655, distinguishes between a license and a contract and uses the following language:

> "The distinction between a license and a contract has been dwelt on in many cases. A contract is an engagement entered into between two competent parties, in relation to something which is a competent subject-matter of contract, upon a mutual legal consideration, and with a mutuality of obligation. The constitution of the United States expressly provides that 'no state shall pass any law impairing the obligation of contracts.' Licenses are grants of especial and exclusive rights and privileges, under authority of law for stipulated sums of money and usually for specified period of time. They are franchises, and partake much of the nature of contracts. Although the effect of a license gives to the license something of an exclusive character, and incidentally confers valuable privileges, it is not its design to confer any vested rights. Yet the constitutional authority of the legislature to control them by an amendment or repeal of the law regulating them, or to absolutely revoke or annul them, with a view to the overruling considerations of the public interest, is unquestionable. It has frequently been held that acts amending and repealing laws regulating exclusive rights and privileges secured by licensees or absolutely revoking and annuling such privileges, did not impair or destroy the obligation of contracts; and that a tax upon such as are licensed is not violation of a contract. Toledo Bank vs. Bond, 1 O. St., 623-655."

It is therefore my opinion that a ferry license issued under sections 3640, 3641 and 3642 is not such a contract, an interest in which held by any councilman forfeits his right of office under section 4218 of the General Code.

You inquire in question three as follows:

> "If George Smith and Edward Smith have either or both forfeited their office as councilmen or member of the board of education or both and are still attempting to act as such officers can or cannot the remaining members of the separate boards fill the vacancies without further action?"

The answer to question two disposes in part of question three, in that the holding of a ferry license does not forfeit the right of office. However, under section 4218, above quoted, they cannot hold any other public office or employment, and if George Smith claims to be a member of the board of education

that fact in itself would vacate the office of councilman and council may forthwith proceed to fill the vacancy as provided by the General Code.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

29.

COUNTY COMMISSIONERS—TRANSFERS TO FEE FUNDS DURING YEAR ENDING APRIL 1, 1911—DATES ARE DIRECTORY PROVISIONS.

The stipulation of section 2984, General Code, with reference to transfers by the county commissioners from other county funds to the fee funds, for needs of the ensuing quarter on the first Monday of April, July, October and January, for a year after the first Monday of April, 1910, are directory provisions merely and when the commissioners fail to make such transfers on the first Monday of October, they may, when the need arises, for the ensuing quarter, make such transfer on any date prior to April 1, 1911.

COLUMBUS, OHIO, January 16, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Replying to your favor of January 13th, inquiring whether or not the commissioners of your county may legally adopt a resolution, a copy of which is set out below, under and by virtue of section 2984 of the General Code, as amended April 30, 1910, 101 O. L., page 200:

> "WHEREAS, There is a deficiency in the clerk of court fee fund for the past quarter, ending on December 31, 1910, and,
>
> "WHEREAS, The proper officers neglected to provide for said deficiency on the first Monday in October, 1910, as provided for by section 2984 of the General Code, and,
>
> "WHEREAS, Said clerk and his deputies have not received any compensation for their services for such clerk and deputy for the last quarter of the year 1910, and,
>
> "WHEREAS, It is here and now desired to provide for such deficiency in said fund to pay officers for and during said last quarter of the year 1910; therefore, be it
>
> "*Resolved*, By the board of county commissioners of Crawford county, Ohio, in due session this first Monday in January, A. D. 1911, all the members of said board being present, that there be transferred under and by virtue of section 2984 of the General Code of Ohio as amended April 30, 1910, to the clerk of court fee fund the sum of $..... from the ..... fund of said county. That the amount so transferred be for the purpose of making payment to the said officer and his deputy and other assistants of all amounts due and owing them under the law and the allowance made by the board of county commissioners for the last quarter. And the county auditor is authorized to make such transfer in manner and form as provided by law."

The resolution sets forth that there is a deficiency in the clerk of court

fee fund for the quarter ending December 31, 1910, and that the proper officers neglected to provide for said deficiency on the first Monday of October, 1910, as provided by law. It also sets forth that the clerk of courts and the deputy have not received any compensation for their services as such clerk and deputy for the last quarter of the year 1910.

Sections 2893 and 2894 of the General Code were amended as follows:

> "At the end of each quarter, each such officer shall 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 official services, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received, and he shall also, at the end of each year of his incumbency in office and at the close of the term for which he shall have been elected, make and file a sworn statement with the county commissioners, of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind, which are due his office and unpaid."

Section 2984, General Code:

> "On the first Monday of April, July, October and January, whenever necessary, during one year after April 1, 1910, the county commissioners by order entered on their journal, shall transfer from any other fund or funds of the county officer's fee fund, such sums as are necessary to make good any deficiency in such fee fund likely to arise during the ensuing quarter in consequence of the payment of such officer, deputies, assistants, bookkeepers, clerks or other employes during such period from the amounts then in or estimated to come into such fee fund for that period from such office. Provided that the aggregate amounts so transferred to the fee fund of any such officer, except the county clerk, probate judge and sheriff, shall not exceed the aggregate amounts paid into or authorized to be paid into the general fund from the fee fund of such officer during such period."
>
> 101 O. L., pp. 199-200.

Section 2984, as amended, extended the time for the period of one year or until April 1, 1911, guaranteeing the salaries of the various county officers under the county salary act, and provided that on the first Monday of April, July, October and January, whenever necessary, during one year after April 1, 1910, the county commissioners, by order entered on their journal, shall transfer from any other fund or funds of the county, in their discretion to any county officer's fee fund, such sums as are necessary to make good any deficiency in such fee fund likely to arise during the ensuing quarter in consequence of the payment of such officer, deputies, etc., or other employes during such period from the amounts then in or estimated to come into such fee fund for that period from such office, etc.

It is my opinion that the statute naming the first Monday of April, July, October and January, whenever necessary, etc., is only directory. That is, the commissioners on such dates *can* provide by resolution for a transfer from any other fund to the county officers fee fund, such sums as are necessary to make good any deficiency in such fee fund, and on their failure so to do on the dates mentioned at the beginning of any quarter, that they can provide at any time

within the year ending April 1, 1911, for such a transfer of fund that may be necessary to meet deficiencies in the fee fund. I therefore hold that the county commissioners may legally adopt the above resolution.

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

31.

COUNTY CLERK — ALLOWANCE OF AGGREGATE EXPENSES AS FIXED BY COMMISSIONERS, FINAL—DATE OF COMMISSIONERS' ACTION, DIRECTORY.

The stipulation of section 2980, General Code, requiring the commissioners to fix the aggregate allowance of the county clerk "within five days" after the filing of the required statement by that official is directory only and such action taken by the commissioners at a later period is none the less valid.

The allowance once fixed by such action and entered upon the journal is final as to the aggregate sum permitted and after such action the commissioners are not empowered to make further allowances.

COLUMBUS, OHIO, January 17, 1911.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—You state that on November 20, 1910, the county clerk of Adams county filed with the county commissioners the statement provided for in section 2980 of the General Code; that such statement was considered at a meeting of the county commissioners held November 22d, and action taken as shown by the following journal entry of the county commissioners:

> "The matter of making deputy allowance for 1911, came up and the same being discussed fully, and as Commissioner Lewis not being present, it was moved by Ramsey and seconded by McCormick that we lay the matter over to our regular meeting in December."

That on December 6th action was taken as shown by the following journal entry of the board of county commissioners:

> "In compliance with section 3 of the act of the general assembly of Ohio, passed March 23, 1906, the various county officials filed on November 20, 1910, with the county auditor of Adams county, Ohio, their sworn statement of the amount required for the payment of deputies, clerks, bookkeepers and assistants for the year of 1911, and after said statements had been examined by the board of county commissioners, it was moved by Ramsey, seconded by Lewis, that the following sums be fixed and determined as the aggregate sum to be expended by said respective officials for all deputies, assistants, bookkeepers and clerks or other employes of their respective offices for the year beginning January 1, 1911. County clerk the sum of $200 for the year 1911. * * *"

And that subsequent to such action of December 6, 1910, the county clerk

has asked for a sum of money in addition to the amount fixed at the meeting of the county commissioners on December 6th for the employment of additional help in the office of the county clerk for the coming year. You ask:

"1. After the county commissioners have bona fide made an allowance or appropriation to be expended for clerk and deputy hire in the county clerk's office upon a requisition duly and legally made by said clerk and within the time specified by law, can they at their next meeting rescind such action and make another and greater allowance?

"2. Whether the action of the county commissioners on December 6th in fixing the aggregate sum to be expended for the year 1911 is valid?

"3. Whether the county commissioners can act only once under section 2980 or whether they may from time to time make allowance of such amount as the commissioners deem sufficient?

"4. Whether the county commissioners may make an allowance under section 2980 to cover a deficit created in a previous year, when the allowance for such previous year has been made and exhausted?"

Section 2980 of the General Code provides as follows:

"On the twentieth of each November, such officers 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, showing in detail the requirements of their offices for the year beginning January first next thereafter with a sworn statement of the amount expended by them for such assistance for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix *an aggregate sum to be expended for such period* for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, which sum shall be reasonable and proper, *and shall enter such finding upon their journal.*"

Section 2981, General Code, provides as follows:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. *Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office.* When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Section 2989, General Code, provides as follows:

"After deducting from the proper fee fund the compensation of all deputies, assistants, clerks, bookkeepers and other employes, *as fixed and authorized herein*, each county officer herein named shall receive from the balance therein the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

Section 2999, General Code, provides as follows:

> "Nothing in this chapter shall be construed to make a county, or an officer thereof, liable to any of the officers named herein or his deputies, assistants, clerks, bookkeepers or other employes, for the payment of compensation in excess of the amount herein authorized, or except in the manner herein provided."

Since the county commissioners are public officers they have only such powers as are conferred upon them by statute, either expressly or by implication. Unless, therefore, statutory authority, express or implied, can be found authorizing any action, the county commissioners are not authorized by law to take such action.

Under section 2980 of the General Code it was the duty of the county clerk to file a statement with the county commissioners on the 20th of November. This he has done in this case. It is also the duty of the county commissioners, under such section, to fix the aggregate sum to be expended during the year 1911 by the county clerk within five days after the filing of such statement. In case the county clerk fails to file his statement at the time prescribed, or in case the county commissioners fail to act within five days, they can be compelled by law to perform the duties prescribed for them by statute.

It has been held, however, in numerous cases that in case such action is not taken within the statutory time, the statute will be construed as directory to the extent that the action taken will be deemed legal and binding. When, therefore, the county commissioners took the action above described on December 6th, they were derelict in their duty in that they acted more than five days subsequent to the filing of the statement, but their action was nevertheless legal and binding.

The question thereupon arises whether when the county commissioners have once acted and entered their findings upon their journal, as provided in section 2980, any additional appropriation can be made in excess of the aggregate sum thus fixed.

So far as section 2980 is concerned, no authority is given to change the aggregate sum fixed as provided in such section.

The language of section 2981, "such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office," seems to indicate that the action taken under section 2980 is final.

Of similar purport is the language "as fixed and authorized herein," as found in section 2989, and the language "in excess of the amount herein authorized, or except in the manner herein provided," as found in section 2999.

Unless, therefore, we find some statutory authority elsewhere we must conclude that the action taken under section 2980 is final.

I find upon investigation that certain sections of the statute provide for giving additional amounts to various county officers. For example, section 2629 provides for additional allowance to the county auditor under certain circumstances. Section 2998 provides for an additional allowance to the sheriff, etc. I am unable, however, to find any provision of law expressly or impliedly authorizing any additional allowance for the county clerk. The absence of any statute of this kind relating to the county clerk, together with the presence of specific statutes on this subject relating to other officers, leads me to believe that the general assembly intended that no additional allowance should be made for the county clerk, and that the action of the county commissioners

on December 6, 1910, is complete and final so far as the year 1910 is concerned.

I am, therefore, of the opinion, first, that the county commissioners cannot rescind the action taken on December 6th in allowing $200 for the year 1911; second, that while it is the duty of the county commissioners to act under section 2980 within five days, their action is legal if taken subsequent to the expiration of such five days; third, that the action of the county commissioners on December 6th is final, and that they may make no allowance for the county clerk from time to time, and fourth, that since section 2980 provides only for the fixing of an aggregate sum "for the year beginning January first next thereafter," the county commissioners are not authorized to make an allowance to cover the deficit created in a year prior to the year for which such aggregate sum to be expended, is fixed.

I appreciate that the opinions herein expressed may work a hardship in the particular case presented to me, but the remedy lies with the general assembly. I suggest as a means for providing for such contingencies that the general assembly enact a law authorizing the county commissioners in such cases as this to file a petition in the common pleas court, asking for authority to make allowances in excess of the sum fixed by them as provided in section 2980 of the General Code.

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

40.

RIGHTS AND DUTIES OF COUNTY COMMISSIONERS AND COUNTY CLERK WITH REFERENCE TO SUPPLIES FOR LATTER.

Under section 2872, General Code, the commissioners are empowered to purchase and furnish supplies for the clerk. When they fail so to do, however, the clerk may procure such articles and upon his certificate shall be allowed for the same by the commissioners.

January 19, 1911.

F. A. SHIVELY, *Esq., Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your letter of January 17th, requesting construction of section 2872 of the General Code received. You also inquire:

> "First: If the county commissioners actually furnish, or offer to furnish all such supplies for the clerk is the clerk bound to accept same or may he disregard the wishes of the commissioners in the matter and buy from whom and at what prices he pleases?
>
> "Second: Is the clerk the sole judge of what supplies he shall purchase, and what remedy have the commissioners if he becomes exorbitant or exacting in such matters?"

Section 2872 of the General Code is as follows:

> "The county commissioners shall furnish the clerk all blanks,

books, including printed trial dockets, blanks, stationery, and all things necessary for the prompt discharge of his duty. The clerk may procure all such articles and upon his certificate shall be allowed therefor."

It is my opinion that under section 2872 of the General Code just quoted if the county commissioners actually furnish or offer to furnish the necessary supplies for the clerk of the court, the clerk is bound to accept the same as it becomes the duty of the county commissioners under section 2872 of the General Code to furnish the clerk all blank books, trial dockets, blanks and stationery and all things necessary for the prompt discharge of his duty.

However, if the commissioners at any time fail to supply the necessary books, stationery and supplies the clerk may procure such articles and upon his certificate shall be allowed therefor. Your second inquiry is answered by the reply to the first in that it is the primary duty of the county commissioners to furnish supplies and the clerk therefore is not the sole judge of what supplies he shall purchase, and the commissioners have the power to determine what are the needs of his office.

However, the commissioners should consult the clerk and determine what supplies he may need for the prompt discharge of his duties.

Yours respectfully,
TIMOTHY S. HOGAN,
Attorney General.

44.

TAXES AND TAXATION—HOUSES FOR PUBLIC WORSHIP—INSTITUTION OF PURELY PUBLIC CHARITY.

A house, owned by a private individual and used exclusively as a place for public meetings and for addresses, the owner receiving no pecuniary gain therefrom, is not a house used exclusively for "public worship" nor an "institution of purely public charity," within the comprehension of article 12, section 2 of the constitution nor of sections 5345 and 5353, General Code, providing for exemptions from taxation.

COLUMBUS, OHIO, January 20, 1911.

HON. FRANK H. FREBIS, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—You state that from the years 1848 to 1901 certain property at Ripley, Ohio, was occupied by the Christian church for religious purposes of the church building constructed thereon; that no taxes during this period were paid on such property; that in 1901, the church having disbanded, this property was sold to an individual and conveyed to him by deed, and that from 1901 until about one year ago this property was used only for religious meetings, W. C. T. U. meeting; as a public meeting place and as a place for the delivery of addresses upon public questions, the owner of the property receiving no revenue from such property in return for such uses of the same.

You ask whether or not the owner of such property is exempt from paying taxes on the same from the time of his acquisition of such property since 1901. Article 12, section 2 of the constitution provides that:

"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."

Section 5349 of the General Code provides that:

"Houses used exclusively for public worship, the books and furniture therein and the ground attached to such building necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit * * *, shall be exempted from taxation."

Section 5353 of the General Code provides that:

"Property belonging to institutions of public charity only, shall be exempt from taxation."

Since the persons owning the above exempted classes of property, enjoying benefits arising from the taxation of property without being themselves taxed, and since exempted property enjoys such advantages at the expense of the property not exempted, it would be an injustice to the public at large to give any particular property the special privileges of exemption from taxation unless such property clearly falls within the exempted class.

The above property cannot be described as property belonging to an institution of public charity only, because an individual cannot be an institution and because such property was not set aside for public charity only in such a manner that it could not at any moment be used by the owner for a different purpose. The owner, in fact, continued to exercise full control over this property, and may, so far as we know, have been holding such property as an investment with a view to selling the same at a profit, or may have permitted its occupancy upon certain conditions as to the care or custody of the same, which conditions might amount to an adequate consideration for the use of such property. At any rate the ownership and control of such property was vested in an individual instead of in an organization or corporation which might be classed as an institution of public charity only, and such individual could use or dispose of such property at any time in any manner he desired without taking into consideration anything except his own individual profit.

This property cannot be classed as under the heading "houses used exclusively for public worship," because it was owned by an individual and used, not merely for public worship, but also as a public meeting house and a place for W. C. T. U. meetings and a place for the delivery of addresses. Even if such a building were used exclusively for religious purposes, it might be claimed that the individual owner might be compelled to pay taxes for such property unless the property were owned by the particular persons or organizations using such property for public worship.

Since, therefore, the property described by you does not fall within the two classes above named as exempt or within any other classes of exempted property, I am of the opinion, from the facts presented, that the owner of such property is liable for taxes thereon from the date of his purchase in 1901.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

45.

COUNTY PROSECUTOR—CRIMINAL PROCEDURE—EXPENSE OF BRINGING WITNESS FROM ANOTHER STATE, ALLOWED BY COMMISSIONERS—ORDER OF COURT.

Under authority of section 3004, General Code, authorizing the county commissioners to allow expenses incurred by the county prosecutor in furtherance of justice, the actual expenses of bringing a witness for the state in a criminal case together with a necessary companion, from the state of Illinois, may be advanced by the prosecutor and reimbursement may be made by the county commissioners.

It would be well, however, to have a special order of the court for the purpose.

January 20, 1911.

HON. CHARLES H. DUNCAN, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—Your letter of January 18, 1911, requesting my opinion on the following state of facts received:

> "In the case of State vs. Brannon, now pending in the court of common pleas of this county, the defendant is charged with first degree murder. The only witness available for the state and one without which it cannot safely go to trial is a resident of Illinois. This witness is willing to come here and testify at the trial provided her expenses are paid. Her condition is such that she cannot and will not travel without a companion. Am I authorized under section 3004 of the General Code to advance to this witness her actual expenses incurred in coming here to testify, including the traveling expenses of her companion, less, of course, such sum as she may lawfully draw as witness fees and mileage to the state line, and include sum so advanced in my monthly expense account? The phrase 'in furtherance of justice' would seem to be broad enough to include such an item of expense."

Section 10 of the Bill of Rights provides that in any trial in any court the party accused shall be allowed to demand the nature and cause of the accusation against him, and have a copy thereof, to meet the witness face to face, and to have compulsory process to secure the attendance of witnesses in his behalf.

Under section 13668 of the General Code it provides

> "That if a material witness for the defendant resides out of the state, etc.,"

the procedure necessary to secure the attendance of such witness, but there seems to be no section of the General Code that expressly authorizes the expenditure of money to secure the attendance of witnesses for the state who reside outside of the state.

The section of the Bill of Rights just referred to gives the accused the absolute right to meet the witnesses against him face to face; then in the proper administration of justice there should be a statute authorizing the incurring of expenses under conditions named by you in your letter. I believe there is.

To hold otherwise it would retard and sometimes defeat the administration of justice.

Section 1024 of the Revised Statutes, now section 2570 of the General Code, formerly section 12 of Swan's Statutes amended, provides as follows:

> "Except moneys due the state, which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from such treasury, upon presentation of the proper order or voucher therefor, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose and on what fund. He shall not issue a warrant for the payment of any claim against the county, unless allowed by the county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal authorized by law so to do."

The statute just quoted authorizes the auditor to issue county warrants for the payment of any claim against the company where the amount due is fixed by law, or allowed by an officer or tribunal authorized by law so to do. In the case of the State ex rel. Cooper vs. Armstrong, Auditor, found in 19 Ohio Reports, page 116, the sheriff of Hamilton county, during the May term of 1850, expended the sum of $174.17 in and about the boarding and care of two traverse juries, impanelled to try a person charged in two indictments, with the crime of murder, there being no statutory provision at that time providing for the payment of such expenses. This money was expended by the sheriff in obedience to the order of the court made necessary in the administration of justice in a criminal proceeding. The auditor refused to make an allowance for this bill and mandamus was brought by the sheriff against him seeking to compel him to allow this bill.

The supreme court in passing upon the question said:

> "There is no difference of opinion amongst our number, in respect to the justice of this claim, and the propriety of the expenditure by the sheriff, under the circumstances.
>
> "Indeed we would with one voice unite in advising the defendant to audit and allow the account as a proper charge against the county of Hamilton, but we do not see the way clear to carry out the remedy by mandamus, as the law no where, in express terms, makes it the duty of the auditor to act upon the allowance of the court, in cases of this sort.
>
> "A majority of the court, however, believe it to be a necessary incident to their authority, to make a provision for the sustenance and care of juries when called to administer the criminal laws of the state, in any county; and as the speediest way of reimbursing the sheriff for money advanced by him for this salutory purpose, they will direct the county auditor to consider an account of this character, audited and allowed by the court as 'a just demand against the county, settled and allowed by a tribunal authorized by law to do so.'"

While there has been no ruling of this department upon the identical question involved, but I am informed that it has been the custom of the state accounting bureau to hold that expenses incurred under like circumstances set forth in your letter were lawfully incurred by the prosecuting attorney under section 3004 cited by you and a proper subject for allowance by the county com-

missioners. It is, therefore, my opinion that the prosecuting attorney can incur the expenses referred to in your letter under authority of section 3004 of the General Code, and the same should be allowed by the county commissioners. I, however, advise that you also secure a special order of the court authorizing you to incur the expenses stating in the entry the same is necessary for the purpose of administration of justice in the case referred to.

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

47.

COMMISSION, "OLDEST" OF JUSTICE OF THE PEACE—DATE OF SIGNING AND ISSUE.

The "oldest commission" for the purpose of determining the justice of the peace who shall fill a vacancy in the board of trustees, is one bearing the earliest date of signing and issue.

COLUMBUS, OHIO, January 21, 1911.

HON. DAVID A. WEBSTER, *Prosecuting Attorney of Williams County, Bryan, Ohio.*

DEAR SIR:—Your favor of January 4, 1911, addressed to my predecessor, Hon. U. G. Denman, has been referred to me.

You ask for a construction of section 1452 of Bates' Revised Statutes, and an answer to the following question:

> "Does the oldest commission refer to the date of the commission, as signed by the governor or the date of the term beginning under the commission?"

Section 3263 of the General Code, which was formerly section 1452, Revised Statutes, reads as follows:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

My opinion is that the words "oldest commission" undoubtedly refer to the date upon which the commission was signed and issued. You state that one commission is dated November 29, 1909, and that the other commission is dated December 21, 1909; therefore, under section 3262, the oldest commission is the one dated November 29, 1909.

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

49.

ASSESSMENTS ON SCHOOL LANDS VESTED BY CONGRESS IN LEGISLATURE IN TRUST FOR SCHOOL PURPOSES ILLEGAL—SECTION 16; MARION TOWNSHIP.

Section 16 of school lands in Marion township was vested in the state in trust for school purposes, by act of congress. There is no special statutory provision making such lands amenable to assessments for pike improvements and such an assessment would furthermore be a violation of the trust defined by agreement between the state and the United States.

Nor are the trustees of said section authorized or given any power to consent to such an assessment.

COLUMBUS, OHIO, January 21, 1911.

HON. J. R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—You state that Marion township in your county still owns original school section sixteen, and that under sections 7181, et seq., of the General Code, an assessment for the construction of a pike has been levied against such section of school lands. You ask whether such assessment is valid, and whether the trustees of the original township are authorized to pay such assessment if they so desire.

In the case of Lessee, etc., vs. Campbell, et al., 17 Ohio, 267, the court say:

> "Section sixteen by act of congress, passed March 3, *1803, was vested in the legislature of the state in trust for the use of schools.* By a law of Ohio, relating to original surveyed townships, provision is made that three trustees and a treasurer shall be elected for the purpose of taking into their care the school lands."

In the case of Trustees, etc., vs. Campbell, et al., 16 O. S., 11, the court say:

> "By the ordinance and resolution passed by the convention of Ohio, November 29, 1802, modifying the propositions made by congress, in the act of April 30th of the same year, it was required that all lands to be appropriated by the United States for the support of schools should be *vested in the legislature of this state, in trust for said purpose.* Congress, by act approved March 3, 1803, confirmed its propositions to the requirements of the ordinance, and declared that section sixteen, and the other lands appropriated for the use of schools in the state of Ohio, should be vested in the legislature of the state, in trust for the use of schools, and *for no other use, intent, or purpose whatever* * * *. The vesting of these lands, by the act of congress, in the legislature, in pursuance of the ordinance of this state, is the same in legal effect as if the title had been vested in the state, eo nomine. They thereby became the property of the state, in trust for the townships or districts for which they were designed."

The court further held that the management of such lands by officers provided for by laws of the state "in no way lessens the rights or responsibilities of the state, or changes its relations to the property," and that the legislature

itself has taken this view, in a number of acts. by describing such school property as "the property of the state."

The principles above cited from 16 O. S., 11, are reiterated in the case of Seeley vs. Thomas, 31 O. S., 301, in which case it is held that the statute of limitations does not operate as to school lands, for the reason that such lands belong to the state in trust.

It is conceded that, under article 12, section 2 of the constitution and section 5349, General Code, school lands are exempt from taxation. However, the point is raised in this case that, an assessment under sections 7181, et seq., is not a tax under the above provisions of the constitution, and section 5349, General Code; and the case of Lima vs. Cemetery Association, 42 O. S., 128, is cited in support of this view. In commenting upon such case, the court, in the case of Poock, Treasurer, vs. Ely, et al., 4 C. C. R., 41, used the following language:

> "In that case the lands were the property of a private corporation, which but for the express exemption by law, would have been liable for taxes. In other words, it is only by virtue of the statute that cemeteries and the like are exempt from taxation, and assessments as distinguished from taxes not being included within the exemption, may be lawfully levied upon the real estate of such corporations. But can this be so as to lands belonging to the state, and held for the support of public schools? The policy of the state from the time of its organization has been to encourage schools and the means of education. To hold that school lands may be assessed for the construction of roads, ditches and the like, and the rents sequestrated to pay the expense, would be to defeat the object of the trust upon which the state holds its title, and against state policy. We are bound to presume that the legislature, in whom is vested the title to these lands, did not intend, in exempting from taxation cemeteries and the like, to imply the right to assess lands held by it for school purposes for local improvements, and thus impair, if not defeat, the very object of the grant."

To hold that an assessment can be made and enforced against school lands would, therefore, amount to holding that such lands could be made liable for the payment of money without the consent of the state, and in violation of the trust reposed in the state when such lands were conveyed to the state by the United States government for the support of our schools. This is made more evident when we consider that if the assessment can be made against such lands, then upon the refusal of the trustees to pay such assessment, such lands could be sold for the payment of the assessments, in the same manner as other property assessed.

This view is further supported by the decision of the supreme court in the case of Toledo vs. Board of Education, 48 O. S., 83, in which the court held: (See syl.)

> "School property is not liable to assessment for a street improvement; nor can a judgment be rendered against the board of education for the payment of the assessment out of its contingent funds."

And in the case of 48 O. S., 87, it is held that school property is not assessable for a sidewalk.

Whether, therefore, we follow the rule of statutory construction, that a general statute cannot be made applicable to the state or to lands owned by the

state unless specifically made applicable: or whether we take the view that such school lands are held in trust by the state and that the permission of such an assessment would be a violation of such trust, as defined by agreement between the state and the United States, we must conclude that such an assessment cannot be made against school lands.

Nor can it be contended that under the provisions of section 3197, the trustees may, of their own volition, pay such an assessment, because of the benefits to be derived from the school lands under their control. The trustees of such school lands are only the agents of the state, and "are a corporation for special limited purposes, with special and definite powers only, and cannot, in general, do any act foreign to the purpose of their creation." (5 Ohio 185.) While section 3197 authorizes them to make improvements "on the school lands," such improvements are to be made by the trustees themselves, and not by some outside authority; and I find no law authorizing such trustees to consent to an assessment, even voluntarily, on the ground of benefits to be received by school lands by reason of any improvement.

I am, therefore, of the opinion that an assessment against the school lands under section 7181, et seq., General Code, is invalid, and that the trustees of school lands cannot consent to and pay such assessment. Such lands should, therefore, be entirely excluded from consideration in the making of assessments in connection with such road improvement.

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

51.

SHERIFFS—ALLOWANCE BY COUNTY COMMISSIONERS OF EXPENSE OF "MAINTAINING" HORSES AND VEHICLES—NO ALLOWANCE FOR PURCHASING OR RENTING THE SAME.

As section 2997, General Code, provides only that the sheriff may be allowed the expenses of "maintaining" horses and vehicles necessary to the administration of his duties, such expenses may only be incurred to the extent of the cost of up-keep, subsistence or care, etc., of horses or vehicles.

Expenses may not therefore, be allowed for purchasing or renting, or contracting for these facilities.

January 23, 1911.

HON. WALTER W. BOULGER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 11th, 1911, in which you state:

> "I have been requested by the county commissioners of this county to give an opinion as to the right of the commissioners either to contract for horses and vehicles necessary to the proper administration of the duties of the sheriff's office or to allow the sheriff his expenses incurred in renting horses and vehicles for such purposes."

You also refer to the opinion of Attorney General Ellis rendered December

20, 1906, which held that under what is now section 2997 of the General Code, the county commissioners should furnish the necessary horses and vehicles for the use of the sheriff, and to the case of the State vs. Commissioners, 10 C. C., n. s., 398, which disapproves of this opinion; and you also ask whether or not this department has made any further ruling in this regard.

Answering your last question first, I wish to state that to the best of my knowledge this department has made no further ruling upon this particular question since the decision of the circuit court that you refer to, unless a decision rendered by Attorney General Denman November 2, 1909, holding that the commissioners were without authority to purchase an automobile for the use of the county surveyor, can be so regarded.

Section 2997 of the General Code was originally section 19 of the salary law, as passed March 22d, 1906, Ohio Laws, volume 98, pages 89, et seq. This law as originally enacted, and as found in said reference, is as follows:

> "The county commissioners shall, in addition to the compensation and salary herein provided, make allowances quarterly to every sheriff for keeping and feeding prisoners under section 1235 of the Revised Statutes, and shall allow his actual and necessary expenses incurred or expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state asylum for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office. Every sheriff shall file under oath with the quarterly report herein provided for, a full, accurate and itemized account of all his actual and necessary expenses, mentioned in this section before the same shall be allowed by the county commissioners."

Upon this law as above quoted the opinion of Attorney General Ellis, and the opinion of the circuit court in the 10 C. C., n. s., 398, were both rendered. I wish to call your attention particularly to the language of the court in said case beginning on page 399:

> "As we view it, there is nothing in the section which indicates an intention on the part of the legislature in the use of the word 'maintaining,' of using it, or giving to it, any other than its ordinary meaning. On the contrary every word in the section indicates otherwise.
>
> "There is no provision in it for the allowance of expenses in the purchase of any articles by name, but feed; and all other intended articles can be ascertained only by implication. Public offices can be allowed only such compensation, or fees, as are provided for in express terms, or by necessary implication from the terms used, and the words 'expense of maintaining,' as applied to horses and vehicles, cannot, by implication, include, or refer to, the expense of their purchase. If the legislature intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it certainly would have so provided in unam-

biguous terms. Simple words only were needed to make such a provision.

"What, then, is the definition—the ordinary meaning—of the word 'maintaining' especially when applied to animals and vehicles?

"All lexicographers define maintenance as 'maintaining: supporting; upholding; keeping up; sustenance; supply of the necessaries of life; subsistence:' and the word maintain 'to hold or keep up in any particular state or condition; to support; to sustain; to keep up.' So that the meaning of the word 'maintaining' as used in this section in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the legislature therefore, in this provision only meant and intended that sheriffs should be allowed the necessary expenses incurred in supporting, sustaining and supplying their horses with the necessaries of life, and in keeping their vehicles in good condition, and not in the purchase of them."

You will not particularly that the court expressly says:

"Public officers can be allowed only such compensation, or fees, as are provided for in *express terms*, or by necessary implication from the terms used."

And again:

"If the legislature intended to have the county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it certainly would have so provided in unambiguous terms. *Simple words only were needed to make such a provision.*"

Therefore, my opinion is that if the legislature had intended to give the commissioners the right to contract for horses and vehicles necessary to the proper administration of the duties of the sheriff's office, or to allow the sheriff his expenses incurred in renting horses and vehicles for such purposes, it certainly would have said so, as the court says, in unambiguous terms—simple words only were needed to make such a provision.

My opinion in this regard is made all the stronger from the fact that after the decision of the circuit court was so rendered, holding that the commissioners were without authority to supply horses, etc., to the sheriff, or to allow them expenses necessarily incurred in their purchase, and that public officers can only be allowed such compensation or fees as is provided for in express terms; the act quoted in full in the first part of this opinion was amended by the legislature. See vol. 99, Ohio Laws, 73; and is the same as section 2997, incorporated in the General Code. The defects and omissions in the original law, if any existed, had been clearly indicated by said decision of the circuit court, and yet, the only amendment the legislature made was to insert the following paragraph in said original law, to wit:

"The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases."

and also the following words:

"including railroad fare and street car fare."

Evidently the legislature is cognizant of the fact that such necessary expenses as railroad fare and street car fare were not provided for by said original law, and that if the sheriffs were to be allowed therefor it would be necessary to so specify these items in express terms; which was done.

Therefore, as the closing paragraph of this section now stands, is:

> "Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare and street car fare, *mentioned in this section* before they shall be allowed by the commissioners."

And said section nowhere provides for the allowance to the sheriff for his expenses incurred in renting horses and vehicles for the proper administration of his office. It is my opinion that the same cannot be allowed. I am aware that this holding is in all probability contrary to the general practice in this state, and that the disallowance of such bills will in many cases work a positive hardship to the sheriff, but under the decision of the circuit court, and other decisions along the same line, and the language of the statute itself, I cannot see my way clear to make any other holding. If the public interest requires it (and it certainly does require that an officer shall not be compelled to perform necessary duties, and pay necessary expenses of his office without any remuneration whatever therefor), it is a matter for the legislature.

As to the right of the commissioners to purchase vehicles or horses for the sheriff that question is expressly decided by the circuit court in the negative and it is not necessary to state anything further concerning it.

It is my opinion, however, that the sheriff can be allowed for all his actual necessary expenses, whatever the same may be, incurred in pursuing or transporting person accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of the unfortunates.

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

53.

COUNTY AUDITOR NO POWER TO TRANSFER FUNDS TO FEE FUNDS.

The county auditor is without any power to transfer funds from the county fund to the auditor's fee fund without any order or direction from the county commissioners.

COLUMBUS, OHIO, January 23, 1911.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your favor of January 21st, in which you request my opinion on the following question:

> "The county auditor of this county has attempted to transfer

$1,000.00 from the county fund to the auditor's fee fund without any order or direction from the county commissioners so to do. Calling your attention to section 2571 and sections 2296-2303 and section 2443 of the General Code, has the auditor any authority of law for such action?"

I agree with the opinion rendered by you to the county treasurer to the effect that such action on the part of the county auditor is without authority of law. I am of the opinion that he is attempting to act under sections 2983 and 2984 of the General Code, as amended in vol. 101 Ohio Laws, pages, 199, 200.

Section 2984 of the General Code, as amended, provides that:

"On the first Monday of April, July, October and January, whenever necessary, during one year after April 1, 1910, the county commissioners, by order entered on their journal, shall transfer from any other fund or funds of the county in their discretion, to any county officer's fee fund, such sums as are necessary to make good any deficiency in such fee fund. * * *"

Whether the auditor was assuming to transfer the funds under the section just quoted or under sections 2296 to 2302, cited by you, and other sections, I am unable to state. However, I concur, as above stated, in the opinion rendered by you, to the effect that the auditor was without authority of law to transfer funds from the county fund to the auditor's fee fund without any order or direction from the county commissioners so to do.

Respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

57.

COUNTY PROSECUTOR—LEGAL ADVISER OF "ONE MILE TURNPIKE" ROAD COMMISSIONERS.

Though not strictly county officers, the duties of the road commissioners, under the one mile turnpike law, are due to the county, and are so closely wrapt up with the work of the county commissioners, that under section 1274, General Code, in its old and in its present form, the prosecuting attorney is the sole legal adviser of these commissioners in their official capacity.

COLUMBUS, OHIO, January 24, 1911.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your communication of January 2, 1911, addressed to my predecessor in office, Hon. U. G. Denman, has been referred to me for answer.

In your communication you ask for an answer to the following questions:

"*First.* Did the prosecuting attorney under the old law, by virtue of his office, represent the road commissioners under the one mile turnpike law; if not, were said road commissioners authorized in the per-

formance of their duties enjoined by the statutes upon them, to employ counsel to assist them therein, and pay for said services?

"*Second.* Does the prosecuting attorney under the present law, by virtue of his office, represent gratis, the road commissioners in the performance of their duties enjoined upon them by the statutes, or is such board authorized to employ other counsel and to pay for his services in the performance of such duties?"

In answer to your first question, I desire to say that prior to the amendment of section 1274 of the Revised Statutes, as amended 98 O. L., p. 160, the prosecuting attorney was, by virtue of his office, attorney to prosecute on behalf of the state all complaints, suits and controversies in which the state was a party, and such other suits, matters and controversies as he was directed by law to prosecute within the county, in the probate court, court of common pleas and circuit court. In addition thereto it was his duty, and he was the legal adviser of the county commissioners and other county officers, and any and all of them could require of him written opinions or instructions in any matters connected with their official duties, and for these services the county commissioners were compelled to annually, at their December session, make him such allowance as they thought proper for said services.

By the amendment of section 1274, above referred to, 98 O. L., 160, the duties of the prosecuting attorney were enlarged to the extent that it made it his mandatory duty to be the legal adviser, in addition to those officers enumerated in the statute, of all township officers, and said amendment also provided that no county officer or township officer had the right to employ other counsel or attorney-at-law to prosecute or defend their respective boards or members in any suits or actions at the expense of the county or township except as provided in section 2412, and the said amendment as now found in the latter part of section 3003 of the General Code provides that:

"No prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars. Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

The board of road commissioners under the one mile turnpike law, while not directly county officers or a county board, yet their duties being for the benefit of the county or the public, and under the supervision of the county commissioners, and such duties being so intertwined with those of the commissioners of the county, I am of the opinion that they are by implication one of the boards that it becomes the duty of the prosecuting attorney to represent, the same as the board of county commissioners or any other county board in any action or controversy without additional compensation for such services other than those provided by statute. Therefore, the old law, in my opinion, required the prosecuting attorney to perform the legal services necessary to be performed by said board of road commissioners without additional compensation, and that said board was without authority to employ other counsel to assist them in any litigation or controversies and pay for said services.

In answer to your second question, I am thoroughly convinced that under the present law, by virtue of his office, the prosecuting attorney would be com-

pelled to represent said road commissioners in any litigation or controversy without additional compensation for so doing. It is very clear that the amendment of section 1274, as amended in 98 O. L., 160, removed any doubt, if there ever was any, as to what the duties of the prosecuting attorney were, and as to the salary or compensation he was to receive for said services, and that any and all services rendered to any and all boards of the county, such as inquired about in your letter, are being paid for under the salary provided for in said statute.

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

58.

TAXES AND TAXATION—JOINT SCHOOL DISTRICTS—TAXATION OF JOINED DISTRICTS IN PROPORTION TO PROPERTY VALUATION.

When a joint school district is formd for high school purposes by a township school district and an adjoining village district, such district becomes one district and taxes for the support of the same must be borne by the respective joined districts in proportion to the total valuation of the property in each, notwithstanding the fact that the village district sends the most pupils and has the smallest valuation.

COLUMBUS, OHIO, January 24, 1911.

HON. J. J. WEADOCK, *Prosecuting Attorney, Allen County, Lima, Ohio.*

DEAR SIR:—Your letter of December 31st, 1910, has been unanswered until now on account of the great accumulation of work in this office, occasioned by the change in administration.

You ask for an interpretation of sections 7669 and 7671 of the General Code of Ohio. Section 7669 reads as follows:

> "The boards of education of two or more adjoining township school districts, or of a township district, and of a village or special school district situated partially or wholly within the township, or of any two or more of such school districts, by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building, it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

Section 7671 of the General Code reads as follows:

> "The funds for the maintenance and support of such high school

shall be provided by appropriations from the tuition or contingent funds, or both, of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

You state:

"We have a situation here in which the valuation of the property in the township greatly exceeds that of the valuation of the property in the village, but the village has about three times as many pupils to attend the high school as the township."

and you ask:

"Can the board of the township and the board of the adjoining village agree upon the amount the township and the village shall use in erecting the buildings and purchasing a site, or must the village and township bear the burden in proportion to the total valuation of the property in the respective school districts?"

The sections above quoted, really need no interpretation on the point raised by you, as they are silent with regard to it. Section 7670 refers to the high school district established as provided by section 7669 as a "joint district;" therefore, it is to be regarded as one district—a joint high school district; section 7672, General Code, provides that "boards of education exercising control for the purpose of taxation over territory within a township or *joint township high school district* may levy upon *all the taxable property within such territory;* section 7669, quoted above, provides that the bonds shall be issued as is provided by law in case of erecting or repairing school houses; this provision is found in section 7625 of the General Code; and section 7628, General Code, provides the method for levying taxes to pay the bonds issued under section 7625 and is as follows:

"When an issue of bonds has been provided for under the next three preceding sections, the board of education, annually, shall certify to the county auditor or auditors as the case may require, a tax levy sufficient to pay such bonded indebtedness as it falls due together with accrued interest thereon. Such county auditor or auditors must place such levy on the tax duplicate. It shall be collected and paid to the board of education as other taxes are. Such tax levy shall be in addition to the maximum levy for school purposes, and must be kept in a separate fund and applied only to the payment of the bonds and interest for which it was levied."

Therefore, as all taxes must be uniform; as the district when established under section 7669 is one district; and no express authority is given by the statute for the board of the township and the board of the village agreeing upon the amount the township and the village shall use in erecting buildings or purchasing a site, it is my opinion that the same must be borne in proportion to the total valuation of property in the respective districts, and levied in the manner provided in section 7628 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

59.

INFIRMARY DIRECTORS--NECESSITY TO ADVERTISE FOR BIDS FOR MEDICAL SERVICES—REASONABLE METHOD OF NOTICE.

Infirmary directors may not contract for medical services without advertising for bids. But such advertisement need not be made in a newspaper and any reasonable method of notice will suffice.

COLUMBUS, OHIO, January 24, 1911.

HON. JOS. C. RILEY, *Prosecuting Attorney, Lawrence County, Ironton, Ohio.*

DEAR SIR:—I am in receipt of your favor of January 18th, in which you request me to reconsider my construction of section 2546 of the General Code in regard to the employment of medical services by the infirmary board.

I have gone over the decision carefully, and see no reason to change my opinion. If you will read the opinion of this department under date of January 2d you will see I do not hold that it is necessary to advertise in a newspaper for bids from competent physicians in your county, for services to be rendered to the board.

Section 2546 of the General Code provides that the infirmary directors may contract with one or more competent physicians to furnish medical relief, etc., for persons in the respective townships, who come under their charge, and that such contract shall be given to the lowest competent bidder, the directors reserving the right to reject any or all bids, etc. Quoting from my former opinion:

> "The section does not specifically provide for advertising, but it is clearly the meaning of the statute that the infirmary directors shall give notice in some way for bids, for the reason that it would be impossible for them to receive competitive bids from competent physicians unless the matter was brought to their attention by some sort of a notice. Under the statute, inasmuch as it is not provided in what way the notice shall be given, I am of the opinion that any reasonable notice will be sufficient. The infirmary directors may advertise in a newspaper, distribute circulars or personally notify the physicians who would be competent bidders under the statute."

I am further of the opinion that some notice must be given to the various physicians in your county, asking them to bid for medical services, etc., to be rendered to your board. Under authority of section 2546 of the General Code, however, I hold that the notice is not required to be published in newspapers. I cannot see how it would work a hardship on your county to resort to competitive bidding, under notice that may be given verbally, by advertising, or any other method upon which you might determine. To hold that the county infirmary directors may employ physicians without notice would throw the doors open to fraud.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

70.

MUNICIPAL CORPORATION—CONTRACTS OF COUNCIL AND OF PUBLIC SERVICE DIRECTOR FOR ELECTRIC LIGHT—ADVERTISEMENT FOR BIDS.

Contracts for the furnishing of electric light to a municipality amounting to over $500 must be advertised and let to the lowest and best bidder as provided by statute. Before such contract may be entered into by a public service director, however, it must be authorized by ordinance of council.

COLUMBUS, OHIO, January 26, 1911.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 17th, 1911, in which you make the following inquiry:

> "Do the provisions of sections 4328, 4329 and 4330 of the General Code providing for advertisement and public bidding on contracts involving an expenditure of more than five hundred dollars apply to a contract for furnishing electric light to a municipality and its inhabitants, running over a term of years, where the company to be contracted with is a new company and not at the time of said contract operating a plant or engaged in business in said municipality?"

The sections you refer to, 4328, 4329 and 4330 of the General Code provide for public contracts that may be made by the director of public service on behalf of the municipality: if under these provisions of the statute the director of public service has the power to enter into such a contract as you refer to, it is my opinion, if the expenditure contemplated exceeds $500 such expenditure shall first be authorized and directed by ordinance of council, and the contract must be made with the lowest and best bidder after advertisement as provided in said section. I find nothing in this section or the other sections relating to contracts to be made by the director of public service that authorizes any exception from the provision for advertisement and public bidding upon contracts involving an expenditure in excess of the amount fixed by the statute.

Section 3809 of the General Code provides for a contract of this character to be entered into by council; section 3994 of the General Code also provides for a contract by a municipal corporation for supplying electric light, etc.

Section 4221 of the General Code is as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Therefore, my opinion is as above stated, that a contract of this character can only be entered into in accordance with said statute.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

77.

CLERK OF COURTS—ALLOWANCE FOR DEPUTY HIRE AS FIXED BY COUNTY COMMISSIONERS, FINAL.

A clerk of courts is limited to the amount fixed by the county commissioners in fixing compensation of his deputies. When the county commissioners, therefore, allow $720.00 *and the clerk pays his deputy* $75.00 *a month, after the* $720.00 *is exhausted, further warrants may not be drawn for compensating said deputy.*

COLUMBUS, OHIO, January 27, 1911.

HON. J. W. SMITH, *Prosecuting Attorney, Putnam County, Ottawa, Ohio.*

DEAR SIR:—Your communication of January 24th received.

You state:

> "The commissioners made an allowance to the clerk of the common pleas court for deputy hire in the sum of $720.00, under the provisions of section 2980, General Code. The allowance for the two years previous had been $900.00 per year. The clerk makes his certificate showing that he has fixed the compensation of his deputy at $75.00 per month. This exceeds 1-12 of the amount allowed for the year."

and inquire:

> "Can the auditor legally pay to such deputy $75.00 at the end of each month until the fund is exhausted? If so, is the auditor authorized to issue warrants on the treasury for such deputy hire after the fund is exhausted?"

Under authority of section 2980 of the General Code, the clerk of the common pleas court, on or before the 20th day of each November, shall prepare and file with the county commissioners, a detailed statement of the probable amount necessary to be expended by him for deputies, assistants, clerks and other employes of his office for the year beginning January 1st next thereafter; and the law requires that the county commissioners within five days thereafter shall fix an *aggregate* amount to be expended for such period for the compensation of such deputies, assistants and clerks, and shall enter their finding on the journal.

Under section 2981 of the General Code, after the commissioners have fixed the aggregate amount to be expended by the clerk for deputy hire, the clerk is authorized to employ a deputy and fix his compensation, and file with the county auditor a certificate of such action, but the compensation fixed by the clerk shall not exceed in the *aggregate* the amount fixed by the commissioners for his office for clerk hire.

You state that the clerk of the court, under the authority of the section last named, employed a clerk for $75.00 per month and filed the necessary certificate with the county auditor. You also state that the county commissioners fixed an aggregate amount to be expended by the clerk of the court for clerk hire of $720.00. The clerk is not authorized to expend for clerk hire any larger amount than that fixed by the commissioners. He has the right to fix the compensation of his clerk and may fix it at $75.00 per month, and the auditor may

legally pay to such deputy $75.00 per month at the end of each and every month until the fund is exhausted, after which the auditor shall not issue any more warrants on the treasury.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

81.

COUNTY TREASURER— SEMI-ANNUAL SETTLEMENTS—DATE MANDATORY—LENIENCY RECOMMENDED.

As the county treasurer may be forced by mandamus to make his semi-annual tax settlement, if delayed until after February 15, such duty is mandatory.

In view of the fact however, that the law has been changed to make February 14th the date for sale of delinquent lands, all public officials are recommended to make allowances.

COLUMBUS, OHIO, January 30, 1911.

HON. SHOLTO M. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 16th, in which you request an answer to the following question:

> "Is section 2683 of the General Code directory or mandatory? That is, can the treasurer delay making the semi-annual settlement with the auditor until after February 15th?"

In reply I desire to say that it is my opinion that said section 2683 of the General Code is mandatory, and that the treasurer must make a semi-annual settlement on or before the 15th day of February in each year.

Any statute which enjoins upon an officer a duty, the non-performance of which would make him, as such official, subject to an action in mandamus to compel the performance of said duty, is mandatory.

In view of the fact, however, that the general assembly in 1910 so amended the sections of the General Code relating to the time of holding the sale of delinquent lands (101 O. L., 164-165) as to make the day (this year on February 14) only one day before the time the county treasurer is compelled to make his semi-annual settlement with the county auditor, I would advise that the treasurer perform the duties enjoined by both statutes referred to in your letter as nearly as possible in strict conformity thereto, and it appearing to be almost impossible for the county treasurer to hold said delinquent land tax sale on the 14th of February and make his semi-annual settlement with the county auditor on the 15th of February, there will have to be some leniency shown by all officials in order to meet such a misfortunte as now exists relative to said matters.

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

86.

ELECTIONS—GENERAL EXPENSES—BOOTHS, HEAT, LIGHT, ETC.—PAYMENT FROM COUNTY TREASURY UPON APPROVAL OF BOARD OF ELECTIONS.

The necessary expense of removing, preserving and taking care of booths, and equipments when intrusted to township clerks and city auditors after elections, is payable out of the county treasury upon the approval of the board of elections. The same is true with respect to heat, light, tables and chairs and other such incidentals required in the election.

COLUMBUS, OHIO, January 31, 1911.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication of January 16th received. You inquire:

> "*First.* Is it obligatory upon the board of deputy state supervisors of elections to allow the necessary expenses incurred by the clerk or auditor for putting up booths and equipments at the various voting places under section 5046 of the General Code, or is the allowance of this item of expense discretionary with the board? In other words, does the word 'may' as used in that section mean 'shall?'"

The provisions of section 5044 of the General Code and other succeeding sections of chapter 8 of the election laws, provide that the board of deputy state supervisors of elections shall furnish booths, guard rails, etc., that may be necessary for the proper conduct of elections.

Section 5046, General Code, provides that after each election these booths, guard rails, etc., shall be returned to the clerk of the township or clerk or auditor of the corporation for safe keeping.

Since the booths, guard rails and voting shelves are purchased by and are under the control of the board of elections, and after each election this property is to be preserved by the township clerk or the city auditor, as the case may be, it is my opinion that the necessary expense for the removal of the same, after each election, is payable out of the county treasury, and it is obligatory upon the board of elections to allow the necessary expense for the preservation and taking care of and removal of said equipment after the election. The amount to be allowed for this expense, of course, is subject to the approval of the board of elections.

You also inquire:

> "*Second.* Under section 5052, should the expense of furnishing heat and light, tables and chairs and other things used in connection with the election, excepting the booths, be paid out of the county treasury, or should such expense be borne by the township or municipality? I understand the holding to be that the municipality shall furnish the place for voting. Does this include the furniture, heat, light and other necessary things excepting the booths and ballot boxes and other supplies?"

Under authority of section 5052 of the General Code, which provides that:

> "All expenses of printing and distributing ballots, cards of explana-

tion to officers of the election and voters, blanks, and other property and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

I am of the opinion that heat and light, tables and chairs and other things used in connection with the election should be paid for by the board of elections out of the county treasury.

I enclose herewith copy of an opinion this day rendered to A. E. Jacobs, city solicitor of Wellston, Ohio, which will answer your second inquiry, giving the sections of the General Code bearing upon the question in detail.

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

88.

INFIRMARY DIRECTORS AND SOLDIERS' RELIEF COMMISSION—CONCURRENT AUTHORITY WHEN—LEGAL SETTLEMENT OF PATIENT.

The infirmary directors have equal authority with the soldiers' relief commission over the parties with respect to whom the latter commission is given jurisdiction.

When one of such parties enters into a strange county and becomes in need of assistance, before having obtained a legal residence therein, it is mandatory upon the infirmary directors of said county to return such party, if his health permits, to the county of his last legal residence.

COLUMBUS, OHIO, February 1, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your communication dated January 4th, addressed to Hon. U. G. Denman, my predecessor in office, requesting the opinion of this department upon the following question, to wit:

"1. Do section 2930 and the sections of the General Code following, grant the exclusive authority to the soldiers' relief commission, in the matter of caring for indigent soldiers, sailors and marines and their indigent parents, wives, widows and minor children, or have the infirmary directors equal authority under these sections governing their powers and duties to contribute to the relief of any member of the classes above named?

"2. In the event of one of the persons named in the classes defined herein, going from his county into another county, and meeting with an accident requiring immediate relief, before he had lived in such last county the full period of six months as required by section 2934, is it the duty of the soldiers' relief commission of the county in which said person had his last legal residence to go to said other county and provide for such person, or does such duty devolve upon the infirmary directors?"

has been turned over to me for answer, and in reply to your first query I desire

to say, that it is my opinion that sections 2930, et seq., of the General Code do not give exclusive jurisdiction to the soldiers' relief commission in the matter of caring for the parties in said sections defined, and I further think that the infirmary directors have concurrent authority under the sections governing their powers and duties to contribute to the relief of any member of the classes above named.

2d. As to your second query, I desire to say that under section 3482 of the General Code, which provides as follows:

> "When it has been so ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement."

makes it mandatory upon the infirmary directors to remove said person entitled to relief to the county in which said person had his last legal residence, without specifying any class or persons other than a person requiring relief which may be an indigent soldier or a member of the class referred to in your inquiry. While no such authority is given to the soldiers' relief commission by statute, therefore, I am of the opinion that it is the duty of the board of infirmary directors and not of the soldiers' relief commission.

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

93.

EXAMINER OF FINANCES OF COUNTY COMMISSIONERS—ALLOWANCE OF COMPENSATION—PAYMENT BY AUDITOR WITHOUT APPROVAL OF COUNTY COMMISSIONERS.

The amount due the examiners of the financial transactions of the county commissioners is a sum "fixed by law" and also allowed by a tribunal authorized by law so to do within the meaning of section 2570, General Code, and may be paid by the auditor upon a certificate of the clerk of courts without the approval of the county commissioners

COLUMBUS, OHIO, February 2, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Your letter of January 26th, 1911, received. You state:

> "The court of common pleas of Crawford county, at a former term appointed two persons to assist the prosecuting attorney to examine the financial transactions of the county commissioners, as provided by law, to wit: section 2510 of the General Code. Said examiners completed their investigation and reported to the court, the number of days they were employed. Section 2510, General Code, fixes the compensation at $3.00 per day for the time so employed. The court approved the report, fixed the compensation of the examiners as per bills presented and ordered the clerk of court to certify the same to the county

> auditor, and ordered the auditor to draw his warrant therefor upon the county treasurer for the amounts so fixed. The auditor refuses to draw the warrants, and claims the bills must be allowed by the commissioners and cites a ruling by one of the bureau of accounting."

and inquire for a construction of section 2514 of the General Code applicable to the above state of facts.

Section 2510 of the General Code provides as follows:

> "The court of common pleas shall cause such report to be investigated and examined by the prosecuting attorney of the county, together with two suitable persons appointed by the court. The persons so appointed shall each be allowed and paid from the county treasury, on the warrant of the county auditor, three dollars for each day for their time necessarily employed in making such investigation."

Section 2511 of the General Code limits the time they must be employed in the examination of the commissioners' report to thirty days unless extended by the court of common pleas.

Section 2513 provides for the subpoenaing of witnesses and *section 2514* of the General Code provides how expenses of the examination, together with the witnesses, etc., as provided in section 2513, shall be paid and states that the clerk of the court shall certify all costs arising under such proceedings to the auditor of the county, who shall draw warrants upon the county treasurer for the payment thereof.

Section 2570 of the General Code provides that the county auditor shall not issue a warrant on the county treasurer for the payment of any claim against the county, unless allowed by the county commissioners, *except where the amount due is fixed by law or allowed by an officer or tribunal authorized by law so to do.*

I am of the opinion that the compensation allowed the examiners of the commissioners' report comes under the exception provided for in section 2570 of the General Code, "the amount due as fixed by law," to wit: three dollars per day and only requires mathematical computation to determine the amount due each examiner, and is also allowed by an officer or tribunal authorized by law so to do.

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

94.

POOR RELIEF—PROPER OFFICIAL IN VILLAGE—POWERS OF COUNCIL.

A village council may by virtue of section 3476, General Code, designate a proper person to care for the poor. When it fails so to do, the care of the village poor rests in the trustees of the township.

COLUMBUS, OHIO, February 2, 1911.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney of Wayne County, Wooster, Ohio.*

DEAR SIR:—Your communication of January 23d, 1911, received. You inquire in substance, who is the proper officer of a village to look after the poor.

The statutes are specfic as to cities, designating the director of public safety as a proper officer to look after the poor; but in villages there seems to be no designated officer whose duties correspond to the duties of director of public safety in cities, in reference to the relief of the poor.

Section 3476 of the General Code authorizes council of municipal corporations to afford relief to all persons therein who are in condition to require it.

Section 4356 provides that council may provide by resolution for the care, supervision and maintenance of municipal infirmaries.

I take it from your letter that the village you refer to has not a municipal infirmary nor has the council designated as it had a right to do, a proper officer to look after the poor in the municipality; in the absence of a municipal infirmary, with its proper officers; and having no overseer of the poor in the municipality, the trustees of the township in which the village is situated are required to look after the relief of the poor under authority of section 3476 of the General Code.

However, I hold that it is in the power of the council of a village to designate some officer to look after and provide for the relief of the poor in the municipal corporation.

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

95.

TAXES AND TAXATION—HUSBAND'S DOMICILE APART FROM WIFE—LISTING PERSONAL PROPERTY.

A husband has the right to fix the domicile and where a man resides half the time in township No. 1, votes therein and desires to consider that place as his domicile, he may rightly list for taxation therein his personal properties, moneys, credits and investments, except merchant and manufacturer's stock and personal property upon farms, even though his wife with whom he lives, part of the time, resides in township No. 2 and refuses to move to township No. 1.

COLUMBUS, OHIO, February 3, 1911.

HON. T. J. KREMER, *Prosecuting Attorney, Monroe County, Woodsfield, Ohio.*

DEAR SIR:—Your favor of January 25th received.

You state:

> "We have a party who was born and raised in an adjoining township, which for convenience we will call number one, and has always resided there since his birth up until about six years ago, when he married a lady in an adjoining township, which for convenience we will call number two; and his wife and child maintain a home in number two. That is, they rent property and live there entirely, and in short, make it their permanent home, and claim nothing to the contrary. The husband is in number two perhaps half of his time, and while there, makes his home with his wife and children. We are not positive, but judge that he has, at least part of his washing done in

number two. He claims, however, that number one is his home, and residence, and has always voted at that point. He resides there with a brother, and perhaps has some interest in the farm upon which his brother resides. He insists that number two is not his home, that his wife refuses to go with him to number one or any other point, and of course takes the position that he, being a man, should have the right to decide as to where their home should be. We might further say, that up until the last six or seven months, his wife has always conducted a business in her own name in number two. While he makes the claim that he is desirous of having his wife go with him to some other point, we think this is not a fact, and that his main pretext in making this claim is to avoid the taxation in number two, which is much higher than it is where he claims his home to be. Up to this time he has always listed all of his property in number one, whereas it has been contended by a great many of the officials that it should be listed in number two.

"Last year he listed all of his personal property in number one, but the assessor in number two also listed his property in number two. The matter was contested by this party before the board of county commissioners. He insisted that they had no right to list his property for taxation in number two, which resulted in the board holding that this property should be taxed in number one, and not listed and taxed in number two—one of the commissioners objected and voted against this theory. Thereupon, the auditor was advised to issue a remitter to said party for the taxes listed against him in number two, and he was compelled to pay only the taxes in number one."

You inquire:

"1. Should this party list his property and pay taxes in number one or number two?

"2. If it should be determined by yourself that he should pay taxes in number two, would it be possible to have a reconsideration of the board's decision, and have his taxes transferred to number two, and an additional amount collected?"

Section 5371 of the General Code provides:

"A person required to list property on behalf of others, shall list it in the township, city, or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs. Merchants and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, especially credits, and investments, except as otherwise provided, shall be listed in the township, city, or village in which person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed.

You do not state in your letter whether the property listed for taxation

was *merchants and manufacturers' stock, personal property upon farms*, or whether it was *moneys, credits, investments, etc.* If the property owned and listed by the party mentioned, was merchants and manufacturers' stock, and personal property upon farms, under authority of section 5371 of the General Code, it must be listed in the township in which it is situated; if however, he has property other than merchants and manufacturers' stock and personal property upon farms, it should be listed, as required in section 5371, "in the township in which the person to be charged with taxes thereon resides at the time of the listing thereof."

You state in your letter that the party was born and raised in one township, which we will designate "number one," and resided there until about six years ago, when he married a lady living in an adjoining township, which we will designate "number two;" that his wife and children live in township number two—that is, they rent property and live there entirely, make it their permanent home and claim nothing to the contrary; that the husband is in township number two half of his time and while there makes his home with his wife and children, that he claims his home and residence is in township number one, and has always voted at that point, that he resides there with his brother and has some interest in the farm upon which his brother resides; that he insists that township number one is his home, that his wife refuses to go with to township number one or any other point, and takes the position that he, being the man, should have the right to decide as to where their home should be. You also state that he has listed his property in township number one, and you inquire—should he list his property and pay taxes in township number one or number two.

I am of the opinion that, under section 5371, just quoted, that the personal property, moneys, credits and investments, except merchants and manufacturers' stock and personal property upon farms, should be listed in township number one. As stated in your letter he votes in township number one, claims that as his home, resides there one-half of his time; and under the law the husband has the right to fix the place of domicile, not the wife. I am therefore, of the opinion that, under the facts stated in your letter, the property must be listed in township No. 1.

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

97.

SHERIFF'S EXPENSES—HORSES AND VEHICLES—ALLOWANCE BY COUNTY COMMISSIONERS FOR MAINTENANCE.

The county commissioners may legally allow the sheriff his expenses of "maintaining" horses and vehicles whether such facilities were cared for by the sheriff himself or through contract with a third party.

COLUMBUS, OHIO, February 4, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I have your letter of February 2d, 1911, which is as follows:

"Under section 2997 of the General Code, which section provides in part as follows: 'and all expenses of maintaining horses and vehicles

necessary to the proper administration of the duties of his office.'

"Now, I would like to have your opinion as to whether such sheriff can perform the services required to be performed in maintaining such horses and be legally allowed therefore by the county commissioners, or shall he place such horses in a livery barn or boarding stable, and have some one other than himself maintain and care for same, before the county commissioners can legally pay for the maintaining for such horses."

Section 2997 of the General Code provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff * * * and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

In the case of the state ex rel. vs. Commissioners, 10 Circuit Court, n. s., page 398, the circuit court has defined the word "maintaining" as follows:

"What, then, is the definition—the ordinary meaning of the word 'maintaining,' especially when applied to animals and vehicles?

"All lexicographers define maintenance as 'maintaining; supporting; upholding; keeping up; sustenance; supply of the necessaries of life; subsistence;' and the word maintain, 'to hold or keep up in any particular state or condition; to support; to sustain; to keep up.' So that the meaning of the word 'maintaining' as used in this section in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the legislature therefore in this provision only meant and intended that sheriffs should be allowed the necessary expenses incurred in supporting, sustaining and supplying their horses with the necessaries of life, and in keeping their vehicles in good condition, and not in the purchase of them."

Therefore, my opinion is that the commissioners can legally allow the sheriff for maintaining horses and vehicles, as defined by the court whether the expense was incurred in keeping the horses in his own stable or barn or in a livery barn or boarding stable.

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

98.

SALARIES OF COUNTY OFFICERS BASED UPON FEDERAL CENSUS OF 1910—"LAST FEDERAL CENSUS"—INTENT OF STATUTES.

For the purpose of determining the salaries of county officers which are based upon the county population, and who were elected at the November election of 1910, *the federal census of* 1910 *must govern in accordance with the term "last federal census" as employed in the statutes.*

The term "census" as used in the statutes includes the elements of "enum-

eration" and "computation and compilation" but does not include "publication" and it is not essential on principle that the county auditor receive official notice of the results, as a condition precedent to a recognition of the census.

As the statutes make no express stipulation with reference to the subject, their intention must be found by implication. Such intention must have been to base salaries on the actual existing population and not upon the mere fact of a date of publication or notice. The intention furthermore was to provide a uniform measure for all counties and such would not be the result if various counties received reports at different times.

The act providing for the federal census stipulated that reckonings should be made as of April 15, 1910, and therefore, the entire census and every step therein must be held to be a proceeding as of that date.

The county auditor in allowing the salaries aforesaid therefore, must determine as best he may, the actual computations of the federal census of 1910 and be governed thereby.

COLUMBUS, OHIO, February 4, 1911.

HON. F. J. ROCKWELL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 18th, submitting to me for an opinion thereon the following question:

> "At what date will officers whose salaries are prescribed by the county officers' salary law, so-called, begin to receive salaries on the basis of the census of 1910?"

The county officers' salary law (the act found in 98 O. L., 89), constitutes sections 2977 to 3000 inclusive, General Code. The pertinent provisions of said sections are as follows:

> "Section 2989. After deducting from the proper fee fund the compensation of all deputies, assistants, clerks * * * and other employes as fixed and authorized herein, each county officer herein named shall receive from the balance therein the annual salary hereinafter provided, payable monthly *upon warrant of the county auditor.*
>
> "Section 2990. Each auditor shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, *as shown by the last federal census next preceding his election;* * * *
>
> "Section 2991. Each treasurer shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, *as shown by the last federal census next preceding his election;* * * *
>
> "Section 2992. Each probate judge shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, *as shown by the last federal census next preceding his election;* * * *
>
> "Section 2993. Each clerk shall receive eighty-five dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election.
>
> "Section 2994. Each sheriff shall receive sixty-five dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election.
>
> "Section 2995. Each recorder shall receive sixty dollars for each

full one thousand of the population of the county as shown by the last federal census next preceding his election.

"Section 3003. Each prosecuting attorney shall receive an annual salary, not to exceed sixty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election."

It is apparent at a glance that the fundamental question under these sections as applied to the compensation of officers elected in November, 1910, is the following: What was the last federal census next preceding such election?

It is first to be observed that neither the chapter of the General Code relating to the salaries of county officers nor any other statute of general application throughout the state defines or attempts to define the term "the last federal census." The only qualification of the term is that embodied in the various sections above quoted, viz: the census next preceding the *election* of the officer whose salary is thus determined. The census then must precede the election in order that the salary of the officer may be based thereon. From this it is fairly to be assumed that whatever is included within the meaning of the word "census" must be a complete act at a date previous to the election in question.

The following are definitions of the word "census:"

"An official reckoning or enumeration of the inhabitants and wealth of a country."

Bouvier's Law Dictionary.

"An official registration of the number of the people, the value of their estates and other general statistics of a country."

Webster's Dictionary.

The word " reckoning" as used in Bouvier's definition is defined by Webster as:

'The act of one who reckons, counts, computes; calculation."

The word "official" is defined by Webster as:

"Derived from the proper office or officer, or from the proper authority; made or communicated by virtue of authority; as an *official* statement or report."

The essential elements then of the term "census" when used in its popular sense are as follows: 1. An authoritative or official enumeration of people and gathering of statistics. 2. An official reckoning or computation showing the result of such enumeration and the totals thereby arrived at.

It will be observed that there is no element of official *publication* in the primary meaning of the word census. That is to say, in the absence of a contrary intention, apparent upon the face of a statute providing for a census, the official announcement or publication of the result of the computation above referred to is no part thereof. For reasons which will become apparent, however, it is necessary to take note of the familiar fact that it is customary, at least officially, to publish a census.

It is clear from the foregoing definitions then, that unless a contrary

intention appears, that is not a census within the meaning of a statute, like those under consideration, which does not consist of the two acts of taking or enumeration, and computation or compilation; and it is to be questioned, as will more fully appear, whether in the meaning of such statutes that is a census which has not been officially published.

The act of congress providing for the thirteenth and subsequent decennial census, passed April 2, 1909, contains the following provisions:

> "Section 2. The period of three years, beginning on the first day of July next preceding the census provided for in section 1 of this act, shall be known as the decennial period, and the reports on the inquiries provided for in said section shall be completed within such period.
>
> "Section 20. The enumeration of the population required by section 1 of this act shall be taken as of the *15th day of April, 1910*, * * * and it shall be the duty of each enumerator to commence the enumeration of his district on that day * * * and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district.
>
> "Section 10. * * * each supervisor of census shall * * * examine and scrutinize the returns of the enumerators and in the event of discrepancies or deficiences appearing in any of the said returns * * * use all diligence in causing the same to be corrected or supplied; * * * forward the completed returns of the enumerators to the director at such time and in such manner as shall be prescribed * * * in accordance with the orders and instructions of the director of the census."

Said sections 9 and 10 of the act provide that supervisors shall be appointed "so far as practicable and desirable" for congressional districts, and that each supervisor shall subdivide his district with the approval of the director into such subdivisions as he deems proper.

Section 13, however, provides that the enumeration district shall be clearly described by civil divisions or other easily distinguishable lines.

There is no provision in the act of 1909, or in any other statute of congress relating to the department of census, requiring any official publication, excepting that by inference included in section 2 of the act above quoted. The only dates fixed by the law are the limits of the census period, and the date as of which the census shall be taken. The former is directory merely, the latter clearly mandatory, and in my opinion the 15th day of April, 1910, is the only fixed date in connection with the taking and compilation of the federal census of that year.

It is also to be observed in passing that the act above quoted from does not require enumeration of the population to be made with reference to political subdivisions, other than congressional districts; that is to say, the director of the census could, if he saw fit, provide that the total number of inhabitants to be ascertained by the taking of the census, might be the total number of inhabitants of a congressional district, or some other subdivision greater in extent than a county.

I have thus fully set forth the provisions of the state and federal statutes that the question might be properly defined. I find that my predecessor, in an opinion under date of December 12, 1910, addressed to the bureau of inspection and supervision of public offices, held that the last federal census preceding the general election of 1910 was the census of 1900. I have carefully examined

this opinion. It is based apparently upon the assumption that a census is not complete until it is officially published, or rather upon the assumption that because the county auditor, whose duty it is to determine and pay the salaries of the various county officers above referred to, not having been officially advised of the result of the director's computation prior to November 8, 1910, the determination of the salary could not be made until after that date.

The facts upon which the opinion was based are as follows: The director of the census on November 23, 1910, gave out for newspaper publication a statement showing the population of the various counties of the state of Ohio as computed by him, upon the basis of the returns of the enumerators as corrected by the supervisors. This seems to have been regarded by my predecessor as an official act, and furthermore, as the official act by which the time of the census of 1910, so far as it relates to the question at hand, is to be fixed.

Assuming this to be true then, the census was not completed, i. e., was not officially announced until after the election of the officers in question, and, under the statutes above quoted, they could not receive compensation on the basis thereof.

After very careful consideration I find myself unable to agree with my predecessor's opinion for the following reasons:

In the first place, it seems to me erroneous to assume that the mere newspaper announcement of the director of the census was an official act. It was not an act which he was expressly required or authorized to perform under the federal statute above quoted. It was not such a legal publication as would charge any person with notice of its contents. It would seem (although there are decisions to the contrary) that courts should not take judicial notice of such a statement, particularly in view of the possibility of typographical error therein.

If publication is to be the test, then I am satisfied that the only publication which will serve the purpose is an official publication under certification of the director of the census—not a mere statement given out to the press. No such publication has yet been made, and while my predecessor asserts his opinion that such publication must be made prior to the expiration of the census period, as defined by section 2 of the act, it is clear to me that this section is merely directory, and that the director of the census may publish the result of the labors of his department at any time the same may be completed. In my opinion the publication or official announcement of the result of the census has nothing to do with the question.

The sections of the General Code above quoted, do not provide expressly that the census upon which the salaries of county officers shall be based, is the census last published and officially announced, nor on the other hand, I confess, do they expressly provide that such census shall be the census last taken and compiled. In fact the statutes in question leave the whole question, now under consideration, to be determined by implication, which in turn must be ascertained by the manifest intent of the statute.

In my predecessor's opinion an element which may be properly looked to to ascertain the intention of the legislature in this respect and which is entitled to great weight, is the practical difficulty which will confront all county auditors on the date when they are first required to act respecting the salaries of county officers elected in November, 1910, which in the case of some of these officers would be on the first day of February, 1911. It is urged that because the auditor on that date would have no official notice of the population of the county the general assembly must be presumed to have intended that he should not act

until he should receive such official notice. This argument is plausible, but it is overridden, in my judgment, by the manifest controlling intention of the general assembly.

It seems to me most reasonable that the general assembly must have intended that salaries of county officers should be in proportion to the extent of the services required of them, and equally reasonable to presume that the legislature intended that the test of population should be applied solely for the reason that it affords the most accurate index to the probable amount of work required of such county officers at a given time.

This being the controlling intent of the general assembly it seems to me unreasonable to presume that it intended also that the adjustment of salaries to population should be postponed until an official announcement might be made. It is here to be noted that in making the compensation of officers dependent upon the federal census, the general assembly must be presumed to have known that the federal statutes pertaining to the census are subject to repeal by congress, and that as was in fact the case, the law pertaining to the taking of the census of 1910 was different from that pertaining to the taking of the census of 1900. It is scarcely possible that the general assembly actually intended that this law should be affected from time to time by changes in the federal law. It is much more reasonable to presume that the general assembly had in mind the provision of section 2 of article 1, of the United States—a fixed and relatively permanent provision, which is as follows:

> "The actual enumeration (of persons for the purpose of apportioning representatives and direct taxes) shall be made within three years after the first meeting of the congress of the United States, and then every subsequent term of ten years, in such manner as they shall by law direct."

This is the provision which defines the period at which the census shall be taken, and it is to be noted that the word "census" as used in the act of congress, is, after all, but a paraphrase of the word "enumeration." It is the enumeration that congress has authority to provide for taking, and a census which was not an enumeration would not be a constitutional census.

On the whole, therefore, it seems to me reasonably clear that the general assembly in enacting the county officers' salary law intended to measure the salaries therein provided for by an event which would happen at a definite time, at least with respect to the year in which it would happen, and did not intend to provide by necessary inference for periodical changes in the compensation of county officers without fixing any definite or certain date at which such changes would become effective.

In this connection it is worth while, I think, to consider the logical possibility of the announcement by the director of the census of the population of different counties of the state at different dates so that the announcement of one county might be made before the election and that of another county after the election. If then the general assembly intended that the period of the census should depend upon the date of its announcement as to a given county, then the officers of the one county elected at the election of 1910 would be entitled to receive salaries according to the census of 1910, while those of the other would still receive salaries on the basis of that of 1900. I do not believe that the general assembly ever harbored such an intention.

In short, I have concluded that the announcement of the population of the counties in Ohio made by the director of the census in November, 1910, through

the newspapers had nothing to do with the determination of the date of the census, and that, furthermore, any announcement or publication, official or otherwise, which the director made from time to time, or finally made with respect to the population of the counties in Ohio would be of no consequence in the determination of the question at hand.

I have heretofore pointed out that the word "census" includes two things, enumeration and calculation. The census then is not complete until the calculation is made and totals are ascertained. As pointed out, however, this census is an enumeration of the population of the several *states*, for the purpose of apportioning representatives in the federal house of representatives, and there is no requirement that the department of census ascertain the population of subdivisions of a state. While it may be a fact susceptible of proof that on a certain date the calculations and compilations by which the total population of a given county was ascertained in the department of census were completed, yet to make the question depend in each instance upon such an uncertain date would be open to the same objections already suggested. That is to say, the clear intention of the law is that salaries in all the counties shall change at the same time, yet it might be true that the calculations as to one county were completed before the date of election, and those in another after the date of election.

In my opinion then the general assembly in using the language "the federal census next preceding his election" had in mind the familiar fact that it is customary to take the federal census in the early part of the decennial year, and intended that officers elected in such decennial years should receive compensation on the basis of the census begun in the year in which they were elected.

Whether or not this was the intention of the general assembly, however, it seems to me to be perfectly clear as above stated that there was no intention to make a change or adjustment of salaries dependent upon a shifting and indeterminate date. The inquiry must be then as to whether there is *any date fixed* in the act of congress relating to the taking of the census by which the question may be determined. The above quoted provisions of section 20 of the act of April 2, 1909, discloses the fact that the enumeration is to be taken "as of the 15th day of April, 1910." This is the only fixed date at which any of the acts pertaining to the census are required to be done. It follows, therefore, that if the general assembly intended to make the change of compensation dependent upon a fixed date, this date, April 15th, 1910, is the date of the census of 1910. This being the case, then every step in the taking of the census, including a computation of totals by the director of the census, is in contemplation of the Ohio law to be deemed to have been taken on April 15th, 1910.

From this it follows that the census of 1910 preceded the November election of that year, and that officers elected at such election are entitled to receive salaries on the basis of the population of their respective counties as shown by that census.

It is true that what the census shows may not have been determined until after the election, indeed, may not be now officially determined. It is a fact, however, capable of proof as other facts. Each county officer in drawing warrants for the payment of salaries of officers elected in 1910 must ascertain at his own peril what the census of 1910 shows to be the population of his county. If he is disposed to rely upon a newspaper publication made on November 23, 1910, he is at liberty to do so, subject to liability in case such newspaper provocation is not *accurate*. In other words, if there is in the department of census, or at any time shall be in that department, a complete and official determina-

tion of the population of one of the counties of Ohio, as shown by the census of 1910, the auditor of that county in the last analysis must rely upon such record or a certificate thereof. If he relies upon anything else he may incur personal liability, and his action is binding neither upon the county nor upon the officers involved. Even if there is not now, and for some time will not be any such official record in the department of census, nevertheless the county auditor must ascertain as best he may that the probable population of the county is as shown by the federal census of 1910 and draw his warrant accordingly, subject to correction later. In like manner, were an action brought in a court of competent jurisdiction to determine what the population of a given county was as shown by the next preceding federal census at the time of the November election in 1910 such a court would, in my judgment, receive as evidence tending to establish the sole fact in controversy anything having probative value. The best evidence, of course, would be a certificate from the department of census showing the enumeration of the county. In the absence of such best evidence other evidence, such as a newspaper publication would be received. In case, however, the court should find as a fact that the population of the county as shown by such census was a certain aggregate number, and a subsequently ascertained official record in the department of census should be at variance with the finding of the court, I question seriously whether the court's finding would be conclusive, excepting as to the specific salary warrant involved in the action.

The foregoing conclusions are supported by the decided weight of authority. Many states have laws similar to that under consideration, and many cases have been decided upon questions similar to that now raised. These decisions are far from harmonious I admit. They do not establish any clear cut and definite rule, but I am satisfied that all of them support the conclusion that the "last federal census preceding" a given day, is a fact susceptible to proof as other facts, and that publication or announcement, official or unofficial, is merely evidence of the main fact. The extent to which this rule is applied differs in specific cases, but the rule itself seems well established.

See People vs. Williams, 64 Cal., 87.
Davis vs. Commissioners, 35 Pac., 467.
State vs. Will, 103 Pac., 479.
State vs. Brascamp, 87 Iowa, 588.
People vs. Won Wang, 92 Cal., 277.

In conclusion, then, it is my opinion that the last federal census next preceding the November election, 1910, was the census of 1910, and that the population of a given county in Ohio, as shown by that census when ascertained to the satisfaction of a county auditor must guide him in issuing his warrants for the compensation of officers elected at such election.

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

99.

TEACHER—NO PAYMENT FOR ATTENDING INSTITUTE AFTER AGREEMENT FOR SALARY INCLUDING SAME—BOARD OF EDUCATION'S RIGHTS AND POWERS.

Where a teacher entered into a contract with the board of education for forty-five dollars to include compensation for attending teacher's institute, making out reports, etc., he cannot receive extra compensation from the board for attendance at such institute.

COLUMBUS, OHIO, February 6, 1911.

HON. DAVID T. SIMPSON, *Prosecuting Attorney, Holmes County, Millersburg, Ohio.*

DEAR SIR:—Your letter of January 20th received.

You ask my opinion concerning the following state of facts:

"The board of education of Mechanic township employed a school teacher for 1905 and 1906 and agreed to pay forty-five dollars per month in full payment for teaching the school, his expenses for attending the teachers' institute and making out reports, etc. In 1906 and 1907 they made a like contract at sixty dollars per month. The teacher never presented a certificate of the president and secretary of the institute for pay for attending there, because he had been paid according to contract for teaching, including all other claims. Two years after he closed the school he demanded pay for attending the institute for the two years, the fall of 1905 and 1906.

"Is the board of education required to pay the teacher for attending the institute for those two years?"

Your letter is rather indefinite as to the terms of the contract between the board of education mentioned and the school teacher, regarding his compensation for attending the county institute. You say that the board agreed to pay him forty-five dollars per month in full payment for teaching the school, and his expenses for attending the teachers' institute; I take it that you mean by *expenses*, the compensation allowed the teachers under section 7870 of the General Code, which is as follows:

"The boards of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the president and secretary of such institute, for not less than four, nor more than six days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next em-

ploying such teacher or superintendent, if the term of employment begins within three months after the institute closes."

If the teacher mentioned, entered into a contract for the years 1905 and 1906 to teach the school located in Mechanic township, for forty-five dollars per month, which was to be in full payment for teaching the school, for the salary provided for attending the institute, under section 7870, and making out reports; and in 1906 and 1907 made a like contract at $60.00 per month, he cannot now require the board of education to pay him the salary provided under section 7870, for attending the institute, for the reason that, under the terms of his contract he has already received pay for the same.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General

100.

COUNTY INFIRMARY DIRECTORS—POWER TO EMPLOY DOCTORS IN PARTICULAR CASES—COMPENSATION FROM COUNTY.

Infirmary directors are entitled, under section 3002, *General Code, to a refunder for amounts spent by them for lodging and board while away from their homes transacting the business of their office.*

In cases of emergency where a physician has not been employed, as provided in section 2540, *General Code, or when such physician has become incapacitated or temporarily absent, infirmary directors may make a special contract with a doctor for a particular case and such doctor may be compensated from the county treasury through an order from the infirmary directors.*

COLUMBUS, OHIO, February 6, 1911.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Lawrence County, Ironton, Ohio.*

DEAR SIR:—Your favor of January 19th, 1911, received. You ask me for a written opinion upon the following:

> "Are infirmary directors entitled to receive from the county a refunder of the amounts spent by them for lodging and board while away from their homes transacting the business of their office?"

My predecessor, in an opinion rendered to Hon. Wm. Dunipace, prosecuting attorney of Bowling Green, February 27th, 1909, held that infirmary directors were entitled to a refunder for the amount spent by them for lodging and board while away from their home, transacting business for the office.

Section 3002 of the General Code provides as follows:

> "Each infirmary director shall be allowed, *in addition to his traveling expenses*, two dollars and fifty cents for each day employed in his official duties."

My predecessor held, "actual traveling expenses," means actual expense in-

curred in traveling and unquestionably included hotel bills. I concur in that opinion:

You also inquire:

> "Where the infirmary directors have not employed a doctor to take care of the sick in their charge in townships other than the township in which the county infirmary is located, can infirmary directors make a special contract with a doctor to take care of a particular case; and can said doctor, upon receiving an order properly signed by the infirmary directors for his pay for treating said case, collect the same from the county?"

Section 2546 of the General Code provides as follows:

> "Infirmary directors may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships, who come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the directors reserving the right to reject any or all bids. The physicians shall report quarterly to the infirmary directors on blanks furnished by the directors, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the directors. The directors may discharge any such physicians for proper cause."

The section just referred to directs how physicians are to be employed to take care of the sick in townships other than the townships in which the county infirmary is located: yet, it does not follow that because the infirmary directors have not employed physicians in certain townships or that a physician who is employed under authority of section 2546 is temporarily absent or incapacitated, that the poor should be defeated to their right of public relief in proper cases.

While it will be impossible for me to answer the question without more information as to the particular case you have in mind, giving the reasons why a physician is not employed, I hold that the right of the poor, in proper cases, to have public relief, is fixed by the general statutes and infirmary directors may make a special contract with a doctor to take care of a particular case, and the doctor upon receiving an order properly signed by the infirmary directors, for treating said case, can collect the same from said county. However, each case must be determined by the fact surrounding it and I do not hold that generally, the infirmary directors can make special contracts with doctors to take care of particular cases, but it must be in such cases as the absence of the regular physician, or his being incapacitated to render the services, or in case that the infirmary directors have had no time to employ physicians as provided for in section 2546.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

102.

SECRET SERVICE OFFICERS—POWER OF PROSECUTOR TO EMPLOY NON-RESIDENTS OF COUNTY FOR LOCAL OPTION INVESTIGATION.

By virtue of section 6184, General Code, the prosecuting attorney may employ secret service officers to aid investigation of violations of local option laws, and as said section does not provide otherwise, non-residents may be appointed.

COLUMBUS, OHIO, February 7, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Your favor of February 4th, 1911, received. You state section 6184 of the General Code provides that the prosecuting attorney may appoint a secret service officer or officers to aid in discovering evidence to be used in the trial of cases for violation of the local option laws, and such appointments shall be made for such term as the prosecuting attorney deems it advisable.

You inquire as to whether such secret service officer or officers shall be a resident or residents of the county in which the work is to be done.

Section 6184 of the General Code cited by you provides for the appointment of the secret service officer, but does not state that he shall be a resident of the county in which the work is to be done; that in the absence of the requirement of the statute that he must be a resident of the county in which the work is to be done, it is my opinion that a non-resident of the county can be appointed by the prosecuting attorney as secret service officer under authority of 6184 of the General Code.

You also inquire when a person elected clerk of a school board for two years from January 1st, 1910, under section 4747 of the General Code, shall he serve out the full time for which he was appointed? Or, shall the township clerk assume his full duties under section 4747 as amended? I have passed on the last question and herewith enclosed you will find a copy of the opinion covering the point inquired about by you.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

103.

FEES OF COUNTY RECORDER FOR SEARCHING, FILING AND MAKING ENTRIES ON INSTRUMENTS—MORTGAGES WITH TWO PARTIES.

COLUMBUS, OHIO, February 7, 1911.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your favor of February 2d received. You state that:

"A dispute has arisen in this county in regard to section 8572 of the General Code of Ohio in regard to how much a recorder can charge for recording a mortgage to which there is two parties. In other words, if a person should bring in a mortgage to which there is the mortgagor

and mortgagee would the charge under the statute be 18 cents or would it be twenty-four cents for filing the instruments, searching each paper and for making the entries upon filing of the instrument for both parties?"

And you inquire the amount of fees that can be charged by the recorder under the facts stated.

Section 857.2 of the General Code provides the following fees:

"For filing each instrument or copy six cents; for searching each paper, six cents; for making the entries upon filing an instrument, six cents for *each party thereto.*"

From the facts stated in your letter the recorder would be entitled to six cents for filing the chattel mortgage; for searching, six cents; for making the entries upon the filing of the instrument, six cents for each party, which amounts to twelve cents. Or, the total amount he can charge under the items mentioned would be twenty-four cents.

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

104.

COUNTY COMMISSIONERS—POWER TO RAISE MONEY FOR CHARITABLE INSTITUTION — ILLEGAL CONTRACT — CONSTITUTIONAL INHIBITIONS AGAINST PECUNIARY AID TO PRIVATE INSTITUTIONS—CERTIFICATE OF AUDITOR.

In view of article 6, section 8 of the constitution of Ohio prohibiting the general assembly from raising money for, "loaning its credit to, or aiding any joint stock company, corporation or association," a contract might be entered into between the county commissioners and a charitable institution for the care of indigent sick and disabled persons of the county, but a contract providing moneys to be raised by taxation for the purpose of aiding and assisting in the "maintenance" of such institution would be void and a statute authorizing such contract would in all probability be unconstitutional.

Such a contract entered into before the levy of taxes for the purpose, would be void also, for the reason that it violates section 5660, General Code, requiring a certificate from the auditor to the effect that the money was in the treasury or in process of collection.

COLUMBUS, OHIO, February 7, 1911.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—You have submitted to me, for my consideration, the following contract:

"This memorandum of agreement, made and entered into, this 6th day of June, 1910, between the board of commissioners of Pickaway county, Ohio, and the Circleville Home and Hospital of Circleville, Pickaway County, Ohio, witnesseth:

"That whereas, the general assembly of the state of Ohio, on the

30th day of April, 1910, duly passed an act, entitled 'An act to authorize the board of commissioners of any county to render assistance to a corporation or association, maintaining a hospital for charitable purposes' which act was duly approved by the governor on the 2d day of May, 1910.

"And, whereas, the said Circleville Home and hospital, a corporation, duly incorporated and organized for charitable purposes, has been duly established in the city of Circleville for the sick and disabled, and has made application to the county commissioners for aid and assistance in the maintenance and support of said hospital, under and in pursuance of said act.

"Now, in consideration of the wants and needs of said corporation in the maintenance thereof, and that the same will be beneficial to the public, it is agreed that an appropriation be, and the same hereby is made by said county commissioners, in the sums of $1,500.00, for the period of one year, payable to the treasurer of said corporation as follows: One-half from collection of December tax,. 1910, and one-half from collection of June tax, 1911. (About March 1st, 1911, and September 1st, 1911) and upon the following terms and conditions, to wit: that said money so appropriated shall be applied by the board of managers of said home and hospital exclusively in aiding and assisting said corporation in the maintaining said hospital for charitable purposes, and said board of managers shall admit all sick or injured charity patients in said county under such rules and regulations as the board of managers have, or shall prescribe, and that the said board shall render to the said county commissioners an itemized report of the use and expenditure of said moneys by July 1, 1911, and January 1st, 1912.

"It is further agreed that for the purpose of enabling said home and hospital to use and apply said moneys within the provision of said act, the board of managers thereof, shall use and apply so much of said moneys as may be necessary in furnishing and equipping said hospital with the necessary rooms and operating appliances and equipments, and also that a competent nurse shall be employed therein, at all times when the services of such nurse may be required under this contract.

"It is further agreed that the said home and hospital shall furnish free of charge to said county, the necessary care, nursing and food in said hospital to any indigent person therein, requiring surgical treatment or medical relief, and who in the opinion of the board of infirmary directors of said county shall need such treatment, and whom said directors shall determine is a county charge under the provision of section 2544, Ohio Code, provided such person is not afflicted with an infectious or contagious disease.

"In witness whereof the said board of county commissioners and the said Circleville Home and Hospital have hereunto set their hands, and the said home and hospital has attached its seal, the day and year first above written."

You also state that the board of county commissioners of your county, has levied a tax of one-tenth of a mill, on the grand duplicate of the county, under authority of section two of the act approved May 2, 1910, 101 O. L., 166. You

ask whether such tax levy is legal, whether such contract is legal, and in general, for an explanation of the meaning of such act.

The act, 101 O. L., 166, above referred to, entitled "An act to authorize the board of commissioners of any county to render assistance to a corporation or association, maintaining a hospital for charitable purposes," is as follows:

> "Section 1. That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes in such county where a hospital has been established, or may hereafter be established, for the sick and disabled, upon such terms and conditions as may be agreed upon between said commissioners and such corporation or association, and said commissioners shall provide for the payment for the amount agreed upon, either in one payment, or installments, or so much from year to year as the parties stipulate.
>
> "Section 2. The board of commissioners may annually, at the June session, levy a tax not exceeding two-tenths of one mill upon the taxable property of said county for the purpose of providing such aid and assistance to any such corporation or association; and all taxes so levied and collected under this act shall be applied under the order of said board to the purpose for which the same are so levied and collected."

The question has been raised that such act is in contravention of section six, article eight of the constitution; and a gentleman of your city has referred me to the case of *City of Zanesville* vs. *Crossland*, 8 C. C., 652, which case upholds the constitutionality of a similar statute, relating to municipalities, namely: Section 1536-452, R. S.

Such section six, article eight of the constitution provides as follows:

> "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."

The circuit decision above referred to reversed the ruling of the common pleas court in such case, but the decision of the circuit court was later reversed by the supreme court, in the same case, as is shown by the decision of the supreme court in the unreported decisions of said court, contained in the 56 O. S., 735, in the following language:

> "Judgment of the circuit court reversed and that of the common pleas affirmed."

Section 1536-452, R. S., which was construed in such case, was as follows:

> "The council may enter into an agreement with a corporation or association, organized for charitable purposes in such municipal corporation, for the erection and management of a hospital for the sick and disabled, and for a permanent interest therein, to such extent and upon such terms and conditions as may be agreed upon between the council and such corporation or association; and the council shall provide

for the payment of the amount agreed upon, for any interest so acquired, either in one payment, or installments, or so much, from year to year, as the parties may stipulate."

The questions raised in such case were:

"1. That such section did not authorize the contract in question.
"2. That such section violated section six, article eight of the constitution."

While this case is unreported in the supreme court, the statute and contract involved in it were strikingly similar, from a legal standpoint, to the statute and contract involved in the case presented by you. It seems to me, on looking at the circuit court decision, that the court takes a wrong view of the language, "with a view to gain," as quoted from the case of *Walker vs. Cincinnati*, 21 O. S., 14, at page 54, when it attempts to limit the application of section six, article eight of the constitution to companies, corporations and associations for profit, and to exclude charitable associations from the meaning of such section of the constitution. The supreme court in the Walker case, was considering the expenditure of money by a city, for the purpose of constructing a railway, and say as to such section, at page 53, that:

"Its language is sufficiently comprehensive to embrace every enterprise involving the expenditure of money, and the creation of pecuniary liabilities."

The court also say, on page 54, that:

"The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

Since associations not for profit were in existence at the time of the adoption of the constitution in 1851, and since such section six, article eight, uses the words, "raise money for, or loan its credit to, or in aid of any joint stock company, corporation, or association *whatever*," it appears that the language "any corporation or association whatever," would under such section include those organized not for profit or for charitable purposes; in other words, this section of the constitution does not discriminate between types of corporations or associations, but does provide against the evil of permitting a public corporation, such as a county or a city, from raising money for, or loaning its credit to, or in aid of, another corporation or association, and thus devoting public money to such purposes that the county or city does not have the direct management and control of the disposition of such money. I believe that it was intended that a county or city should spend its own money directly and solely for county or city purposes, and that there should be no divided responsibility. It was said by the common pleas court in the above case of Crossland vs. Zanesville, that:

"It is for the public interest that the municipality retain control and management of the sick and disabled poor.
"One of the chief purposes of the local government is to preserve

> the health and safety of the inhabitants. If the municipality may escape its obligations and duties to the sick and disabled by farming out the same to a charitable association or corporation, the public interests may suffer in that respect. 'The statutes will be construed the most beneficial way which their language will permit to oppose all prejudice to public interests.' Southerland on Statutory Construction, section 324." (See Wyscarver vs. Adkinson, 37 O. S., 80; Taylor vs. Commissioners, 23 O. S., 22.)

As an executive officer of the state of Ohio, I feel that the constitutionality of a law such as 101 O. L., 166, is a matter for the courts, and not for this department, and therefore, prefer to act on the assumption that laws are constitutional until the courts have declared them to be otherwise.

Looking at matters in that way, it might be possible for a tax levy under such section to be legal and valid as against the constitutional objections above referred to, if such tax levy is made for the general purpose of providing for the sick and disabled of the county, rather than for the purpose of providing funds for carrying out the above contract. It may be too, that such act can be construed as an as act authorizing the county commissioners to make provision for the care of sick and disabled persons by charitable associations, provided the contract is specifically for the care of such persons, and not for the purpose of giving aid to the institution. In such case the persons would continue in the care of the county in the same manner as persons in a county hospital, the county employing the institution to care for such persons in the same manner as it employs attendants in a county hospital to care for such persons.

The contract presented to me does not appear to be such a contract. It sets out that the hospital "has made application to the county commissioners for aid and assistance in the maintenance and support of said hospital," and that an appropriation is made by the county commissioners in the sum of fifteen hundred dollars "in consideration of the wants and needs of said corporation in the maintenance thereof, and that the same will be beneficial to the public." Such money is to be used in "maintaining said hospital" rather than specifically for the care of particular sick and disabled persons. And it is provided that the board of managers of such hospital "shall use and apply so much of said moneys as may be necessary in *furnishing and equipping said hospital, etc.*"

It is thus seen that the contract referred to is not a contract for the care of sick and disabled persons of the county, but rather, an agreement to give a certain sum of money to such hospital for aid to the hospital. It appears to me that outside of the constitutional questions, as a matter of public policy, this is a diversion of public money to a private purpose, however charitable the object may be, and that it is contrary to the general principle of our government, that the subdivisions of the state should spend directly the public money of each subdivision, for the purposes authorized by law.

In addition to the above, section 5660, General Code, provides that:

> "The commissioners of a county * * * shall not enter into any contract, agreement, or obligation involving the expenditure of money * * * unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be

drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose."

And section 5661 provides that:

"All contracts * * * entered into contrary to the provisions of the next preceding section, shall be void. * * *"

If the above contract was entered into prior to the levy of the county commissioners above referred to, it is void under the provisions of sections 5660 and 5661 of the General Code.

I am of the opinion therefore, that, even if it is assumed that the act of 101 O. L., 166, is constitutional, the above contract entered into by the county commissioners is nevertheless illegal, and that no money can be paid by the county to the Circleville Home and Hospital, in pursuance of such contract.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

106.

OFFICES INCOMPATIBLE—VILLAGE COUNCILMAN AND MEMBER OF BOARD OF EDUCATION, OR TOWNSHIP TRUSTEE, OR ANY STATE, TOWNSHIP, COUNTY OR SCHOOL DISTRICT OFFICE.

COLUMBUS, OHIO. February 9, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your letter of February 3d received. You inquire:

"First. Can a member of a village council be also a member of the village school board of education?

Second. Can a village councilman also act as township trustee?

"Third. Can a village councilman hold any state, township, county or school district office?"

In reply I beg to call your attention to section 4218 of the General Code which reads in part as follows:

"No member of the council shall hold any other public office or employment except that of notary public or member of the state militia * * * who ceases to possess any of the qualifications herein required * * * shall forfeit his office."

Following the above section I am of the opinion, that a village councilman may not be a member of the village board of education, township trustee, nor hold any state, township or school district office except those enumerated in said section, under penalty of forfeiting his position as councilman.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

107.

CONSTABLE—FILLING OF VACANCY—"SUCCESSOR ELECTED AND QUALIFIED."

When a vacancy in the office of constable is filled by appointment, the appointee holds office until the next biennial election for constable or until a successor is elected and "qualified."

February 9, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your letter of January 31st received. You submit the following question for my opinion:

> "At the November election in 1909 one, Thomas Bond, was elected constable for Norwalk township and failed to qualify as required by law. Prior to that time, to wit: in February, 1909, A. J. Curran had been duly appointed as constable to fill a vacancy then existing, and Mr. Curran continued to occupy such position and fill such until seven months after the 1909 election, when Mr. Bond was appointed constable by the township trustees. Mr. Curran believes that no successor having been elected and qualified he continues to hold the office, while the township trustees contend that their appointment of Mr. Bond was regular."

Section 3329 of the General Code provides how a vacancy in the office of constable may be filled and is as follows:

> "When, by death, removal, resignation, or non-acceptance of the person elected, a vacancy occurs in the office of constable, or when there is a failure to elect, the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified. If there is no constable in a township, the constable of an adjoining township in the county shall serve any process that a constable of such township is authorized by law to serve."

You state that A. J. Curran had been duly appointed as constable for Norwalk township to fill a vacancy then existing in February, 1909. By the terms of section 3329, just quoted, Mr. Bond was appointed by the trustees "until the next biennial election for *constable and until a successor was elected and qualified.*" You also state that Thomas Bond was elected constable for Norwalk township at the November election 1909, but failed to qualify as required by law; Bond having failed to qualify, the election of 1909 does not avail him and Curran continues to occupy this position under the terms of his appointment "until his successor is *elected and qualified.*"

I am, therefore, of the opinion that Mr. Curran is still the constable for Norwalk township.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

110.

COUNTY AUDITOR—POWER TO COMPENSATE WIFE FOR CLERICAL "PIECE WORK" IN A LUMP SUM—POWER TO EMPLOY DEPUTIES, CLERKS AND ASSISTANTS—DISHONOR OF VOUCHER BY TREASURER.

A county auditor, under section 2981, General Code, is authorized to "appoint and employ deputies, assistants, clerks or other assistants" and to pay such regular salaries, but he is not authorized to employ assistants to do clerical work "by the piece" and to pay for such in a lump sum.

A county treasurer is therefore justified in dishonoring a voucher drawn by an auditor in favor of his wife, which is intended as a lump compensation to the auditor's wife for work done at home and at odd hours, where the payment amounts, in fact, to compensation for "piece work."

COLUMBUS, OHIO, February 10, 1911.

MR. THOMAS MULCAHY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I beg your pardon for not sooner replying to your inquiry of January 16th, which was as follows:

> "May the county treasurer refuse to pay a warrant issued by the county auditor to a person appointed by him as clerk or deputy?
>
> "The clerk or deputy is the wife of the auditor, and it is admitted by her that the greatest part of her work was performed at her home, and consisted largely in preparing the county commissioners' annual report."

With this inquiry is a statement of fact which you gave me in your letter of January 21st. Said statement of facts is as follows:

> "The work done by Frances K. Meekison, to whom this order was issued, was the preparation of copy for printers, of the appraisers' tax pamphlets, and compiling commissioners' report. Most of the work done was preparation of appraisers' pamphlets.
>
> "F. K. Meekison was appointed deputy auditor, October 18, 1909, at a salary of $75.00 per month. Her certificate of appointment is filed with the county treasurer.
>
> "July 1, 1910, she left the office and did not return to work regularly until December. Part of this work, payment for which this warrant was issued, was done in the auditor's office before or after office hours when the books were not in use by other clerks. Part of it was done at her home.
>
> "The editors of Henry county papers who have the copy prepared for them by F. K. Meekison will testify that the work was actually done. The other clerks in this office will also testify that this work was actually done. The annual commissioners' report in the handwriting of F. K. Meekison is on file in the office of the clerk of courts.
>
> "For the reason that a temporary clerk was employed July 1st on account of the extra work of appraisement year, and at the same salary received by F. K. Meekison; and for the reason that F. K. Meekison was given work on these appraisers' pamphlets, warrants were issued

monthly to said temporary clerk at this salary; and when her work was finished, warrant was issued to F. K. Meekison for $100.00 for 'clerk to auditor' as compensation for all work done from July 1st to November 1st.

"No receipt was presented to the treasurer with this warrant; but was given to the auditor, as is the custom in this office, and as required by section 2988, General Code.

"The work done by F. K. Meekison took about half the time of office hours during these four months, and the amount, $100.00, is small compensation for the work actually performed."

There arises first from the statement of facts, a question in my mind, as to whether it is necessary to answer the question, "May the county treasurer refuse to pay a warrant issued by the county auditor to a person appointed by him as clerk or deputy?" However, I will answer that question first. It is my opinion that if a voucher is illegally and unlawfully issued, and the treasurer has knowledge of it, not only will a court sustain him in refusing to honor such a voucher, but he should do so. Illegality has no force anywhere.

Now to the question, whether or not Mrs. Meekison was a deputy or clerk. It appears from the statement that, she was appointed deputy on October 18, 1909, at a salary of seventy-five dollars per month, and that her certificate of appointment is filed with the county treasurer. It further appears that on July 1, 1910, she left the office and did not return to work regularly until December. It further appears that a temporary clerk was employed July 1st, at the same salary as that received by Mrs. Meekison, and that the temporary clerk received the salary theretofore paid to the deputy; also that when Mrs. Meekison's work was done a warrant was issued to her for $100.00, designated "clerk to auditor" as compensation for all work done from July 1st to November 1st. The statement of facts discloses that the voucher was not issued to Mrs. Meekison in her capacity as deputy or as clerk.

Section 2 of the General Code provides that "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer shall take an oath of office before entering upon the discharge of his duties." In giving my opinion in the matter at hand, I am assuming that Mrs. Meekison did not take an oath as clerk. From the statement of facts presented I am not able to bring myself to believe that in law she was in fact a deputy. I do not understand it to be the spirit of section 2980 or section 2981, that work may be let out by contract. Section 2980, General Code, provides:

"On the twentieth of each November such officers 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. * * *"

Section 2981, General Code, says:

"Such officers may appoint and employ necessary *deputies, assistants, clerks, bookkeepers* or other employes for their respective offices, *fix their compensation*, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall

not exceed in the aggregate for each office the amount fixed by the commissioners for such office. * * *"

A careful reading of the two foregoing sections will disclose that officers may appoint and employ certain persons named, as deputies, assistants, clerks, bookkeepers or other employes. It does not seem to be contemplated that, specific work may be let out by an officer and an allowance made therefor at the conclusion of the work. From the facts I have at hand, my mind goes to the idea that this is what occurred in the case you present. When a deputy, clerk or assistant is appointed, the presumption would be that such person will do the work at the office; however, I am not holding that this is necessary; but the fact that the work was done at home seems to be evidence that the person doing it was performing the services rather as a specific work to be done for an allowance than as a deputy, clerk or assistant. This interpretation is further borne out by section 2988, General Code. The form of receipt provided seems to disclose that the person must be an officer, deputy, clerk or assistant.

I might add further that the statute contemplates payment by the month and not by the piece. The voucher issued seems to be a sort of a lump sum allowance and not a payment for monthly services.

However, I am not passing upon the question of fact. You are on the ground, and in a position to know what the facts are, and if it is your judgment from the facts, that Mrs. Meekison was in fact and not merely in form, acting either as a deputy, clerk, assistant or employe, at a stated salary, fixed according to the statute, it would be proper to recommend that a voucher in proper form should be honored. If, on the other hand, the work was done in the manner indicated, but that the auditor directed his wife to do a certain work for which he afterwards made her an allowance, in my opinion, such a voucher would not be legal.

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

112.

INCORPORATION OF VILLAGES—TERRITORY LAID OUT INTO LOTS AND TERRITORY NOT SO LAID OUT—PROCEEDINGS UPON PETITION TO TOWNSHIP TRUSTEES AND UPON PETITION TO COUNTY COMMISSIONERS.

Petitions for the incorporation into a village of territory which has been laid off into lots, must be presented to the county commissioners and the proceedings will be governed by section 3517, General Code.

When the territory has not been so laid off into village lots, the petition must be presented to the township trustees and proceedings under section 3526 will govern.

COLUMBUS, OHIO, February 11, 1911.

HON. FRED W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your favor of January 27, 1911, received. You submit the following statement of facts and inquiry:

"The inhabitants of certain territory situate in the township of

Sutton, Meigs county, Ohio, desire to incorporate this territory into a village, and furthermore desire to make application therefor by petition to the trustees of the township in which said territory is situated. A portion of this said territory has been laid off into village lots, a plat of which territory has been acknowledged and recorded as is provided with respect to deeds, as per section 3517, of the General Code of Ohio; the remainder of this said territory is adjacent territory and not laid off into lots.

"Can the inhabitants of said territory, for the purpose of incorporating said territory into a village, lawfully make application for said purpose by petition to the trustees of the township in which said territory is located and have the trustees of said township power and authority under such circumstances in case petition is filed to proceed with the incorporation? Or is it mandatory and absolutely required that application for the purpose of incorporating this said territory into a village shall be addressed to the county commissioners of said county and acted upon by them accordingly?"

Section 3516, General Code, provides that villages may be created and incorporated in the manner provided in this title.

Section 3517 provides that the inhabitants of any territory laid off into village lots, a plat of which territory has been ackonwledged and recorded, as is provided with respect to deeds, may obtain the organization of a village in the manner provided in division 1, chapter 2d of the General Code, which provides that the application for incorporation shall be made by petition addressed to the county commissioners, accompanied by a correct map of the territory.

Section 3519, General Code, provides what the petition shall contain.

You state in your letter that the inhabitants of a certain territory situated in the township of Sutton, Meigs county, had already laid off their territory into village lots, had made a plat as provided by law and the same was recorded in the office of the county recorder as provided by section 3517, General Code; by virtue of the provisions of section 3589, General Code, the land intended for public use, as set forth in said plats or maps, filed with the county recorder, was thereby conveyed in fee simple to the county in which the village was situated, for the uses and purposes therein named, expressed or intended, and the jurisdiction thereof, by reason of the vesting of the fee in the county as provided by section 3589, General Code, of all such parcels of land intended for public use, would rest in the county commissioners.

Section 3526 of the General Code provides how the inhabitants of any territory *not laid off into a village* may incorporate themselves into a village, and that they may do so by petitioning the township trustees. Said section 3526 reads as follows:

"When the inhabitants of any territory or portion thereof desire that such territory shall be incorporated into a village, they shall make application by petition, to the trustees of the township in which the territory is located, or, if the territory is located in more than one township, to the trustees of the township in which the majority of such inhabitants reside. Such petition shall be signed by at least thirty electors of the territory, a majority of whom shall be freeholders, and shall be accompanied by an accurate map of the territory, and shall contain in addition to the matter hereinbefore required to be

set forth in petitions to incorporate territory laid off into village lots, the request of the petitioners that an election be held to obtain the sense of the electors under such incorporation. Such petition may be presented at a regular or special meeting of the township trustees."

You will note that the section of the General Code just quoted uses the following language: "*and shall contain in addition to the matter hereinbefore required to be set forth in petitions to incorporate territory laid off into village lots, etc.*" This language shows that the legislature, in providing for the two methods of procedure for the incorporation of villages, meant to provide, that when the inhabitants of a territory had laid off their territory into village lots, as was the case in your county, they must proceed to incorporate under the provisions of section 3517, General Code, and when the inhabitants of a territory had not laid off their territory into village lots they should proceed in accordance with the provisions of section 3526, General Code.

Judge Kyle, in the case of Shore & Motzer vs. Braun, County Recorder of Butler County, reported in the 4th N. P. (n. s.), 561, under a state of facts similar to the facts in this case, held, that when a portion of the territory included within the proposed corporation, has theretofore been platted, its incorporation must be effected by the county commissioners, under the provisions of section 1553, R. S., now section 3517, General Code. This opinion was later affirmed by the circuit court without report, December 15, 1906.

I am therefore of the opinion, that it is mandatory and absolutely required that the application for the purpose of incorporating the territory mentioned, into a village, shall be addressed to the county commissioners of your county, and acted upon by them.

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

117.

COUNTY COMMISSIONERS—$3.00 PER DIEM FOR EXAMINATION AND APPROVAL OF BONDS IN PROCEEDINGS FOR DITCH CONSTRUCTIONS.

When the county commissioners meet for the purpose of examining and approving bonds as provided in section 6488, *they are each entitled to the* $3.00 *per diem, under section* 3001, *General Code, to the extent of an aggregate of* $300.00 *and no more.*

February 13, 1911.

HON. CHARLES S. HATFIELD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Replying to your letter of the 20th of January, in which you inquire:

"Kindly advise me at your earliest convenience as to the status of county officials elected Nov. 8th, 1910, and who take their offices under the law on the first Monday in January, 1911, with reference to salaries being decreased where the population of the county at this last federal census has been found to have decreased."

As to the fixing of the salaries under the census a verbal opinion has been

expressed to the effect that salaries should be based upon the population shown by the 1910 census, and a written opinion will be prepared. When that is done, copy will be forwarded to you.

You state further:

> "Section 3001 of the General Code of Ohio provides that 'in counties where ditch work is carried on by the commissioners in addition to the salary herein provided, each commissioner shall receive three ($3.00) dollars for each day of time he is actually employed in ditch work, the total amount so received for such ditch work not to exceed three hundred ($300.00) dollars in any one year.'
>
> "Section 6523 of the General Code of Ohio provides that 'for services actually rendered under the provisions in this chapter (referring to county ditches) county commissioners each shall receive three dollars per day.'
>
> "Section 6486 of the General Code of Ohio, provides that 'the contracts and bonds (referring to the bonds given by the purchaser, at the public sale of the construction of the improvement for ditches, etc., provided for by sections 6481-6482 of the General Code of Ohio) shall be examined and approved or disapproved by the county commissioners, who shall cause an entry of their decision to be made on their journal and cause the contractors to be notified thereof.
>
> "Query: Is each member of the board of county commissioners entitled to three ($3.00) dollars a day for approving of bonds of purchasers at public sales for the construction and improvement of ditches."

Prior to the enactment of the county salary law the commissioners discharged the duties involved upon them in relation to ditches strictly as county commissioners and were compensated for their work under the existent law; likewise they received pay for the time they spent in discharging their ordinary duties.

The salary law repealed the per diem compensation and no doubt the legislature contemplated the discrimination that would result between counties where there was much and counties where there was little, if any, ditch work, and to correct the inequity inserted that part of section 3001 of the General Code allowing to each commissioner in addition to the salary to which he was entitled the sum of three ($3.00) dollars per day where ditch work was carried on so long as such per diem did not exceed three hundred ($300.00) dollars in any one year.

In view of the above I am of opinion that if the county commissioners met for the purpose of examining and approving of the bonds in the manner provided by section 6486 they are each entitled to the per diem provided in section 3001 so long as any commissioner does not receive to exceed three hundred ($300.00) dollars in any one year for said work.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

118.

MOVING PICTURE PRESENTATION OF PASSION PLAY—ILLEGAL ON SUNDAY.

As a moving picture show which portrays the Passion Play is a "theatrical or dramatic performance," such a show comes within the prohibition of section 13049, General Code, and therefore, cannot be presented on Sunday.

COLUMBUS, OHIO, February 13, 1911.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Your favor of January 24th received. The delay in answering your letter is due to the large accumulation of the work in this office, and matters must necessarily take their turn. When I took charge of this office on January 9th there was a great deal of work left by my predecessor, which required immediate attention.

You inquire:

> "Is a moving picture show, showing the 'Passion Play,' licensed by the mayor, given on Sunday, in an orderly manner, a violation of section 13049 of the General Code?"

Section 13049 of the General Code provides that:

> "Whoever, on the first day of the week, commonly called Sunday, participates in, or exhibits to the public, with or without charge for admittance in any building, room * * * any theatrical or dramatic performance of any kind or description * * * on complaint made within twenty days thereafter, shall be fined in any sum not exceeding one hundred dollars, or be confined in the county jail not exceeding six months or both, at the discretion of the court"

The legislature has already provided against the exhibition of any theatrical or dramatic performance of any kind or description, or the participation therein by any persons upon the Sabbath day, and prohibits the exhibition or participation therein, by any person or persons of various other performances, exhibitions or sports; but nowhere in the statute does the law prohibit expressly the exhibition of a moving picture showing the Passion Play or similar plays. The only question then for me to decide is:

> "Is the Passion Play exhibited by a moving picture a theatrical or dramatic performance?"

The Century Dictionary gives the following definition of "theatrical:"

> "1. Of or pertaining to a theater or scenic representation; resembling the manner of dramatic performers, as theatrical performance, theatrical gestures;
> 2. Calculated for display; all that pertains to a dramatic performance."

A "dramatic performance" is defined by said Century Dictionary as:

> "Of or pertaining to the drama; represented by action; appropriate to or in the form of a written or acted drama."

"Drama" is defined as:

> "A story put into action, or a story or human life told by actual

representation of persons by persons with imitation of language, voice, gestures, dress and accessories or surrounding conditions, the whole produced with reference to truth or probability, and with or without the aid of music, dancing, painting and decoration; a play."

The "Passion Play" is defined as:

"A mystery or mystical play representing different scenes in the passion of Christ. The Passion Play is still extant in the periodical representations of Oberammergau in the Bavarian highlands and presents the only example to be found at the present day."

Under the definitions given, the Passion Play is in the strict sense a dramatic performance, and the exhibition of a moving picture which purports to show the Passion Play will come under the prohibition of the statute as a dramatic or theatrical performance, and the exhibition of the same on Sunday is a violation of section 13049, General Code.

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

120.

ASSESSOR IN VILLAGE HAVING TOWNSHIP ORGANIZATION—FILLING OF VACANCY BY TOWNSHIP TRUSTEES.

When there is a vacancy in the office of assessor in a village which is not identical with the limits of the township in which such village is situated, there is a township organization within the meaning of section 3352, General Code, and such vacancy shall therefore not be filled by the county auditor but by the trustees of said township.

COLUMBUS, OHIO, February 15, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Your favor of February 4th, 1911, received.

You state that

"Section 3352, General Code, provides in substance in case of vacancy in the office of assessor in any ward or precinct of a municipal corporation *not having a township organization*, that the county auditor shall fill such vacancy by appointing an elector of such ward or precinct to the office of assessor.

"Section 3261 provides that in case of vacancy in the office of assessor from precinct or township in which he was elected, that the township trustees shall fill such vacancy, etc.

"In Cadiz township we have an assessor elected for the township outside of the incorporated village of Cadiz, and we have an assessor of personal property elected for the village alone.

"And while the voters of the entire township including Cadiz corporation vote for the township trustees, yet for assessor of personal

property the municipality elects its own assessor and the voters outside of the corporation elect a second assessor for that part of the township outside of the corporation."

and you inquire:

"Does the auditor or the township trustees have the appointing of the officer to fill the vacancy in question?"

Section 3352 of the General Code of Ohio provides as follows:

"If a person elected assessor in any ward or precinct of a municipal corporation *not having a township organization*, fails to give bond and take the oath of office for one week after his election, or in the event of removal from the ward or precinct after his election, the office shall be deemed vacant, or should there be at any time a vacancy in such 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."

Section 3261, General Code, provides as follows:

"If by reason of non-acceptance, death or removal of a person chosen to an 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 was 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 3512 of the General Code provides:

"When the corporate limits of the city or village become identical with those of a township, all township offices are abolished and the duties thereafter shall be performed by the corresponding officers of a city or village."

You state that you have an assessor elected for the village of Cadiz, and also one elected for the township outside of the village of Cadiz; there seems to be a vacancy in the office of assessor in the village, and you inquire, by whom is this vacancy filled, the county auditor or the township trustees?

Section 3352 of the General Code, quoted above, provides that, if a person elected assessor in any ward or precinct of a municipal corporation *not having a township organization* fails to give bond or his office becomes vacant, the county auditor shall fill such vacancy by appointing an elector of such ward or precinct to the office of assessor. Section 3512 of the General Code provides that, when the corporate limits of the city or village become identical with those of the township, all township offices are abolished, and the duties thereafter shall be performed by the corresponding officers of a city or village. However, the corporate limits of the village of Cadiz are not identical with those of Cadiz township, and consequently, the township offices are not abolished, and you have a township organization; the voters of the village of Cadiz vote for trustees for Cadiz township, and the trustees of Cadiz township have jurisdiction of the town of Cadiz. It is my opinion therefore, that the county

auditor only appoints assessors in cases where there are no trustees elected, by reason of the abolition of all township offices, under authority of section 3512, General Code; and therefore, it is the duty of the trustees of Cadiz township to fill the vacancy in the office of assessor for the town of Cadiz.

This opinion is in accord with the former ruling of this department, reported on page 539 of the Opinions of the Attorney General, 1909-1910.

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

134.

INTOXICATING LIQUORS—DOW-AIKEN TAX—APPLICATION TO PARTY ENGAGING IN, DISCONTINUING AND RE-ENGAGING IN TRAFFIC.

A party who engages in the traffic of intoxicating liquors, discontinues and again engages in the business at the same place, should be taxed the minimum of $200.00 *for every time he enters into the business, with the one limitation that payments shall not be demanded in excess of* $1,000.00 *for each year.*

COLUMBUS, OHIO, February 24, 1911.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 30th, enclosing a copy of an opinion addressed by you to Charles J. Sanzenbacher, county auditor, in which you hold that a person engaged in the business of trafficking in intoxicating liquors, thereafter discontinuing, and again commencing the business at the same place, after an interval of time, must pay the minimum of $200.00 for each occasion on which he was found engaged in the business of trafficking in intoxicating liquors. I have carefully examined the opinion prepared by you and concur heartily in the conclusion that you reach.

In addition to sections 6073 and 6074, General Code, on which you rely, permit me to point out that the first section of what is known as the Dow-Aiken law, which is the section doubtless relied upon by counsel for the interested party in this case, provides that:

> "Upon the business of trafficking in * * * intoxicating liquors there shall be assessed yearly, and paid * * * by each person * * * engaged therein, and for each place where such business is carried on * * * the sum of $1,000.00."

Instead of indicating the legislative intent that, if the same person at the same place repeatedly engaged in and discontinued the business of trafficking in intoxicating liquors, the limit should nevertheless be one thousand dollars, this section indicates clearly to my mind that the tax is on the business. Now, if A engages in the business, conducts it for a short time and discontinues it, that is one business; if he re-engages in the business at the same or another location and again discontinues, that is another business. I accordingly concur in your opinion that, under the circumstances above described, a trafficker in intoxicating liquors is liable for the minimum tax, on account of both ventures commenced and abandoned by him.

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

135.

TOWNSHIP TRUSTEES—VACANCY NOT FILLED WHEN TOWNSHIP WITHOUT JUSTICE OF THE PEACE—APPOINTMENT OF JUSTICE OF PEACE BY TRUSTEES.

Where there is no justice of the peace in the township, a vacancy in the board of township trustees cannot be filled.

A majority of the trustees may appoint a justice of the peace, however.

February 25, 1911.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Under date of February 18th, you state that you desire my opinion on the following proposition:

> "Washington township, this county, has no justice of the peace, and they have not been able to get anyone to serve in that office for the last six years.
>
> "There are but two legally elected township trustees in the township; and one of them has tendered his resignation to take effect March 1st, and on that date will remove from the township.
>
> "By section 3262, G. C., it is provided in case of a vacancy in the board of township trustees, that the justice of the peace of such township holding the oldest commission shall appoint a suitable person * * * to fill such vacancy or vacancies.
>
> "What I desire to know is: There being no justice of the peace in said township, who will make the appointment to fill the vacancies in the board of trustees in that township?"

Section 3262 of the General Code is as follows:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

Section 1714 of the General Code is as follows:

> "If a vacancy occurs in the office of the justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the court of such vacancy and the date when it occurred."

It is my opinion that there being no justice of the peace in Washington township, your county, and under the provisions of section 3262, supra, it being

necessary that the justice of the peace holding the oldest commission shall make the appointment of the trustee and there being no other provision governing the point there is no one who can make the appointment to fill the vacancy in the board of trustees in that township.

If the resignation of the trustee that you mention has not yet been accepted and he has not removed from the township, the two trustees under section 1714, supra, could appoint a justice of the peace who in turn under section 3262 could appoint a successor to the trustee who is leaving the township.

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

136.

COUNTY COMMISSIONERS—ADVERTISEMENT AND NOTICE OF BRIDGE ERECTION COSTING OVER $1,000.00—OLD AND NEW BRIDGES.

Section 2444, General Code, requiring county commissioners to advertise for four consecutive weeks, their intention to erect a bridge at an expense of one thousand dollars, applies as well to repair of old as to construction of new bridges.

COLUMBUS, OHIO, February 27, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—In your letter of February 11th, you ask the opinion of this department upon the following question:

> "Will you kindly give me your construction of section 2444, G. C.? The precise question is whether or not this section applies to all bridge structures, the cost of which exceeds $1,000.00, whether it be upon an old location or a new location."

Section 2444 provides as follows:

> "Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate handbills, and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building, or location is made. They shall hear all petitions for, and remonstrances against such proposed purchase, location, or improvement."

It is well settled that a construction comporting with the presumed intention must be given in cases of doubt. If the language of the statute is unambiguous there is no room for construction.

McCormick vs. Alexander, 2 Ohio, 65

I am of the opinion that the provisions of section 2444 as to the publica-

tion and hearing applies as well to the construction of a bridge at a cost exceeding $1,000.00, whether upon an old or a new location. The object of the section is to afford an opportunity to the taxpayer to know how and where, and for what purpose his money is to be spent, and to afford him an opportunity to remonstrate if he sees fit. It is an established rule of law that the intention of the law maker should be sought and the statute construed in keeping with that intention. (Slingluff vs. Weaver, 66 O. S., 621.)

If the view be taken that the statute exhausted itself after notice was given in the first instance, as to the original location and the location of the bridge thereon, then the commissioners, after a publication and hearing upon a $1,200.00 improvement at a later date, when a new structure was sought to be placed on the old location, expended an unlimited amount to the prejudice of the taxpayers of the county.

I am, therefore, of the opinion that the provisions of section 2444 would have to be followed in the case you mention.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

144.

COUNTY ROAD IMPROVEMENTS—SEPARATE PROCEEDINGS FOR EACH ROAD—NECESSITY FOR VOTE OF ELECTORS IN PURCHASING CEMETERY LAND AND IN MAKING ADDITIONS.

The proceedings of section 6926, General Code, must be applied for each road to be improved, and the rule applies to petitions of resident land owners which must be filed in each case.

Under sections 3445 and 1465, General Code, the question of whether or not cemetery lands shall be purchased in the first instance by cemetery trustees, must be submitted to a vote of the electors.

When these proceedings have been followed in the first purchase of cemetery lands, additional adjoining lands may be purchased without submission to a vote of the electors.

March 2, 1911.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Replying to your letter of February 1st, in which you state: *First*:

> "I enclose herein a plat showing the road involved; the road which is proposed to be improved is indicated by the red line.
>
> "A, B and C indicating the main road B, D indicating a branch road connecting another pike indicated by D, F.
>
> "Under the above section (section 6926, G. C.) can these roads A, B, C and D be improved under one and the same petition?"

Section 6926 of the General Code provides:

> "When a majority of the resident owners of real estate situated

within one mile of a public road, present a petition to the board of county commissioners asking for the grading and improving of *such road*, the county commissioners shall go upon the line of the *road* described in such petition. If, in their opinion, the public utility requires *such road* to be graded and improved, they shall determine whether *the improvement* shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of *such road improvement* shall be of stone, gravel or brick, and enter their decision on their journal."

It is well settled that if the language of the statute is unambiguous there is no room for construction.

McCormick vs. Alexander, 2 Ohio, 66.

The section refers to a single improvement, and as stated in the books, generally speaking each separate and distinct improvement requires a separate proceeding.

If the two roads be improved under one and the same petition and the proceedings be held valid and the precedent established, what would hinder the county commissioners from uniting numerous improvements in one proceeding, and justify it on the ground that the roads connected or crossed each other, and that the improvements confer a common benefit upon the entire area of their locality?

I am of opinion that the improvement of one road is contemplated by the statute, and that two proceedings would have to be instituted to make the improvements you speak of.

Second:

"Would it be necessary to have a majority of the resident land owners owning land lying and being within one mile of each of said roads A, B, C and B, D, or will it be sufficient if a majority of the resident land owners owning land lying and being within one mile of both of said roads?"

The reply to your first inquiry obviates an answer to the second question.

Third:

"Under section 3445 of the General Code of Ohio is it necessary for the trustees of a township to submit to a vote of the electors of such township the proposition whether or not such trustees shall buy lands for cemetery purposes, or can such trustees buy land for such purpose without first submitting the same to a vote?

"Said section provides as follows: 'Before such purchase, etc., is made, etc., the question of establishment of such cemetery, on the order of the trustees, or the written application of any six electors of the township, shall be submitted to a vote, etc.' It seems to me that the statute intends that if the trustees see fit they may have such propositions submitted to vote, or upon the written application of six electors they are required to take action and submit the proposition to a vote, but that they could purchase land for such purpose on their own motion without submitting the proposition to a vote, but I would like to have your opinion in the matter at your earliest convenience."

Section 3445 of the General Code provides:

"Before such purchase or appropriation is made or conveyance ac-

cepted the question of establishment of such cemetery, on the order of the trustees, or the written application of any six electors of the township, shall be submitted to a vote of the electors of the township at a regular annual election. Such order or application shall specify as near as may be the proposed location of such cemetery, and the estimated cost thereof, including inclosing and improving it."

Section 1465, Bates' Revised Statutes, provides in part:

"That before any such purchase or appropriation is made or conveyance accepted, the question of a cemetery or no cemetery shall be submitted to a vote of the electors of the township at the regular annual election, which vote shall be taken *on the order of the trustees, or the written application of any six electors of the township.* * * *"

"Where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed."

Allen vs. Russell, 39 O. S., 337.

Reading section 3445, General Code, in the light of section 1465 of the Revised Statutes there can be no question that a proposition whether or not cemetery trustees should buy lands for cemetery purposes, in the first instance, must be submitted to a vote.

Fourth:

"Franklin township, this county, together with two adjoining townships, one of which is in Richland county and the other in Knox county, own a union cemetery which is situated in Franklin township; the lots of this cemetery have all been disposed of and it is necessary that additional ground be purchased. An individual owns a cemetery adjacent to this union cemetery; can the trustees of these townships purchase this adjacent cemetery and would it be necessary for them to submit the proposition to a vote?"

In the case of Norton vs. Trustees reported in 8 C. C., 335, affirmed by the supreme court without report 54 O. S., 682, it is held the provision of section 1465 requiring the question of "cemetery or no cemetery" to be submitted to a vote of the electors has no application to the acquisition of additional cemetery lands under section 1472 (now 3455, General Code). From this authority it appears that if the statute has been followed in the first instance in determining the question of a cemetery or no cemetery it is not necessary when it comes to purchasing necessary additional ground that the question be submitted to a vote.

Trusting this answers all of your questions.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 145.

DITCH SUPERVISOR—POWER TO CONTRACT FOR CLEANING OF DITCHES SINGLY OR IN GROUPS.

COLUMBUS, OHIO, March 3, 1911.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I have your letter of January 26th, 1911, which is as follows:

> "I wish that you would give me your ruling on section 6714, General Code, R. S., Bates' 4584-14. In this, must the ditch supervisor let each party who has a ditch to clean, say 50 or 75 feet or more, do his own work or apportionment? Or can he, the supervisor, group all or many of these small assessments (of more than $3.00) together in large sections of not more than one mile in length, and let said sections to the lowest responsible bidder."

It is my opinion that each person or corporation through whose land a ditch is constructed has the right, and it is his duty to keep the same free from obstructions; and that if they fail to do so, as provided by section 6712, General Code, after notice as provided in the preceding sections, then that the supervisior shall let the work of cleaning a ditch as provided by section 6714, and that the supervisor can group as many of the small assessments as he wishes and let the same, as provided in section 6714, in sections, provided no section exceeds one mile in length.

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

149.

SALARY AS MEMBER OF AND AS CLERK OF SCHOOL BOARD PAYABLE TO SINGLE INDIVIDUAL—SHERIFF'S FEES—MILEAGE FOR SERVICE OF SEVERAL WRITS AT SAME PLACE.

Contrary to the general rule of policy that a member of a board may not hold a salaried position under such board, special provision of statute makes it possible for a member of a board of education to serve as its clerk and receive the salary for both positions.

When a sheriff serves several writs, mileage may be charged on each writ regardless of the number of persons thereon or of the fact that said writs are served at the same time upon several parties residing in the same place.

COLUMBUS, OHIO, March 4, 1911.

HON. T. E. MCELHINEY, *McConnellsville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 31st and to apologize for the delay in answering the same, which has been occasioned by an unusual pressure of official business in the department.

You request the opinion of this department upon the following questions:

> "1. A member of a township board of education is also acting as

clerk of the board and receiving compensation as such clerk. Is he entitled to his per diem as member of the board for attending meetings as well as his compensation as clerk?

"2. A sheriff has placed in his hands two or more writs from the same office, which are served upon different parties residing at the same place; can he charge mileage on each writ separately or must he charge for the total miles traveled and make return on one writ with no charge for mileage on the other writs?"

With respect to your first question I beg to cite the following sections of the General Code:

"Sec. 4747. The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president and a person, who may or may not be a *member of the board,* shall be elected clerk. The president shall serve for a term of one year and the clerk for a term not to exceed two years. * * *"

(This section was amended, 101 O. L., 138, so as to provide that in township school districts the clerk of the township shall be the clerk of the board, and in all other districts, a person who may or may not be a member of the board shall be elected clerk. I assume, however, that your question relates either to a former clerk of a township board of education, or to a present incumbent who is serving out his two year term.)

"Sec. 4715. Each member of the township board of education shall receive as compensation two dollars for each meeting actually attended by such member, but for not more than ten meetings in any year. * * *"

In my opinion, under section 4715, above quoted, each member of the board of education is entitled to his compensation as a matter of law, and regardless of any action taken by the board itself, except as to the number of meetings attended. See Walker vs. Dillonville, 82 O. S., 137. There is a principle of public policy which prohibits a member of an administrative board from holding a salaried position thereunder. This principle, however, is expressly waived, so to speak, by section 4747, above quoted. The authority to prescribe compensation for the clerk is clearly vested in the board by section 4781, General Code, which reads:

"The board of education of each school district shall fix the compensation of its clerk * * * which shall be paid from the contingent fund of the district. * * *"

Reading all of these sections together I am of the opinion that the clerk of a township school district, who is also a member of the board of education, is entitled to the compensation prescribed by the statute as a member of the board of education, and in addition to the compensation prescribed by the board as clerk.

Answering your second question, I beg to state that section 2845, General Code, which provides the schedule of fees to which a sheriff is entitled is in part as follows:

"The fees and compensation of sheriffs shall be as follows: * * *

levying each writ of execution * * * or the service of an order of arrest upon the body of each defendant named in the writ, thirty cents, and mileage, as in other cases; * * * traveling fees upon all returns, precepts, and subpoenas, eight cents per mile, going and returning, provided, that where more than one person is *named in such writ*, mileage shall be charged for the shortest distance necessary to be traveled; * * * service of copy of pleading and return, the same fees as are allowed for the service of summons, including mileage, as herein provided; * * * serving any person with an order of court, and making return thereof, thirty cents, and mileage as on service of summons; * * * serving a writ of restitution, eighty cents, and mileage thereon as in other cases; * * * executing a writ of partition, one dollar and twenty cents, and traveling fees as in other cases; * * *"

Section 2847, General Code, provides that:

"When a sheriff returns in any manner other than by himself or his deputy personally any process issued from the court of common pleas or other court of a county other than that in which he resides, he shall receive only *mileage thereon*, to be computed from his office to the place of service and back to his office."

It is clear from the reading of the above sections that mileage is to be computed upon each separate writ served, regardless of the place to which the sheriff is required to go by the writ, and regardless also of the number of persons named in the writ. In the case supposed by you, it is my opinion that mileage should clearly be charged on each separate writ. In fact this is the only possible answer to your question; if the actual miles traveled were returned upon one writ with no charge for mileage on the other writs, then, one litigant might have to pay for services rendered to others than himself. This is manifestly not the intention of the statute.

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

151.

SALARIES OF TOWNSHIP TRUSTEES OF MARIETTA, OHIO—METHOD OF PAYMENT.

COLUMBUS, OHIO, March 6, 1911.

HON. ALLEN THURMAN WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your letter of January 23d requesting my opinion on the following question is received:

"Whether or not the trustees of the township of Marietta, Washington county, Ohio, should draw their salaries under section 3294 of the General Code, and other sections providing for pay where the trustees act for private persons as in partition fences, etc., or under

an act entitled 'an act to fix the compensation of certain township officers and clerks,' passed April 15, 1902, and found in 95 O. L., 764?"

In reply I desire to say, it is my opinion that all township trustees should draw their compensation as provided by section 3294 and other sections of the General Code, and that said special act does not operate, not now being in force, the General Code having omitted it, and no such provision would, in my opinion, be constitutional. Therefore, you would be right in advising said trustees as above stated.

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

155.

PROSECUTING ATTORNEY—PAYMENT OF SALARY ON WARRANT OF AUDITOR—APPROVAL OF COUNTY COMMISSIONERS NOT NECESSARY.

As the amount of the salary of the prosecuting attorney is fixed by law, the same may be paid on the warrant of the auditor the first of each month without the approval of the county commissioners.

COLUMBUS, OHIO, March 7, 1911.

HON. J. GUY O'DONNELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your letter of February 8th is received, in which you request my opinion upon the following question:

"Is the salary of the prosecuting attorney of a county payable on the warrant of the auditor the first of each month without the approval of the board of county commissioners?"

In reply I desire to say that section 3003 of the General Code which provides for the salary of prosecuting attorneys reads in part as follows:

"Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers whether in criminal or civil matters."

Section 3004 of the General Code provides for the necessary expenses incurred in the performance of his official duties or in furtherance of justice by a prosecuting attorney, and also provides that such expense account shall be itemized and duly verified, and if found correct shall be allowed by the county commissioners and paid monthly from the general fund of the county.

In taking the two sections 3003 and 3004 and reading them together, the first providing for the salary, which is fixed according to the census, and provides that it shall be paid out of the general fund, and the other for expenses, which provides that they must be found correct by the board of commissioners and allowed, I am of the opinion that the salary is payable out of the general fund upon the warrant of the county auditor without first being allowed by

the commissioners. I base my opinion further upon the fact that bills allowed by the commissioners must be filed with the auditor, as their clerk, five days prior to allowance, and the auditor shall not issue a warrant until five days after the allowance of said bill, but the salary shall be paid in equal monthly installments from the general fund, and does not come under the provisions of the law requiring allowance by the commissioners, the certainty of the amount of the same being fixed by statute.

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

158.

AUTHORITY OF COUNTY COMMISSIONERS TO MACADAMIZE OR PAVE ROAD, UNDER SECTION 6903, GENERAL CODE—PETITION OF PROPERTY OWNERS.

COLUMBUS, OHIO, March 7, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of February 14th, in which you request my opinion upon the third paragraph of section 6903 of the General Code.

Section 6903, General Code, reads as follows:

> "On a petition therefor signed by the owners of at least a majority of the foot frontage on a county road or part thereof, the county commissioners may do any one or more of the following acts or things:
> * * * * * * * * * * * * * * *
> "3. Grade, drain, curb, pave and improve it or part thereof."

I am of the opinion that the clause "grade, drain, curb, pave and improve it or part thereof," can be construed to mean that the commissioners may macadamize the road or pave it under said section 6903.

I am constrained to hold this view under the authority of the decision in the case of John D. Van Deman, et al. vs. the City of Delaware, recently decided in the circuit court, copy of which I herewith enclose.

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

160.

FIREMEN UNDER CIVIL SERVICE—COUNCIL MAY NOT INCREASE SALARIES.

The statutes confer no authority upon a city council to increase the salary of firemen appointed under civil service rules.

COLUMBUS, OHIO, March 7, 1911.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—In your letter of February 14th, you state that the firemen of the city of Mansfield desire to secure an increase of salary from sixty-five to

seventy-five dollars per month, and that the city council is willing to grant the same provided it can be legally done.

You also state that the firemen secure their appointment by examination under the merit sytem, and hold under the so-called civil service rules, and that there is sufficient money in the funds of the city heretofore appropriated for the payment of salaries to pay such increased amounts.

You inquire whether their salaries can be increased.

The identical question you ask has been decided by the circuit court of Lake county in the case of the State ex rel., Spaller vs. Painesville, et al., 32 O. C. C., 123, found in Ohio Law Bulletin, vol. 46, No. 7, published February 13, 1911. The court held in that case that a city council has no power to increase or diminish the salary of a police office appointed under the civil service provision of such code, during the term for which he was appointed, which is during good behavior. You will note that section 166 of the Municipal Code (now 4487, General Code) provides that no officer, secretary, clerk, sergeant, patrolman, *fireman* or other employe * * * shall be removed or *reduced* in rank or pay except in accordance with the provisions of section 152.

Section 126, Municipal Code, provides as follows:

> "The council shall fix the salaries of all officers, clerks and employes in the city government, 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."

The court in the case just mentioned held that section 126 was in entire harmony with the provisions of section 166, Municipal Code. It said in part:

> "It will be noted that section 166 says nothing whatever about increasing the pay of an officer, nor anything about reducing his pay, except in accordance with the provisions of section 152 of this act. Now section 152 relates entirely to the method of procedure in case of removal of officers and employes in the police and fire departments for incompetency, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, or for any other reasonable or just cause; and in such case the officer may be suspended by the proper officer and upon the charges against him being sustained, removed; and it was evidently the purpose of section 166 to provide that the pay of an officer might be reduced by and under proceedings had by favor of section 152. In other words, a policeman might be suspended and during his suspension his pay might be reduced or entirely taken away, and if permanently discharged his pay might be entirely cut off.
>
> "Thus considered, these two sections of the statute are in entire harmony, and both conduce to exactly the same end; namely, the good of the service and to protect the officers of these two departments against unwarranted interference with their salaries by way of reducing them, and upon the other hand, to take away from such officers the temptation to be constantly using their influence and office to secure increased emoluments."

Following that decision it is my opinion that a city council has no power

to increase the salary of a fireman appointed under the civil service provision of the Municipal Code during the term for which he was appointed, which is during good behavior.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

162.

COMPENSATION OF TOWNSHIP TRUSTEES—STATUTE UNCONSTITUTIONAL—REMAINING SECTIONS GOVERN.

COLUMBUS, OHIO, March 8, 1911.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry of February 10th, which is as follows:

> "The township trustees of Steubenville have insisted that they are entitled to compensation under section 1530 of the Revised Statutes at the rate of $1.50 per day because the population of Steubenville township is more than 21,175.
>
> "What is the compensation of the township trustees in townships exceeding 21,175, said trustees having been elected in the year 1909?"

With reference to section 1530, R. S., I would say that the second paragraph of said section is clearly unconstitutional, and the same has been left out of the new General Code of Ohio, that the sections which now cover the fees of trustees of townships are as follows: Sections 3294, 5946, 6619 and 6923 of the General Code; that therefore, the trustees of said Steubenville township are entitled to $1.50 per day for each day's services in the business of the township, not to exceed $150.00 in any year.

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

163.

MUNICIPAL WORKHOUSE—PAYMENT BY COUNTY FOR STATE PRISONERS MAINTAINED—PRISONERS SENTENCED BY POLICE OR MAGISTRATE'S COURT.

The county commissioners may allow payment for claims presented to the county by the superintendent of a municipal workhouse for the maintenance of prisoners convicted of state offenses.

Sections 12384 *and* 12384-1 *do not relieve the county from payment of such bills for prisoners sentenced by police courts or other inferior courts.*

COLUMBUS, OHIO, March 8, 1911.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication of February 10th was received, in which you state that your office is in receipt of a letter from E. L. Weinland, solicitor

of this city, in which he calls attention to section 12384-1 of the General Code, as found in 101 O. L., 230, which supplementary section to 12384 reads as follows:

> "In any county which has no workhouse, but contains a city which has a workhouse maintained by such city, it shall be competent for the commissioners of such county to agree with the directors of public safety of such municipality upon terms and conditions upon which persons convicted of violations of said laws shall be maintained in such city workhouse at the expense of such county. In any such case persons committed to such city workhouse for the violation of any law of the state of Ohio, whether such committment be from a court of common pleas or from a police court, mayor's court or magistrate's court, the cost and expense of maintaining such persons so committed shall be paid out of the general fund of the county commissioners; provided, however, that all persons committed to any such city workhouse for the violation of any ordinance of such municipality shall be maintained in such workhouse at the sole cost of such municipality."

You also state that Mr. Weinland further states that in his opinion under this new law the maintenance of prisoners sentenced by police courts and other inferior magistrates for violation of state laws is fixed upon the county and that bills for such maintenance from and after the date when the act became a law, to wit: May 16th, 1910, should properly be rendered to the county. And further that he so advised the authorities at the workhouse, and in pursuance of that advice the superintendent of said workhouse has presented bills to the county commissioners for the maintenance of all prisoners committed for the violation of state laws for the time they were held at the workhouse after the said 16th day of May, 1910, the date of the passage of the supplemental section.

You request the opinion of this department on the following question:

> "As to the authority of your board of county commissioners to allow the payment of these claims?"

You further state that on May 20, 1908 a contract was made and entered into by and between the board of public service of this city and the board of county commissioners of this county in which the board of public service agreed to receive, keep, board, clothe and maintain during the time of their sentences, under certain conditions, all persons sentenced by any court of competent jurisdiction of said county of Franklin, state of Ohio, for which said board of county commissioners agreed to pay to the said board of public service or its successors in office for every person so sentenced, at the rate of thirty cents per day during said confinement, and that further your board of county commissioners agreed to pay for the transportation of prisoners, etc., and that either part may terminate the same, except as to convicts already received, by giving sixty days' notice in writing to the other party, and this contract is still in force, and the county commissioners have been paying for the maintenance of prisoners as charged to the county under and by virtue of said contract. You make a further request for the opinion of this department upon the following question:

> "Inasmuch as the aforesaid contract above referred to has not been terminated, and a new contract made and entered into by and between the

director of public safety of the city of Columbus and the board of county commissioners of Franklin county, whether under section 12384-1 of the General Code, the commissioners should allow the payment of bills rendered to them for the maintenance of those prisoners sentenced by police court or other inferior magistrates' courts for the violation of state laws?"

In reply to your first inquiry I desire to say that it is my opinion that your commissioners have authority to allow the payment of the claims presented to the county by the superintendent for the maintenance of prisoners confined in the workhouse of the city of Columbus sentenced by any court of competent jurisdiction within Franklin county, Ohio, whether the common pleas court, police court or inferior magistrates' courts.

As to your second inquiry, I am of the opinion that under the original section 12384 and section 12384-1 as found in 101 Ohio Laws, 230, the county of Franklin would not be relieved from the payment of said bills because of the prisoner or prisoners being confined in the workhouse under sentence from the police court or a magistrate's court of this county for the violation of any state law, as I am of the opinion that said sections, in relation to any contract entered into by the respective authorities therein specified, apply to the terms and conditions upon which such prisoners will be accepted by said workhouse authorities, and does not and cannot legally except any prisoner sentenced under any state law for a misdemeanor by any court of competent jurisdiction within the county of Franklin, whether the court of common pleas, police court of the city of Columbus or inferior magistrate's court.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

164.

COUNTY COMMISSIONERS—COLLECTION OF CLAIMS UNPAID FOR ONE YEAR.

It is the duty of the county commissioners in conjunction with the prosecuting attorney, to collect the various items remaining due the county and unpaid for one year, as provided in section 2929, General Code. The commissioners, however, if the auditor is unable to perform these duties, may employ a clerk at their office, only when it is necessary for said clerk to devote his entire time to the discharge of such duties. The could not, employ a clerk to act in conjunction with the prosecuting attorney in the performance of such duties at the office of the latter.

COLUMBUS, OHIO, March 8, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 14th, in which you request the opinion of this department upon the following questions, viz:

"1. Is it the duty of the county commissioners in conjunction

with the prosecuting attorney to collect the various items remaining due the county and unpaid for more than one year, as specified and set forth in section 2979 of the General Code?

"2. Have the county commissioners authority to employ a clerk at their office or to act in conjunction with me in the collection of these amounts?

"3. Can the county commissioners authorize the employment of a clerk to facilitate the discharge of the clerical work that may arise in connection with performing the duties specified in question one?"

As to the first question I would say that section 2979 of the General Code makes it mandatory upon the commissioners, in conjunction with the prosecuting attorney, to collect said items therein specified in any manner provided by law.

In answer to the second question I am of the opinion that the county auditor being the secretary of the county commissioners by virtue of his office, as specified in section 2566, General Code, which means that he shall act as clerk of said board, should perform all the duties devolving upon the clerk of the board of commissioners if he is able so to do. But when the board of commissioners finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor, and such necessary assistants to said clerk, as the board deems necessary. Such clerk shall perform the duties required by law and by the board. (Section 2409, G. C.) Under the last above mentioned section it is my opinion that the commissioners of your county would have the authority to employ a clerk at their office to perform the services necessary in order to carry out the provisions of section 2979, if they found that in the performance of said duties, it would be necessary for the clerk to devote his entire time to the discharge of the duties of such position. But I am of the opinion that the county commissioners could not employ a clerk, to be employed in your office while you are acting in conjunction with the commissioners of your county, in performing the duties enjoined upon you by section 2979.

In reply to your third question I would say that it is disposed of in the answer to our second inquiry. But that there may be no misunderstanding, I desire to say that I am of the opinion, that under the authority of the above mentioned sections, the commissioners could employ a clerk to facilitate the discharge of the clerical work in connection with the matter above referred to, if in their opinion it were necessary for said clerk to devote his entire time to the discharge of the duties of such position, but not otherwise.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

165.

TOWNSHIP CLERK AS CLERK OF SCHOOL BOARD—ELECTION BY SCHOOL BOARD NOT NECESSARY.

Under section 4747, General Code, the clerk of the township becomes ipso facto the clerk of the school board and no election by the school board is required to authorize him to act as clerk.

COLUMBUS, OHIO, March 8, 1911.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of February 11th, in which you state:

> "I have before me the opinion of your office rendered May 27, 1910, construing section 4747 of the General Code in reference to its application to clerks of township boards of education, but I would like further to be informed as to this point, viz: a number of township boards of education of this county at their meeting in January, 1910, elected clerks for a period of one year, under and by virtue of the law as it was before amended by section 4747 of the General Code, the term of the clerks elected at that time being for one year, expires in January of the present year, and a vacancy now occurs by reason thereof."

And you inquire:

> "Should such boards of education in January of this year have elected a clerk as section 4747, amended, provides, and if so, is the duly elected and qualified township clerk the only person who is eligible to such election, or could any person be elected to that position as provided by said section before amendment thereto?"

Section 4747, General Code, as amended (101 O. L., 138), reads as follows:

> "The board of education of each school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, *one as vice-president and in township school districts the clerk of the township shall be clerk of the board.* The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

You will note that the board organizes on the first Monday of January after the election of members of such board; that one member of the board shall be elected president, and one as vice-president; *and in township school districts the clerk of the township shall be the clerk of the board.* The reading of this section of the General Code answers your inquiry. The clerk of the township becomes by virtue of his office, under authority of section 4747, the clerk of the school board of the township, and no election is required on the part of the school board to authorize him to act as clerk.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

167.

COUNTY ROAD IMPROVEMENT—PAYMENT OF 25% BY TOWNSHIP TRUSTEES. A CONDITION PRECEDENT TO APPROVAL BY COUNTY COMMISSIONERS.

The payment of 25% of a county road improvement extending through a township, under section 1200, General Code, is optional with the township trustees and until such payment is made, the county commissioners may not approve such improvement.

March 8, 1911.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your favor of recent date has been received.

You state:

"We would be pleased to have your construction of section 1200, General Code, under the facts as here presented.

"Two petitions have been presented to the county commissioners of Noble county under section 1198, asking for the improvement of certain roads leading into the village of Caldwell, Ohio, each road petitioned for being in Olive township in said county. The trustees of said township are opposed to the improvement of one of these roads, but favorable to the other and have passed a resolution in accordance with section 1200. Can the county commissioners and the state highway commissioner order the improvement of the other road petitioned for, and compel the township trustees to pass the resolution mentioned in section 1200?

"In short, is section 1200 mandatory on the part of the trustees, or is the passage of the resolution therein named optional with them?"

Section 1197 is in part as follows:

"The commissioners of a county by resolution may order the improvement of a public road or section thereof at least one mile in length, or, less than one mile in length if it is an extension of or connected with a permanently improved street or highway of approved construction."

Section 1198 is as follows:

"If the owners of fifty-one per cent. of the lineal feet adjacent to such road or highway petition the county commissioners for its improvement under the provisions of this chapter, the county commissioners shall grant the petition, if from a view of such a road or highway they are of the opinion that the improvement will be for the best interests of the public."

Section 1200 is as follows:

"Before their approval of a road improvement, the county com-

missioners shall require that the township or townships through which it extends shall pay twenty-five per cent. of the costs thereof, and that the trustees, by resolution, approve its construction."

It is my opinion that it is a condition precedent with the county commissioners approving a road improvement that the township through which it extends should pay twenty-five per cent. of the costs thereof, and that the trustees approve its construction, and that it is optional with the trustees whether or not they will so approve the construction of the road.

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

168.

EXPENSES OF SHERIFF—LIVERY EXPENSE IN LUNACY ARRESTS ALLOWED.

Section 1981, General Code, expressly authorizes the sheriff to "secure vehicles" in making arrests in lunacy cases and is to be distinguished from the statute authorizing only an allowance for "maintenance" of vehicles in criminal cases. A $2.00 livery expense, therefore, incurred by a sheriff in making an arrest in a lunacy case is a legal charge against the county which should be allowed by a probate judge.

COLUMBUS, OHIO, March 8, 1911.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of February 20th, in which you submit the following question for my opinion thereon:

"Wil you give me your opinion of that portion of section 1981 of the General Code relating to expenses of sheriffs in lunacy cases which reads as follows:

"'To the sheriff or other person making the arrest, the actual and necessary expense thereof including conveyance and assistants upon the allowance of the probate judge, and such fees as are allowed by law in making arrests in criminal cases;'

"This is to be construed in connection with section 2997 of the General Code which relates to the maintenance of horses and vehicles for the sheriff."

Briefly, the facts are as follows:

"On the 14th day of February a lunacy warrant issued from the probate court of this county directing the sheriff to take into custody a certain alleged insane person and at the time the court warned the sheriff that the person to be arrested was violent and dangerous. The

sheriff deemed it necessary to have assistance in making the arrest and because he had no conveyance in his stables sufficient to transport himself and assistants to the residence of the alleged lunatic, he proceeded to hire from one of the local livery stables a suitable conveyance, paying therefor from his own 'hard earned' cash the munificent sum of $2.00. The arrest was duly made and in due time the sheriff asked the court to make an order reimbursing him for the $2.00, all of which the court very promptly and most emphatically refused to do. I was appealed to and advised the court that said $2.00 was an *actual* and *necessary* expense and ought to be allowed, but he demurred, saying that Attorney General Hogan had held the other way and of course I had to gracefully fade away.

"Now the duties incident to the office of sheriff in this county do not require the maintenance of numerous horses and vehicles; in fact, the case stated above might not occur more than once in a year. I do not think the statute means to impose a duty on the sheriff to keep the expense of the county innumerable vehicles, only to be prepared in such a case as this.

"If the sheriff had the proper conveyance in his stable I think he would be required to use it, but when he has not would not the expense of hiring one be a necessary and actual expense?

"*Question*: If the sheriff has not a proper conveyance for making an arrest in a lunacy case may he hire a proper conveyance and collect on order of the probate court for the amount actually expended for the same?"

You state in your inquiry that sections 1981 and 2997 of the General Code should be construed together. Section 1981 provides as follows:

"The probate judge shall make a complete record of all proceedings in lunacy. The taxable costs and expenses to be paid under the provisions of this chapter shall be as follows: To the probate judge with whom the affidavit is filed, the sum of two dollars for holding an inquest, and for all clerical services he necessarily performs, the same fees are allowed by law for like services, and the postage on communications to and from the superintendent which the judge is required to pay; to the medical witnesses who make out the certificate, two dollars each, and witness fees allowed by law in other cases; to witnesses and constables, the same fees as allowed by law for like services in other cases; to each person employed by the probate judge to commit a lunatic to the county infirmary, seventy-five cents per day; to the jailor for the keeping an idiot or insane person, thirty-five cents per day; to the sheriff or other person making the arrest, the actual and necessary expense thereof including conveyance and assistants upon the allowance of the probate judge, and such fees as are allowed by law in making arrests in criminal cases; to the sheriff, or other person, other than assistant, for taking an insane person to a state hospital, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going and returning, and seventy-five cents per day for support, and mileage at the rate of three cents per mile for the railway transportation of each patient to and from the hospital, and to one assistant, five cents per

mile each way, and nothing more, for such services, the number of miles to be computed in all cases by the nearest route traveled."

Section 2997 of the General Code provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare and street car fare, mentioned in this section before they shall be allowed by the commissioners."

You state that, because of my opinion of recent date construing section 2997, General Code, the probate judge refused to reimburse your sheriff for expenses incurred for livery hire under authority of section 1981, General Code. I enclose you herewith a copy of my opinion construing that part of section 2997, General Code, in regard to the care and maintaining of horses and vehicles used by the sheriff, and you will readily come to the conclusion upon reading this opinion, that it has no bearing whatever upon the question propounded by you.

Section 1981, General Code, just quoted, expressly authorizes the sheriff or other person making arrests in lunacy cases to *secure vehicles* and assistants, and the probate court is authorized to make an allowance for such expense.

It seems that your sheriff has a conveyance in his stables, but it was not sufficient to transport himself and assistants to make the arrest of the alleged lunatic referred to in your letter; that the sheriff hired a rig for the purpose from a local livery stable and presented his bill to the probate judge for allowance and the same was refused. I am of the opinion, under authority of section 1981, General Code, that the $2.00 expense incurred by the sheriff under the circumstances related in your inquiry is a legal charge against the county, and the same should be allowed by the probate judge.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 168.

ESTABLISHMENT OF TUBERCULOSIS HOSPITAL BY JOINT BOARD OF COUNTY COMMISSIONERS—SPECIAL STATUTORY PROVISIONS CONCLUSIVE—NOTICE OF INTENTION TO ERECT HOSPITAL BY COMMISSIONERS.

As the statutes make special provisions for the establishment and maintenance of a tuberculosis hospital by a joint board of county commissioners of adjoining counties, these provisions are to be deemed conclusive and upon general principles of construction, section 2444, General Code, which is a general statute, providing for publication of notice of the contemplation of the commissioners to erect a bridge or building at a cost of $1,000.00 *or over, has no bearing in this connection.*

COLUMBUS, OHIO, March 9, 1911.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 18th, in which you submit the following question and request my opinion thereon, viz:

> "Do the provisions of section 2444 of the General Code apply when the county commissioners of two counties join together forming a joint board for the purpose of establishing and maintaining a tuberculosis hospital under the provisions of section 3148, et seq., General Code?"

As I construe the statute all that is required of the county commissioners of the two or more counties is provided for in chapter 4, division V, title X of the General Code. Section 3148, General Code, provides:

> "In accordance with the purposes, provisions, and regulations of the foregoing sections, except as hereinafter 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 provided."

Section 3151, General Code, provides:

> "*Subject to the provisions of this chapter*, such board of trustees shall prepare plans and specifications, and proceed to erect and furnish the necessary buildings for a district hospital for tuberculosis. * * *"

This chapter of the General Code is entitled "hospitals" and provides how county, county tuberculosis, district tuberculosis and detention hospitals may be provided.

Section 3127 provides how a county hospital shall be provided by the county commissioners—for an election to determine the question of issuing bonds for the hospital, the purchasing of a site, the erection of buildings and the maintenance thereof. Section 3131 provides for the appointment of suitable trustees

by the county commissioners, and section 3132 provides "with the approval of the county commissioners" that such trustees shall have charge of the purchase of the site, the erection of the buildings and the management and control of such hospital.

Section 3139, et seq., provide for the establishment of county tuberculosis hospitals.

Now, the only provisions and regulations to be found in the sections preceding section 3148 in this chapter are contained in the subdivision pertaining to county hospitals, to wit: Sections 3127 and 3132. When the provisions of these sections have been complied with all that is required by the law has been accomplished.

Section 2444, General Code, provides:

> "Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate hand bills, and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building, or location is made. They shall hear all petitions for, and remonstrances against, such proposed purchase, location, or improvement."

This section is found in chapter I, division II, and in my opinion is not to be considered as affecting in any way the provisions in chapter IV.

Section 2444, General Code, was formerly section 877, Revised Statutes. In a case reported in the 43 O. S., 311, where a similar question was raised, as to the necessity of complying with the provisions of section 877, R. S., when it was proposed to build a children's home, under the provisions of section 929, Revised Statutes, being section 3077, General Code, the first proposition of the syllabus states:

> "The provisions of section 877, Revised Statutes, requiring county commissioners to publish notice of their intention to purchase any lands or erect any building, do not apply to proceedings under section 929, et seq., for the purchase of lands for a children's home."

I would also call attention to that portion of the decision of Judge Owen, found at page 315, where he says:

> "It is conceded that the provisions embodied in this section by the revision of 1880, were originally limited to the purchase of lands for, and the erection thereon of, court houses, jails, and county infirmaries, and the building of bridges. The act of which these provisions were a part related to this subject alone. The only change effected by the revision is that the words, 'as provided by this act,' which originally occurred between the words 'a bridge' and 'the expenses,' are omitted. It is contended that the codifying commissioners intended, by the omission of these words from the new section 877, to enlarge its operation. No such requirement of notice as is now found in this section was to be found in any of the provisions relating to children's homes prior to the revision of 1880."

In Allen vs. Russell, 39 Ohio State, 337, it is said:

> "Where all the general statutes of a state, or all on a particular

subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed."

In Commissioners vs. Board of Public Works, Ibid., 632, it is said:

"Particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms, and not expressly contradicting the provisions of the prior act, unless such intention is clear.

"As the chapter in which section 877 is found is a compilation and consolidation of numerous acts, the retention of the words 'as required by this act' would have been an absurdity. Their omission is accounted for upon other grounds than that of an intention to extend the application of the requirements of this section to subjects not originally within its operation. There is no warrant for the conclusion that, by the mere omission of these words, it was intended to apply section 877 to the provisions relating to children's homes, which have been brought into the revision, also, without substantial change from their original form."

Again section 3148 provides:

"In accordance with the purposes, *provisions* and *regulations* of the foregoing sections, except as hereinafter 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 provided."

Section 3151 of the General Code provides:

"Subject to the provisions of this chapter, such board of trustees shall prepare plans and specifications, and proceed to erect and furnish the necessary buildings for a district hospital for tuberculosis. * * *"

Sections 3148 and 3151 of the General Code were sections 6 and 8 of the act of March 12, 1909 (100 O. L., 86), and were among those supplemented sections to the *county* tuberculosis hospital act which provided for district hospitals. As it will be seen, the district boards were to act in accordance with the purposes, provisions and regulations of the sections providing for the county hospital and the plans and specifications were to be under and subject to the provisions of "this act," namely, the act of March 12, 1909, now section 3135, which was section 8 of the county hospital act passed May 9, 1908 (99 O. L., 488). Since the provisions for the district hospital were to be in accordance with the purposes, provisions and regulations of the county hospital act, and since the county hospital act, section 3135, provided how bids should be advertised for, it is manifest that section 2444 could have no application whatsoever

and the provisions for advertising for bids for both the county and district tuberculosis hospitals will be found in section 3135, above mentioned.

For the foregoing reasons I conclude that your inquiry should be answered in the negative.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

169.

CHILDREN'S HOME—NO AUTHORITY FOR PURCHASE OF ADDITIONAL LANDS BY COUNTY COMMISSIONERS.

When the commissioners have erected a children's home in compliance with the special statutory provisions therefor, their powers with reference thereto are executed and there are no authorizations of law permitting the commissioners to purchase additional lands therefor.

March 9, 1911.

HON. JOHN J. WOOLLEY, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Under date of February 6th, 1911, you state:

> "The commissioners of Athens county are desirous of purchasing additional lands for the Athens county children's home, already established.
>
> "I have found no statute by which I feel satisfied in advising them that they have authority to make such purchase. Will you kindly advise me in the matter?"

Your inquiry does not go into the facts of the establishment of the Athens county children's home in detail, and I therefore assume that it is an institution under the ownership and control of the county commissioners, and was established under section 929, Revised Statutes (section 3077, General Code).

I also assume, that said county commissioners are desirous of purchasing the additional lands in question, to extend the grounds of the institution.

Section 3077, General Code, is as follows:

> "When in their opinion the interests of the public so demand, the commissioners of a county may, or upon the written petition of two hundred or more taxpayers, shall, at the next regular election submit to the qualified electors of such county, or of the counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. Notice of such election shall be published for at least two weeks prior to taking such vote, in two or more newspapers printed and of general circulation in such county or in the counties of the district, and shall state the maximum amount of money to be expended in establishing such home."

Section 3078 provides:

> "If at such election a majority of electors voting on the proposition

> are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof. Such institution shall be styled the children's home for such county or district."

The powers and duties of county commissioners are regulated by statute, and said commissioners have no power not expressly given, or necessarily incident thereto.

Having established the institution in question under the above sections, their powers therein are executed.

Section 2434 of the General Code provides:

> "For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, or other necessary buildings, or bridge, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

Aside from the above sections I do not find any that seem pertinent to the subject.

In the case of Norton vs. Trustees, 8 C. C., 335, affirmed by the supreme court, without report, in 54 O. S., 682, the court says on page 338:

> "We are of opinion that the provisions of section 1465 requiring the question of 'cemetery or no cemetery' to be submitted to a vote of the electors of the township, has no application to the acquisition of lands for the extension of the area of a cemetery already established according to the requirements of such section."

This opinion rests upon section 3455, General Code (Revised Statutes, 1472), which section as I view it, by implication permits the trustees of a township to purchase additional lands for cemetery purposes.

There is no section as far as I am able to discover similar to section 3455 in regard to the purchase of additional lands for children's homes, and I am, therefore, of the opinion that there is no such implied authority in the county commissioners to purchase such additional lands.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

179.

SEVENTH DAY ADVENTIST—TEACHER'S EXAMINATIONS ON SATURDAY—CONSTITUTIONALITY OF STATUTORY REQUIREMENTS.

As ruled in a former opinion, a Seventh Day Adventist may not be permitted, on account of religious convictions, to take a teacher's examination at a time other than the regular Saturdays prescribed by statute.

The question whether or not statute requiring examinations at these times is unconstitutional should be tested in the courts and if found to be unconstitutional, the statute would be ineffective in its entirety and relief would be required through the legislature.

COLUMBUS, OHIO, March 13, 1911.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your communication of March 11th, advising me that my predecessor gave a ruling which you are informed I reversed in reference to the right of school examiners to hold examinations of teachers for teacher's certificates at times other than those prescribed by statute, is received.

I am enclosing you herewith copy of my opinion of February 23d, 1911. I did not know until I received your communication that my predecessor had handed down an opinion on this same subject, but in examining the records I find such to be the case, and that on May 19, 1909, this department held that a Seventh Day Adventist may take teachers' examinations on some other day than Saturday. I have carefully reviewed the opinion of May 19, 1909, and my own opinion of February 23, 1910, and am entirely satisfied with the correctness of my own conclusion.

Quoting from the opinion of May 19, 1909, it is said:

> "The law says that the questions shall be prepared, printed and sent under seal to the clerks of the boards of examiners and the seal 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."

To my mind this very sentence, in which I concur, repeals the conclusion arrived at in that case. It is further stated in that opinion that:

> "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 provision 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."

I find no provision for the state school commissioner furnishing a list of questions to be used at any examination other than those provided for by statute, and no provision for the furnishing of a list of questions for a single examination. I do not understand that a board of school examiners have any powers

whatever, except those conferred by statute, and if it is the aim of the law that teachers shall take examinations at regularly stated times, I am not able to conclude that the law has two aims. So far as I am concerned, I am content to let it have one.

Now as to the constitutional right of a teacher to an examination, my conclusion is this, that her right to a statutory examination is fixed by statute. If the statute is unconstitutional, the entire structure may fall down. So that the teacher may test the constitutionality of the statute on the one hand, and failing in this, her appeal would be to the legislature.

Personally my sympathies are with the teacher who conscientiously is unable to take this examination on Saturday, and if I should follow my own inclinations I would like to hold that she should have the right to take the examination at such time as her conscience dictates, but legally I cannot come to this conclusion.

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

180.

TAXES AND TAXATION—INHERITANCE TAX—EXCEPTIONS—AMERICAN SOCIETY FOR PROPAGATION OF THE CATHOLIC FAITH.

If the American Society for the propagation of the Catholic faith is not an institution purely for the purposes of only public charity or other exclusively public purposes which extend their benefits to the entire public and not to any particular creed, an inheritance in its favor cannot be exempted from taxation.

COLUMBUS, OHIO, March 13, 1911.

HON. CHARLES A. BLACKFORD, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Your letter of January 19, 1911, was received in due time. I beg your pardon for the delay in reply, but the fact is we have been so utterly overwhelmed with work that it was impossible to reach your inquiry sooner. The former administration left a number of opinions for me to take care of, and as a consequence I am necessarily somewhat behind. In addition to this, we have had a number of suits that absorbed much of our time. You inquire:

> "Whether or not the American Society for the propagation of the Catholic faith is exempt from the payment of the collateral inheritance tax as provided by sections 5331 and 5364, General Code?"

Before rendering an opinion upon this question I would like for you to ascertain more definitely just what the American Society is. Is it an institution in this state, organized for the purpose only of public charity or other exclusively public purposes? I suggest that you confer upon this point with the officers of the society and ascertain just what it is. Such society would not be exempt from taxation unless it were an institution in this state organized for the purpose only of public charity or other exclusively public purposes. In my judgment section 5364 does not apply to your case. It is not the policy of the law that there would be an exemption from taxation except in cases where

the entire public are benefited as distinguished from any religion or creed. A hospital which takes care of persons without regard to creed may be what is known as a Catholic hospital and an inheritance in its favor would be exempt from the collateral inheritance tax, but such hospital should be one open to anyone of the public without reference to religious belief.

I am inclined to the belief, from what you have stated in your question, that the American Society for the propagation of the Catholic faith is not exempt from the payment of the collateral inheritance tax, but in the light of what I have said, if there should be any fact essential in the determination of the question, please let me hear from you further.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

181.

DOMESTIC CORPORATION—NO LIMITATIONS AS TO CITIZENSHIP OF MEMBERS FOR ENGAGING IN TRAFFIC OF INTOXICATING LIQUORS —APPLICATION OF INTERROGATORIES OF STATUTE.

In section 6083, question one (1) with reference to the citizenship of a trafficker in intoxicating liquors, does not apply to corporations, and question (2) with reference to convictions for felony applies only to officers of corporations.

An Ohio corporation therefore, regardless of the citizenship of its incorporators or stockholders may engage in the retail liquor business.

COLUMBUS, OHIO, March 16, 1911.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 14th, in which you request my opinion as to whether the officers of a domestic corporation are required to disclose the citizenship of their incorporators or stockholders, or either, in making the statement provided by section 6081, et seq., of the General Code; and whether such a corporation may engage in the retail liquor business regardless of the citizenship of its incorporators or stockholders?

The purpose for which a corporation may be formed under the laws of Ohio is defined in section 8623, General Code, as "for any purpose for which natural persons lawfully may associate themselves."

The transaction of the retail liquor business is lawful in this state excepting where prohibited locally under the local option laws.

The sections to which you refer, and which are above cited, provide in general that each assessor shall require every person, corporation and co-partnership engaged in the business of trafficking in intoxicating liquors to make a statement, setting forth certain facts, among them, those enumerated in section 6083 as follows:

> "1. Are you, or if a firm, is any member of your firm an alien or an unnaturalized resident of the United States?
>
> "2. Have you, or has any member of your firm or any officer of your corporation, ever been convicted of a felony? * * *"

Section 13221, General Code, is to be read in connection with the sections above cited and quoted, and provides in part that:

> "Whoever, being engaged in the business of trafficking in * * * intoxicating liquors, makes *affirmative answer* to a question set out in the statement which he is required by law to make to the assessor, * * * and thereafter engages in the sale * * * of intoxicating liquors as a beverage, upon indictment and conviction, shall be fined not less than two hundred dollars nor more than one thousand dollars, * * *"

This scheme of legislation clearly makes unlawful the business of trafficking in intoxicating liquors on the part of aliens or unnaturalized residents of the United States as individuals or as firms or partnerships. In my judgment, however, a corporation, some of whose stockholders or incorporators are aliens or unnaturalized residents of the United States, may lawfully engage in the retail liquor business. The following reasons for such a conclusion suggest themselves to me:

First. I am of the opinion that a corporation is not required to answer question one, set forth in section 6083. By comparing this question with question number two it will be observed that said question number one relates to individuals and to *firms*, while question number two relates to individuals, firms and corporations. If it had been the intention of the general assembly to make question number one apply, by implication, to corporations, it would necessarily follow that such an intention must have been expressed by the word "firm." This intention is effectually negatived by the language of question number two, from which it is clear that the word "firm," as therein used, does not include corporations.

In the second place, as a general rule, corporations are regarded as citizens of the state of their origin, and would have to be so regarded in this connection even if question number one were held applicable to corporations.

Your letter suggests that the intention of the general assembly must have been to impose a character qualification upon the person engaged in the business of trafficking in intoxicating liquors, and that for that reason the artificial entity of the corporation should be disregarded, and the persons composing the corporation should be regarded as those to which question number one refers. This does not seem to me to be the expressed intention of the general assembly. Question number two discloses that the character qualifications exacted in the case of corporations are intended to apply to the *officers of the incorporation*, and not to the incorporators and stockholders; so that, in my opinion, even if question number one was held to be applicable to corporations because of the supposed general intent of the legislature, it should not be regarded as obliging the corporation to answer with regard to the citizenship of persons other than its officers.

For all the foregoing reasons, I am of the opinion that an Ohio corporation, regardless of the citizenship of its incorporators or stockholders, may lawfully engage in the retail liquor business, and that if required at all to answer question number one set forth in section 6083, General Code, may answer the same negatively.

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

182.

FEES OF SHERIFF—PAYMENT INTO FEE FUND—OMISSION OF PLACE FOR SPECIFIC CHARGE IN REPORT FORM.

The charge for the sheriff of sixty cents for "committing to prison or discharging therefrom" under section 2845, General Code, should be made by him and paid into the fee fund. If there is no place on the returns or report of the sheriff in his quarterly fee bill, a place should be made.

COLUMBUS, OHIO, March 17, 1911.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under date of February 27th you state, and inquire as follows:

"In the sheriff's fee bill, made up under section 2845 of the General Code of Ohio, item five provides, 'committing to prison or discharging therefrom, 60 cents.'

"How is this sixty cents to be charged? As there is no place on the returns or report of the sheriff on his quarterly fee bill or report for same, does it go into the fee fund, or does it go to him personally, or should it not be charged at all?"

Section 2845, General Code, provides in part as follows:

"The fees and compensation of sheriffs shall be as follows: * * * committing to prison or discharging therefrom, sixty cents; * * *"

Section 2977, General Code, provides:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county * * * sheriff * * * shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2978 provides:

"Each * * * sheriff * * * shall *charge* and collect the fees, costs, percentages, allowances and compensation allowed by law."

Section 2988, General Code, provides in part as follows:

"At the end of each quarter, each such officer shall 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 such quarter, for his official services, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received. * * *"

Section 2996 provides:

"*Such salaries shall be instead of all fees*, costs, penalties, percentages, allowances and all other perquisites of whatever kind which

any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

Section 3046 provides:

"On the first Monday of September of each year, each county * * * sheriff * * * shall make returns, under oath, to the county auditor, of the amount of fees and moneys received by them, or due them during the year next preceding the time of making such return."

It is my opinion that the said charge under item 5 of section 2845, mentioned in your letter, should be made, and that it goes into the fee fund. If there is no place on the returns or report of the sheriff in his quarterly fee bill, a place should be made therein to include such charge.

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

183.

EXPENSES OF PROSECUTING ATTORNEY IN MATTERS OUTSIDE OF PENDING LITIGATIONS ALLOWED.

Section 3004 authorizes the prosecuting attorney to certify all expenses incurred in "the performance of his official duties" or "in furtherance of justice" and its provisions are extended beyond matters of pending litigation, and include investigation of matters not yet presented to the grand jury.

COLUMBUS, OHIO, March 20, 1911.

HON. H. S. BALLARD, *Assistant Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry which reads as follows:

"I would like to secure from you an opinion as to the construction of section 3004 of the General Code. Are the expenses incurred to be limited to cases which are pending in the courts, or may the prosecuting attorney certify under this section expenses incurred by him in investigating matters which have not been presented to the grand jury and acted upon?"

It is my opinion that section 3004 does not mean that expenses incurred are to be limited to pending cases, but that the prosecuting attorney under this section may certify expenses incurred by him in investigating matters not yet presented to the grand jury and acted upon, so long as the expenses incurred are in the performance of his official duties or in the furtherance of justice.

Said section further provides, as follows:

"* * * which expense account shall be certified and duly verified, and if found correct, shall be allowed by the county commissioners and paid monthly from the general revenue fund of the county."

This seems to leave to the discretion of the county commissioners the determina-

tion of the question whether or not such account for expenses incurred is correct. So that it is the judgment of this department that prosecuting attorneys should exercise due care in keeping within the limits of the statute and to see that such expenses are incurred in the performance of their official duties or in the furtherance of justice.

Trusting that this answers your inquiry I am,

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

190.

FEES—CHIEF OF POLICE AND POLICEMEN—CITIES WITHOUT POLICE COURT—FELONIES AND MISDEMEANORS.

March 22, 1911.

HON. R. H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I regret very much the long delay in finally answering your inquiry.

You ask first:

> "In cases of felonies wherein the state fails and of misdemeanors wherein the defendant proves insolvent, are chiefs of police or policemen entitled to any fees or any allowances in lieu thereof out of the county treasury in case the city wherein said policemen are employed has no police court?"

I am of opinion that under the authority of the case of Matthews vs. City of Delaware that chiefs of police or policemen are not entitled to any fees or any allowances in lieu thereof out of the county treasury in the case mentioned. I am inclosing copies of opinions rendered board of inspection and supervision of public offies.

You ask second:

> "In cases of misdemeanors wherein the defendant is bound over either to the probate court or the common pleas court, is convicted or pleads guilty, and pays all of the costs including those of the chief of police or policemen, are the policemen or chief of police entitled to have such costs paid to them by the clerk of the court of common pleas or the probate court, or are they not entitled to such costs?"

In my opinion policemen or chiefs of police are not entitled to have such costs paid to them by the clerk of the court of common pleas or the probate court, nor are they entitled to such costs which belong to the person or persons or public agencies from whom such costs have been collected.

The opinion in the copies of the two opinions inclosed confirm the opinion expressed herein.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General

192.

COUNTY COMMISSIONERS—CONTRACTS FOR STEAM ROLLERS AND ROAD OIL—NECESSITY FOR ADVERTISEMENT FOR BIDS.

By complying with the provisions of section 2414, *General Code, the county commissioners may purchase two steam rollers at a cost of more than* $2,000.00 *without advertising for bids.*

Road oil purchased under authority of section 6956-1, *General Code, upon petition of foot frontage owners, and amounting to over* $1,000.00 *is subject to advertisement for bids, however.*

COLUMBUS, OHIO, March 22, 1911.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of the 18th inst., in which you make the following inquiry:

> "The commissioners' report shows that during the period embraced within that report, the county commissioners purchased two steam road rollers at a cost of more than $2,000.00 each, to be used upon the county roads; that they purchased road oil for use upon the county roads in amounts, at one purchase of over $1,000.00. None of these purchases were made by advertising for bids in the newspapers or otherwise, but were purchased by private sale without any competition.
>
> "*Question*: Can the county commissioners legally make purchase of the separate items above mentioned without advertising in the newspapers for bids, where the amounts exceed $1,000.00 or $2,000.00 as above specified?"

Section 2414 of the General Code provides:

> "No proposition involving the expenditure of one thousand dollars or more shall be agreed to by the board, unless twenty days have elapsed since the introduction of the proposition, unless by unanimous consent of all the members present of the board, which consent shall be taken by yeas and nays, and entered on the record."

Section 2444 of the General Code provides:

> "Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate hand bills and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building or location is made. They shall hear all petitions for, and remonstrances against, such proposed purchase, location, or improvement."

Section 6956 of the General Code was supplemented May 10, 1910 (101 O. L., 291), to read as follows:

> "Section 6956-1. That when the owners of more than one-half of the

foot frontage of the lands abutting upon a macadamized or other improved road or highway shall petition the board of county commissioners of any county to sprinkle or treat the same with crude oil, liquid asphalt, or other suitable preparations, said commissioners may proceed to carry out the prayer of said petition within thirty days after filing the same or as soon thereafter as may be practicable, and may proceed to invite sealed bids for such work or material or both by advertising therefor in some newspaper of general circulation in the county each week for two consecutive weeks, and by posting notices on a public bulletin board in the county commissioners' office, or the county auditor's office for not less than fifteen days."

Therefore, in conclusion, my answer to your above stated question is that the county commissioners can legally purchase steam road rollers without advertising in the newspapers for bids; but in respect to oil purchased for use upon the county roads, I presume the oil was purchased under authority of section 6956-1 above quoted, and the commissioners are required to advertise for bids for such material as provided in 101 O. L., 291, which is an act supplementing section 6956 of the General Code by adding sections 6956-1 and 6956-2.

I trust that this answers your inquiry, I am,

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

195.

EXPENSE OF MAINTAINING PRISONERS IN COUNTY JAIL—NO LIABILITY OF MUNICIPALITY IN ABSENCE OF CONTRACT.

In the absence of a legal contract between the director of public safety and the county, a municipality is not liable to the county for the maintenance of prisoners committed to the county jail for violation of a city or village ordinance.

COLUMBUS, OHIO, March 23, 1911.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of inquiry of last month and to further say by way of explanation that because of the pressure of business in this department we have been unable to dispose of your matter at an earlier date, and I herewith apologize to you for not giving the matter attention at an earlier date.

In your letter you submit to this department the following inquiry:

"Is the city of Painesville liable to the county for keeping prisoners in the county jail—prisoners committed for violations of the city ordinances and sent to the county jail instead of the city prison—in the absence of an express contract?"

Section 4367, General Code, provides as follows:

"In each 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."

Section 4370 provides:

"The director of public safety shall manage, and make all contracts in reference to the police stations, fire houses, reform schools, houses of correction, infirmaries, hospitals, workhouses, farms, pest houses, and all other charitable and reformatory institutions. In the control and supervision of such institutions, the director shall be governed by the provisions of this title relating to such institutions."

Section 4371 provides:

"The director of public safety may make all contracts and expenditure 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 other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless 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 the preceding chapter relating to public contracts, except that all bids shall be filed with and opened by him. He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council."

Under the sections just quoted it is my opinion that it is the duty of the director of public safety to make all contracts in reference to police stations, fire houses, reform schools, houses of correction, infirmaries, hospitals, etc., subject to the restrictions of section 4371, General Code. That is to say, any obligations involving an expenditure of more than five hundred dollars must be authorized by council. This is in line with the spirit of the law as originally contained in section 1693, Revised Statutes. In the case of the City of Wellston vs. Morgan, 65 O. S., 219, the court held that municipalities cannot enter into contracts otherwise than as provided by law. In the case of McCormick vs. the City of Miami, 81 O. S., 246, the court held that, for the rendition of services to a municipality the liability therefor must rest on express contract.

In conclusion, it is the opinion of this department that there can be no implied liability against a municipality in favor of a county for keeping persons in the county jail in the absence of an express contract. In order to make the municipality liable upon a contract for the care and keeping of prisoners such contract must be entered into by the director public safety; and if more than five hundred dollars is involved then such contract must be authorized by ordinance of council. Unless section 4371, General Code, has been followed I take it that there is no liability on the part of the city of Painesville for the keeping of prisoners in the county jail.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 196.

COUNTY COMMISSIONERS—LIMITATIONS ON POWER TO EXPEND FOR OFFICE SUPPLIES—PARTS OF REALTY—PERSONAL PROPERTY.

By virtue of section 2414, *General Code, when proceedings to erect or repair public buildings under sections* 2352, 2353 *and* 2354, *General Code, involve an expenditure of one thousand dollars or more, such expenditure shall not be authorized by the commissioners until after the lapse of twenty days following the introduction of the proposition except by unanimous consent of the board.*

Office appliances which form part of the realty must be governed by section 2353 *and if the expenditure therefor amounts to less than* $1,000.00, *a publication for four weeks in a newspaper is not necessary. If such are not part of the realty, the only limitation is that of section* 2414, *General Code, aforesaid, requiring twenty days' suspension unless the amount is less than* $1,000.00, *or unless the expenditure is authorized by unanimous vote.*

COLUMBUS, OHIO, March 23, 1911.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date wherein you state:

> "To what extent, if at all, do the provisions of section 2414 of the General Code affect the provisions of sections 2352, 2353 and 2354 of the General Code?
>
> "May the county commissioners contract for office appliances and furniture in an amount of $1,946.00 in one contract, without submitting same to competitive bidding?
>
> "The office appliances and furniture in question consist of steel furniture, being a gallery attached to the wall by iron beams, three (3) inches into the wall held by cement; a steel stairway attached to the floor; steel book shelves and book files, all let in one contract for the lump sum of $1,946.00.
>
> "In the State of Ohio ex rel., Warren Gard vs. Zoller and others, reported in the 18 Ohio Circuit Court Reports, page 275, the court in its opinion states as follows:
>
> "'We see no reason whatever for likening it and 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.'"

In answer to your first question, to wit:

> "To what extent, if at all, do the provisions of section 2414 of the General Code affect the provisions of sections 2352, 2353 and 2354 of the General Code?"

I would say that section 2343 provides in part that:

> "When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building * * * or an addition to or alteration thereof * * * they shall cause to be made by a competent architect or civil engineer the following: * * * a full

and accurate estimate of each item of expense and of the aggregate cost thereof. * * *"

Section 2352 provides in part that when plans, drawings, representations, bills of material, specifications and estimates as required by section 2343, are made and approved as provided in section 2348, that the county commissioners shall be given notice by publication of the time and place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such building or addition to or alteration thereof.

Section 2353 provides that if the cost of such building or the making of an addition to or repair thereof does not exceed one thousand dollars, that a four weeks' publication in a newspaper is not necessary.

The above sections are found under the chapter regarding building regulations.

Section 2414 provides that:

"No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members present of the board, which consent shall be taken by yeas and nays, and entered on the record."

It is my opinion that after the county commissioners have received the plans, drawings, representations, etc., setting forth the aggregate cost of the building or the addition or repair thereof, as required by section 2343, it is necessary, should it appear from such estimate that the proposition involves an expenditure of one thousand dollars or more, that the same shall be agreed to by the board under section 2414 before advertising for bids under section 2352.

I would say, therefore, that to that extent the provisions of said section 2414 affect the provisions of sections 2352, 2353 and 2354 of the General Code.

In answer to your second question, to wit:

"May the county commissioners contract for office appliances and furniture in an amount of $1,946.00 in one contract, without submitting same to competitive bidding?"

I would say that the question depends upon whether or not the said office appliances and furniture are to be considered, when placed in position, as a part of the building.

The case of Teaff vs. Hewitt, 1 O. S., 511, is the leading case in this state in regard to what shall be considered as personalty, and what shall be considered as part of the realty. The tendency of recent cases on the subject of fixtures has been to relax the strict rule that anything that is attached to a building is to be considered a part of said building which has been in any way attached to the walls or floors of said building.

The office appliances and furniture mentioned in your letter are to my mind simply personal property, and are not to be considered in any way as being permanently attached to the building. These appliances and furniture are not the same as the placing of an elevator in a building, as was the case in State ex rel. vs. Zoller, 18 Ohio Circuit Court Rep., 275.

I can find no limitation on the powers of the county commissioners in the purchase of personal property other than section 2414 set out in full above.

I would, therefore, say that in my opinion the county commissioners may contract for the office appliances and furniture mentioned in your letter, in the amounted stated therein. your letter in one contract without submitting the same to competitive bidding.

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

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COUNTY COMMISSIONERS—LIMITATIONS UPON POWER TO "BUILD" AND TO "IMPROVE" OR "REPAIR" PUBLIC BUILDINGS—REPAIR OF TWO OLD BUILDINGS AND CONNECTION BY A THIRD NEW BUILDING.

Under section 5645, the county commissioners may expend an amount not exceeding ten thousand dollars for the purpose of improving or rebuilding a county building, without a submission to vote of the electors.

Under section 5638, General Code, they may expend an amount not exceeding fifteen thousand dollars for the purpose of purchasing a site for and erecting a new county building, without a submission to the vote of the electors.

When, however, the apparent repairing, rebuilding or improving an old building in fact amounts to the construction of a new building, section 5638, aforesaid, will govern.

Where the county commissioners desire to improve two existing buildings and then to join the two by a third building, the general scheme exceeding a cost of $35,000.00, such proposition may not be let in separate contracts for the purposes of avoiding the limitations aforesaid, for the reason that the general proceedings in reality constitute a complete physical unit and that the plan refers to one contemplated building.

March 24, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 20th inst., in which you submit to the consideration of this department the following letter of inquiry:

> "The commissioners of Clermont county passed a resolution today, a copy of which I enclose you herein, I will state fully to you the situation down here, and then ask for a finding by you in this matter.
>
> "Clermont county at the present time, has a court house consisting of the court room down stairs and a witness and jury room upstairs. Which building is not nor never has been, to my knowledge occupied by a county official, other than the judge of the court of common pleas. On the same lot and about fifty feet away, we have a building for county officials, in which all the county officials have an office, except judge of the court of common pleas. There is no connection between these two buildings at all.
>
> "The commissioners desire if possible to spend about $35,000.00 in

repairing these two buildings and also building them a fireroof building, which brings up section 5645 as a possible bar to this action. And the question presents itself to me, as the prosecuting attorney, whether or not they can spend a sum of ten thousand dollars, on the county building and also at the same time spend a sum of $10,000.00 on the court house. There is no doubt in my mind that they can do this at different times and I see nothing in the statutes to prevent them doing it at the same time.

"Under section 5645 it says that the commissioners can enlarge, repair and improve *a public county building*. Now is there any law to prevent them from simultaneously issuing the bonds on the same day and letting all the contracts out, separately, of course, for the two buildings. Then they desire to go further and build an absolutely new fireproof building between the court house and the public building, which will eventually make one complete building, out of all three. They desire to build this new part at a cost not to exceed $15,000.00 under section 5638. Would it be possible to pass a resolution to repair the court house and to repair the public building and to build a new county building between those two and let out the three separate contracts on the same day.

"We want to avoid a vote in this matter, if possible, and at the same time want to be practically sure of our ground before we go ahead.

"We intend to have three separate sets of plans. Would it be advisable to let the contracts at different times. I can't see anything in the statutes that prevents the going ahead and issuing the bonds for $35,000.00 and for letting the contracts for the three specific buildings at one and the same day. And I would like your opinion as to whether this can be done or whether you think it would be an invasion of the statutes."

First, by way of preface I will cite the statutes which apply to the situation as set forth in your letter.

Section 2434, General Code (sec. 871, R. S.), provides as follows:

"For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, or other necessary buildings, or bridge, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

Section 5638 of the General Code (section 2825, R. S.), provides as follows:

"The county commissioners shall not levy a tax, or appropriate money for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expense of which will exceed fifteen thousand dollars, except in case of casualty, and as hereinafter provided, or for building a county bridge, the expense of which will exceed eighteen thousand dollars, except in case of casualty and

as hereinafter provided, 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 purchasing sites therefor, or for the purchase of lands for infirmary purposes, or for the building of a county bridge, by general tax."

Section 5645, General Code (section 2825-a, R. S.), provides as follows:

"When the commissioners of any county determine to enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed ten thousand dollars, before levying a tax or appropriating 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 sections fifty-six hundred and thirty-eight, fifty-six hundred and thirty-nine and fifty-six hundred and forty."

Said section 5638, General Code, was first enacted in 1877 and section 5645 was enacted in 1902. In 1897, which was prior to the enactment of section 5645 of the General Code, cited above, in the case of the State ex rel. vs. Commissioners (7 Ohio Decisions, 34), brought in the Ottawa common pleas court, the question arose as to when "repairing, enlargement and improvement of an old court house amounts to the building of a new court house."

The fourth and fifth syllabus of the above named case read as follows:

"4. Where the proposed 'repairs, enlargement and improvement' of an old court house amount substantially to the building of a new one, involving an expenditure of more than $10,000.00, such action comes within the inhibition of sec. 2825, Rev. Stat., and the matter must be submitted to a vote of the people of the county.

"5. A proposed improvement of an old court house, involving an expenditure of $100,000.00, by which of the old building only three dead walls, valued at $2,500.00 to $4,000.00, will be left or utilized, amounts, under a fair construction of the English language, to the erection of a new building, and comes within sec. 2825, Rev. Stat."

The commissioners in this case proceeded by resolution substantially in the manner that the commissioners have proceeded in your county. At page 46 of the opinion the court defines "repairing" as follows:

"Repairing has been defined to be the restoration of a building or whatever it might be, to its former state, to bring it back where it was before it went into decay or bad condition. The covenants in a lease to keep buildings in repair mean ordinarily to keep them as they are at the time the lease takes effect."

At page 48 of the opinion the court in considering the question as to whether the proposed improvement amounted to the building of a new building says:

"That brings us to a consideration of the question as to whether these proposed improvement are in fact repairs of the old building or the building of a new one. In my judgment the law is that if the

proposed action of the county commissioners is, under a fair construction of the English language, the building of a new court house, that then they would be required to submit the policy of their action to the voters of the county before they could expend any amount exceeding $10,000.00, and that if it was simply a repairing, enlarging and improving, then, of course, if it was under $10,000.00 there is no statutory requirement that it be submitted, and whether it would be necessary to submit it if it exceeded $10,000.00 if it was for the purpose of enlarging, repairing or improving, I do not find it necessary to determine; but I shall determine and decide this case upon the proposition as to whether the board of county commissioners intend legitimately and fairly to repair, enlarge and improve this building in which we sit, or intend in every sense of the word, or ordinary sense of language, to build a new building.

"At the time the case was heard to dissolve the temporary injunction no plans were submitted to me for inspection; none had been prepared at that time, therefore none could be submitted. And there was no positive evidence as to the purpose or intention of the board except that they said that they intended to expend this money in repairing, enlarging and improving this building. Upon this hearing all of the commissioners were called as witnesses. Mr. Emil Dressler was called by the plaintiff, and I say that the commissioners one and all have stated their purpose, their proposed action, what they propose to do, with candor, frankness and honesty, and they agree as to their purpose, that it had been talked over and that they had certain plans outlined in their mind without having arrived at any exact or definite conclusion, that they had all agreed as to about what they should do in this matter; and I find the facts in this case to be that it is the purpose and was the purpose of the board of county commissioners to tear down the entire west wing of this building, that is the part west of the so-called 'central portion' of the building, which west wing is about thirty by sixty feet front. That they were uncertain whether to tear down the whole central part which is about twenty-eight feet square or not. That they might leave some portions of the walls of that part and might not, depending upon the practicability of it as the work progressed. I find that they intend as to the part in which we are now sitting, which was built some fifty years ago, and called the main part in these proceedings, which is forty feet by fifty feet, that they intend to do what is known in architecture as 'gutting' it; that they intend to take out all the floors, woodwork, all windows, all the ceiling, take out everything except possibly one partition wall in the lower story which now separates the boiler room from the janitor's part; intend to take off the roof; intend to raise this part one story, make a basement, second story and a third story, and that they intend then to rebuild this in such a way as would make it absolutely fireproof; intend to change the windows and location of them to some extent, make them larger, and put in new windows in the way of glass, in fact they had no intention of leaving any portion of this old building as it stands today except three dead walls of this part we now sit in, with possibly one brick partition in the story below; that the south wall of this building was in such a condition that it would be necessary to take down at least a part of it and with the part of that wall remaining and these three dead walls as a nucleus, they intended

to expend $100,000.00 in 'repairing, enlarging and improving' what there was left.

"I find as a fact that outside of these walls they intended to use the heating apparatus so far as possible in the old building, the electrical apparatus and water pipes and some other things. The evidence shows that the part left standing of the old building would be worth from $2,500.00 to $4,000.00 probably; if it was built new, and the old walls are said to be as valuable as if new. Mr. Shively, who was called on behalf of the county commissioners, testified in his judgment that the old walls, the water and electrical apparatus, boiler and all the material that could be used in the new building would be worth $8,000.00.

"The defendants called Mr. Shively as a witness and he testified that since the commencement of this action he had prepared certain plans which would indicate how this proposed improvement might be made. He says they were prepared at the suggestion of counsel for the defendants; that he never had any talk with the commissioners themselves as to how these plans should be made or at least with more than one of them and not much with him. But the commissioners say the plans were made to be used upon the trial of this case and to show the court how this improvement might be made, and being made under those circumstances, at the suggestion of the commissioners and their counsel, and being made to use as evidence in their behalf in this case, I conclude that they are as favorable to the defendants as the truth would permit so far as indicating their purpose in this matter.

"These plans show that they intend to take down all these portions of the old building which I have mentioned and intend to incase these dead walls with a stone casing, some eight inches thick of cut stone. There was some talk of terra cotta brick, but these plans indicate stone, and the commissioners say they intend to use stone; that they intend to anchor these outside stone walls to the old walls by taking out certain portions of the walls here and there tying them together, or anchoring them as it is called; and that in place of the west wing they intend to build a new building about sixty-five feet front, toward the city, by ninety-six feet deep, extending south, which would bring it back as far as the main building in which we now sit and quite a considerable distance beyond, according to these plans. In that part which was to be entirely new and west of the central part which is about twenty-eight feet square, and which new part was to be sixty-five by ninety-six feet, there was to be the commissioners' room, the treasurer's office, the recorder's office, the probate judge's office, and the private offices of these officers; that in this old part which we are now in on the first floor there was to be a boiler room, coal room, vault, auditor's private office, surveyor's office, and toilet rooms; that on the second floor of the old part there would be the library, sheriff's office, stenographer's office, and judges' room; and that in the new part to the west they intended to have the common pleas court room, clerk's office, prosecuting attorney's office, grand jury room and circuit court room. In the center of the new building at the west—the center of western front—it was intended to have the entrance, and through the middle of this new part was to be a hall from which was to be the entrances into these various offices and court rooms I have mentioned. There was to be an entrance to the central part which would lead upstairs to the second floor and into

the clerks office and from his private office into the court room, and from this entrance access was to be had to the old parts of the building. So these contemplated plans as I say anticipate such a building as I have indicated here. The part to the west was to be sixty-five feet by ninety-six feet and was to entirely new and the part to the east was to be constructed of cut stone on the outside with a tiled roof, the building throughout to be made entirely fireproof, with cement floor, iron joists and girders and all the other things which are ordinarily used in constructing a fireproof building, and the building was to be three stories in height. A front view is shown in one of the exhibits put in evidence. It shows a front elevation of the proposed building and shows it to be a stone building, three stories high, with a roof over this somewhat similar to the roof now on, but it was to be of tiling and entirely fireproof. In short, the result of the proposed improvement was to be to all intents and purposes a fireproof court house which would appear on the outside and would in fact be a stone building, the old walls so far as they were left to be used on the inside as is often done in building stone buildings. I find these to be the facts from the testimony of the commissioners themselves and from the testimony of Mr. Shively, the architect, who prepared these plans for them for the use on the hearing of this case. And I propose to decide this case by determining the question whether or not under that statement of facts the commissioners of this county are proposing to 'repair, improve and enlarge' this building as it stands, or are proposing to build what to all intents and purposes would be a new court house.

"I have already called attention to the statute 2825 which provides that '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 bridges, except in case of casualty, the expense of which will exceed ten 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, etc.' The statutes of the state show upon examination that in many counties applications have been made to the legislature for power to expend more than $10,000.00 in repairing, improving or enlarging public buildings under sec. 871—many special acts of that character were cited by counsel in argument— and it rather seems to have been the judgment of county commissioners and of the legislature that to expend more than $10,000.00 in repairing, enlarging and improving without submitting it to a vote of the people would require action of the legislature.

"But in this case, under this state of facts, shall the court say that this is a 'repairing, improving and enlarging' or declare it to be in fact a new building. Now if this court house had been burned by fire and all of its destroyed except the three dead walls of this old part and a portion of the south wall, with the woodwork all gone and the rest of the building absolutely destroyed, would anybody contend that if the commissioners started out with that as a nucleus to expend $100,000.00 that they would be simply enlarging, repairing and improving the court house that they had? It seems to me not. It seems to me that that, by common consent, would be a new building.

"Now the commissioners say themselves, that before they begin to expend this sum of money they propose to reduce this building to just

that condition, and starting with that, expend $100,000.00 in repairing, enlarging and improving it. Now, if that can be done, sec. 2825, Rev. Stat., might as well be repealed. If the courts should hold that commissioners could do that without submitting it to a vote of the people, the courts of the state by such action would repeal that section, for if commissioners can do that, then in a county not having any court house they may build a $10,000.00 court house, and the next year expend a half million to improve it without first submitting it to a vote of the people.

"What is the purpose and object of this legislation? It is not a trifling piece of legislation. The statutes state the limitations and conditions upon which great power is conferred upon this board. The law says it shall have certain power upon certain conditions. The object of the statute is to permit the people to say whether their money in such a large amount as will exceed $10,000.00 shall be expended or not. The object of the statute is to prohibit any board of county commissioners who may happen to be in office from expending any such sum as $100,000.00 or a half million or a million dollars of the people's money without restriction, condition or limitation; and I think these statutes should be strictly construed. They are statutes made for the protection of the people and the people's property."

Webster defines "repairing" as follows:

"To restore to a sound or good state after decay, injury, delapidation or partial destruction."

And the Century Dictionary gives practically the same definition as Webster.

I have cited the foregoing case and the opinion of the court therein in order to determine whether the resolution adopted by your board amounts to the building of a new court house after its completion and in the event that it does then the total expenditure of $35,000.00, which it is proposed to have expended on the proposed building, would bring the matter within the limits of the statutes and require that the proposition be submitted to a vote of the people of the county.

I am firmly of the opinion that it does not, so long as the buildings you now have (the court house for the common pleas judge and the county officials' building) remain practically intact as they now exist, and so long as the aforesaid buildings are only restored to a sound and good state on account of decay, delapidation, injury, etc. That is to say, by the reasoning of the court, repairing is not the building of a new building, unless such repairing results in practically an entire new building, without any semblance to the other building. I herewith requote the remaining inquiry of your letter, which is:

"Would it be possible to pass a resolution to repair the court house and to repair the public building and to build a new county building between those two and let out the three separate contracts on the same day?"

Under the language of section 5645, General Code, when the commissioners of any county determine to enlarge, repair, improve or rebuild a *public county building*, etc., the court house occupied by your common pleas judge as described in your inquiry is *a public county building;* likewise the building for

your county officials is *a public county building*. Under the wording of the statute $10,000.00 can be expended by the county commissioners in the repairing of a public county building without being required to submit the same to a vote of the people for approval; likewise such county commissioners can levy a tax or appropriate money for building county buildings to the amount of $15,000.00 without submitting the proposition to a vote of the people.

Section 5638, General Code, provides, inter alia, the county commissioners shall not levy a tax or appropriate money for the purpose of building a county building, the expense of which will exceed $15,000.00 without first submitting to the voters of the county the question as to the policy of building any public county building or buildings.

Section 5645 provides that when the commissioners of any county desire to enlarge, repair, improve or rebuild a public county building the entire cost of which expenditure will exceed $10,000.00 before levying a tax or appropriating money for such expenditure the question as to the policy of such expenditure shall first be submitted to the voters of the county as provided in sections 5638, 5639 and 5640, General Code.

From the foregoing it seems that $15,000.00 is the maximum which the county commissioners may levy to meet the expenses of building a county building, and $10,000.00 is the maximum which they may levy to meet the expenses of enlarging, repairing, improving or rebuilding a public county building. In your statement you say:

> "Then they desire (meaning the commissioners) to go further and build an absolutely new fireproof building between the court house and the public building, which will eventually make one complete building, out of all three."

In my judgment, the act of the county commissioners in legal effect would mean the expenditure of $35,000.00 under one consideration, although it might be by separate resolution. There is a unity of purpose, and that is the uniting of the two buildings and the expenditure of $20,000.00 for the improvement of the two buildings ($10,000.00 each) and $15,000.00 for the erection of a new building between the two connecting each, means nothing more nor less than the enlargement of one building or of both. Whether it be the enlargement of one or both the inhibition would apply, because it would be an expenditure of $35,000.00 under one consideration of the commissioners without a vote of the people. It is perfectly apparent to my mind that the new building to cost $15,000.00 is one that would not be erected independent of the other two buildings; if its construction is dependent upon the existence of the other two buildings it cannot be said to be an independent building. If the plan were adopted after the completion of the work there would be but one building and that building would not be a new one, but an enlargement of each of the other two, and if the expense of the enlargement be divided it would be an expenditure in excess of $10,000.00 for each building.

In short, the physical unit in connection with the improvements you refer to would be complete, and I am unable to bring my mind to the proposition that we may separate the questions legally which cannot be separated physically.

I am, therefore, of the opinion, after the most careful consideration of this case, that before $35,000.00 be expended for the purposes stated the question should be submitted to the people of Clermont county.

With sentiments of great respect. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

200.

BOARD OF EDUCATION OF TOWNSHIP HAVING NO HIGH SCHOOL—LIABILITY FOR TUITION OF PUPILS WHO ATTEND HIGH SCHOOLS OUTSIDE TOWNSHIP—CONTRACT WITH BOARDS OF SAME OR ADJOINING TOWNSHIPS.

When the board of education of Madison township has made no agreement with another board of education for attendance of Madison township pupils at a high school in the same or in an adjoining township, the board of said Madison township can be compelled to pay a "reasonable sum" for the tuition of its pupils to the board whose high school said pupils elect to attend, provided notice is served by said pupils on the Madison board at least five days previous to the date of attendance.

COLUMBUS, OHIO, March 28, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your recent communication, in which you submit for my opinion the following inquiry:

> "I would like to have your opinion as to whether or not the board of education of Madison township will be compelled to pay the full tuition of pupils attending the high school in Muskingum county, if due notice in writing has been given to the clerk of the board of education of Madison township, of the name of the school be to be attended and the date the attendance is to begin, and such notice having been filed not less than five days previous to the beginning of attendance, or whether it will only be compelled to pay on such schooling the amount that would be required to be paid in Guernsey county?"

Section 7750, General Code, to which you refer in your letter provides that:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools elected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less five days previous to the beginning of attendance."

My construction of said section is, that the provision "a board of education not having a high school may enter into an agreement, etc., for the schooling of its high school pupils" means that such board can fix the tuition to be charged by agreement. That is to say, such board can or may make a contract as to what tuition shall be charged its high school pupils for the privilege of attending a high school, either in the same civil township or some adjoining township.

Section 7735, General Code, provides in substance, that where scholars live more than a mile and a half from their own school house they may attend a district school in some other district, and their own district shall be compelled to pay their tuition. This provision is similar to the provision contained in section 7750 of the General Code above quoted.

In the case of the Board of Education vs. the Board of Education, Volume 10, Circuit Court Reports, 617, the circuit court of the second circuit in construing section 7735, General Code (section 4022-a, R. S.), held, that the school board of the district where school children reside is liable under the provisions of said statute to the school board of the district where said children attend school.

In an opinion rendered by this department September 27, 1909, it was held that, 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 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 follows therefore by analogy, that if the board of education fails to make an agreement whereby pupils within its jurisdiction may attend a high school in the same civil township or in an adjoining township, if the pupil serves the notice required to be served upon said board of education, then such board of education must pay his tuition at such high school he is so attending, and which he designates in his notice to the board that he is so attending. The rate of tuition to be charged pupils attending a high school in another district as provided in said section is, by this statute made a matter of contract between the respective school boards. In the absence of such agreement I can find no statutory provision as to what rate of tuition is to be charged.

In the case of State ex rel. vs. Board of Education, 8 N. P., the court in construing section 7750, General Code (section 4029, subdivision 3, R. S.), says at page 207:

> "This statute provides no means by which it is to be estimated what that tuition shall be that is to be paid. The legislature has provided by an act that boards of education in this situation may agree as to the tuition, but this act nowhere provides that there shall be any antecedent agreement. And none is required, because if the scholar receives a certificate and if the adjoining high school district will take the scholar the right to require the payment of tuition at once arises, if the scholar attends that school, not by virtue of any express agreement under the statute because none was made between the two school districts, but it is by virtue of the agreement made between the scholar on the one hand and the school receiving on the other, which binds the school district in which the scholar lives, because the statute says it shall use its money for that purpose. There is, however, not anywhere to be found in the statute any means of ascertaining what that compensation of the school district shall be. * * * Now it can't reasonably be said that because the statute does not provide any means of ascertaining the amount of compensation, therefore the statute becomes void, but clearly the amount to be paid must be in some way ascertained before the payment could be asserted against the school district."

It would seem that the boards in the situation concerning which you inquire

are left in the same position as individuals would be in a similar situation and that a reasonable tuition fee can be charged the Madison township school board by the Muskingum county board when the pupils living in the district of the former board are attending a high school in the district of the latter board in compliance with the provisions of said section 7750, quoted above, and that said tuition fee can be recovered by suit being brought before the proper tribunal. So that therefore, it is my conclusion that the board of education of Madison township is bound to pay the full tuition of its pupils attending a high school in Muskingum county if said rate of tuition is a reasonable one, and provided that the high school which they are attending is in the same civil township or in an adjoining township.

I trust that this satisfactorily answers your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

207.

COUNTY INFIRMARY DIRECTORS AND DIRECTOR OF PUBLIC SAFETY—DUTIES WITH REFERENCE TO POOR RELIEF—"COUNTY CHARGE"—TEMPORARY RELIEF.

Just what prerequisite conditions the statutes intend before a party shall become a "county charge" or just what the line of demarcation is which takes control of the poor from the township and places it in the county, is a mooted question.

The infirmary directors are given a certain amount of discretion in determining whether or not a person is entitled to become a county charge, and if all positive conditions are fulfilled, and these officials are satisfied that such persons require more than the "temporary relief" which the public safety directors are authorized to give, the duty of the infirmary directors is imperative to receive such person as a "county charge."

The statutes primarily intend that the poor shall be cared for at the infirmary and it is only in cases of overcrowding, or in cases of emergency or where justifiable reasons exist, that the directors may care for the poor by other methods.

Where infirmary directors therefore, maintain an office or storeroom for the purpose of supplying necessaries of life to poor, they are acting illegally and in all probability usurping the functions of the director of public safety in furnishing all necessary temporary relief.

COLUMBUS, OHIO, March 31, 1911.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of January 23d, 1911, in which you make three inquiries as follows, to wit:

"1. Under the provisions of section 2544 of the General Code, what are the prerequisite conditions to a person becoming a 'county charge'?

"2. Quoting from section 2544 of the General Code: '* * *' and the directors are satisfied that he should become a county charge, they

shall forthwith receive and provide for him in such institution, *or otherwise*. and thereupon the liability of the township shall cease.'

"Does the language above quoted authorize the board of infirmary directors to accept one as a 'county charge,' and thereupon provide him or his family with the necessities of life, as is now being done, at its office or store room in the court house where said assistant clerks, stenographers, storekeepers and inspectors, are necessarily employed in furnishing said relief?

"3. Is the employment of said assistant clerks, stenographers, storekeepers, and inspectors, for the purposes indicated in the preceding inquiry, and as set forth in said report, authorized by law?"

In answer to your first inquiry, section 2544 of the General Code provides as follows:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the infirmary directors, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the directors are satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The infirmary directors shall not be liable for any relief furnished, or expenses incurred by the township trustees."

The prerequisite conditions which shall exist for a person to become a county charge are as follows:

1. If the township trustees (or the proper officer of a municipality) after making inquiry as provided in section 3481, General Code, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall transmit a statement of facts to the infirmary board.

2. If it appears that such person is legally settled in the township, or has no legal settlement in this state, or that such settlement is unknown, and *if the directors are satisfied that he should become a "county charge,"* they shall forthwith receive and provide for him in such institution or otherwise.

Section 2544 of the General Code just quoted, seems to relate only to the proceedings of the township trustees in reference to the poor; but section 3512, General Code, provides that, when the corporate limits of a city or village become identical with those of the township, all township offices are abolished and the duties thereof shall thereafter be performed by the corresponding officers of the city or village. Section 4089, General Code, designates the director of public safety as the officer of the municipal corporation who shall look after the poor. So that if the city of Toledo has no township trustees because of the fact that the corporate limits are identical with those of the township, then the duty prescribed in section 2544, to be performed by the township trustees will devolve upon the director of public safety. Section 3476 provides as follows:

"Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such

township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

Sections 3480 and 3481 provide for investigation by the trustees or the directors of public safety before any relief is extended to the poor, temporarily or otherwise. There is no doubt but that the township or municipality have some responsibility in reference to the relief of the poor and needy, but where the dividing line is, that is, when does a person seeking relief become a "county charge," and the responsibility of the township and municipality end is a difficult question. In the case of Miller et al. vs. the Board of Infirmary Directors of Huron County, the court said:

> "It seems from the statutes that the responsibility and burden for taking care of the poor and indigent devolved in the first instance upon the township where they have a legal settlement; but under certain circumstances the burden may shift and be imposed upon the county. Under precisely what circumstances this may be done, we, in searching through the statute, have not been able to determine; but there seems to be some theory or scheme that the legislature had undertaken to map out or develop, but we have not discovered the key to it. We do not understand it, but something of the kind has been attempted."

The township trustees and the director of public safety are required under section 3476 to furnish all *temporary* outside relief, and the infirmary directors are not authorized to expend money for such purposes.

It does not appear from your inquiry whether the city of Toledo has a municipal infirmary as authorized by section 4089, General Code. If it has such infirmary section 4095 would govern and the authority of the board of infirmary directors of the county would be limited as therein provided. I take it for granted, from the nature of your inquiry that the city has no municipal infirmary. So that if it appears that a person seeking relief is legally settled in your municipality, or has no legal settlement in this state, or that such settlement is unknown, the infirmary directors are in law bound to receive such person provided that they are satisfied that he should become a "county charge." The provision "provided they are satisfied that he should become a county charge" relates to additional matters than the prerequisite conditions just mentioned; for instance, that such person is entitled to relief because he is in a suffering condition either for want of food, or clothing, shelter, medical or surgical aid, or the like, and that he ought to be relieved; that he is without property or credit; and lastly, the question as to whether the relief is temporary and ought to be provided by the trustees or the proper officer of the municipality.

It is my opinion that the infirmary directors have some discretion in determining whether the person seeking relief is a "county charge" as distinguished from a "township or municipal charge," that is, whether temporary relief which must be furnished by the trustees or director of public safety will be sufficient, or the person will require more than temporary relief. In the event the infirmary directors are satisfied that he should become a county charge, and the relief should be of a permanent nature, then they shall provide for him in the county infirmary or otherwise.

In conclusion it is my opinion that if all the prerequisite conditions exist as to the settlement of a person seeking relief, or if the settlement of such person is unknown, and the infirmary directors are satisfied in all the particulars

mentioned that the person should become a county charge, their duty becomes imperative to provide for such a person in the county infirmary or otherwise.

With respect to your second question, section 2544 provides, inter alia:

> "And the directors are satisfied that he shall become a county charge they shall forthwith receive and provide for him in such institution, *or otherwise* and thereupon the liability of the township ceases."

You inquire, does the language above quoted authorize the board of infirmary directors to accept one as a county charge, and thereupon provide him or his family with the necessities of life, as is now being done at its office or store room in the court house, where said assistant clerks, stenographers, storekeepers and inspectors are necessarily employed in furnishing said relief. I think the answer to your inquiry is contained in an opinion delivered by one of my predecessors, Hon. Wade H. Ellis, under date of January 30, 1907, to the prosecuting attorney of Allen county. I quote therefrom:

> "The following language in said section 'they shall forthwith receive said person and provide for him or her in said institution, or *otherwise*,' authorizes the infirmary directors, in my judgment, to exercise their discretion as to whether they will provide for the paupers properly coming under their charge, in the infirmary or outside. I desire to say, however, that this discretion may be abused. It is manifestly the intention of the law that paupers coming under the charge of infirmary directors shall be provided for in the county infirmaries and unless there be sufficient cause to justfy the infirmary directors in providing for a person who is a county charge outside of the infirmary it is the duty of the infirmary directors to provide for all paupers coming under their charge, inside the county infirmaries."

I concur in that opinion, in that, it is manifestly the intention of the law that paupers coming under the charge of the infirmary directors shall be provided for in the county infirmary, and unless there be sufficient cause to justify infirmary directors in providing for a person who is a county charge, outside of the infirmary, it is the duty of the infirmary directors to provide for all paupers coming under their charge inside the county infirmary. If, however, on account of overcrowding, or on account of any special fact or circumstances, such as that the person in need of relief is not in a physical condition to be removed to the county infirmary, or is affected with some contagious disease, or for other similar reasons, the infirmary directors would deem it advisable to care for a county charge elsewhere than at the infirmary of the county, they may do so and be within the pale of the law; that is, the infirmary directors have some discretion as to whether they will provide for paupers properly coming under their charge, in the infirmary; but this discretion may be abused, and I believe has been abused in your county, in the furnishing of outdoor relief as stated in your letter.

Answering your second question it is my opinion that the board of infirmary directors of Lucas county, having accepted persons as county charges cannot provide them or their families with the necessities of life, as is now being done at its office or store room in the court house, where assistant clerks, stenographers, storekeepers and inspectors are necessarily employed in furnishing relief to said persons, unless the county infirmary is not large enough to take care of all the distressed poor of your county who have need of permanent

relief and are "county charges," or are that said persons are not able to be removed to the infirmary by reason of some physical infirmity, or that they have some contagious disease, or for other similar reasons justifying the furnishing of outdoor relief. I am of the opinion from the facts stated in your letter that a great portion of the relief is in the nature of temporary relief and would come within the jurisdiction of the director of public safety in your city, that the infirmary directors have no jurisdiction in the premises. However, these statutes in reference to the poor, are, in the language of the court in the case of Beach vs. Trustees, 2 W. L. M., page 79, "to be liberally construed, especially in favor of the destitute and unforunate poor who are alike entitled to the commiseration and regard of a jury, of courts and the legislature. These laws have provided almost the only, and this but an inadequate, tribute which wealth and property pay to destitution and distress." I am, therefore, inclined to hold that all money expended in the past in outdoor relief in your county, under the circumstances stated in your letter, should not be questioned, but advise that the jurisdiction of the director of public safety and the board of infirmary directors should be separately maintained, and that if possible, all persons who are "county charges" be maintained in the county infirmary, and if the facilities in the infirmary are not sufficient to maintain the county charges therein, that the proper officers of your county should increase the capacity thereof, for it is the evident intention of the law that county charges should be maintained within the infirmary. I further advise that all persons who are in need of temporary relief in your city shall be provided for by the director of public safety.

Answering your third inquiry, it is my opinion therefore, that the infirmary directors having abused their discretion with reference to the furnishing of outdoor relief, having exceeded their authority in furnishing outdoor relief in the city of Toledo, for the reasons above stated, the employment of assistant clerks, stenographers, storekeepers and inspectors for the purposes indicated in your inquiry, was unauthorized by law, and I am further of the opinion that the statutes do not contemplate under any circumstances that the infirmary directors of any county shall be authorized to establish permanent store rooms, to employ clerks, stenographers, storekeepers and inspectors for the purpose of furnishing relief to the poor in the manner that the same is being furnished in the city of Toledo as indicated in your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

208.

MAYOR AND JUSTICE OF PEACE—JURISDICTION NOT CONCURRENT IN COMPLAINTS AGAINST DELINQUENT PARTIES WITH RESPECT TO ROAD LABOR REQUIREMENT OF COUNCIL—DEFENDANT, SON OF MAYOR.

By express provision of section 3739, complaints against delinquent parties ordered by council of a municipality to perform two days' road labor, shall be brought before the mayor. A complaint before a justice of the peace is therefore illegal and recovery for costs in such a proceeding may not be had against the municipality.

The fact that defendant is a son of the mayor does not deprive that official of jurisdiction.

COLUMBUS, OHIO, March 31, 1911.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I herewith note the receipt of your communication of the 15th ult., and in explanation of the delay in answering your inquiry I desire to say that this department has been very busy on account of the large volume of inquiries which have come to us for consideration.

In your letter you submit the following inquiries:

"1. Has the justice of the peace jurisdiction with the mayor of a village in the trial of a case for the failure to perform two day's labor?

"2. Where suit was brought by a street commissioner of a village against a resident of the village for failure to perform two days' labor, before a justice of the peace in June, 1910, said suit being afterwards dismissed upon motion of the street commissioner, would the village be liable to the justice of the peace for costs therein?

"3. In the event you answer the first question in the negative, would the fact that the defendant was a son of the mayor give such just jurisdiction?"

Section 3378 of the General Code is as follows:

"If any person so notified who is liable to perform such labor, refuses or neglects to attend, by himself or substitute, to the acceptance of the road superintendent, or having attended, refuses to obey the directions of the road superintendent, or spends the time in idleness or inattention to the duties assigned him, he shall forfeit and pay the sum of one dollar for each such offense, and in case of non-attendance be liable in the amount allowed for two days' work, to be recovered by action before a justice of the peace of the proper township, at the suit of the road superintendent within whose district he resides, and shall not be entitled to any exemption under any of the laws of this state against execution issued on such judgment and costs."

By the provisions of section 3270 of the General Code the road superintendent is appointed by the township trustees; and by the provisions of section 3371 such road superintendent shall have full control of all roads in his respective district.

By virtue of section 3714, General Code, municipal officers are given power

to regulate the use of their streets, and shall cause them to be kept in repair and free from nuisances.

By the provision of section 3738 council of any municipal corporation may require each able bodied male person between the age of twenty-one and fifty-five years, etc., to perform by himself or substitute in each year two days' labor upon the streets of such corporation, and further providing that such labor may be commuted by the payment of three dollars to be expended where the labor should have been applied.

You will note the language of section 3739 to the effect that, whoever is delinquent shall be liable to the same fines, penalties and forfeitures as are provided against persons refusing to perform two days' labor upon roads and highways, which shall be recovered in the name of the corporation *before the mayor thereof.*

Inasmuch as municipalities have the control and regulation of their streets, and in view of the provision of said section 3739 that penalties against a person for refusing to perform two days' labor on the streets shall be recovered in the name of the corporation, before the mayor thereof, it is my opinion that the justice of the peace and the mayor have not concurrent jurisdiction in such cases; that by the provision of the statutes in such cases which apply to townships, and by the provision of the statutes in such cases which apply to municipalities, it is my opinion that the justice of the peace has jurisdiction in the township but not jurisdiction in the municipality, and that the mayor has jurisdiction in the municipality but not in the township.

In answer to your second question, a justice of the peace not having jurisdiction, it is my opinion that the village is not liable to a justice of the peace for costs.

In answer to your third question, the fact that the defendant is a son of the mayor would not deprive the mayor of jurisdiction for the reason that there is no statutory provision that the mayor shall not entertain jurisdiction in criminal matters wherein one or more of the parties before him are in any way related to such mayor.

I believe that this answers your respective inquiries.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 208.

COMPENSATION TO LAWYERS FOR SERVICES IN CRIMINAL AND CONTEMPT PROCEEDINGS—COURT OFFICERS.

As a part of their professional obligations, lawyers are presumed to perform services required by the court gratuitously and as a matter of right, therefore, they are not entitled to compensation for services rendered in examining and reporting on contempt proceedings.

COLUMBUS, OHIO, March 31, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 17th, in which you refer to the fact that you submitted to this department the proposition involving the right of a common pleas judge to make an allowance to a

committee of the bar for examining into and reporting on contempt proceedings. I also have the request from your county auditor, Mr. Fred N. Tynes, requesting my opinion as to the legality of the allowance made to the committee of the bar appointed by Judge Blair for the purpose of examining and reporting on a contempt proceedings in the common pleas court of your county, and asking me to give him the section of the General Code which authorizes him as auditor of the county to draw a warrant on the treasurer for the payment of said allowance, made by said judge.

I desire to say that the inquiry will admit of but one answer. The law makes no provision for the payment out of the treasury for such services, hence, your county auditor is without authority to issue a warrant for the payment of said seventy-five dollars, the allowance made to the committee of the bar appointed by Judge Blair to examine and report on said contempt proceeding.

I might say that this department some years ago rendered a decision holding that lawyers are officers of the court and it is their duty to assist the court in the administration of justice; and if the court asks their assistance in a proceeding for contempt, they must render such assistance as the court may require gratuitously. That is an obligation lawyers assume upon being admitted to the bar. Although the law makes no provision for compensation to an attorney he is yet, nevertheless, bound to obey the orders of the court as an officer thereof. The court has the right in the administration of justice to call upon any officer of his court, and if the law makes no provision it is his duty to perform the services and he can receive no compensation therefor.

While there is no case directly in point in Ohio the authorities outside of the state are uniform in supporting the opinion herein expressed. An attorney is not a "civil, governmental or public officer, he is not a holder of an office of public trust within the meaning of the constitution. He is simply *an officer of the court.*"

Strippleman vs. Clark, 11 Tex., 238.
Austen Case, 5 Rawle, 161.
Petition of Splane, 123 Pa., 52.
In re Baum, 8 N. Y., Supp., 771.

In criminal prosecutions the accused has a right to be heard and to defend by himself and counsel, and the court will in case of inability of the accused to obtain counsel appoint counsel for him and *compel* counsel, as *an officer of the court*, to defend the accused against unjust conviction. The law confers on licensed attorneys rights and privileges and with them imposes duties and obligations which must be reciprocally enjoyed and performed.

The attorney but performs an official duty for which no compensation is provided.

Edgar Co. vs. Mayo, 8 Ill., 82.
Vise vs. Hamilton, 19 Ill., 78.
Weeks on Attorneys, 82 note.

Of course our statute fixes a compensation for counsel appointed to defend indigent prisoners, but there was no provision for compensating such counsel until the act of March 1844, now found in section 13618, General Code.

In Long vs. Commissioners, 75 O. S., 539, the trial court in a homicide case fixed the fee of counsel at $500.00, but the commissioners only allowed $350.00, and counsel appealed therefrom. Our supreme court found that counsel

had no right of appeal, as the statute, while it gave the court the right to "express an opinion as to what an attorney should receive in a first and second degree murder case, the commissioners are not required to adopt it" nor was the auditor authorized to draw an order until the commissioners had fixed and allowed the compensation.

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

209.

AMERICAN SOCIETY FOR PROPAGATION OF THE CATHOLIC FAITH—NOT EXEMPTED FROM COLLATERAL INHERITANCE TAX.

Though the American Society for the propagation of the Catholic faith is an institution for purposes only of public charity, yet, it is not an "institution in this state for purposes of public charity only" as it was incorporated in New York, and is therefore not within the provisions of section 5332, General Code, exempting such institutions from the collateral inheritance tax.

April 3, 1911.

HON. CHAS. A. BLACKFORD, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Further referring to your letter of January 19th, wherein you request an opinion of this department as to whether or not the American Society for the propagation of the Catholic faith is exempt from the payment of the collateral inheritance tax as provided by sections 5331 and 5364 of the General Code, I beg to advise that I have made further investigation, and adhere to what I said to you in my letter of March 13th, 1911, in relation to all the questions that were then before my department on the facts submitted. On March 24, Mr. John Sheridan, attorney for the estate in question, wrote me advising that the legatee was an incorporated association of priests and bishops of the Catholic church, duly incorporated. Under section 5364 of the General Code this incorporation unquestionably will be exempt from any obligation to return or list such property for taxation.

Section 5364 of the General Code is as follows:

> "Real or personal property belonging to an incorporated post of the Grand Army of the Republic, Union Veterans' Union, grand lodge of Free and Accepted Masons, grand lodge of the Independent Order of Odd Fellows, grand lodge of the Knights of Pythias, association for the exclusive benefit, use and care of aged, infirm and dependent women, a religious or secret benevolent organization maintaining a lodge system, an incorporated association of ministers of any church, or incorporated association of commercial traveling men, an association which is intended to create a fund or is used or intended to be used for the care and maintenance of indigent soldiers of the late war, indigent members of said organizations, and the widows, orphans and beneficiaries of the deceased members of such organizations, and not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or

income derived therefrom, shall not be taxable, and the trustees of any such organizations shall not be required to return or list such property for taxation."

I think misapprehension exists in the mind of Father Weber, the executor, because of his idea that my opinion would exempt Masons, grand lodge of Independent Order of Odd Fellows, grand lodge of Knights of Pythias, and would hold the incorporation referred to in your letter. In this he has a misapprehension. Under my holding the American Society for the propagation of the Catholic faith is entitled to the same exemption as either of the organizations to which I have referred under section 5364, but these exemptions refer to the *returning and listing* of property that already belongs to such society, *and not to property subject to a collateral inheritance tax before the title thereto vests in the legatee.*

COLLATERAL INHERITANCE.

Section 5331 of the General Code provides as follows:

"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 pass by will or by the interstate 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 a person in trust or otherwise, 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 and made a legal heir under the provisions of a statute of this state, or the lineal descendants thereof, or the lineal descendants of an adopted child, the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of five per cent. of its value, above the sums of two hundred dollars. Seventy-five per cent. of such tax shall be for the use of the state, and twenty-five per cent. for the use of the county wherein it is collected. 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 they 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 the property, and be and remain a lien until paid."

Now, the above section is absolute and the exemptions provided for under section 5364, supra, do not apply. The only exemptions that apply to collateral inheritance are to be found in section 5332 and this is as follows:

"The provisions of the next preceding section shall not apply to property, or interests in property, transmitted to the state of Ohio under the interstate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or, public institutions of learning, *or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes.* The property, or interests in property so transmitted or embraced in such devise,

bequest, transfer or convevance shall be exempt from all inheritance tax and other taxes while used exclusively for any of such purposes."

There is no doubt in my mind that the American Society for the propagation of the Catholic faith is an institution for the purpose only of public charity. The whole purpose of this church is for the public, for mankind, but this society, I am informed by Father Weber, is incorporated under the laws of New York, and the question presents itself to my mind "Is the society an institution in this state?" As before said I am conceding, as it is my decided opinion, that the society is for the purpose of purely public charity or other exclusively public purposes, but it is not an institution in this state under the statute. The supreme court of the state of Ohio passed upon this question in the case of Humphreys, Executor, et al. vs. the State of Ohio et al., 70 O. S., 67; the second syllabus in that case is as follows:

"Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for 'purposes of purely public charity or other exclusively public purposes' are not 'institutions' of that class in this state within the meaning of the latter clause of section 2731-1, Revised Statutes; and where they are entitled to receive property within the jurisdiction of this state, by deed of gift, bequest or devise, such gift, bequest or devise is liable to a collateral inheritance tax as provided in said section, although some of the charitable work, operations and enterprises of the institutions so incorporated and organized are carried on within this state."

Section 2731-1, Revised Statutes, referred to in the syllabus was carried into the General Code under sections 5331 and 5332.

In the light of the foregoing I am constrained to hold that the American Society for the propagation of the Catholic faith is not exempt from the payment of the collateral inheritance tax as provided by section 5331, General Code, and I sincerely trust that from the statutes cited, the facts as given to this department by yourself, Mr. Sheridan, attorney for the executor, Father Weber, and the decision which I have quoted, that all concerned may be satisfied that under our law no other conclusion could be justly arrived at.

I appreciate the delicacy of questions of this kind, but it is my duty to interpret the laws as they are.

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

B 214.

TAXES AND TAXATION—LEVY AND BOND ISSUE FOR COUNTY BUILDINGS—EXCEPTION WHEN COUNTY INFIRMARY DESTROYED BY FIRE—CERTIFICATE OF APPROVAL OF PROCEEDINGS BY PROSECUTING ATTORNEYS—BUILDING COMMISSION.

The county commissioners may not enter into a contract for rebuilding an infirmary that has been destroyed by fire without the certificate of the prosecuting attorney as provided by section 2356, General Code. The latter official's authority in this connection is not limited to a passing upon the mere legality of the contract, but is accompanied by a broad discretion which extends to all steps in the proceedings.

Under section 2436, General Code, when an infirmary has been destroyed by fire, the commissioners are empowered to appropriate money, levy tax, and issue and sell bonds in anticipation of said tax in an amount not to exceed $50,000 without submission to the vote of the electors.

While this section presents an exception to that part of sections 2333-2343, General Code, providing for a submission to the electors the question of issuing bonds for county buildings in excess of $25,000. it in no way excepts any of the other restrictions of these sections, providing for a building commission, etc.

COLUMBUS, OHIO, April 7, 1911.

HON. THEO. N. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I regret very much my inability to answer at an earlier date your inquiry of some weeks ago, in which you submit the following questions:

> "1. May the county commissioners enter into a contract for rebuilding an infirmary that has been destroyed by fire, without the certificate of the prosecuting attorney, as provided by section 2356 of the General Code?
>
> "2. Do the provisions of sections 2436 and 2349 of the General Code do away with the necessity of the building commission, as provided for in section 2333 to and including section 2342, in rebuilding an infirmary destroyed by fire?"

Section 2356, General Code, provides as follows:

> "Before work is done or material furnished, all contracts that exceed one thousand dollars in amount shall be submitted by the commissioners to the prosecuting attorney of the county. If found by him to be in accordance with the provisions of this chapter, and his certificate to that effect is indorsed thereon, such contracts shall have full force and effect, otherwise they shall be null and void."

Section 2921 of the General Code provides in part as follows:

> "Upon being satisfied * * * that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption

> * * * the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract * * * or to recover for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

Now, reasoning from the above cited sections, as a starting point, it is seen that the prosecuting attorney has certain duties to perform with reference to contracts, to wit: to see that contracts are not in contravention of law, that they were not procured by fraud or corruption, etc.; and to aid the prosecuting attorney in this duty, the legislature by the further enactment of the above cited section 2356, requires that certain contracts be submitted to him for his approval, so that he can maintain the check thereon which, by law (section 2921) he is bound to maintain.

I am of the opinion that the prosecuting attorney by virtue of the phrase "upon being satisfied" contained in said section 2921, cited above, not only shall pass upon the legality of such contracts, but he also possesses some discretionary authority, other than just to pass upon the mere legality of the contract. In fact, the courts have so held, as per the decision of the supreme court in the case of State ex rel. vs. Nash, 23 O. S., 568. In this case the court held as follows:

> "1st Syl. The prosecuting attorney, in discharging the duty imposed on him by section 10 of the act of April 27, 1869, providing for the erection of public buildings, etc. (66 Ohio L., 52), is not limited to ascertaining whether the contract awarded by the commissioners is in legal form, but he is also required to ascertain whether the necessary steps which precede the awarding of the contract have been followed.
>
> "2d Syl. The duties of the prosecuting attorney, under the statute, are not limited to such as are merely ministerial; he is also invested with discretionary authority."

I am therefore of the opinion that the county commissioners cannot enter into a contract for building an infirmary that has been destroyed by fire without the certificate of the prosecuting attorney; that such contract must be submitted to the prosecuting attorney for his approval as provided in section 2356, General Code.

With respect to your second question, sections 2333 to 2342, General Code, inclusive, provide in substance for the construction of county buildings and bridges. Section 2333 specifically provides as follows:

> "When county commissioners have determined to erect a court house or other county building at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply

> to the judge of the court of common pleas of the county who shall appoint four suitable and competent freeholder electors of the county, who shall in connection with the county commissioners constitute a building commission and serve until its completion. Not more than two of such appointees shall be of the same political party."

I take it that all of said sections are mandatory and are to be strictly followed by the commissioners; and if there were no exception to the provisions of the above mentioned sections, then the procedure therein contained would be the exclusive method by which such county buildings would be constructed and erected. But there is an exception, at least in respect to the building of an infirmary building when the same has been destroyed by fire, as provided in section 2436, General Code, which reads as follows:

> "For the purpose of rebuilding an infirmary destroyed by fire or other casualty, the commissioners of a county may appropriate money, levy tax and issue and sell the bonds of such county in anticipation thereof, in an amount not to exceed fifty thousand dollars without first submitting to the voters thereof, the question of rebuilding such infirmary, appropriating such money, levying such tax and issuing and selling such bonds."

So that it follows, whenever by reason of fire or other casualty, an infirmary is destroyed, the commissioners may resort to the power given them by the legislature in said section 2436, which is an exception to the provisions of sections 2333 to 2342, General Code, inclusive, and that the commissioners may proceed under said section 2436 to rebuild such county infirmary without first submitting the proposition to a vote of the people of the county, the undoubted intent of the legislature being to enable the commissioners in such calamity as is covered by this section to rebuild the county infirmary with as little delay as possible.

On May 21, 1908, this department rendered an opinion to the prosecuting attorney of your county, on the construction of this particular statute, as follows:

> "This section expressly provides that in a county in which a county infirmary has been destroyed by fire, the county commissioners of said county shall have authority to issue and sell the bonds of said county in anticipation of a levy in an amount not to exceed $90,000, for the purpose of rebuilding such infirmary, without first submitting the question to a vote of the qualified electors of the county."

For the reasons already given above I concur in that opinion, although you will of course note that the statute in question has since been amended in this, that the amount for which the commissioners may issue bonds, etc., is now fifty thousand dollars instead of ninety thousand dollars. My final conclusion is that in the situation covered in said section 2436, General Code, the said section becomes operative and governs in so far as the exception goes, to wit: the commissioners may appropriate money, levy tax and issue and sell the bonds of such county in anticipation thereof, in an amount, etc., without first submitting to the voters thereof the question of rebuilding such infirmary, appropriating such money, etc.; for to hold otherwise would make the

exception of no effect upon the original rule which it modifies, and more restricted than it really is. But with respect to the remaining provisions of said sections 2333 to 2342, General Code, I think it necessarily follows, and I am of the opinion that said remaining provisions would apply and govern and that the county commissioners would be legally required to rebuild in accordance therewith. That is to say, the only exception, as I have stated above, to the provisions contained in said sections is, that in the event the county infirmary is destroyed by fire or other casualty, then the commissioners may expend a sum to the extent of fifty thousand dollars without submitting the proposition to a vote of the people of the county; and this being the only exception, of course it follows that all the remaining provisions would govern.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 216.

BOARD OF EDUCATION—VOTES OF ELECTORS AUTHORIZING CENTRALIZATION OF SCHOOLS AND LATER REFUSING ALLOWANCE OF BOND ISSUE FOR BUILDING—ADHERENCE TO DISTRICT SYSTEM.

Where by popular vote the electors have authorized the centralization of schools, but have later, by popular vote refused to authorize a bond issue necessary for a proper building for the purposes of such centralization, the centralization is not deemed complete until the voters have also authorized the "means" to carry it out and until such time the board of education may adhere to the old district school arrangement.

COLUMBUS, OHIO, April 10, 1911.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Fulton County, Wauseon, Ohio.*

DEAR SIR:—I am in receipt of your favor of March 16, 1911, from which, together with an earlier letter on the same subject, I glean the following facts:

1. That the Dover township board of education, Fulton county, submitted to the qualified electors of such township at the last November election, the question of centralization of the schools which was carried by a large majority.

2. That after said centralization was duly authorized by said election, the board of education proceeded to centralize by submitting to the electors the question of issuing bonds for the building of a suitable school house within which to conduct such central school, which was lost by twelve votes.

3. That said board again submitted the question of issuing bonds to the electors, which was again lost.

Your inquiry is whether the board of education can reconsider the vote for centralization and proceed with subdistrict schools. That is to say, can the subdistrict schools be resumed since they have been voted out?

Section 4726 of the General Code provides:

> "A township board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to the vote of the qualified electors of such township district *at a general or*

special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such board of education shall proceed *at once* to the centralization of schools of the township, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not be again submitted to the electors of such township district for a period of two years."

Section 7625 of the General Code provides:

"When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the 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 a special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

I assume that the revenues which can be created under other provisions of the General Code are not sufficient to provide a fund sufficient for the purpose of building a central school, and that a bond issue, under section 7625, *is necessary* to provide said fund.

The policy of the state has always been to educate the youth of the state and to provide such means for same by way of school houses, teachers, etc., as may be necessary to properly educate such youth.

Section 4726, supra, provides that if the issue of centralization shall carry the board shall "proceed at once" to such centralization, and if necessary purchase a site and erect a suitable building thereon. The *building* referred to in said section must necessarily mean a building suitable to house teachers and pupils of such centralized school.

The electors of the township school district have given the board the *power* to centralize but have refused it the *means*. My opinion is that the mere authority given to the board by vote of the electors to centralize does not of itself work a discontinuance of subdistrict schools, but such discontinuance is effected only when centralization is complete.

Under the circumstances set forth in your inquiry, the board has been denied the *means* of carrying out the centralization of its schools, and it being the policy of the state that opportunity for education be provided for the youth of the state, the centralization of the schools must be held in suspense until the board has been given the *means* whereby to centralize such schools, and that until such means are provided, should keep up the subdistrict schools for the accommodation of pupils of such school district.

To centralize the schools means to consolidate all the district schools in one central school and the board, having been refused the means of so doing, cannot "proceed" to centralize.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

221.

CRIMINAL PROVISIONS FOR EMPLOYMENT OF MINORS IN THEATRES—"OTHER ESTABLISHMENTS"—LORD TENTERDEN'S RULE—"WHERE INTOXICATING LIQUORS ARE SOLD."

Section 12993, *General Code, prohibiting employment of children in factories, business offices, hotels, etc., or "other establishments" does not include "theatres" for the reason that a familiar construction of law requires that only those establishments of the same kinds as those enumerated are to be intended.*

Section 12968, *General Code, however, governs with respect to the employment of children under fourteen years of age in theatres.*

The words "wherein intoxicating liquors are sold," apply to hotels, theatres, concert halls, drug stores and saloons, as provided by section 13003, *General Code.*

COLUMBUS, OHIO, April 14, 1911.

HON. HENRY T. HUNT, *Prosecuting Attorney, Cincinnati, Ohio.*

MY DEAR SIR:—Replying to the letter of Edward N. Clopper, Ohio valley secretary of the National Child Labor Committee, which you recently referred to me, I will say that as you are aware that I cannot give an official opinion to Mr. Clopper, I will treat the letter as having been sent directly by you. The letter states, first:

> "We are constantly being confronted here in Ohio by a point in the child labor law which to my knowledge has not been decided by the courts, namely, whether the employment of children is restricted in theatres. The child labor law beginning with section 12993 of the General Code provides that no child under the age of fourteen years shall work in any 'mercantile or other establishment' among other places, theatres not being specifically mentioned. The question is whether a theatre can be included in the term 'other establishment.' If a theatre is included in 'other establishment' then no boy under sixteen years nor girl under eighteen years may work in a theatre after six o'clock in the evening, because the section prohibiting night work by such children applies to the establishment covered by the first section."

Section 12993 of the General Code provides:

> "Whoever, having charge or management of a factory, workshop, business office, telephone or telegraph office, restaurant, bakery, hotel, apartment house, mercantile or other establishment, employs or permits a child under fourteen years of age to work in or in connection with such establishment, or in the distribution or transmission of merchandise or messages, shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 12996 of the General Code provides:

> "Whoever, having charge or management of such establishment, as provided in section twelve thousand nine hundred and ninety-three,

> employs or permits a boy under the age of sixteen years, or a girl under eighteen years of age to work in or in connection with such establishment, or in the distribution or transmission of merchandise or messages, for more than forty-eight hours in one week, more than eight hours in one day, before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening, shall be fined not less than twenty-five dollars nor more than fifty dollars."

The courts of our state, so far as the reported decisions disclose, have not been called upon to decide the exact question involved, but the law is well settled and I think the statutes can bear but one construction. "Theatres," not being specifically mentioned in the statutes, are not included. The term "other establishments" can only mean "*other like establishments*," or establishments of a like kind. This word "other" is a co-relative term. It is a rule of interpretation, sometimes called "Lord Tenterden's Rule" that where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like" so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated. The cases illustrating this rule are collected in 21 American and English Encylopedia of Law, second edition, page 1011, under the word "other."

Applying this rule, "theatres" cannot come under the classification of "other establishments."

Section 12968 of the General Code provides:

> "Whoever takes, receives, hires, employs, uses, exhibits, sells, apprentices, gives away, let out or otherwise disposes of a child, under the age of fourteen years for or in the vocation, occupation, service or purpose, of singing, playing on musical instruments, rope or wire walking, dancing, begging or peddling or as a gymnast, contortionist, rider or acrobat, or for an obscene, indecent or immoral purpose, exhibition or practice, or for or in a business exhibition or vocation injurious to the health or dangerous to the life or limb of such child, or causes, procures or encourages such child to engage therein, or causes or permits such child to suffer, or inflicts upon it unjustifiable physical pain or mental suffering, or has such child in custody for any such purposes, shall be fined not more than two hundred dollars or imprisoned not more than six months, or both."

This appears to be the only criminal statute directly dealing with the employment of children under fourteen years of age in shows, theatres, etc.

Section 12972 of the General Code provides:

> "Whoever wilfully causes or permits the life or limb of a child under the age of sixteen years to be endangered, its health to be injured or its morals to become depraved, from and while actually in his employ, or wilfully permits such child to be placed in such a position or engaged in employment whereby its life or limb is in danger, its health likely to be injured, or its morals likely to be impaired or depraved, shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not less than thirty days nor more than ninety days."

Under this section, if the facts justify it, employment of certain children in theatres may be prevented.

Your second inquiry is:

> "Again, in another section the law provides that no child under the age of sixteen years shall work in any hotel, theatre, concert hall, drug store, saloon, or place of amusement where intoxicating liquors are sold. The question here is whether a child of any age may be employed in a theatre if intoxicating liquors are not sold there. There are very few theatres in which intoxicating liquors are sold, consequently we are at a loss to know what action to take in the many casses involving child labor in theatres."

Section 13003 of the General Code provides:

> "Whoever employes or permits a girl under the age of sixteen years to work at the manufacture of goods for immoral purposes, or in or about a distillery, brewery, or other establishment where malt or alcoholic liquor is manufactured, packed, wrapped or bottled, or in a hotel, theatre, concert hall, drug store, saloon or place of amusement where intoxicating liquor is sold, or in assorting, manufacturing or packing tobacco, or as a pin boy in a bowling alley, shall be fined not less than twenty-five dollars nor more than fifty dollars."

I understand that recently the Stark county common pleas court held that the words "wherein intoxicating liquors are sold" applies as well to hotels, theatres, concert halls, drug stores and saloons as to places of amusement mentioned in the statutes. I am constrained to follow this authority as it plainly appears, from a careful reading of the section, that the object of the law was to prevent minors from being employed not so much in certain places as in certain places where certain business was carried on calculated to result in an impairment or destruction of their morals.

I trust this fully answers your questions.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

222.

BOARD OF EDUCATION—SCHOOL OF TOWNSHIP OVER ONE AND ONE-HALF MILES DISTANCE—LIABILITY OF TOWNSHIP BOARD FOR TUITION OF PUPIL AT A SCHOOL ONLY FORTY FEET NEARER IN OTHER TOWNSHIP.

When a child of school age lives more than one and one-half miles from the nearest school house in his own township, he may attend the nearest school in another township, and upon notice to the board of education of his own township, said board will be obliged to pay his tuition to the board of the second township, and the fact that the school attended is but forty feet less distant than the school in his own township will have no bearing.

COLUMBUS, OHIO, April 14, 1911.

HON. WM. VINCENT CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

MY DEAR SIR:—Your favor, enclosing statement of facts and map in regard

to the controversy between the township boards of education of Kirkwood and Warren townships in your county, received. From an examination of the statement of facts and the map, I find that the following facts are agreed upon:

1st. That one Thomas Hunt, the father of children of school age, resides at the dwelling in Kirkwood township, Belmont county, on his farm which extends to the township line only.

2d. That the actual measured distance from the residence of the said Hunt, along the most direct public highway to the nearest school house in Kirkwood township, is 9,491 feet, or a distance of more than one and one-half miles.

3d. That the actual measured distance from the residence of the said Hunt, along the most direct public highway to the nearest school house in Warren township, is 9,951 feet, or a distance of more than one and one-half miles, but forty feet less than the distance to the nearest school house in Kirkwood township.

4th. That Hunt's children attend the Warren township school, and the board of education of Kirkwood township have refused to pay the board of education of Warren township the per capita tuition for the said Hunt's children.

Section 7735 of the General Code reads as follows:

> "When children live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

The law is specific that if the pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside (in this instance the Kirkwood school No. 7) *they may* attend a nearer school in the same district, or *if there be none nearer therein, then the nearest school in another school district* (in this instance the Warren school No. 8) in all grades below the high school. The statute has made no exception because of the small margin of difference in distance between a school in the district where the pupils reside and the nearest school in another school district. I am, therefore, forced to the conclusion that the children of the said Hunt are entitled to attend the Warren township school No. 8.

I assume that the board of education of Warren township has given notice to the board of education of Kirkwood township as provided in section 7735, supra.

Section 7736 of the General Code provides:

> "Such tuition shall be paid from either the tuition or the contingent funds and the amount per capita must be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvements and repairs, by the

total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of a month will create a liability for the whole month."

Under the provisions of the said section, the board of education of Kirkwood township should pay to the board of education of Warren township the per capita tuition of the said Hunt's children.

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

B 222.

BONDS OF CLERMONT COUNTY FOR PURPOSE OF PURCHASING EXPERIMENT FARM—LEGALITY.

COLUMBUS, OHIO, April 15, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of March 20th, in which you submit for our consideration the following inquiry:

> "At the general election held on Nov. 8th, 1910, the question of issuing bonds in the sum of $12,000 was submitted to the electors for the purpose of purchasing an experiment farm. The proposition was carried and in pursuance of section 1165-6, General Code of Ohio, the Milford National Bank of Milford, Ohio, has purchased bonds in the sum of $12,000 to be issued by the county for the purchase of said experiment farm.
>
> "The county commissioners of Clermont county, Ohio, before signing these bonds, desire an opinion from the attorney general of the state as to the legality of said bonds, so kindly advise me, if under section 1165-1 to 1165-13 the commissioners have the power to issue such bonds, granted that all steps under the law have been properly taken?
>
> "The question I desire to be answered is has the county the power to issue bonds under said act?"

I am of the opinion that the bonds are legal. Section 1165-6 of the General Code provides as follows:

> "To anticipate the collection of the tax authorized by this act, and the use of the money to be raised thereby, the commissioners are hereby authorized and required to issue the notes or bonds of their county, such notes or bonds to bear interest at a rate not to exceed six per cent. per annum, and not to run to exceed ten years, and not to be sold for less than their par value, and the proceeds of the sale thereof shall be deposited in the county treasury, to be applied by the commissioners to the purchase and equipment of an experiment farm, containing eighty acres or more, as hereinafter provided for."

It is my opinion that the county commissioners, under the authority granted by the above section, clearly had the power to issue the bonds therein provided for.

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

H 222.

POWER OF COUNTY COMMISSIONERS TO FENCE PUBLIC BURIAL GROUNDS—STATUTE EXECUTED—POWERS OF TOWNSHIP TRUSTEES.

As section 1475-1 *directed the county commissioners within six months to fence abandoned burying grounds and as these six months have passed, the section has been executed and was therefore omitted by the codifying commission.*

Such power is now conferred on the township trustees by virtue of sections 3451, 3452, 3453, *G. C.*

April 14, 1911.

HON. WALTER W. BOULGER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state:

> "The general assembly of the state of Ohio on March 4th, 1902 (95 O. L., 34), amended section 1475-1 of the Revised Statutes of Ohio so as to provide that:
>
> "'The county commissioners of each county shall, within six months after the passage of this act, enclose with a substantial fence of stone, iron, or posts and boards all abandoned public burial grounds in the several counties, and from which the remains of the dead have not been removed.'
>
> "I do not find that this section has ever been amended, but the codifying commission in section 3475 of the General Code of Ohio seem to have omitted that portion of the Revised Statutes heretofore cited authorizing the commissioners to enclose said burial grounds.
>
> "The question is now up before the county commissioners of this county as to whether or not they can at this time enclose certain abandoned burial grounds or whether by reason of the fact that that portion of the statute has been omitted in the new code that they have no authority to do so and if the county commissioners have no authority at this time to enclose said grounds, would the township trustees have the power to do so?
>
> "Will you kindly advise me as to what would be the ruling of your department in this matter?"

Section 3475, General Code, provides:

> "Where the county commissioners of a county have enclosed with a substantial fence of stone, iron, or posts and boards, all abandoned public burial grounds in the county, from which the remains of the dead have not been removed, the township trustees shall keep the fence in good repair, and shall remove the undergrowth and weeds from such cemetery at least once a year and pay the expense thereof from township funds."

The above section purports to be a codification of section 1475-1 of the Revised Statutes which read as follows:

> "The county commissioners of each county shall, within six months after the passage of this act, enclose with a substantial fence

of stone, iron, or posts and boards, all abandoned public burial grounds in the several counties, and from which the remains of the dead have not been removed. The expense of such enclosure shall be paid out of the general fund of such county.

"(Township trustees shall keep in repair.) After such enclosure shall have been made as herein provided, the township trustees shall keep the fence in good repair, and shall remove the undergrowth and weeds from any such abandoned cemetery, at least once a year and pay the expense thereof out of the township funds."

As you state the codifying commission in codifying section 1475-1, Revised Statutes, omitted the first paragraph of said section, the reason being, I presume, that the six months within which the county commissioners were given the authority to enclose all abandoned public burial grounds had long since passed, and the power of the county commissioners thereunder had ceased to exist by limitation of time.

I am, therefore, of the opinion that the county commissioners do not have the power to enclose abandoned public burial grounds.

Section 3451 of the General Code provides:

"The title, right of possession and control of and in all public graveyards and burial grounds located without the corporate limits of any city, or village, which have been set apart and dedicated as public graveyards or burial grounds, and grounds which have been used as such by the public, but not expressly dedicated, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any city, or village, shall severally be vested in the trustees of the township where located."

Section 3452 of the General Code provides:

"Such trustees shall provide for the protection and preservation of such grounds, and prohibit interment therein when new grounds have been procured for township cemeteries or burial grounds. Where such old graveyards or cemeteries are in or near village or town plats, and the public health is liable to be injured by further interments therein, they shall institute suits to recover possession thereof, remove trespassers therefrom, and may recover damages for injuries thereto or any part thereof, or to any fence, hedge inclosing them, any tomb or monument therein."

Section 3453 of the General Code provides:

"The trustees shall inclose such burying grounds with a substantial fence or hedge, and keep them in repair, and levy a tax for that purpose, not to exceed one-half of one mill in any one year, upon all the taxable property of the township."

The above section 3451 places the title, right of possession, and control

to and in *all* public burial grounds located without the corporate limits of any city or village in the trustees of the township where located.

Section 3452, supra, directs such trustees to provide for the protection and preservation of *such* grounds.

Section 3453, supra, directs the trustees to inclose such grounds with a substantial fence or hedge and keep them in good repair.

It is my opinion that as the above sections do not except *abandoned* public burial grounds from its provisions but includes *all* public burial grounds the township trustees have the power to inclose such grounds.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

I 222.

TAXES AND TAXATION—DOMICILES OF SISTERS OR LAY TEACHERS OF PAROCHIAL SCHOOLS EXEMPT FORM TAXATION.

Houses used exclusively as places of domicile for the sisters or lay teachers of parochial schools, are "buildings connected with public colleges and academies" or "lands connected with public institutions of learning," within the meaning of section 5349, *G. C., and are therefore exempted from taxation.*

COLUMBUS, OHIO, April 17, 1911.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Lucas County, Toledo, Ohio.*

DEAR SIR:—I confess to being very tardy in replying to your inquiry as contained in copy of letter to the auditor of state of date January 13, 1911. I wish to say, however, that the delay has been due to the great number of matters which this department has had presented to it for consideration. A copy of said letter is as follows:

> "The auditor of this county informs me that he has been instructed, through your department, to exempt from taxation the houses used as places of domicile for the sisters or lay teachers of the parochial schools.
>
> "It has been suggested that this matter was determined in the case of Watterson against Halliday in 77 Ohio State, at page 150. It appears in the opinion in that case that the houses used by the priests as places of residence were not exempt from taxation, and nowhere in the opinion of the court are we able to find where the houses used by the teachers are brought in question in the case at all. Some reference was made by the court to the opinion of the circuit court but we do not find the case reported in any of the circuit court reports, and am not able to state, of course, as to what was the finding of the circuit court. The only other place this case appears to be reported is in vol. 2 Nisi Prius, page 693. It would appear from that case that among the pieces of property in question were houses used as places of domicile by teachers of the parochial schools and apparently, although not in so many words, the common pleas court held such property exempt.

"What disturbs us at the present time is why the distinction is made between the houses occupied by the priests and the houses occupied by the teachers. Both are places of residence, and in the instance of the houses occupied by the teachers they are in no way physically connected at least with the schools where the teachers are employed.

"In one instance in this county a building, entirely separate and distinct from any of the parochial schools or academies owned by the Catholic church, is occupied as a domicile by the teachers in the various Catholic schools. If you might refer us to some decision of the court that governs this matter, it will aid us very materially in determining what should be done in the way of assessing this class of property.

"Section 2732, R. S. O., provides that there should be exempt from taxation all public academies and all buildings connected with the same, and this might have the effect of exempting houses which were occupied solely by persons who were teaching in such public academies, as for instance a convent, but it would hardly seem that a parochial school could be termed a public academy. If, on the other hand, it is termed a public school house, then only such grounds attached thereto and necessary for the proper occupancy, use and enjoyment of the same would be exempt, and it is difficult to ascertain by what mode of reasoning a house, located in some distant portion of the city and used as a place of residence, would be exempt under this provision of the statutes. In other words, it occurs to us that there is so much similarity between houses occupied by the priests and those occupied by teachers that they would be supposed to be governed by the same rule under the laws of exemption.

"It appears in 77 Ohio State that the only question they raised, as indicated by the court on page 162, is the question of taxing what are denominated as priests' houses and the entire argument centered upon this question. Then, too, it would seem that even though parochial schools could be denominated as buildings belonging to institutions of purely public charity, as was indicated in the case of Gerke vs. Purcell, 25 Ohio State, page 229, yet under the 6th subdivision of section 2732 this exemption would be confined to the buildings constituting the school, together with the land actually occupied.

"In regard to these matters, it is proper to say that the house in question, and possibly one or two others of a similar nature, occupied as places of residence by teachers in schools and academies, have always been taxed heretofore in this county and are on the tax duplicate today as any other property, and this letter is written for the purpose of getting further information as to what the decisions are which your department had in mind when it issued the instructions to which I have called your attention. I am sending a copy of this letter to the attorney general, asking his opinion in regard to the matters embraced in this letter.

"As a further suggestion, suppose that in the vicinity of each parochial school there was a residence building, purchased by the Catholic church, where the superintendent and the teachers of each parochial school made their home. This might mean a dozen of other buildings throughout the city. If your proposition to the auditor is correct they would of course be exempt from taxation, while the building possibly standing right alongside of this building and occupied by

the priests would not be exempt. This suggestion is only made with a hope that it will indicate a little more clearly what appears to us to be a similarity between priests' houses and houses occupied by teachers."

The inquiry which you submit is as follows: *Are the houses which are used as places of domicile for sisters or lay teachers of parochial schools exempt from taxation?*

Section 5349 of the General Code (2732, Revised Statutes) provides as follows:

"Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies, and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation."

In the case of Watterson vs. Halliday, 77 O. S., page 150, a petition was filed by the plaintiff in error therein against the auditor and treasurer of Franklin county praying for an order to enjoin the collection of taxes and assessments levied and assessed on various parcels of real estate situate in the said county. In the said petition the plaintiff in error alleged that legal title to said real estate was being held by him as bishop in and for the diocese of Columbus which included Franklin county and other counties. Said property as described in the petition included places of public worship, public parochial schools, academies, asylums and parishes. The petition definitely describes each piece of property and the uses to which the same were devoted and claimed that each of the said parcels is exempt from taxation and assessment for street and other public improvements.

The court seemed to have held substantially that the taxing of all the properly mentioned in the said petition, except the residences or parishes of the priests, should be enjoined. While there is no mention in the report of the case of residences or places of domicile of the sisters or teachers in the parochial schools, it is a fact that some of the property described in the petition was such residence and places of abode of some of the instructors or teachers in such parochial schools as extracts from the said petition hereinafter set forth discloses. and the holding of the court in the said case was substantially to the effect that such residence or places of abode are exempt from taxation.

The following are extracts from the petition filed in the trial court by the plaintiff in error; the following appears as description of the third parcel in the said petition:

"That building erected many years ago on the said premises has ever since its erection been used and is now used and occupied as a public academy in part of which the religious services of said church are held and in another part of which are dormitories for the use of the pastor and teachers of said academy."

Then again, appearing as part of the fourth parcel in the said petition is the following:

"That a school for the use of the public was long since erected on

the said premises in which dormitories and rooms were arranged for the accommodation of teachers of the said school during the term of the said school to which school or schools the children of parents of all denominations were and are freely admitted on equal terms as aforesaid and taught many branches of useful knowledge."

Then again, appearing as part of description of the tenth parcel in the said petition, as mentioned above, is the following:

"That a church building known as Church of the Holy Cross is and has been many years situated thereon; also building for offices and rooms of the clergy of the said church and part for dormitories for the use of said clergy and public parochial school building for the use of the said church and school building and rooms as offices for the said clergy and teachers of the said school."

The syllabus of the case of Watterson vs. Halliday, 77 O. S., 150, reads as follows:

"Parish houses, otherwise known as the residences of the priests and bishops of the Roman Catholic church, are not exempt from taxation and legal assessments, by virtue of section 2 of article 12 of the constitution of Ohio, nor by provisions of section 2732, Revised Statutes, although such places of residence are used by the priests and bishop for the discharge of many duties of a religious and charitable nature, which are imposed by the vows of their ordination and rules of the church."

The said court holding, as you will observe, that all of the property described in the petition was exempt from taxation except the residences of the priests and the bishop.

The case of Kenyon College vs. Schnebly, 12 Circuit Court, N. S., page 1, and which is affirmed without report in 81 O. S., 514, seems very pertinent in determining the inquiry of your letter to the auditor of state. The syllabus in that case reads as follows:

"1. The exemption from taxation of property belonging to colleges and academies, provided by section 2732, Revised Statutes, extends to all buildings and lands that are with reasonable certainty used in furthering or carrying out the necessary objects and purposes of the institution.

"2. Residences occupied by the president, and professors and janitors are exempt, as also is vacant land from which no revenue is derived, but land used for agricultural purposes or pasturage is not exempt."

I am, therefore, of the opinion that the department of auditor of state is right in instructing the auditors in the respective counties in the state to exempt from taxation the houses used as places of domicile for the lay teachers of the parochial schools for the reason that same come within the exceptions in the said section 5349, General Code (2732, Revised Statutes), as being

necessary for the proper use and enjoyment of such schools and as said section is construed in the two cases cited herein, to wit: Watterson vs. Halliday, et al., 77 O. S., 150, and Kenyon College vs. Schnebly, 12 C. C., N. S. 1.

Trusting that I have fully answered your inquiry, I remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

L 222.

COUNTY COMMISSIONERS—POWER TO RELEASE OR COMPROMISE FINE DUE FROM PRISONER TO THE COUNTY.

Under authority of section 2416, to compromise or release claims due to or for the use of the county, the commissioners of a county, wherein a prisoner was convicted and sentenced to a workhouse in another county, wherein he was working out his fine by virtue of contract between the counties, may release such fine if the same was destined to have gone into their county treasury.

If however, had the fine been paid, it would not have inured to the benefit of the county, the commissioners of that county could not release the same.

COLUMBUS, OHIO, April 18, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state:

"Section 2416 of the General Code provides as follows:

" 'The board may compound or release, in whole or in part, a debt, judgment, fine or amercement due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition.'

"Guernsey county has no workhouse of its own, but has a contract with another county which has a workhouse, for the confinement of prisoners. Now where a person is convicted of a misdemeanor in Guernsey county and is sentenced by the court to such workhouse in default of payment of the fine and costs, there to remain until such fine and costs are paid, I would like to have your opinion as to whether or not after such person is confined in such workhouse the commissioners of the county from which said person in convicted and sentenced can compound or release such fine and costs or any part thereof before such fine and costs are worked out by the prisoner according to law, and thereby have such prisoner released from such workhouse?"

Section 12378 of the General Code provides:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days

after the receipt thereof, take the treasurer's duplicate receipt therefor and forthwith deposit one of them with the county auditor."

The sole question to be considered in your inquiry is whether or not the fine and costs of the person sent to the workhouse is within the provisions of section 2416 of the General Code set out in your letter. This is a question that must be answered in each individual case.

If the fine, had the same been paid at the time the sentence of the court was imposed, would have been turned into the county treasury to the credit of the county general fund under section 12378 of the General Code, it is my opinion that not having been so paid, it would be considered as "due the county and for the use thereof."

The fact that the judgment of fine and costs was in the name of the state of Ohio would not alter the fact that such fine and costs, when collected, would inure to the benefit of the county, nor would the fact that the person convicted had been sent to a workhouse in another county deprive the county commissioners of the county where such person was convicted of any rights which said commissioners have under said section 2416 of the General Code.

I would, therefore, say that the county commissioners may compound or release any fine and costs which, had the same been paid, would have gone into the county treasury to the credit of the county general fund.

I am confirmed in my opinion by the language used by Burrows, J., in the case of In Re Carrie McAdams, 21 O. C. C. Rep. 450, at page 452, wherein he states:

> "By section 855 (codified under section 2416, General Code) the board of county commissioners are given plenary power 'to compound for or release in whole or in part the debt, judgment, fine or amercement due the county, and for the use thereof * * * and they shall enter upon their journal a statement of the facts in the case and the reasons that governed them in making such release or composition.' That the fine and costs for which judgment was rendered in this case were 'due the county' is settled by section 6802 (codified under section 12378, General Code), while the judgment in form was in favor of the state, the law provides that when the money is collected it shall be paid into the treasury of the county 'to the credit of the county general fund.'"

In case, however, where the fine, if paid, would not inure to the benefit of the county, I am of the opinion that the county commissioners would not have the power to compound or release the same.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

A. 223.

COUNTY COMMISSIONERS' EXPENSES OF BURIAL OF INDIGENT SOLDIERS OUTSIDE OF STATE—SOLDIERS' RELIEF COMMITTEE.

The county commissioners under section 2950, G. C., are authorized to arrange and pay for burial of indigent soldiers only in cemeteries within this state.

COLUMBUS, OHIO, April 19, 1911.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 31st, submitting to me for my opinion the question as to whether the body of an indigent soldier may lawfully be buried at the expense of the county in a cemetery or burial ground outside of the state:

Section 2950, General Code, provides that:

> "The county commissioners * * * shall appoint two suitable persons in each township and ward in the county * * * who shall contract * * * with the undertaker selected by the friends of the deceased, and cause to be interred in a decent and respectable manner, the body of any honorably discharged soldier * * * who dies, not having means to defray the necessary funeral expenses. Such burial may be made in any cemetery or burial ground *within the state*, other than those used exclusively for the burial of paupers and criminals."

Section 2951 and succeeding sections provide the procedure to be followed by the committee and contain the following provisions relating to the place of burial:

> "They shall * * * make a report * * * to the county commissioners * * * setting forth * * * the * * * where buried. * * * (Sec. 2952.)
>
> "The undertaker * * * shall use blanks to read as follows: I * * * hereby agree to furnish the following items for the burial of..... * * * viz, * * * to pay for digging the grave in the place designated by the friends of the deceased *or otherwise provided.*" (Section 2954.)

Upon examination of all the related sections, I find nowhere any provision inconsistent with that of section 2950, that the burial may be made in any cemetery or burial ground within the state. This provision is a grant of power to subordinate officers and is to be strictly construed.

I am, therefore, of the opinion that a soldiers' relief committee may not enter into a contract with an undertaker providing for the burial of an indigent soldier in a burial ground outside of the state of Ohio.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

224.

DUTY OF COUNTY COMMISSIONERS TO MAINTAIN HIGHWAYS IMPROVED BY STATE AID—STANDARD OF MAINTENANCE FIXED BY STATE HIGHWAY COMMISSIONER.

The duty of the county commissioners, under section 1225, *General Code, to "maintain" highway improved by state aid, is qualified by the remainder of the section which provides that the state highway commissioner shall prescribe the standard of the condition which shall be maintained. The obligations of the commissioners are limited to a compliance with that standard.*

COLUMBUS, OHIO, April 19, 1911.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 28th, requesting my opinion as to the meaning of the word "maintain" as used in section 1225, General Code, relating to the duties of county commissioners in regard to roads improved by state aid. Said section provides in part that:

> "* * * such highway shall be kept in repair *and maintained* by the county commissioners at the expenses of such county in conformity with such reasonable general standard of condition as the state highway commissioner prescribed."

You inquire particularly as to whether the use of the word "maintain" in the section under consideration makes it the duty of the commissioners to keep such road free from snow and obstructions and in all respects in perfect condition for public travel.

The word "maintain" in its primary significance means:

> "To hold in an existing state or condition; keep in existence or continuance; * * * keep up. * * *" Standard dictionary.

This definition is adopted and followed by courts generally. See Words and Phrases Judicially Construed. It is to be noted that this meaning is not greatly different from that of the phrase "keep in repair." It will be apparent from the cases quoted from in the work last referred to that courts have had no difficulty construing sections containing both of these terms even where they are obliged to hold them synonymous.

In the section under consideration it is made the duty of the commissioners to keep the highways in repair. In so doing they might adopt varying standards. Being required, however, to "maintain" the highways, it is thereby made their duty, in providing for repairs, to measure the necessity or sufficiency of repairs in a given instance by the condition of the road, as they receive it from the state highway commissioner. Therefore, if the section contained no other directions it would be the duty of the county commissioners to provide for such repairs from time to time as might be necessary to keep all state highways in precisely the same condition as they were received from the state. The remainder of the section, however, mitigates the strictness of this rule; for it provides that the state highway commissioner may prescribe the standard of condition which shall be "maintained" by the commissioners. Whether or not the authority of the state highway commissioner in the premises

is sufficiently broad to empower him to order the commissioner to keep state aid highways free from snow and such other obstructions it is not necessary to decide, as I do not understand that the state highway commissioner has made any such order. In my opinion the state highway commissioner is given authority to prescribe the condition which shall be maintained, and the duty of the county commissioners existing by virtue of the presence of the word "maintain" is to keep the road in the condition prescribed by the state highway commissioner and that alone.

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

225.

NEWSPAPERS—ALLOWANCE BY COUNTY COMMISSIONERS OF LESS THAN LEGAL PUBLICATION FEE—EFFECT OF FAILURE TO APPEAL.

When newspapers have been allowed $1.00 *per square by the county commisisoners for publishing commissioners' and turnpike directors' annual reports, and have not appealed within fifteen days thereafter, to the common pleas court, as provided in section* 2461, *General Code, they are not entitled to an extra* 50 *cents per square even though the attorney general ruled later that* $1.50 *per square was a proper compensation.*

April 20, 1911.

HON. SHOLTO M. DOUGLASS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state the following:

> "During the years 1903 to 1908, inclusive, the newspapers in this county which published the commissioners' and turnpike directors' annual report filed their vouchers with the auditor for compensation therefor at the rate of $1.50 per square.
>
> "The commissioners allowed their bills for the work done, but at the rate of $1.00 per square, and the publishers drew this amount from the treasury, and made no appeal from the decision of the commissioners. (See sec. 2461, Gen. Code, R. S., 896.)
>
> "Subsequently (sometime during 1909) the bureau of inspection and the attorney general sent out instructions to the effect that printers were entitled to $1.50 per square for publishing such matter and thereupon (Nov. 1, 1909) the publishers presented a bill for the difference between the amount claimed by them (based on the $1.50 rate) and the amount formerly allowed by the commissioners (based on the $1.00 rate), which amount to 50 cents per square on the matter printed.
>
> "This bill was rejected by the commissioners once but has been or soon will be presented to them again.
>
> "Now, can the printers at this time recover additional compensation at the rate of 50 cents per square for matter printed during the years '03 to '08 inclusive, the commissioners having allowed and the

printers having accepted, without appeal, compensation at the rate of $1.00 per square?"

Section 896, Revised Statutes, in force at the time mentioned in your letter provided as follows:

> "If a person is aggrieved by the decision of the county commissioners in any case, such person may, within fifteen days thereafter, appeal to the next court of common pleas, notifying the commissioners of such appeal at least ten days before the time of trial, which notice shall be in writing, and delivered personally to the commissioners, or left with the auditor of the county, and the court shall, at their next session hear and determine the same, which decision shall be final."

This section of the Revised Statutes was re-enacted as section 2461 of the General Code.

The newspapers in your county having presented their account to the county commissioners calling for compensation at the rate of $1.50 per square, and said county commissioners having only allowed $1.00 per square it was their duty under said section above set forth, if they felt themselves aggrieved by the decision of the county commissioners to appeal within fifteen days thereafter to the common pleas court.

Having failed so to do, it is my opinion, that they are now remediless and that the county commissioners are not authorized to allow them the difference between what they received and what the court in the case of Knoor vs. Darke County, 4 N. P. n. s. 35, has since decided was the legal amount that should have been allowed.

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

227.

COUNTY AUDITOR—FEE FUNDS—DEPOSIT OF FEES, COSTS, ETC., AN EMBEZZLEMENT—PAYMENT AT END OF QUARTER—RECORDS OF COUNTY INFIRMARY DIRECTORS KEPT AT INFIRMARY.

By provision of section 12873, *General Code, a public officer is guilty of a felony who deposits public funds other than as authorized by law and as section* 12875 *expressly excepts treasurers from this provision, the inference follows that officers not expressly excepted are to be governed by the statute aforesaid. Therefore, though section* 2983, *General Code, stipulates that a county auditor shall pay all fees, costs, etc., collected by him, into the county treasury "at the end of the quarter," there is no prohibition against paying in such collections at prior times, and a deposit of such funds would amount to the embezzlement aforesaid.*

As county infirmary directors are legally obliged to hold their meeting at the infirmary, the same is the proper place for the keeping of their records.

COLUMBUS, OHIO, April 21, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Your letter of recent date received. You inquire, can a county

official, upon collecting the fees of his office under section 2977, General Code, deposit the same in a bank to be there kept on deposit until the end of the quarter, to be then paid into the county treasury as provided for in section 2983.

Section 2977 of the General Code provides as follows:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as hereinafter provided."

Section 2983 of the General Code provides that:

> "At the end of each quarter, each such officer shall 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 such quarter, for his official services, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received."

Section 12873 of the General Code is as follows:

> "Whoever, being charged with the collection, receipt, safekeeping, transfer or disbursement of public money or a bequest, or part thereof, belonging to the state, or to a county, township, municipal corporation, board of education, cemetery association or company, converts to his own use, or to the use of any other person, body corporate, association or party, or uses by way of investment in any kind of security, stock, loan, property, land or merchandise, or in any other manner or form, or loans with or without interest to a company, corporation, association or individual, or, except as provided by law, deposits with a company, corporation or individual, public money or other funds, property, bonds, securities, assets or effects received, controlled or held by him for safekeeping or in trust for a specific purpose, transfer or disbursement, or in any other way or manner, or for any other purpose, shall be guilty of embezzlement of the money or other property thus converted, used, invested, loaned, deposited or paid out, and shall be imprisoned in the penitentiary for not less than one year nor more than twenty-one years and fined double the amount of money or other property embezzled."

You state in your letter that it is the common custom in your county for county officials to deposit their collections in the banks of their community, and at the end of the quarter withdraw the same from the bank and deposit them in the county treasury; that there has been no shortage or defalcation on the part of the officials and at the end of each quarter the fees so collected have been promptly paid over. You also state that you see no personal objection to this custom and believe it to be the safe one to pursue, but the objection thereto is that by the terms of section 12873 of the General Code it becomes unlawful for such county officers to deposit with any company, corporation

or individual any portion of the public money received, controlled or held by them for safekeeping or in trust for a specific purpose, transfer or disbursement or in any other way or manner or for any other purpose, etc.

Section 12873 of the General Code was formerly section 6841 of the Revised Statutes. The supreme court in the case of State ex rel. vs. Ellet et al., 47 O. S., at page 99, said in reference to section 6841, Revised Statutes:

> "The criminal code, Rev. Stats., sec. 6841, makes it a felony for any person charged with the collection, receipt, safekeeping, transfer, or disbursement of the public money or any part thereof, belonging to the state, or to any county, township, municipal corporation, or board of education in this state, to loan, with or without interest, to any company, corporation or individual, *or to deposit* with any company, corporation, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safekeeping, transfer, or disbursement, or in any other way or manner, or for any other purpose. And the offender may be imprisoned in the penitentiary for a term of years, and heavily fined.
>
> "Any county treasurer who should deposit the public moneys in any bank, with or without interest, and whether so directed by the county commissioners or not, would be guilty of a violation of this section, and subject to the punishment it prescribes. And if the county commissioners should advise and direct such deposit to be made, they would be equally guilty."

Section 12875 of the General Code provides as follows:

> "The provisions of section twelve thousand eight hundred and seventy-three shall not make it unlawful for the treasurer of a township, municipal corporation, board of education or cemetery association to deposit public money with a person, firm, company or corporation organized and doing a banking business under the laws of this state or of the United States, but the deposit of such funds in such bank shall not release such treasurer from liability for loss which may occur thereby."

This latter section was a part of section 6841, Revised Statutes, and were it not for the exceptions provided in this part of the original section just quoted, it would have been unlawful for the treasurer of any township, municipal corporation, board of education or cemetery association to deposit money in banks. The exception provided in section 12875 supports the conclusion that it would be unlawful to *deposit* public funds in banks, or there would be no reason for the exception set forth in section 12875, General Code.

At the time of the passage of section 6841, Revised Statutes, the county officers were on a fee basis. In 1907 they come under the county salary act, and all fees they now collect become public funds and they come under the provisions of section 12873. While section 2983 of the General Code permits the various county officers to collect and hold all fees, costs, etc., collected by their offices during such quarter, and to pay the same into the county treasury on the warrant of the county auditor at the end of each quarter, yet there is nothing to prevent each officer now paying into the county treasury the fees, etc., collected daily.

I, therefore, hold that it is unlawful for county officials to deposit fees

collected during the quarter in a bank to be kept there on deposit until the end of the quarter and to be then paid into the county treasury as provided in section 2983.

You also inquire whether or not the records of the board of county infirmary directors should be kept at the court house or whether they can be lawfully kept at the infirmary?

Section 2521 of the General Code provides for the organization of the board of infirmary directors by appointing one member president and another clerk, and that the clerk shall keep a record of their proceedings.

Section 2522 of the General Code provides, among other things, that:

> "* * * It shall meet not oftener than once each month at the infirmary, but the president may call a special meeting thereof at any time he deems necessary. The directors shall keep a book in which the clerk shall record the proceedings of their meetings and of their transactions, which book shall at all times be open to public inspection."

The meeting place of the board of infirmary directors, in counties where they have an infirmary, is fixed by the General Code at the infirmary, and they are required to meet at least once a month at the infirmary, but they may have special meetings called from time to time. The special meetings can, no doubt, be held at the infirmary or at any other place in the county that the infirmary directors may designate. Since the Code fixes the meeting place of the board at the infirmary, it is my opinion that the record of the proceedings of the board should be kept at the county infirmary; and in counties where they have no infirmary the record of the board should be kept at the regular meeting place of the board, which would, presumably, be at the court house.

I, therefore, hold that the records of the infirmary directors can be legally kept at the infirmary, and that is the proper place for them.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

D 228.

SHERIFF'S EXPENSES FOR PURSUIT OF FIRST DEGREE MURDERER IN DISTANT STATE—ALLOWANCE BY COUNTY COMMISSIONERS—EXPENSE OF PROSECUTING ATTORNEY.

Under section 3015, *General Code, providing for expenses for pursuit of a fugitive felon or under section* 3004, *General Code, providing for expenses of the prosecuting attorney incurred in official duty or in furtherance of justice, the commissioners may allow the expenses incurred by a sheriff and a secret service companion, in an unsuccessful pursuit in a distant state of a person indicted for first degree murder.*

COLUMBUS, OHIO, April 22, 1911.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—In your letter of April 14th, receipt whereof is acknowledged, you state that you requested the sheriff of your county to go to a place in a distant state where a person indicted for first degree murder was supposed to

be, for the purpose of apprehending him, and to take with him an employe of a detective agency who was able to identify the defendant; that the sheriff did so; that they did not succeed in capturing the fugitive; that upon his return the sheriff presented his bill to the county commissioners for expenses incurred by him, including the expenses of his companion; that no compensation was asked for either; and that the county commissioners allowed the bill as presented by the sheriff.

You request my opinion as to the authority of the commissioners to allow this claim. Section 3015 of the General Code provides that:

> "The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

Section 3004 provides that:

> "* * * each prosecuting attorney shall be allowed his reasonable and necessary expenses * * * in furtherance of justice, which expense account shall be itemized and duly verified, and if found correct, shall be allowed by the county commissioners and paid monthly from the general fund of the county."

Inasmuch as you state in your letter that the action of the sheriff was at your direction, and that of the commissioners upon your recommendation, I have chosen to quote section 3004. Section 3015 clearly authorizes the commissioners to take such action as that described by you, but if it is desired by them to place the responsibility for such action directly upon the prosecuting attorney I presume they might allow and pay a bill such as this, incurred at the direction of the prosecuting attorney as expenses of the prosecuting attorney, although it would have to appear, at least technically, that the prosecuting attorney himself had incurred the expense.

In either event I know of no reason why the action of the commissioners should be regarded as illegal. So far as they were concerned they would be absolved from the criticism that they had abused their discretion, by the express recommendation of the prosecuting attorney, their legal advisor. So far as the prosecuting attorney is concerned, he is made the judge of the necessities of the case.

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

E 228.

ROADS CONSTRUCTED BY GOOD ROADS COMMISSION—REPAIR BY ROAD COMMISSIONERS.

Roads constructed by the good roads commission under section 7095, General Code, shall be kept in repair by the road commissioners, under section 7129, General Code.

April 22, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Under recent date you submitted to me the following inquiry:

> "The following question has been put to me for an opinion, and I am unable to find anything in the statute that gives me any light. The question is as follows: 'Who must keep in repair roads built by the good roads commission?' For example we have in our county four townships, that have organized under a good road commission act.
>
> "Now, the road superintendents wish to know whether it is their duty to keep in repair roads that are built by this commission."

Section 7095 of the General Code provides:

> "Not less than two nor more than four adjacent townships in any county, occupying contiguous and compact territory, may organize into road districts. Such road districts shall be governed and controlled for the purpose of constructing pikes and improving roads, as hereinafter provided, by a road commission composed of one member from each township."

Under the same chapter will be found section 7129 which provides as follows:

> "All improved roads in such district shall be kept in repair by the road commissioners in like manner as is provided by the general statutes for repair of roads. To enable the road commissioners to keep them in repair, there shall be annually levied by the county commissioners, upon each dollar's valuation of all taxable property in the road district, an amount not exceeding one mill, as is deemed necessary by the road commissioners."

I believe the above sections of the General Code will fully answer your question.

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

229.

COMPENSATION OF CITY SOLICITORS BY COUNTY COMMISSIONERS FOR SERVICES IN MAYOR'S COURT IN STATE CASES, NOT ALLOWED—CONTRACT FOR SUCH, ILLEGAL.

The power given to the county commissioners to compensate city solicitors has been repealed, and therefore, compensation for prosecuting state cases in the mayor's court may not be allowed, by the commissioners.

The power to so compensate, under the former law, was limited to "compensation" for special services and could not be extended to a right to contract for a salary, and therefore, a contract for the latter purpose entered into before the repeal of said statute, would not affect the commissioners' inability to allow the compensation aforesaid at the present time.

COLUMBUS, OHIO, April 24, 1911.

HON. HAROLD W. HOUSTON, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—Under recent date you submit for my opinion the following questions:

> "(a) May the county commissioners, by contract, compensate the city solicitor, for prosecuting state cases in the mayor's court?
>
> "(b) If your ruling is against the allowance of such compensation, would the rule be altered by the fact that in January, 1910, the county commissioners entered into a two years' contract with the city solicitor, at a fixed salary, to prosecute such cases?"

Prior to the enactment of the General Code, section 137 of the Municipal Code provided in part as follows:

> "The city solicitor shall also be prosecuting attorney of the police or mayor's court, and shall receive for the service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

Section 4306 of the General Code, which purports to be a re-enactment of said section 137 of the Municipal Code, reads as follows:

> "The solicitor shall also be the prosecuting attorney of the police or mayor's court. Where council allows an assistant or assistants to the solicitor he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court."

It will be noted that said section 4306 of the General Code, re-enacting said section 137 of the Municipal Code omits the words "and shall receive for the service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow." The question is therefore, whether such words are to be read into the section of the code which purports to codify section 137, Municipal Code. While it is not the intention of the codifying commission to omit or repeal any substantive law, and such

codification is not presumed to change the law, yet section 137 of the Municipal Code was expressly repealed in section 13767 of the General Code. (See section 42 of the repealing clause.)

The rule of law governing codification of the statutes is clearly set forth in Allen vs. Russell, 39 O. S., 337, wherein Okey, J., said:

> "But where all the general statutes of the state or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revision and consolidated form, although the language may have been changed. * * * *Of course if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form.*"

The codifying commission evidently considered that the provision of section 137 of the Municipal Code, that, the city solicitor shall receive for the service as acting as prosecutor of the police or mayor's court "such compensation as council may prescribe" is fully covered by section 227 of the Municipal Code, codified as section 4214 of the General Code, which reads as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and *compensation.* * * *"

I have already found that such was the case in a previous opinion, but as there is no corresponding section of the code referring to compensation to be allowed by the county commissioners to such solicitor for prosecuting state cases in the police or mayor's court, it is to be presumed that the general assembly in adopting the General Code and expressly repealing section 137 of the Municipal Code decided that the compensation to be allowed such solicitor by the county commissioners should be abolished.

I am, therefore, of the opinion that there is no power in the county commissioners to allow a city solicitor any *compensation* for services in a police or mayor's court after the enactment of the General Code of February 14, 1910.

You inquire further, however, as to whether the rule would be altered by the fact that in January, 1910, that is prior to the adoption of the Code, the county commissioners entered into a two years' contract with the city solicitor at *a fixed salary* to prosecute such cases.

The question to be decided in the first instance is whether or not the county commissioners prior to the adoption of the Code are authorized to make such a contract. The paragraph of section 137, Municipal Code, under discussion used the word "compensation." What is the meaning to be given to the word "compensation" as so used? Section 227, Municipal Code, directed council to determine the *salary* of the city solicitor and section 137 of the Municipal Code authorized the county commissioners to allow "compensation" for the work of city solicitor in state cases.

As I construe the law, especially in view of the fact that the salary of the solicitor is fixed by council, the word "compensation" as used in section 137, Municipal Code, was in the limited sense of remuneration for special services,

and dependent upon the amount of services performed. It is in no sense "a salary" in the language of the court in the case of Thompson, relator, vs. John Phillips, 12 O. S., 617, wherein it is stated that:

> "Salary is an annual or periodical payment for services. A payment dependent upon the time and not on the amount of service rendered."

The county commissioners were not empowered, therefore, under section 137, Municipal Code, to fix a salary for the city solicitor to be paid irrespective of the *amount* of services to be performed therefor, and consequently it is not a "right * * * accrued or incurred" which is preserved under section 13766, General Code.

The right of the county commissioners extended, under section 137, Municipal Code, to fixing the rate of compensation for services to be performed by the city solicitor, but not to fixing a salary for such services. As soon as the power to allow compensation to such city solicitor was taken away from the county commissioners by the repeal of section 137, Municipal Code, the services not yet having been performed, the right to any compensation on the part of the city solicitor for services to be performed, ceased.

It is my opinion, therefore, in answer to your two inquiries:

(1) That the power given to the county commissioners to compensate city solicitors ceased with the enactment of the General Code.

(2) That the fact that in January, 1910, the county commissioners entered into a two-year contract with the city solicitor at a fixed salary would not change the result, as far as services to be performed after the enactment of the General Code were concerned.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

A 230.

BOARD OF EDUCATION—POWER TO BORROW MONEY TO MEET AN INDEBTEDNESS NOT FUNDED.

Section 7629, G. C., does not empower boards of education to issue bonds for the purpose of taking up a general indebtedness previously incurred.

Sections 5656 and 2658, G. C., however, do authorize the funding of a debt not funded, when the indebtedness cannot otherwise be met by reason of taxation limitations.

COLUMBUS, OHIO, April 25, 1911.

HON. CHAS. S. HATFIELD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 30th, submitting for my opinion thereon the following question:

> "A special school district board of education has made improvements during the last few days as follows: Roofing building, building sidewalks, painting, and other necessary improvements, amounting in

all to about $1,300.00. This debt was contracted but no bonds were ever issued in accordance with section 7629 of the General Code. The board is still in debt in the amount of $90.00.

"May the board issue bonds under section 7629 of the General Code for the purpose of paying this indebtedness?"

I do not believe that section 7629, General Code, which authorizes boards of education to "issue bonds to obtain or improve public school property" empowers such boards to issue bonds for the purpose of taking up a general indebtedness previously incurred for such purposes. Section 5656 of the General Code provides as follows:

"The * * * board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation each * * * district * * * is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

Section 2658, General Code, provides that:

"No indebtedness of a * * * school district * * * shall be funded * * * or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * *. Such resolution shall state the amount of the existing indebtedness to be funded * * * the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear, and the place of payment of the principal and interest."

Section 5659, General Code, provides that, the board of education shall have power to levy a tax in addition to the amount otherwise authorized, to pay the principal and interest of such bonds.

These sections in my opinion authorize the funding of a debt not funded, and should be followed by your board of education. I assume of course that the amount now due cannot be paid by the board of education because of its limits of taxation; otherwise, of course, there would be no necessity for issuing any bonds. This condition is prerequisite to the exercise of power under section 5656.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

231.

BANKS AND BANKING—COUNTY COMMISSIONERS—BANK IN WHICH COMMISSIONER IS INTERESTED MAY BE COUNTY DEPOSITORY.

There is no prohibition in the statutes against the award of county funds to a bank of which one of the commissioners is president, where such bank is the successful bidder and all statutory requirements have been complied with.

April 26, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Under recent date you submitted for my opinion the following question:

> "The board of county commissioners of Clermont county, Ohio, are now advertising for bids on the county funds to be deposited in certain banks through the county according to the county depository act.
>
> "Mr. A. C. Iuen of Owensville, Clermont county, Ohio, is now one of the county commissioners of Clermont county. He is also a stockholder and president of the Owensville State Bank at Owensville, Clermont county, Ohio.
>
> "Under the law, can Mr. Iuen's bank of which he is president bid for the deposit of funds, and if a successful bidder can the board of county commissioners of Clermont county, Ohio, award all or a part of the funds to the bank of which Mr. Iuen is president and a stockholder."

The law providing for a county depository is contained in sections 2715 to 2745 inclusive of the General Code. There is no provision of law in said sections that prohibit the county commissioners from depositing the funds of the county in a bank in which one of the commissioners is interested.

Section 2716 of the General Code provides for competitive bidding for such deposit after full notice published, and places a minimum on the amount of interest to be paid for such deposit.

Section 2717 provides for the opening of such bids in *open session* by the county commissioners and that they shall award the use of the money to the bank offering the highest rate of interest therefor. Consequently it is not left to the county commissioners to determine after the bids are in which they shall accept.

Section 2722 provides for a good and sufficient undertaking of not less than the sum that shall be deposited in such depository at any one time.

As there is no restriction placed upon the county commissioners in selecting a depository other than a full compliance with the provisions of law as set forth in sections 2715 to 2745 inclusive, of the General Code, and as the manifest object is to procure for the county the highest rate of interest by the *fullest competitive bidding*, I am of opinion that it would not be in contravention of law or public policy if the county commissioners award all or a part of the funds to a bank in which one of said commissioners is an officer and stockholder if such bank be a successful bidder.

The award of such a contract by the county commissioners is not within the prohibition of sections 2420 or 12910 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 232.

SALARIES OF COUNTY COMMISSIONERS AND COUNTY AUDITOR—MONEYS RECEIVED FOR SERVICES ON BOARD OF EQUALIZATION MAY NOT BE RETAINED—FEE FUND.

The services of the county commissioners and county auditor on the board of equalization, are obligations due from them in their official capacities as county auditor, and county commissioners, for which sections 3001 *and* 2996, *General Code, provide a salary in full.*

The sums allowed for services on the board of equalization, under section 5597, *General Code, therefore, must be paid by these officials into the fee fund.*

COLUMBUS, OHIO, April 29, 1911.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 22, 1911, of which letter of inquiry the following is a copy:

> "Section 2990 of the General Code provides for the salary of the county auditor.
>
> "Section 2996 provides that such salary shall be instead of all fees, etc.
>
> "Section 3001 provides for the salary of the county commissioners, and that such compensation shall be in full payment for all services rendered by such commissioners.
>
> "Said officers, together with the county surveyor, compose the quadrennial county board, and by the provisions of section 5597:
>
> > " 'Each member of the quadrennial county board, including the county auditor and county surveyor, and each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as a member of the board of revision, the sum of three dollars.'
>
> "Queries: *First.* Can the county commissioners receive the per diem mentioned in 5597 in addition to the salary mentioned in 3001?
>
> "*Second.*- Can the county auditor receive the per diem provided in 5597 in addition to the salary provided in 2990?
>
> "I refer you for the construction of the supreme court upon the former sections to State ex rel., vs. Owens, 81 O. S., 540."

Section 2990 of the General Code provides for the salary of county auditor as follows:

> "Each auditor shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election;
>
> "sixty-five dollars per thousand for each full one thousand of the second fifteen thousand of such population of the county;
>
> "fifty-five dollars per thousand for each full one thousand of the third fifteen thousand of such population of the county;

"forty-five dollars per thousand for each full one thousand of the fourth fifteen thousand of such population of the county;

"thirty-five dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county;

"twenty-five dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county;

"and five dollars per thousand for each full one thousand of such population of the county, in excess of ninety thousand."

Section 2990 of the General Code provides that such salaries shall be instead of all fees, etc., as follows:

"Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

Section 3001 of the General Code provides for the salaries of county commissioners, and that such compensation shall be in full payment of all services rendered by such commissioners.

Section 5597 of the General Code provides for the quadrennial county board as follows:

"Each member of the quadrennial county board, including the county auditor and county surveyor, and each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as member of the board of revision, the sum of three dollars."

In the case of State ex rel. vs. Owens, 81 O. S., 549, which you cite in your inquiry as construing the above statutes—the supreme court decided without report, so that we cannot very well state the reasoning upon which the court based its opinion. In that case, however, the petition filed in the Putnam county court of common pleas contained two causes of action, and the one with which you are concerned in your inquiry, to wit: the first cause of action is as follows:

"Plaintiff says for his first cause of action that he adopts and makes a part here of the preliminary statement herein as fully as if written out in detail herein, and further says, that during the said term of David F. Owens as county commissioner of Putnam county, Ohio, beginning on the third Monday of September, 1904, the said David F. Owens received and was paid his compensation as county commissioner by stated salary, the said salary being then and all the time during said term fixed by law.

"The plaintiff says that on the 25th day of May, 1905, the said David F. Owens as such county commissioner demanded and received from the treasurer of Putnam county out of the public funds of the treasury of said county, the sum of $30.00 for services as member of the board of equalization of Putnam county, for the year 1904;

"That on July 10, 1905, the said David F. Owens demanded and received of the treasurer of Putnam county, out of the public funds of the

treasury of said county the sum of $21.00 for services as member of the board of equalization for the year 1905;

"That on March 12, 1906, said David F. Owens demanded and received of the county treasurer of Putnam county out of the public funds of the treasury of said county, the sum of $9.00 for balance due as services for member of board of equalization for the year 1905;

"That July 16, 1906, the said David F. Owens demanded and received of the treasurer of Putnam county out of the public funds of the treasury of said county, the sum of $30 00 for services as member of the board of equalization for the year 1906;

"That September 9, 1907, the said David F. Owens demanded and received of the treasurer of Putnam county, out of the public funds of the county treasury of Putnam county, the sum of $27.00 for services as member of the board of equalization for the year 1907.

"Plaintiff says that each of said sums so demanded and received by the said David F. Owens were unlawfully received by the said David F. Owens, and that the said David F. Owens was not entitled to receive pay for services as member of the board of equalization for said times or any of them.

"Plaintiff says that there is now due plaintiff from the said David F. Owens on account of said payments to him, as aforesaid, on this cause of action the sum of $117.00 with interest on $30.00 from May 25, 1905, and interest on $21.00 from July 10, 1905, and interest on $9.00 from March 12, 1906, and interest on $30.00 from July 16, 1906, and interest on $27.00 from September 9, 1907."

To that cause of action, the defendant in error filed a general demurrer as follows:

"Now comes the defendant, David F. Owens and demurs to the petition of the plaintiff and to each cause of action thereof, for the reason that said petition and neither cause of action thereof, states facts sufficient to constitute a cause of action."

The said Putnam county common pleas court sustained the said demurrer as to said first cause of action, and this decision was affirmed by the circuit court of said Putnam county, and the decisions of both the circuit and the common pleas courts in sustaining the said demurrer were reversed by the supreme court. As above suggested, the supreme court rendered its decision without report, and it is, therefore, difficult to determine just what was the reasoning of the court and upon which it based its decision. As gathered, however, from the brief filed by counsel in the case, the reasoning seems to be clearly that it cannot be successfully maintained that the defendant therein (Owens) was not performing his duties as a commissioner when he acted as a member of the board of equalization. Section 5594 of the General Code makes the county commissioners and other county officers mentioned in the said section ex-officio member of such county board of equalization. By virtue of this section it was as much the duty of the defendant in error (Owens) to discharge his duties as a member of the board of equalization as to discharge any other duties enjoined upon him as commissioner, i. e., in other words, he did not lose his character as commissioner when so acting as a member of the county board of equalization. His services on the board of equalization were a part of his duties as county commissioner and he is required to perform the duties enjoined upon such

board; that his services upon the board of equalization are incident to his services as county commissioner for which he, as county commissioner, is compensated by virtue of section 3001 of the General Code, and *the compensation therein provided is in full payment for all services rendered as county commissioner.*

It follows that the above reasoning would, of course, apply to and govern all the county officers constituting the county board of equalization as provided by section 5594 of the General Code.

It is, therefore, my conclusion, in answer to your first inquiry, that the county commissioners cannot receive the per diem mentioned in section 5597 of the General Code in addition to the salary mentioned in section 3001 of the General Code. And it is further my conclusion, in answer to your second inquiry, that the county auditor cannot receive the per diem provided in section 5597 of the General Code in addition to the salary mentioned in said section 2996 of the General Code.

The foregoing reasoning and conclusions, I believe, are in full accord with the undoubted intention of the legislature—that the salary of the auditor provided in section 2996 of the General Code and the salary of the commissioners provided in section 3001 of the General Code shall be in full payment for all services that such respective county officers shall perform.

I enclose herewith copy of opinion to the bureau of inspection and supervision of public offices, dated April 7, 1911, in which I have more fully discussed the effect of the adoption of the General Code.

Trusting that I have fully answered your inquiries, I beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 233.

DEPOSITORIES OF TOWNSHIP AND BOARD OF EDUCATION FUNDS—STATUTORY REQUIREMENTS—UNINCORPORATED BANKS "CAPITAL STOCK."

Under the related statutes, to be entitled to the right to receive township funds as a depository, an unincorporated bank must have a regular place of business, and hold itself out to the public as a general banking business in accordance with 5407, *G. C.*

A board of education of a school district can appoint as a depository, a bank such as above described, and may deposit therein public funds equal to the amount of its "capital stock," i. e., all the property of every kind whether in the form of money or other property being used in the business of the bank.

April 29, 1911.

HON. J. R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—In your inquiry of recent date you have submitted three questions for my consideration. The first two questions so submitted are as follows:

"1. Under section 3320, et seq., being the depository laws relating to township general funds, can a private bank, unincorporated, and

being in fact a partnership, be appointed as depository on giving the proper bond. Such bank has its regular business room and holds itself out to the public as an institution to receive deposits and do a general banking business. It has not complied with any of the provisions of division five, General Code, section 9676, et seq. This bank claims to regularly report to the state banking department. It is known as the Mt. Victory Savings Bank.

"2. Can parties, signing their bid "private bankers," but having no regular banking room, and receiving no deposits be appointed as such depository on giving proper bond?"

Section 3320 of the General Code reads as follows:

"The trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions."

The language of section 3320 is general in its terms authorizing the trustees of the township to direct any "bank, banks or depository" to act as depository of the township funds, and does not seek to limit such deposits to banks incorporated under the laws of the state or organized under the laws of the United States as is the case with deposits for county and state funds. (See section 2715, G. C., and 102 O. L., ——.)

tI is my opinion, therefore, that as no restriction has been placed on the township trustees in choosing a depository for the township funds they may select any depository which would be considered in law as a bank, and are not limited to incorporated state banks or banks created under national laws.

A bank is defined as follows:

In Webster's dictionary:

"Bank—An establishment for the custody or loaning, exchange, or issue, of money, and for facilitating the transmission of funds by drafts or bills of exchange."

By the Century dictionary:

"Bank—An institution for receiving and lending money."

By Bouvier:

"Bank—An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes * * * or to perform some one or more of these functions."

As clear a definition of an unincorporated bank as I can find is that given in section 5407, General Code. Such section reads as follows:

"A company, association, or person, not incorporated under a law of this state or of the United States, for banking purposes, who keeps an office or other place of business, and engages 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, is a bank, or banker, within the meaning of this chapter."

The above section is found among the sections of the General Code in reference to taxation, but I believe the definition therein contained is a safe one to follow:

Coming now to answer the question submitted by you in reference to the township depository, I am of opinion:

(1) That an unincorporated private bank, having its regular place of business and holding itself out to the public as an institution to receive deposits and do a general banking business can be appointed as depository on giving the proper bond.

(2) That parties signing their bid "private bankers," but having no regular banking room and receiving no deposits cannot be appointed as such depository.

You further inquire as follows:

"Can the board of education of a school district appoint a private bank such as is described in question one, as such depository?"

And you draw my attention to the concluding clause of section 7604 of the General Code, which reads as follows:

"But no bank shall receive a deposit larger than its *paid-in capital stock*."

Said clause of said section of the Code has received judicial interpretation in the case of State ex rel. Bank vs. Madison Tp. School Dist. (Bd. of Ed.), 15 Ohio Decisions Nisi Prius 720, the first syllabus of which is as follows:

"1. 'Capital stock' used in Lan. R. L. 6440 (R. S., 3968), means 'capital.'

"The term 'capital stock' used in Lan. R. L. 6440 (R. S., 3968), which confers authority upon boards of education to deposit money coming into the hands of its treasurer with banks, subject to the limitation that no bank shall receive a larger deposit than the amount of its paid-in capital stock, means capital. Hence, a partnership bank, as well as an incorporated one, may be selected as a depository for such funds."

(Section 3968, R. S., quoted in the above syllabus is present section 7604 of the General Code.)

As the word "capital stock" has been construed by the court to mean "capital" my opinion is that any bank whether incorporated or not, which has capital invested in the business thereof, shall be entitled to receive deposits of school funds equal to the amount so invested. The capital of such bank would include all the property of every kind whether in the form of money or other property which would properly be considered as being used in the business of such bank.

I would say, therefore, that the board of education of a school district can appoint as a depository such a private bank as is described in your first question submitted.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

241.

OFFICES INCOMPATIBLE COUNCILMAN AND PROBATION OFFICER—DISQUALIFICATION OF COUNCILMAN—SALARY AS PROBATION OFFICER.

A member of council who accepts the position of probation officer, ipso facto, forfeits his position as councilman, and is legally entitled to compensation received as probation officer.

COLUMBUS, OHIO, May 3, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of the 20th ult., in which you submit the following and request my opinion thereon:

> "Mr. G. S. Morgan was legally, under section 4236 of the General Code, selected to fill a vacancy in the council of the then village of Jackson. He properly qualified and assumed the duties of such office. Later and while still holding such office he was appointed probation officer in the juvenile court of this county. He continued to perform the duties of councilman after receiving the latter appointment. As probation officer he received compensation.
>
> "Did Morgan under section 4218, General Code, forfeit his office as a member of council, and can he be compelled to pay back to the county the compensation he has been paid as probation officer?"

Section 4218 of the General Code, prior to the adoption of the Municipal Code, was section 1717, Revised Statutes of Ohio, and read as follows:

> "* * * no member of council shall be eligible to any other office, or to a position on any board provided for in this title, or created by law, or ordinance of council, except as provided in the seventh division of this title."

The case of State vs. Kearns, 47 O. S., 566, holds in the fifth syllabus thereof as follows:

> "The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void."

I think that holding is a correct construction of said section 1717 of the Revised Statutes, as the same then existed, to wit: "no member of council shall be eligible to any other office, or to a position on any board, etc. You will, however, note the difference in the provision of said section as the same formerly existed and as now enacted in the Municipal Code. Formerly, a member of council was *ineligible* to hold any other office; now, as the section reads:

> "* * * No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia * * *. Any member who ceases to possess any of the

qualifications herein required or removes from the village shall forfeit his office."

In other words, said section as to its effect is just reversed, and instead of the appointment of such councilman to any other office being *absolutely void*, such appointment now works an absolute forfeiture of his office as councilman. In the case of Shank vs. Gard, 8 C. C. R. (n. s.), 599, the court holds as follows:

"1st Syl. The inhibition against the holding of other public office or employment, found in section 120 of the Municipal Code (Revised Statutes, section 1536-613), relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office and employment.

"2d Syl. Where one is elected to council who is already serving in the office of school examiner and is further employed as superintendent of a public school, the election is a nullity by reason of his ineligibility, and council has the right to so determine without notice to the one so affected or the taking of any proceedings against him, and may proceed to fill the vacancy forthwith."

If, in the first instance, one who is holding another office is elected as a member of council, and by virtue of holding such other office his said election is an absolute nullity, then it must necessarily follow as being in accord with section 4218, General Code, that if any councilman accepts any other office after his election as such councilman, his acceptance thereof *ipso facto* works a forfeiture of his office as such councilman.

I am, therefore, of the final conclusion that Morgan by accepting the office of probation officer, by that act, forfeited his office as councilman, but that he retained the office of probation officer and that the compensation paid to him as such officer cannot be recovered by the county.

Trusting that I have fully answered your inquiry I am,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

243.

PROBATION OFFICER—EXPENSES FOR TRANSPORTING JUVENILE DELINQUENTS OUTSIDE OF STATE UNDER ORDER OF PROBATE COURT, NOT ALLOWED.

As the statutes do not go further than to authorize the probate courts to commit juvenile delinquents to institutions or reputable citizens within this state, a probation officer may not be allowed his expenses for transporting a minor under direction of probate court to a home outside of the state.

COLUMBUS, OHIO, May 6, 1911.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of the 1st inst., in which you request my opinion as follows:

"Please advise me whether under section 1682, General Code, the

probation officer is authorized to pay transportation and incidental expenses in transporting a juvenile delinquent from this state to another state, and to be reimbursed for same from the county treasury, provided such expenses have been incurred and paid by such probation officer under the direction of the judge in the juvenile court for the purpose of securing a proper home for said delinquent."

Section 1653 of the General Code provides that:

"When a minor under the age of seventeen years is found to be dependent or neglected, the judge may make an order committing such child to the care of some suitable state or county institution, or to the 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 willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been accredited as hereinafter provided. When the health or condition of the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge."

I am of the opinion that the provisions of the section just quoted are exclusive as to whom the care of such minors may be committed, to wit: to the institutions named therein, or "some reputable citizen of good moral character."

Section 1643 of the General Code provides that:

"When a child under the age of seventeen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attains the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

It is my opinion from a consideration of the above sections, as also the chapter treating on this subject, that the juvenile court is limited to the institutions mentioned in section 1653, or to the reputable citizen therein mentioned, and to retain jurisdiction of the ward, the "institution" or "citizen" must be domiciled within this state. Section 1682, General Code, provides that:

"Fees and costs in all such case with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

It would seem from a reading of the above section that the payment of costs of transportation in such cases is limited to the "places" to which they may have been committed. Calling to mind that section 1683 of the General Code provides that "this chapter shall be liberally construed" I am inclined to the view that the costs of transportation of such children to the different institutions to which they may be committed, or to the residence of a reputable citizen

provided for in section 1653, when it becomes necessary to commit them to such citizen, may be paid from the county treasury as provided in section 1682.

I can well understand that in some cases it would undoubtedly be for the best interests of the children to send them or commit them to relatives in various jurisdictions, but I cannot see where the court has any jurisdiction to commit them to places or persons beyond the confines of the state. And aside from the necessity under the law (sec. 1643, G. C.) of retaining them within the jurisdiction of the juvenile court, I do not think the legislature intended to foist upon any county a chance of having to meet the expenses of foreign travel.

From your question it appears that such expense has been incurred and paid by the probation officer under the direction of the juvenile court. This presents an unfortunate situation, but the law is well settled that "to warrant the payment of fees or compensation to an officer out of the county treasury it must appear that such payment is authorized by statute." (Clark vs. Commissioners, 58 O. S., 107.) Further,

> "A public officer is entitled to receive for services required of him no more than the fees or compensation fixed by law. * * * If in the proper performance of any service it is necessary for him to expend money he is deemed compensated by the fees allowed for the service, and if none is allowed he is deemed compensated by the other fees and emoluments to his office."
>
> State vs. Godfrey, 14 O. C. D., 455.

If the court was without jurisdiction to commit the juvenile delinquent to an institution or person in another state, as I believe the law to be, I am constrained to hold that the probation officer would not be entitled to reimbursement for expenses incurred in complying with the void order.

In Helpin vs. Cincinnati, 2 W. O. Caz, 386 (3 O. Dec. Reprint 58), it was announced that if no fees are prescribed by statute or ordinance a public officer can get none though the services are rendered at the request of a superior.

Board of Commissioners vs. Dunn, 4 N. P., 210.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

245.

TAXES AND TAXATION—EXEMPTION OF FARM BELONGING TO CHARITABLE HOSPITAL AND LOCATED TEN MILES AWAY—HAWKES HOSPITAL OF MOUNT CARMEL.

The Hawkes Hospital of Mount Carmel of Columbus, Ohio, is an institution of public charity only, within the meaning of 5353, *G. C., though some of the patients treated therein pay for services rendered, for the reason that though such payments accrue as a profit to the institution, they are nevertheless devoted to the aims of the institution which are exclusively those of public charity and in no way conducive to private pecuniary gain.*

A farm belonging to said institution which is used exclusively for the purpose of producing food products for the hospital, though situated ten miles away from the institution, is exempt from taxation as "property belonging to institution of public charity only," within the comprehension of section 5353 *aforesaid.*

COLUMBUS, OHIO, May 6, 1911.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of some time ago requesting an opinion, also the communication enclosed, from Hon. H. J. Booth, giving the details of the matter, both of which have received due consideration. In your letter you state:

> "The Hawkes Hospital of Mount Carmel in this city is the owner of a farm consisting of about one hundred and eighteen acres of land, situated in Jefferson township, this county, which was purchased by the hospital during the summer of 1909. This farm is used for dairy, poultry, and gardening purposes, and all of the milk, butter, chickens, eggs and other products are used by the hospital solely. In fact no part of anything produced upon this farm is sold.
>
> "The authorities of the hospital have made request upon the auditor of this county to have this farm placed upon the exempt tax list. Under the present decisions of our courts I am somewhat at a loss to know whether this property is properly exempt, and for that reason I am appealing to you for an opinion upon the subject.
>
> "In enclose herewith letter from Hon. Henry J. Booth, in which he goes into detail regarding the matter, with the request that you return it to me with your opinion."

Mr. Booth's letter is in confirmation of your statement and calls attention to the ruling of the state auditor some few years ago relative to some adjacent ground purchased by the hospital, holding the same exempt. Mr. Booth's letter further states the necessity for the farm in question for the purpose of keeping cows at a distance from the hospital, owing to the complaints of neighbors of the hospital against the maintenance of a dairy in their proximity. He calls attention to the vast work of charity done by this institution, although admitting that some patients who are able pay for the accommodations which they there receive.

It is conceded, as I understand it, that the Hawkes Hospital of Mount

Carmel in this city is an institution of public charity within the exemption of our tax laws. Article XII, section 2 of the Constitution provides:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting bonds of the state of Ohio, bonds of any city, village, hamlet, county, or township in this state, and bonds issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds shall be exempt from taxation; 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; and the value of all property, so exempted, shall, from time to time, be ascertained and published as may be directed by law."

Manifestly, the constitution is not self-operative but it was left for the general assembly to provide by general laws what particular property within the limitation of the constitution should be exempt; and by virtue of, and under the constitutional provision above mentioned, the legislature has provided for the exemption of certain property in the various acts found in 56 Ohio Laws, 177; 61 Ohio Laws, 39; and 88 Ohio Laws, 96, in language practically as follows:

> "All public school houses, and houses used exclusively for public worship, * * * and the grounds attached to such buildings necessary for the proper occupancy or enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with a view to profit.
>
> * * * * * * * * * * * * * * * *
>
> "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to such institutions."

It will be noticed that the term "not leased or otherwise used for profit" seems to be the controlling phrase employed. The provision applicable to the question at hand recurs in identically the same language in all the enactments from the very first to the amendment in 91 Ohio Laws, 393, in which was added "buildings and lands used for armory purposes;" and we find the part appertaining to charitable institutions remaining the same in the Revised Statutes, being clause six of section 2732, Bates' Revised Statutes, which reads as follows:

> "(Public charities and armories.) All buildings belonging to institution(s) of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls

of the governor for troops in case of war, riot, insurrection or invasion together with the road (land) actually occupied by such institutions, and that owned and used as sites for such armory buildings of said military organizations not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions and military organizations."

The exemptions to charitable and educational institutions are so closely allied it may be well to refer to other clauses of said section 2732, Revised Statutes, to wit:

"First. (Schools and churches.) 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; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with the view to profit. This provision shall not extend to leasehold estates of real property held under the authority of any college or university of learning in this state. Provided, nevertheless, that all leaseholds, or other estates or property whatsoever, real or personal, the rents, issues, profits and income of which have been, or hereafter shall be given to any city, town, village, school district or subdistrict in this state, exclusively for the use, endowment, or support of schools for the free education of youth without charge, are and shall be exempt from taxation so long as such property, or the rents, issues, profits and income thereof shall be used and applied exclusively for the support of free education by such city, town, village, district or subdistrict.

"Fifth. (Poor houses.) All lands, houses and other buildings belonging to any county, township or town, used exclusively for the accommodation or support of the poor."

Section 2732, Revised Statutes, had in years become so lengthy and unwieldy, containing ten long clauses, the codifying commission to simplify matters split this section up into many independent sections, and the legislature, adopting the report of the commission now has determined under the constitution the exemption of charitable institutions, heretofore included in the fifth and sixth clauses of section 2732, Revised Statutes, in the following language:

"Section 5353. Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, and property belonging to institutions of public charity only, shall be exempt from taxation."

The sole question for our determination is whether this farm, at a distance from the hospital, is property belonging to an institution of public charity only —is such property as is included within the exemption. It may be well to call attention to some of the adjudications on the subject generally, and which may become applicable to the case at bar. I will include cases arising under kindred clauses of section 2732 of the Revised Statutes, wherever the same, or similar principles, are involved.

The early and oft-cited case of Cincinnati College vs. State, 19 Ohio, 110,

was decided before the adoption of the constitution of 1851. The constitution of 1802 contained no provisions limiting the general assembly as to what should be exempt, yet the law of 1846 enumerated specifically the societies whose buildings and land should be exempt, while the law of 1864 substituted "institutions of purely public charity" and embraced all societies without naming them. I deem the case of interest. Judge Caldwell, in that case, decided that the property of a literary and scientific society, not being used exclusively for literary and scientific purposes, *but being leased for profit* could not be held to be exempt. In passing the court well said:

> "We suppose the plain and palpable meaning of this statute is, that the houses and property which these different institutions need to use whilst engaged in the pursuit of their respective objects, shall be exempt from taxation. Such property, when thus used, does not produce an increase. It is used for purposes other than making money; and as the objects for which it is used are beneficial to community, it is exempted from the burdens imposed upon other property."

The first important case under the statute passed pursuant to the provisions of the constitution of 1851 was the celebrated case of Gerke vs. Purcell, 25 O. S., 229. In this case the levy of taxes on a parochial school was involved and the court at some length discussed the doctrines applying to the exemption of property of institutions of public charity. Judge White (page 243) refers to the case of Phillips vs. Bury, 2 Term, 353, in which Lord Holt said:

> "Now, there is no manner of difference between a college and a hospital, except only in degree; * * * both are eleemosynary."

Continuing, Judge White says, all of these institutions stand as respects their claim to exemption from taxation under the constitution on the ground of their being institutions of purely public charity. This case lays down the following principles of law, which are of interest in this case. I quote from the syllabi:

> "3. The fact that the use of property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether compensation be exacted or not. Whether the use is free or not, becomes material only where some other element is involved than that of its public character, as, for instance, whether the use is charitable as well as public.
>
> "6. The constitution, in directing the levying of taxes and in authorizing exemptions from taxation, has reference to property, and the use to which it is applied; and where property is appropriated to the support of a charity which is purely public, the legislature may exempt it from taxation, without reference to the manner in which the title is held, and without regard to the form or character of the organization adopted to administer the charity."

The same judge in a later case, Humphries vs. the Little Sisters of the Poor, 29 O. S., 201, defines "institutions" as used in the sixth clause of section 3 of the tax law, now part of section 5353, General Code, as follows:

> "2d Syl. The word 'institutions,' in the sixth clause of sec. 3 of

the tax law, is used to designate the corporation or other organized body instituted to administer the charity, and the real estate described as belonging to such institutions has reference to property owned by them; and to entitle such institutions to hold the property exempt from taxation, they must not only own it, but it must be so used as to fulfill the requirements of the statute."

At page 207 the court says:

"The word 'belonging' is used in the same sense throughout the clause, and, as there used, means ownership."

The next cause in which the supreme court is called upon to construe the sixth clause of the exemption act is found in 36 O. S., 253, Library Ass'n. vs. Pelton. The holding of the court in this case was that the library association was not exempted from paying tax on "so much of the building and grounds *not necessary for its use*, and which is *rented out*." The court further said that, if later it became necessary to use the building or any additional parts thereof "the parts *withdrawn from renting* ceased to be *leased* or otherwise *used with a view to profit*," and would then fall within the exemption.

In Davis vs. Cincinnati Camp Meeting Association of the Methodist Episcopal church, vol. 57 O. S., page 257, wherein the camp meeting association owned some twenty-five acres of land near Loveland, Ohio, and maintained on these grounds an ice house, grocery store, water works, public livery stable, hotel and boarding house, which was leased, and charged admission to the camp grounds, the court held that since "none of said real estate is leased by plaintiff, nor is any of said real estate in any manner used with a view to profit" and "none of its lands, as shown by the findings, are used for any other purpose than to provide for the convenience and comfort of those who may attend the meeting" the lands were exempt.

As indicative of how the court is prone to regard these exemptions, attention is called to the case of Little vs. the United Presbyterian Theological Seminary, 72 O. S., 417, in which a new question under section 2732, R. S., was raised, to wit: the taxability of moneys and credits belonging to the institution. Judge Shauck, speaking of institutions of purely public charity, says at page 427:

"Since the particular authority conferred upon the general assembly is to exempt such institutions *without limit or qualification*, and since within the contemplation of the provisions the institution must consist wholly of its property, there appears no ground whatever for the constitutional point raised by counsel for the treasurer."

The question involved in a later expression of the supreme court of Ohio, to wit: the case of Halliday vs. Watterson, 77 O. S., 150, being the question of "taxes or parochial residences," has no application to the question under discussion, for in this case it is conceded that the Hawkes Hospital of Mount Carmel is an institution of public charity only.

In the case of Kenyon College vs. Schnobly, reported in 12 C. C. (N. S.), page 1, where the taxing of certain property belonging to an educational institution was under consideration, the circuit court held:

"1st Syl. The exemption from taxation of property belonging to colleges and academies, provided by section 2732, Revised Statutes,

> extends to all buildings and lands that are with reasonable certainty used in furthering or carrying out the necessary objects and purposes of the institution."

In that case the college had installed a pumping station some distance from the college, and in addition to furnishing water to the college community, sold water to outsiders at a profit. It was held that so long as the practice of vending water to persons not connected with the college was continued the pumping station was taxable, the inference being that if they ceased to sell the water the pumping station would then become exempt. The great question in this case involving exemption was as to whether or not profit was derived. This case was affirmed without report in the 81st Ohio State Report, 514, and is the latest expression of our supreme court upon the exemption of property of such institutions.

From a study of the foregoing Ohio cases, all decided prior to the last change in the language of the statute, which was not so broad as the provisions of section 5353, General Code, we may well deduce the following suggestions as affording some aid in the further consideration of the question at issue, to wit: that the property of institutions of purely public charity, including moneys and credits, is exempt; that an institution is one of purely public charity, notwithstanding a charge may be exacted from those taking advantage thereof, so long as said charge is imposed for the purpose of maintaining the charity, and is not made for profit; that so far as the real estate of an institution of purely public charity is rented out to private uses, unconnected with such charity, such real estate is subject to taxation; but when private enterprises are conducted upon such real estate for the purpose of accomplishing the end for which the institution was created such enterprises do not change the character of the institution, even in part, and the whole estate is exempt; and finally that all buildings and lands that are, with reasonable certainty, used in furthering or carrying out the necessary objects and purposes of the institution are exempt from taxation.

Now, while the right to exemption from taxation in general depends wholly upon positive legislation or constitutional amendment, and although the question whether or not exemption exists in this particular instance depends upon the construction of section 5353, General Code, and whether the property in question comes within such provisions and interpretation, the exemption statutes of the several states are quite similar and a consideration of the holdings in cases in other jurisdictions may furnish material assistance in the solution of the problem involved here. The language of section 5353, General Code, "*property belonging to an institution of public charity only*" is in such general and broad terms that it might well be claimed that all property of such institutions is exempt regardless of the manner of use.

It was held in Savannah vs. Solomon's Lodge F. & A. M., 53, Ga., 93, that the use of a house is immaterial when the exemption is of "any house belonging to a charitable institution."

In 33 La. Ann. 850, New Orleans vs. Orphan Asylum, and in 37 La. Ann. 66, it was held that an exemption of "all the property of charitable institutions" included property leased out for business purposes, the income being used for purposes of charity.

In 87 Tenn., 155, an exemption of real estate "so long as it belongs to an incorporated institution of learning" remains in effect, so long as the title remains in the institution, even if leased to third persons.

In State vs. Hamlin University, Minnesota decided June 8, 1891, it was

held that an exemption of "all corporate property belonging to the institution" applied to all property of the corporation which it may lawfully acquire and hold under the terms of its charter.

The following cases are to the same effect:

Osborne vs. Humphrey, 7 Conn., 335.
Landon vs. Litchfield, 11 Conn., 251.
State vs. Sylvester, 52 N. J. L., 73.
Hardy vs. Waltham, 7 Pick., 108.

I would not go to the extent of holding that property leased for profit is exempt, nor is that question before us, for the property involved here is not used or leased for profit, it being admitted that the products of this farm go directly to the support and maintenance of the hospital. It should be borne in mind that the authorities give more liberal construction to property of charitable and educational institutions even, than they do to houses of religious worship. 16 L. B. A., 291, Note.

Attention is called to the fact that our statute exempts the property belonging to the institution rather than the institution itself. In one of the leading cases, reported in 19 L. R. A., 289, Book Agents of Methodist Episcopal Church, South vs. Hinton (92 Tenn., 188), it was held that, property of a corporation united to a religious denomination and devoted to a business of which the income is applied to needy clergymen and their dependents was exempt from tax under constitutional and statutory laws exempting property held and used purely and exclusively for religious, charitable, scientific, literary or educational purposes.

In the leading case of Trustees of Wesleyan Academy vs. Inhabitants of Wilbraham, 99 Mass., 599, it was held that:

> "A farm and the farming stock owned by an institution incorporated within the commonwealth for the education of youth, and by it worked to raise products and do team work for a boarding houses kept by the institution to supply board to the students at actual cost is exempt from taxation."

The sole question in that case was as to the character of the property assessed by defendant. The evidence showed that plaintiff was an educational institution, and in addition to the school and play ground they owned and cultivated about 150 acres for the purpose of keeping cows to furnish milk, and raising vegetables or other provisions on the farm for the support of the students; that in addition to summer fruits and vegetables used from day to day they raised hogs and grain and cattle, and in the year 1866 they had large crops of beans, beets and potatoes; and ten thousand quarts of milk; all of which was consumed by the students and teachers and domestics of the school. The court said:

> "As it is managed, the object not being to make profit to the fund of the institution but to benefit the students it is really used for the purpose for which the institution was incorporated."

The ruling that farms, whose products are used for the support of schools, are exempt from taxation under the statutes exempting lands belonging to charitable, religious or educational institutions has become a well recognized law.

People, Seminary of Our Lady of Angels vs. Barber, 42 Bunn., 27.
Monticello Female Seminary vs. People, 106 Ill., 398.
Williard vs. Pike, 59 Vt., 202.
New Haven vs. Sheffield School, 59 Conn., 113.
Mt. Hope Boys' School vs. Gill., 143, Mass., 139.

As I stated before, I do not think there is any material difference in the various statutes between the exemption for educational institutions and that of charitable institutions. They are usually joined together in the same phrase in the exemption statutes.

Under the Pennsylvania adjudications, and their statute is similar to ours, the word "institutions" in a statute exempting property of charitable institutions from taxation, signifies an organization which is permanent as a contradistinction from an undertaking which is transitory or temporary. It designates corporations or other organized bodies created to administer charity, and exempts the property which they own or use for charitable purposes only.

Burd. Orphan Asylum vs. School District, 90 Pa., 21.
Philadephia vs. Women's Christian Assn., 125 Pa., 572.
Donoghue vs. Library Company, 86 Pa., 206.

Furthermore, it should be borne in mind that, while ordinarily statutes of exemption are to be construed strictly where the exemption accrues to the benefit of the *person* or *corporation* whose property is exempt from taxation, still, this rule does not apply where the *state* is benefited, or the person or corporation for whom exemption is sought renders public services or a fair equivalent to the state in any other manner.

25 Am. Ency. of Law, 159.
Sisters of Charity vs. Chatham Tp., 52 N. J. L., 373.
State vs. Ginke University, 87 Tenn., 245.

In the case of People ex rel. New York Hospital vs. Pinchy, 58 Hunn., 38, the New York Hospital was by law exempt from taxation of real and personal property in New York City if no income was derived from it, and if the same was used exclusively for the purpose for which the hospital was created. The exemption was extended to property of the hospital wherever situated. The hospital had a farm in Westchester county, the products of which were used for the purposes of the hospital, except some insignificant quantities thereof, which were sold and the proceeds applied to the support of the inmates. It was held that the farm was exempt from taxation and the sale of the few insignificant products thereof was not to be deemed a source of income.

I can see no material difference between an exemption from taxation of "real and personal property wherever situate" and "property belonging to;" both are general and include all things the subject of ownership of the institution.

It has been held in Ohio that the land surrounding the intake of the water works system, purchased by a municipality to protect the purity of its water supply, is exempt from taxation no matter how far away, so long as it is used for public purposes. Likewise, the supreme court in the case of Toledo vs. Hosier, Treasurer, 54 O. S., 421, held gas wells, leases, pipe lines, etc., though

situate in *another county* to be exempt. That they were used for public purposes determined the exemption from taxation; not their location or proximity to the owner.

So, in this case the farm is used for the purposes of the institution, and the institution is *one of public charity only* and therefore is exempt from taxation.

From a full consideration of the preceding adjudications of our own and sister states I am of the opinion that the farm belonging to the hospital and situated in Jefferson township, Franklin county, Ohio, which is used for dairy, poultry and gardening purposes, and all of whose products are used by the hospital solely, and it being conceded that no part of anything produced upon the farm is sold, that such farm is not in any manner used for profit, is a part of the plant of the hospital just as much as though it were contiguous and adjacent thereto, that it is a necessary adjunct to the institution.

In my opinion there is no one thing that marks the advancement of the day in which we live so much as the growth of organized charity, the growth evidenced in the number and character of the hospitals and institutions supported by public funds. But in a louder voice speaks the generosity of the people, and their charity in the institutions that owe their existence and maintenance to the liberality and self-sacrifice of individuals. Sickness and disease, poverty and suffering, are with us, and so long will be offered an opportunity for private munificence. The wider the field occupied the better it is for the general public. It may be that now and then some piece of property used in these charitable purposes may cease to pay taxes, but for every dollar withheld from the public treasury, many dollars will be ultimately saved to it by the relief afforded to persons who would otherwise become public charges. If we but for the minute lift our eyes from the tax lists and think of the great and grand work done by these charities in this city alone, we can readily see the immense gain to the public.

The Hawkes hospital is admitted to be an institution of public charity only. This farm in question is its *property*, and *belonging* to such institution, by the terms of section 5353 it is undoubtedly exempt. In addition, this farm is not rented out or leased; it is not used in any way for gain or profit; it is used as a part of and in connection with the hospital; the milk, eggs, and all of the products of the farm are for the hospital; the agricultural and horticultural business of the farm is conducted thereon by the servants of the hospital for the single purpose of furnishing supplies for its maintenance upon the system adopted to carry on its works of charity. The fact that the farm is situated ten miles away does not alter the case in any way; it is as much a part of the plant as though it were within the curtilage. It is not for us to say what limit should be placed, nor how much or how far away should be the land necessary to carry on the work of the institution, for when otherwise within the statute, the limitation can be measured only by its adequacy. It is governed solely by reasonable necessity and proper use.

I can come to no other conclusion than that this farm, upon the statement of facts presented, is equally as exempt from taxation as the hospital itself.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

247.

BOND ISSUES--COUNTY BRIDGES—PROCEEDINGS SEPARATE FOR EACH BRIDGE—DESIGNATION OF SEVERAL BRIDGES IN ONE RESOLUTION.

The county commissioners have authority to issue bonds for the purpose of building a bridge, but not for the purpose of replenishing the bridge fund.

The commissioners have authority in the sale of bridge bonds to designate several bridges, but each bridge is governed separately by the proceedings of the statutes with reference to resolutions, issue of bonds, notes of electors, levy of taxes, etc., and each issue of bonds must designate the specific bridge whose value exceeds $15,000.00 *and for which the bonds are issued.*

COLUMBUS, OHIO, May 8, 1911.

HON. H. R. LOOMIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 18th, 1911, in which you ask the following questions:

> "1. Do county commissioners have authority to sell bonds to replenish the bridge fund without designating the particular bridge for which the money raised by the sale of bonds is to be expended?
>
> "2. If it is necessary for the county commissioners in the sale of bridge bonds to designate the particular bridge for which the bonds are sold to build, do the commissioners have authority in one resolution to designate several bridges and sell bonds for several bridges at one time, making one issue of bonds for the construction of the several bridges designated?"

In respect to the first question I would say that the county commissioners have no authority to sell bonds to replenish the bridge fund, although the commissioners undoubtedly have the right to issue bonds for the purpose of building a bridge, Section 2434 of the General Code gives them this right. It reads as follows:

> "For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, or other necessary buildings, or bridges or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

It seems clearly to be the intent of the statute that the bonds must designate the particular bridge for which the money raised by the sale of bonds is to be expended.

In answer to your second question, it is the opinion of this department that the county commissioners have authority in one resolution to designate several bridges; but that the bonds issued for the building of such bridges must describe and designate the respective bridge for which they are issued. You will note the wording of the statute. The word "bridge" is singular. Had the

legislature intended this statute to mean "bridges" (plural) it would have made the word "bridge" plural instead of singular. The original copy of this act reads as follows:

> "The commissioners of any county for the execution of the object stated in the first section of this act, or for the purpose of erecting any court house, buildings for county offices, jails, county infirmary or bridge, or for the purpose of enlarging, repairing, improving or rebuilding any such building or bridge are hereby authorized to borrow such sum or sums of money as they shall deem necessary, etc."

"Any bridge" means one bridge, and not a plural of bridges. Section 2438 provides that "bonds shall specify distinctly the object for which they were issued." Such bonds could not specify more than that which is contained in the authorizing statute which says "bridge."

Section 5638 of the General Code provides as follows:

> "The county commissioners shall not levy a tax, or appropriate money for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expense of which will exceed fifteen thousand dollars, except in case of casualty, and as hereinafter provided, or for building a county bridge, the expense of which will exceed eighteen thousand dollars, except in case of casualty and as hereinafter provided, 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 purchasing sites therefor, or for the purchase of lands for infirmary purposes, or for the building of a county bridge, by general tax."

In the last cited section the legislature has seen fit to again use the phrase "for building a county bridge, the expense of which will exceed eighteen thousand dollars, etc." I believe the proper interpretation of this section is that no one bridge shall exceed eighteen thousand dollars without first submitting the building thereof to a vote of the electors of the county, which strengthens my view that such bonds must clearly designate the particular bridge, for the building of which the respective bonds are issued.

It is my opinion that the county commissioners have the legal right to designate several bridges in one resolution and advertisement for the building of the same, and for the issuing of bonds therefor, but the bonds so issued must specify distinctly the respective bridge for the building of which they are issued. This necessarily follows so that it may be known that the cost of each bridge, for the building of which bonds are to be separately issued, is properly, and as a matter of fact within the limitation of section 5638 of the General Code cited above.

I trust that this fully answers your inquiry.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

254.

BOARD OF EDUCATION — BIDS — STATUTORY REQUIREMENTS OF GUARANTEE—BONDS OF SURETY COMPANY AS SUBSTITUTE FOR CERTIFIED CHECK FOR TEN PER CENT. OF BID.

Section 7623, G. C., requiring that bids for the erection of a school building be "accompanied by a sufficient guarantee of some disinterested person" vests the board of education with a certain discretion, but does not empower it to demand more than the statute intends.

When the board, therefore, has provided that bids be accompanied by a certified check for ten per cent. of the bids and the lowest bidder accompanies his bid by a surety company bond equal to its amount, for its payment, the board cannot reject the bid unless bona fide it does not consider the guarantee sufficient.

COLUMBUS, OHIO, May 19, 1911.

HON. JAMES R. BELL, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your letter in which you submit the following statement of facts:

> "That the board of education of the village of London, Ohio, advertised for bids for the erection of a new high school building under and by virtue of the provisions of section 7623 of the General Code, and in said advertisement specified that *each bid must be accompanied by a certified check for ten per cent. of the amount of the bid as a guarantee of good faith on the part of the bidder*, and that a certain bidder did not enclose with his bid a certified check in the amount of ten per cent. of his bid, but instead thereof did enclose a bond of a bonding company guaranteeing that if his bid was accepted he would enter into the contract as required by law, and that said bid was the lowest bid, and otherwise conforms to the law and the advertisement."

and requested my opinion upon the following question:

> "Is the board of education bound to accept the lowest bid in preference to a higher bid which conforms to the law and the kind of guarantee required by the advertisement of said board, viz: a certified check?"

was duly received, and in reply I beg to say that subdivision 4 of section 7623 of the General Code which provides, that

> "each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted a contract will be entered into, and the performance of it properly secured,"

vests in the board of education a discretionary power to decide if the guarantee accompanying the bid is sufficient, but does not authorize said board to compel

bidders to do more than the language of the statute itself can be construed to mean.

This section provides that the guarantee accompanying the bid shall be sufficient, and does not say what guarantee shall be considered sufficient by the said board, but further says that the same shall be of some disinterested person. A certified check cannot be a legal guarantee of a disinterested person under any proper construction given to this statute. Again, the word "person" includes a private corporation, and if the guarantee referred to by you in your inquiry is a guarantee of a surety company, duly authorized under the laws of the state of Ohio to guarantee performance of the acts necessary to be performed on the part of the bidder, then in my opinion the bidder would have met the requirements of the statute in said respect, and if his bid was the lowest, the board would have to award the contract to said bidder unless all bids received by said board would be rejected.

This section 7623, subdivision 6, provides that "none but the lowest responsible bid shall be accepted," hence the board of education is vested with the power to decide as to the sufficiency of the guarantee, and as to the bid being the lowest responsible bid, and if the contract is awarded at all on the bids taken, it becomes the mandatory duty of the board to award the contract to the person having the lowest responsible bid which was accompanied by a sufficient guarantee as above set forth.

For the reasons heretofore stated, I am of the opinin that the board of education should award the contract to the bidder referred to in your inquiry, if awarded at all, assuming, of course, that the guarantee is bona fide deemed sufficient by the board.

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

D 255.

INTOXICATING LIQUORS—DOW-AIKEN TAX—SALE OF LIQUORS ON MINOR'S PROPERTY WITHOUT CONSENT OF MINOR.

The property of a minor which has been used, without the consent of the minor, by a stepfather and guardian for the purpose of illegal selling of intoxicating liquors thereon, cannot be subjected to the payment of the Dow-Aiken tax.

COLUMBUS, OHIO, May 20, 1911.

HON. GUY O'DONNELL, *Prosecuting Attorney, Miami County, Troy, Ohio.*

MY DEAR SIR:—I have your favor of the 19th, wherein you advise,

> "There has been certified by the auditor of state to the auditor of this county an amount of $909.00 as the Aiken tax, to be placed on the duplicate and collected against George Hurst, said Hurst having been convicted of violation of the Rose County Local Option Law. This man, Hurst, is not the owner of any real estate or personal property, but he lives in a house which belongs to his minor stepson, the place in which the violation took place. While the levy has been made against this

minor's property by the auditor, I am inclined to the opinion that the minor not having rented this property and not being responsible for the care and control of it and being in charge of his stepfather, Mr. Hurst, that he would not be liable for the acts of this man Hurst. I should like your opinion in regard to the liability of the property of this minor stepson."

and while I am very much behind with my work on account of the volume of it, and especially because of the time I am required to give to the trial of cases on account of the requisition of the general assembly and the governor, yet, I hasten to reply to your letter because of the fact that the property of a minor is involved.

I entirely concur in your opinion. If the property was rented by a guardian he would, of course, be responsible for the payment of the Dow tax, but it would be an unthinkable proposition to advance to hold that the state or any of its political subdivisions could seize upon the property of a minor child because someone committed a violation of the law in such property.

I appreciate your kindness in giving me your opinion in advance and recommend this as a splendid practice for prosecutors to follow. It aids the attorney general very much in coming to a conclusion, and it is a commendable practice for another reason—it discloses that the prosecutor has the courage of his convictions. I am not meaning this because of the subject-matter, but entirely because I think it is the right rule. Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

256.

INTOXICATING LIQUORS—CONSTITUTIONAL PROVISIONS—"LICENSE"—"POND" AND "SCOTT" AND "DEAN LAW"—DOW-AIKEN TAX—DUTIES OF COUNTY AUDITOR AND TREASURER.

Under the constitution of Ohio, the legislature is not permitted to license the business of trafficking in intoxicating liquors but may provide against the evils thereof.

The decisions construing the "Scott law" and the "Pond law" and declaring them unconstitutional, have established the principle that any attempt by the legislature to impose a condition precedent to engaging in the business, is an attempt to "license" and therefore, prohibited.

In the light of this principle, section 6083 of the Dean law requiring the performance of certain conditions precedent, to be disclosed by answers to certain questions therein demanded with respect to naturalized citizenship, and restraints from certain prohibited acts, is unconstitutional.

Said law in its discrimination against aliens, is furthermore a violation of the fourteenth amendment to the federal constitution, prohibiting the states from denying any "person" within its jurisdiction, the equal protection of its laws.

The county auditor and treasurer therefore, may not reject the Dow-Aiken tax when proffered, regardless of these provisions of section 6083.

COLUMBUS, OHIO, May 22, 1911.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 6th, in which

you request my opinion as to the right of the county auditor or treasurer to reject the tax assessed against the business of trafficking in intoxicating liquor when tendered by a person who has answered any or all of the questions set forth in section 6083 of the General Code in the affirmative.

When my attention was first directed to this question I was in doubt as to whether or not the county auditor in any event had any right to accept what is known as an application for a tax raised inasmuch as the statute did not provide for such application. In view, however, of the convenience resulting from the use of the forms and methods adopted by the various county auditors under instructions from the auditor of state, I have dismissed this question from my mind, and have concluded that the general question which you ask should be answered by the application of the reasoning adopted by my predecessor, Hon. U. G. Denman, in his opinion addressed to the auditor of state, a copy of which I enclose herewith. I concur heartily in Mr. Denman's reasoning and in his conclusion therein expressed with respect to the duty of a county auditor in dry territory in this regard. In cannot, however, concur in Mr. Denman's conclusion with respect to the duty of the county auditor or treasurer to reject the tax assessed against the business of trafficking in intoxicating liquor when tendered by a person who has answered any or all of the questions set forth in section 6083, General Code, in the affirmative.

It is perfectly apparent, I think, that sound public policy requires that the officers charged with the collection of the tax in question should not by accepting payment of it in advance in a sense sanction a business which is illegal and made criminal by statute. The application of this rule then squarely raises the question as to whether or not it is lawful for a person who has answered the questions required to be answered by what is familiarly knwon as the "Dean law" again to engage or to continue to engage in the business of trafficking in intoxicating liquors. The sections of the Dean law called in question by your inquiry are as follows:

> "Section 6081. Each assessor shall return to the county auditor, with his other returns * * * a statement as to each place within his jurisdiction where such business in conducted, showing the name of the person, corporation or co-partnership engaged therein, a brief and accurate description of the premises * * * and by whom owned. Such statement shall be signed and verified * * * by such person, corporation or co-partnership.
>
> "Section 6082. If such person, corporation or co-partnership on demand, refuses or fails to furnish the requisite information * * * or to sign or verify it * * * the assessment on said business shall be fifteen hundred dollars. * * *
>
> "Section 6083. The statement named in section six hundred and eighty-one, shall also contain the following questions and answers thereto:
>
> "1. Are you, or if a firm, is any member of your firm an alien or an unnaturalized resident of the United States?
>
> "2. Have you, or has any member of your firm or any officer of your corporation, ever been convicted of a felony?
>
> "3. Have you, within the past twelve months, knowingly permitted gambling to be carried on in, upon or in connection with your place of business?
>
> "4. Have intoxicating liquors been sold at your place of business to minors, except upon the written order of their parents, guardians

or family physicians, or to persons intoxicated or in the habit of getting intoxicated, within the past twelve months, with your knowledge?

"5. Have you knowingly permitted improper females to visit your place of business within the past twelve months?

"Section 13219. Whoever, being engaged in the business of trafficking in * * * intoxicating liquors, makes false answer to a question set out in the statement which he is required by law to make to the assessor * * * shall be fined."

"Section 13221. Whoever being engaged in the business of trafficking in spirituous, vinous, malt or other intoxicating liquor, makes affirmative answer to a question set out in the statement which he is required by law to make to the assessor or fails or refuses to answer a question set out therein or sign or verify such statement before the assessor, and thereafter engages in the sale of * * * intoxicating liquors shall be fined. * * *"

It is evident from an examination of the foregoing sections that they unequivocally prohibit and make unlawful and criminal the carrying on of the business of trafficking in intoxicating liquors by a person who has answered one or more of the questions set forth in section 6083, General Code, in the affirmative. The reasoning of the enclosed opinion then will apply to the question presented by you unless these statutes, which are so intimately related as to constitute a single scheme of legislation, are unconstitutional.

It has always been my desire to avoid when possible the consideration of the constitutionality of any act of the general assembly. I feel that the attitude which the courts are wont to take in approaching such a question ought to be even more strictly adhered to by the attorney general. In this case, however, there is no escape from a consideration of this question and I shall have to either return no answer at all to your question or to state frankly my views thereon.

Section 18 of the schedule of the constitution of 1851 provided that:

> "At the time when the votes of the electors shall be taken for the adoption or rejection of this constitution, the additional section, in the words following, to wit: 'No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom,' shall be separately submitted to the electors for adoption or rejection. * * *"

The said proposed section of the constitution was adopted and became section 9 of article 15 thereof. It would seem to be clear that the statutes above quoted must under the constitution be justified as a provision against the evils resulting from the business of trafficking in intoxicating liquors and that if they impose conditions upon such business amounting to a license they must be held invalid.

State vs. Hipp, 38 O. S., 199.
Butzman vs. Whitbeck, 42 O. S., 223.
State vs. Sinks, 42 O. S., 345.
Adler vs. Whitbeck, 44 O. S., 539.
Anderson vs. Brewster, 44 O. S., 566.

In passing it is to be observed that the purpose and effect of a law relating

to intoxicating liquors is not conclusively determined by the proposed object of the law as expressed in the title. Thus the act in question which was passed March 12, 1909, is entitled, "an act * * * to further provide against the evils resulting from the traffic in intoxicating liquors," and purports to be enacted under the express power of the general assembly granted to it by section 9 of article 15 of the constitution. However, both the "Pond law" so called, 52 O. L., 153, and the "Scott law," so-called, 80 O. L., 164, were similarly entitled and yet both of them were held by the supreme court substantially to amount to license laws, and therefore to be unconstitutional. (State vs. Hipp, Butzman vs. Whitbeck and State vs. Sinks, *supra.*)

Certain provisions of the "Pond law" afford an interesting parallel in connection with the provisions of the Dean law now under consideration. Among other things that law provided that each person engaged in the traffic in intoxicating liquors should execute a bond to the state, conditioned for the faithful performance of all and singular the requirements of the act. The act prohibited certain things incidental to the traffic, such as furnishing liquor to minors and to habitual drunkards, the carrying on of the business in a disorderly manner, etc. The act further provided that each person so engaged in the business should pay an annual tax, failure to pay which should be deemed a breach of the condition of the bond. It was also provided that if a person should continue in the traffic after his bond had been forfeited he should be guilty of a misdemeanor and fined as well as being liable as for default of his bond. In the opinion of the court in State vs. Hipp, supra, per Okey J., page 284, is found the following language:

> "It is * * * where the person engaged or engaging in the traffic fails to comply with the statute in the way stated, impossible for him to carry on such traffic * * * without committing a crime. But dealers in liquors who execute bonds and pay into the treasury, in advance, annual sums of money, as stipulated in the act, acquire a privilege of freely trafficking in intoxicating liquors * * * to the exclusion of all other dealers.
>
> "* * * it is our duty to look through the collocation of words, whatever the form, to the operation and effect of the statute, and determine from that whether it is within the constitutional inhibition. * * *
>
> "The power to license certain classes of business, impose a charge therefor in the form of a tax, and enforce the payment of the tax as a condition precedent to the lawful prosecution of the business, is well settled. * * * With respect to the traffic in liquors, however, the power to license is * * * in terms denied, but in relation to such traffic express power is granted to 'provide against evils resulting therefrom' * * *.
>
> "An effort has been made to show * * * that giving the bond and paying the money is simply the performance of a condition upon which business may be done, the conditions, it is said, not being different in principle from regulations as to the days and times of closing the place of business, putting in or removing screens or the like. But we think the provisions of this statute are of a very different character. They impose, as we have seen, conditions precedent to the lawful prosecution of such business. Non-compliance with the statute renders its prosecution, to any extent wholly illegal; and hence, the act falls

within the definition of a license law stated in the cases to which I have referred. * * * So, it is objected that there is no provision that a dealer shall be a person of good character; but character is not a necessary element in a license. Whether it is in effect the grant of a license, and therefore inhibited, must be determined from the whole act. The constitutionality of a statute depends upon its operation and effect, and upon the form it may be made to assume. This statute, in its title, is an act to provide against evils resulting from the traffic. In form, it requires the payment of money and the execution of a bond, and provides that certain consequences shall follow in case a dealer in liquors fails to comply with the act. In substance, it is, as to all dealers who fail to comply with its provisions, a stringent prohibitory liquor law, and as to all dealers who do so comply, it grants the privilege in the future to deal in such liquors to the extent not prohibited by previously existing laws. In legal effect, it is an act granting to those who comply with its provisions, licenses to traffic in intoxicating liquors, to the exclusion of all other dealers, and hence it is in conflict with the constitutional provision under consideration."

From this decision Johnson, J., dissented in a very able opinion, but it seems to me that the reasoning of Judge Okey, as expressed in the above quotation is absolutely sound. It may be summarized as follows: that which grants to persons who comply with certain conditions a privilege denied to those who fail to comply with those conditions respecting the carrying on of a business, constitutes a license even though the privilege so granted is not absolute and cannot be construed to confer irrevocable authority upon the grantee thereof to engage in such business. It is the distinction between the rights of the performer of the conditions precedent and those of the person who has failed to perform the conditions that constitute the privilege and the license.

In Butzman vs. Whitbeck, supra, Owen, J., in holding the Scott law, so-called, unconstitutional, referred with approval to State vs. Hipp and employed the following language:

"The Pond law said to the dealer: procure a bond signed by two sureties or stand condemned before the law. The Scott law says to the dealer upon another's premises: procure the written consent of the owner of your place of business or suffer the penalties denounced against you. Nor does the analogy fail because the tax is not the price of the license."

The doctrine announced in these two decisions has never been departed from by the supreme court of this state and it may be regarded as the settled law of this jurisdiction under the constitutional provision above quoted.

Returning now to the analysis of the Dean law, it seems to me fair to say that by virtue of this provision an alien or an unnaturalized resident of the United States is prohibited from engaging in the traffic. Naturalization then is clearly a condition precedent to the doing of the business; therefore a naturalized person is vested with a privilege denied to an unnaturalized person, and this privilege while not identical with that announced as a license in the two cases above referred to, seems to me to be essentially similar thereto.

The other provisions of section 6083 may be grouped together. In effect they impose a character condition upon the privilege of carrying on the business.

In substance they enact that the liquor traffic is a business which may be conducted only by persons of good character. It must be acknowledged that these provisions are somewhat different from the others which have been heretofore discussed in that instead of defining the consequences of failure to do certain things they prescribe the consequences of doing certain prohibited things. They are, however, essentially similar to that provision of the Pond law which was to the effect that a breach of the bond required by the act should bar any person from thereafter engaging in the business.

While as remarked by Judge Okey in his opinion in State vs. Hipp., supra, the character qualification is not an essential element of a license, it seems to me that that which imposes a character qualification upon the lawful doing of a business is in the nature of a license.

From all of the foregoing I incline to the opinion that by virtue of the authority laid down in the cases above cited construing section 9 of article 15 of the constitution, it is not competent for the general assembly of this state to impose any condition upon engaging in the business of trafficking in intoxicating liquors, so that the right or privilege of one class of persons to engage therein is not equal to that of another class. It may provide for prohibiting the traffic entirely, and it may prohibit certain things being done by all persons who are engaged in the business, but it may not impose conditions upon which the business may be carried on, for to do so would be to impose a license upon the same.

As remarked in Butzman vs. Whitbeck, *supra*, it is not essential to a license that there be a charge exacted for the privilege imposed by the license. For this reason the fact that the Dean law, so-called, is supplementary to and to be read in connection with the Dow-Aiken law is immaterial. That is to say it is not because those who engage in the business are required to pay a tax of $1,000 a year that the liquor laws in their present form must be regarded as creating a license, but because, and solely because of the distinction or classification created by section 6083 and related sections above quoted—the *special privilege* enjoyed by naturalized citizens and denied to unnaturalized residents; enjoyed by those who have never been convicted of a felony and denied to those who have been convicted; enjoyed by those who have not knowingly permitted their place of business to be conducted in a disorderly manner and denied to those who have so offended.

In this last connection there is a further question which I have not deemed it necessary to consider, viz: the power of the general assembly to require that a person shall return incriminating answers under oath to questions asked him, and to impose a penalty if he refuses to answer such questions at all, or if in a given case he answers them truthfully.

There is another aspect of the act under consideration, however, which has impressed me as worthy of consideration. As above suggested the fact that this act amounts to a license regulation follows under the decisions above quoted because of the classification of persons which it makes. I think it is fair to say that the general assembly is not permitted to classify subjects of legislation of this sort unless it be for the purpose of imposing a license. However, assuming that there may be other purposes in pursuance of which the general assembly may classify all subjects of legislation in the manner in which they are classified in this act, is the classification which has been adopted a reasonable one? The fourteenth amendment to the federal constitution provides in part that, "no state shall * * * deny to any person within its jurisdiction the equal protection of the law." Without citing authorities, suffice it to say that the supreme court of the United States, while conceding the

power of a state legislature reasonably to classify the subjects of legislation, and while being very reluctant to disturb a classification made by such a legislature, has repeatedly felt called upon to do so in cases in which no reasonable or logical ground appears for the distinction so created, applying in so doing the clause of the federal constitution above quoted. Let it be noted that the word used in this clause is "person" and not citizen, which is elsewhere used in the same section. The use of this word in the context is very significant. The obvious intention of the several states in adopting this amendment was to prohibit the states from discriminating in their legislation against particular classes of persons, and a no less apparent intent is disclosed to deny to the several states the right to legislate against aliens as a class except in cases where such a legislation is necessitated by the existence of some evil abuse or difficulty requiring such action. In other words, by virtue of the fourteenth amendment above quoted a state legislature is prohibited from enacting into law a rule of action with respect to aliens as a class different from that applicable to citizens of the United States unless the fact of alienage creates a real distinction for the purpose of the proposed legislation.

Yick Wo vs. Hopkins, 118 U. S., 336.
Ex Parte, Va., 100 U. S., 339.
Mo. vs. Lewis, 101 U. S., 22.

See also as to special legislation:

Barbier vs. Connelly, 113 U. S., 27.
Mo. Pac. R. R. Co. vs. Mackey, 127 U. S., 205.
Pace vs. Alabama, 106 U. S., 583.
Soonling vs. Crowley, 113 U. S., 703.

Tested by these principles the first paragraph of section 6083 is, in my opinion, clearly unconstitutional. The fact that a person may be unnaturalized cannot, it seems to me, in any way affect his fitness to carry on the liquor traffic even if it be admitted that the general assembly has the power to prescribe the qualifications for carrying on such traffic. The classification created by the first question set forth in section 6083 and the related provisions above quoted is, therefore, purely arbitrary and unreasonable. It is probably true that if the legislature has the power to impose a character qualification as a condition precedent to carrying on the liquor business, and if the remaining questions provided for by section 6083, General Code, do not infringe upon other constitutionally protected rights they would not be violate of the guarantee of equal protection of the law.

As I have heretofore indicated, however, I am of the opinion that the imposition of character qualification is, under the decisions above quoted, equivalent to a license and for that reason the statute under consideration must be condemned.

For all of the foregoing reasons I am of opinion that the Dean law, so-called, and particularly section 6083 of the General Code, is unconstitutional and void, and that, therefore, the county auditor and county treasurer should receive the amount of the Aiken tax from a person tendering it, who has answered any or all of the questions required to be asked under said section 6083 of the General Code, or who has refused to answer any such questions.

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

A 256.

OFFICES COMPATIBLE—TOWNSHIP CLERK AND MEMBER OF BOARD OF EDUCATION.

As there are no compulsory, conflicting duties, the clerk of a township may serve as member of the township board of education.

May 22, 1911.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Under recent date you inquire:

"Can a township clerk serve as member of board of education?"

Section 4747, General Code, as amended April 21, 1910, provides that:

"In township school districts the clerk of the township shall be clerk of the board."

Section 4757, General Code, provides in part:

"No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or shall be employed in any manner for compensation by the board of which he is a member except as *clerk or treasurer.*"

There is no statutory provision forbidding the clerk of the board of education from serving on the board as a member thereof; on the contrary section 4757, supra, expressly recognizes that a member of the board of education can be selected as the clerk thereof.

The question, therefore, arises as to whether the duties of a member of a board of education are so in conflict with the duties of township clerk as to make the two offices incompatible. You call my attention to sections 3303 and 3304 of the General Code in that regard.

Section 3303 reads as follows:

"The clerk may administer oaths, and take and certify affidavits, which pertain to the business of his township, or of the board of education of his township, or connected with the official business of either board, including the official oaths of township and school officers, and oaths required in the execution, verification, and renewal of chattel mortgages."

Section 3304 reads as follows:

"Immediately after the township officers have made their annual settlement of accounts, the clerk shall make and enter in the record of the proceedings of the trustees a detailed statement of the receipts and expenditures of the township for the preceding year, if any, the amount of money received and expended for such purposes in each such district in the township, and the receipts and expenditures of the township board of education. He shall state from what source the

moneys were received, to whom paid, for what expended, and in detail all liabilities, if any. On the morning of the first Tuesday after the first Monday in November, each year, the clerk shall post a copy of such statement at each place of holding township elections in the township. A township clerk refusing or neglecting to make, enter and publish such detailed statement, shall be liable to a fine of not less than twenty-five nor more than thirty dollars, to be recovered before any justice of the peace of the township, and paid into the school fund of the township."

I am unable to see in what respect the duties of a member of the board of education would conflict with those of the township clerk, as above set forth. Throop on Public Offices, section 33, says:

"Two offices are incompatible when the holder cannot, in each instance, discharge the duties of each."

Anderson's Dictionary of Law says:

"Offices are said to be incompatible and inconsistent when their being subordinate and interfering with each other induces a presumption that they cannot both be executed with impartiality and honesty."

It would seem to me that the duties described in the above section 3304 do not conflict with the duties of a member of the board of education, and section 3303, supra, simply prescribes acts which the clerk *may* perform, but does not prescribe acts which he must perform. If the provisions of said section 3304 were compulsory it might well be considered that as the clerk of the township was compelled to administer official oaths to school officers, as he could not administer an oath to himself the two offices would be incompatible. I am of opinion, however, that such is not the case, and that the township clerk can serve as a member of the board of education.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

A 257.

INFIRMARY DIRECTORS—POWER TO REBUILD BRIDGE ON INFIRMARY GROUNDS—PUBLICATION OF NOTICES OF TEACHERS' EXAMINATIONS IN "WEEKLY" PAPERS.

The provisions of section 2529, General Code, are broad enough to empower the infirmary director to rebuild a bridge extending over a creek within the infirmary grounds.

The notice of examinations of applicants for county teachers' certificates must be published once a month and only in a "weekly" paper.

COLUMBUS, OHIO, May 23, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 27th ult., copy of which is as follows:

"The county of Jackson owns an infirmary farm through which there runs a creek. There has been built over this creek a bridge,

which at the present time has become out of repair to such an extent that a new bridge will have to be built. Can this be done by the infirmary directors under section 2529, as being 'repairs,' or does this properly come under those sections of the code which confer the authority upon the county commissioners to build the infirmary and other buildings pertaining to the same?

"I would further like your opinion upon the construction of section 7817 of the General Code. Under this section how many times in a year must the notice mentioned therein be printed, and does the term 'weekly newspapers' include those published semi-weekly, so that a notice might be given in such semi-weekly newspaper?"

The care, supervision and management of the infirmary and the grounds around the same, and the necessary buildings connected therewith, are under the control of the board of county infirmary directors. I take it that the bridge to which you refer is necessary to the successful operation of the infirmary and that the same is as necessary as any other outbuilding connected with the infirmary, and I believe comes within the broad provisions of section 2529 of the General Code which provides as follows:

"On the first Monday of March in each year, the board of infirmary directors shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including all needful repairs thereof. The county auditor shall place the amount so certified on the tax duplicate of the county, and the infirmary directors shall have full control of the poor fund and shall be held responsible therefor."

With respect to your second question, section 7817 of the General Code provides that:

"Each board shall hold public meetings for the examination of applicants for county teachers' certificates on the first Saturday of every month of the year, unless Saturday falls on a legal holiday, in which case, it must be held on the succeeding Saturday, at such place or places within the county as, in the opinion of the board, best will accommodate the greatest number of applicants. Notice thereof shall be published in two weekly newspapers of different politics printed in the county, if two papers thus are published, if not, then a publication in one only is required. In no case shall the board hold any private examination or antedate any certificate."

I think it is the intent, by virtue of said section, that the notice of the intention to hold such examination shall be published every month, since the section reads:

"Each board shall hold public meetings for the examination of applicants for county teachers' certificates, etc. Notice thereof shall be published in two weekly newspapers of different politics, etc."

I think the fair construction means that notice of each such meeting shall be published, and in order to give such notice of such various meetings, notice would necessarily have to be published at least once a month, and I am of

the opinion that such notice must be published in a weekly newspaper, that the same cannot be published in a semi-weekly newspaper. The undoubted reason of the legislature for requiring such notices to be published in a weekly newspaper was, I take it, that such newspapers permeate more into the rural sections of the various counties.

I trust I have fully answered your inquiry.

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

B 258.

OFFICIAL STENOGRAPHERS—SERVICES RENDERED IN CIRCUIT COURT UNAUTHORIZED—COMPENSATION ILLEGAL.

As the statutes did not authorize the employment of official stenographers in the circuit court, the county commissioners are not required to pay for such services rendered therein prior to the amendment to section 1547, *General Code.*

COLUMBUS, OHIO, May 20, 1911.

HON. CHAS. KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 25, 1911, in which you submit for our consideration the following:

> "The inspector who is now at work in Stark county has raised a question with the commissioners as to the payment of the court stenographer's fees for services rendered in the Stark county circuit court. The matter has been referred to me for an opinion. It has been the custom here in Stark county for years to pay the court stenographer the compensation for transcripts ordered by the circuit court and services rendered thereon the same basis and rate as that paid for work in the common pleas court.
>
> "Chapter 3 of the code, section 1514 and 1531 inclusive, which is the chapter pertaining to circuit courts, contains no reference to nor makes any provision for stenographers.
>
> "Sections 1546 and 1547 provide for the appointment of stenographic reporter as official stenographer of the common pleas court, and provides that such stenographers, when so appointed, shall be ex-officio stenographers of the insolvency and superior courts, if any, in such county. It has been claimed that the words 'superior court' would bear interpretation of including the circuit courts because they are superior courts, but this does not appeal to me because there are added the words, 'if any in such county,' this being the more convincing because we have the circuit courts in every county in the state.
>
> "Sections 1549, 1550 and 1552 provide for the fees of court stenographer appointed by the common pleas court. The above sections do not seem to throw any light upon the question as to whether or not the commissioners are authorized to pay bills for stenographic services in the circuit court.
>
> "I am forced to the opinion, therefore, that there is no statutory

authority for the employment and payment of the common pleas court official stenographer for services rendered in the circuit court.

"I would be pleased to have your opinion in this matter at your early convenience."

Section 1547, General Code, as amended 101 O. L., page 110, provides as follows:

> "When the services of one or more additional stenographers are necessary in a county, the court may appoint assistant stenographers, in no case to exceed ten, who shall take a like oath, serve for such a time as their services may be required by the court, not exceeding three years under one appointment, and may be paid at the same rate and in the same manner as the official stenographer. Such stenographers when so appointed shall be ex-officio stenographers of the insolvency and superior courts, if any, in such county, but no such stenographer or assistant stenographer shall be a relative or in the employ of the court or prosecuting attorney."

I have made a careful examination of the statutes relating to the powers of circuit courts and have been unable to find any express authority for the employment by said court of official stenographers. Reference may, therefore, be had to the section quoted above to determine whether such authority can be reasonably inferred therefrom. You will notice particularly that the statute provides, "Such stenographers when so appointed shall be ex-officio stenographers of the *insolvency and superior courts, if any*, in such county. * * *"

I am of the opinion that although the circuit court is superior to the common pleas court it is not such a superior court as is contemplated by this statute. The word "superior" as therein used refers to the title of the court rather than to its jurisdiction. The superior court referred to in said section is one of general jurisdiction concurrent with that of the court of common pleas, as for instance, the superior court of the city of Cincinnati. The legislature at the time of the enactment under consideration must be presumed to have known of the existence of the circuit court in each county of the state; and if it was the intention of the legislature to include said court in its provisions, language could have been employed that would clearly indicate such intention. The words "if any," appearing in said section, clearly indicate to my mind that the legislature referred to insolvency and "*superior*" courts, and not to the circuit courts.

For the foregoing reasons I am of the opinion that circuit courts have no authority, either express or implied, to employ official stenographers, and that county commissioners cannot be required to pay for such services rendered in the circuit court.

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

P. S. Since writing the foregoing, section 1547 was amended so as to specifically include the circuit court in its provisions. This amendment, however, does not in any way change my opinion as to transactions occurring before its adoption.

259.

TAXES AND TAXATION—RIGHT OF COUNTY AUDITOR TO PLACE OMITTED TAXES ON DUPLICATE—POWER PRESERVED FOR YEAR 1910.

The county auditor has the right to place upon the duplicate, taxes omitted for the year 1910, but he may not go back of that year.

COLUMBUS, OHIO, May 24, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Your letter of May 8th, requesting my opinion as to the effect of the act of May 10, 1910, 101 O. L., 430, upon the power of the county auditors to place taxes on the duplicate for five years previous to the discovery of the omission, has just reached me. The letter was unaccountably mislaid and I wish to apologize to you for the accident which has doubtless resulted in so much inconvenience to you.

Your question is, in the main, answered by an opinion heretofore prepared to the tax commission, a copy of which I enclose herewith.

In connection with this opinion which, as you will observe, does not pass precisely upon the exact limit of power of county auditors in the premises, permit me to state that I am satisfied that the joint effect of sections 9, 10 and 11 of the act in question is to permit the county auditors at this time at least to place upon the duplicate omitted taxes for the year 1910, but not to go back of that year. The said sections are as follows:

> "Section 9. The provisions of this act shall not apply to the levy or collection of taxes for the year nineteen ten or to the assessment of personal property for taxation for the year 1910.
>
> "Section 10. That said original sections 3942, 3945, 3948, 3954, 5398, 5399, 5400, 5401 and 5402 of the General Code, and all the acts or parts of acts in conflict herewith be and the same are hereby repealed.
>
> "Section 11. This act shall take effect and be in force from and after January 1, 1911."

It seems to me that the intention is clearly expressed to preserve the power of county auditors with respect to taxes of 1910, but not with respect to the omitted taxes for the previous years.

With respect, then, to the taxes for years prior to 1910, I am of the opinion that the auditors have no power after January 1, 1911, to place such property on the duplicate.

In passing, permit me to observe that section 5401 on close analysis does not appear, either in its original form or in its present form, to authorize the county auditors to go back of the taxing year in which the corrections are to be made. The auditor's power under that section is to correct the returns of the assessors rather than the tax list and duplicate.

I trust that the enclosed opinion, with these supplemental remarks, will be of service to you in the matter in which you are interested notwithstanding the unfortunate and unavoidable delay that has ensued.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

260.

BOARD OF EDUCATION—CANNOT PAY PREMIUM ON BOND OF TREASURER—RECOVERY OF SUCH PAYMENT MADE BY BOARD.

The board of education is not authorized to pay the premium on a surety company bond of its treasurer, even though said premium amounts to more than the salary of said treasurer and when it does pay such premium, recovery may be had against the board in a proper action.

COLUMBUS, OHIO, May 29, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of the 19th, in which you state:

> "I am just in receipt of the report of C. P. Godfrey, state examiner, upon the examination of the school and township accounts of Scioto county, Ohio, and I note he calls attention to illegal payments by the board of education of Portsmouth city school district as follows:
>
> 1909, Jan. 1, Premium on treasurer's bond....$87 50
> 1910, Jan. 29, Premium on treasurer's bond....217 50
> 1911, Feb. 20, Premium on treasurer's bond....375 00
>
> "In view of the fact that one of these payments was made with my knowledge and by my advice when acting as city solicitor, I believe it is only proper that an explanation be given with reference to this item. These facts are about as follows:
>
> "The city treasurer is made by law ex-officio, the treasurer of the city school district. For a number of years the salary of such official acting as school board treasurer has been fixed at $250.00 per annum with the view that an approximate $100.00 of this amount should be used to pay the premium on this bond as such school treasurer, the amount of the bond not having varied to any extent during a period of several years.
>
> "On January 29, 1910, it came to my notice officially as city solicitor that the board of education had a much larger balance in the hands of the treasurer than had been customary in the past and a balance very largely in excess of such treasurer's bond. Thereupon in accordance with law, I notified in writing both the treasurer and board of education of such fact and gave instructions that the bond should be increased to cover the amount of money in the treasurer's hands. It happened that the treasurer had shortly before commenced a new term of office, so that there was no possible chance, as it appeared to me, of increasing his salary in order to provide him with the necessary money to pay for this additional bond.
>
> "In common justice to the treasurer who was called upon unexpectedly to give greater security than usual, I instructed the board of education to pay for this additional security themselves, upon the theory that such additional security required by law was given for the protection of the board of education and not the treasurer; that the expense was an etxraordinary one and since no provision had been made

which would enable the treasurer to pay it out of his very meagre salary, it seemed to me only just and right that the board should pay it, regardless of the fact that there was no express authority for so doing.

"I assume that the item of February 20th, 1911, amounting to $375.00 was paid upon the same theory; I cannot answer positively for this, however, as I was not at that time the legal adviser of the board of education.

"During the past year the board of education has been engaged in the issuing of bonds and the work of constructing the new high school building, which accounts entirely for the unusually large sums of money in the hands of the treasurer.

"Whatever the law may be, I feel no hesitancy in saying that I see no justice or right in the proposition of paying an official $250.00 a year salary, and requiring him to pay out $375.00 per year as premium on surety bond.

"You will understand, of course, that it is very nearly impossible for any fiscal official to furnish personal bond in any such sums as this treasurer has been obliged to furnish. I believe had the department of inspection and supervision of public offices been put in possession of all the facts, attention would not have been called to these items as illegal payments.

"I would like very much to hear some expression from your office as to your views on this proposition."

You request my opinion as to whether the payment by the board of education of the Portsmouth city school district of the premiums for the surety bonds of the treasurer was legal and authorized by law.

Section 4763 of the General Code provides that the city treasurer shall be the treasurer of the school funds of the city.

Section 4764 of the General Code provides that:

"Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education and conditioned for the faithful disbursement according to law of all funds which come into his hands."

Section 4781 provides in part:

"The board of education of each school district shall fix the compensation of its clerks and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. * * *"

The above sections of the General Code provide for the giving of a bond by the treasurer of the school district and the compensation to be allowed by the board for his services as such treasurer, but I find nowhere in the General Code authority for the payment of the premium on the surety company's bond

given by a duly elected treasurer of a municipality who is serving as treasurer of a school district.

I agree with you that under the salary of the treasurer fixed by your board of education, if you compel him to pay for the premium on these bonds, which are in some instances in an amount exceeding his salary, it would be unjust; but the fault is with the law. At the time of the enactment of the statute providing that the treasurer of a school district should give bond, surety company bonds were unknown and all treasurers gave personal bonds. Since the enactment of the law providing for the legality of surety company bonds there has been no change in the statutes in regard to bonds. Under a similar statute the state treasurer was required to furnish and pay for the surety bond furnished by him until Senate Bill No. 57 was passed by the recent legislature. This bill provides that if the treasurer of state gives a surety company bond, the amount of the premium, not exceeding $1,800, shall be allowed and paid for by the state.

I am, therefore, of the opinion that the payment by the board of education of the Portsmouth city school district of the premium on the surety company bonds for their treasurer was illegal and the amount can be recovered in a proper action.

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

B 260.

BOARD OF EDUCATION—DUTY TO MAINTAIN FENCES AROUND SCHOOLS, MANDATORY.

Section 7620, General Code, makes it a mandatory duty of the board of education of a district, to build and keep in good repair, fences enclosing school houses.

COLUMBUS, OHIO, May 29, 1911.

HON. T. E. MCELHINEY, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 29th, 1911, and although somewhat tardy in answering your inquiry, I wish to excuse the tardiness on the ground that this department has been very busy with other matters, especially legislative matters. In answer to your inquiry which is as follows:

> "I desire the opinion of your department on the following question:
>
> "Section 7620 of the General Code provides that 'the board of education of a district * * * shall build and keep in good repair fences enclosing such school houses, etc.'
>
> "Former attorney general Ellis and also Sheets rendered opinions directly opposite to each other as to the duty of the board under this section of the Code.
>
> "Does this section make it mandatory upon the board to maintain fences? Can the adjoining land owner compel the board to fence so much of the lands as abuts his property? Is the board under any

obligation to construct or maintain any part or all of such fence if it does not want it for its own use and protection? Do the sections pertaining to partition fences apply to a board and the adjoining land owner?"

I am of the opinion that said section to which you refer, 7620 of the General Code, is mandatory and that the respective boards of education are bound to keep and maintain in good repair fences enclosing their respective school houses, because section 7620 of the General Code clearly provides and requires that boards of education shall "build and keep in good repair fences enclosing such school houses." This section is not a part of the partition fence laws, but is entirely distinct therefrom and governs and applies to school houses which are under the control of the respective school boards of the state. Therefore, I am of the opinion that the school boards are legally bound and required to build and maintain their respective fences enclosing their respective school houses and school grounds, and that the sections pertaining to partition fences do not apply to boards of education for the reason I have already stated—that all boards of education are bound to build and maintain in good repair fences enclosing their respective school houses as provided by said section 7620 of the General Code cited above, and that said section is no part of the partition fence laws.

Another very salient reason why I am of the opinion that school boards "should build and keep in repair fences belonging to such school houses" is that the burden of so building and keeping such fences in repair should and ought to be borne by the tax payers and the respective school districts equally. Otherwise, the adjoining property owners of the respective school grounds in the state would be bearing more than their portion of the burden in enclosing the respective school grounds of the state. For instance, if one individual owns all of the land surrounding a school grounds he would be required to pay half of the cost and expense of building and maintaining a fence around such public property, which would not be fair; and likewise if two individual citizens of any such school district should own the land adjoining such school grounds, they would be required to bear one-fourth of the expense of keeping and maintaining in repair the fences enclosing such public grounds, which would not be fair, and so one might go on *ad infinitum*.

It is, therefore, my final conclusion that school boards are legally bound by section 7620 of the General Code to build and keep in repair fences enclosing their respective school grounds or school houses for the reasons that I have above enumerated.

Trusting I have fully answered all of your questions, I remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 263.

COUNTY RECORDER—FEES FOR INDEXING MORTGAGES AND DEEDS—NON-COMPLIANCE WITH STATUTE.

When a county recorder keeps up an index which is not as complete as that ordered by section 2766, General Code, but which is authorized by the county commissioners, said recorder will be entitled, under section 2767, General Code, to receive ten cents for indexing each lot or parcel.

Said recorder is obliged in law, however, to make and keep up his indexes as provided by section 2767, General Code.

June 2, 1911.

HON. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 27, 1911, in which you state:

> "Section 2765 of the General Code of Ohio provides for an alphabetical index of deeds and mortgages and section 2766 gives the commissioners authority to order the county recorder to make a general index, as therein provided, in addition to the alphabetical index. Section 2767 of the Code provides that after said general index is brought up that the recorder shall keep up the same and shall receive for indexing any lot or parcel, ten cents.
>
> "I have made no effort to go into detail in reference to these various provisions for the reason that they are self-explanatory, but have merely made reference to their general provisions for your convenience.
>
> "I wish to advise that in this county, we have no other real estate index other than the one, a copy of which I herewith enclose you, known as the Campbell system, and which is self-explanatory. I realize that it is more than an alphabetical index provided for in 2765, yet it does not seem to cover all of the requirements provided for in section 2766, but this system was adopted in our county in the year 1872 and all the prior indexes being brought up to that time and continued ever since and so far as I know, the public generally are satisfied with the system. I might further say that for keeping up this index the county recorder has been paid ten cents for each tract of land indexed, from the county treasury on order of the county commissioners, and the same being paid into the recorder's fee fund since January 1, 1907. In addition to this, the recorder keeps a complete mortgage index identical with this, but kept in what is known as the mortgage index and also an index to oil and gas leases. You will observe that a pertinent description of the real estate is given in this index, giving the original section, township and range, but I certainly will not contend that it is altogether in conformity with section 2766, but taking our deed, mortgage and lease indexes together, they seem to fairly well furnish all the information required in the three sections above referred to.
>
> "One of the former state examiners took the position that our system complied with section 2766, but one of the recent examiners has taken the position that it does not conform with section 2766, but was only an alphabetical index, with some addition, provided in section 2765 and that the recorder was not entitled to be paid the ten cents

for each lot or parcel of land as provided in section 2767, and contended that it should be more of an abstract of title and that each subdivision or lot, etc., should be under the head of the original surveyed section and as I understand it, that all subdivisions under section 12, township 5, and range 4 for instance, should be under that head and you will observe from the copy enclosed that our system does not do this and while it gives in which original survey each tract or parcel is located, it intermingles them just as they are left for record and I am inclined to believe that this is all that the statute requires. However, the other would certainly be a convenience. Of course, if the contention of the latter examiner be true, then the recorder will refuse to keep anything other than the alphabetical index unless he is authorized to keep the one as provided in section 2766.

"I realize that section 2767 provides that the recorder shall be paid for keeping up the index provided in 2766 *and also any other indexes authorized by the county commissioners* and whether our index would be one of those 'other indexes' which the county commissioners are authorized to have made and for which the county recorder is to receive pay therefor, is a query. If the recorder was keeping an alphabetical index as provided for in section 2765 and also the one provided in section 2766 and then the commissioners should authorize another index to be kept such as we have, then I do not think there would be any question but what the recorder would be entitled to pay for keeping up the same, but in a case like ours where the alphabetical index and the index provided for in section 2766 are not kept and only the one known as the Campbell system kept, there seems to be some question. Prior to 1872 nothing but an alphabetical index was kept, but a time after the Campbell system was introduced, this was discontinued for the reason that it seemd mere duplication, but it seems to me that if the alphabetical index was kept in conformity to law and in connection with our system, that it would be sufficient and that the recorder would be entitled to pay therefor. I think I have gone over the situation fully and would like to have your opinion on the following questions:

"First. Is an index kept by the county recorder, such an index as entitled him to receive the ten cents for indexing each lot or parcel of lot from the county treasury?

"Second. If an alphabetical index was kept in addition to the Campbell system, would the county recorder be entitled to pay as provided in section 2767?

"Third. If your answer should be no to both of the above, and the board of county commissioners should order the new indexes as provided in section 2766, will it be possible for the county recorder to begin at this time with the new indexes and keep them up from this time on, or will it be necessary to go back to the beginning and bring them up and then keep them up as provided in section 2767?

"I am sorry to be compelled to trouble you in this matter, but as above stated, it is a serious proposition with us and therefore I would be very much pleased to have as early an opinion on this matter as you can possibly render us."

Section 2765 of the General Code provides:

"The county recorder shall keep a daily register of deeds and a

daily register of mortgages, in which he shall note, as soon as filed, in their alphabetical order according to the names of the grantors, respectively, all deeds and mortgages affecting real estate, filed in his office. He shall keep such daily register in his office, and open to the inspection of the public during business hours."

Section 2766 of the General Code provides:

"When in the opinion of the commissioners of any county they are needed, and they so direct, in addition to alphabetical indexes, the county recorder shall make, in books prepared for that purpose, general indexes to the records of all the real estate in the county by placing under the heads of the original surveyed sections or surveys, or parts of a section or survey, squares, subdivisions, or lots, on the left page of such index book, first, the name of the grantor or grantors; second, next to the right, the name of the grantee or grantees; third, the number and page of the record where the instrument is found recorded; fourth, the character of the instrument, to be followed by a pertinent description of the property conveyed by the deed, lease, or assignment of lease; and on the opposite page, in like manner, all the mortgages, liens, or other incumbrances, affecting such real estate. For his services in making such description and noting incumbrances, he shall receive for each tract described five cents, in addition to his other fees."

Section 2767 of the General Code provides:

"When brought up and completed, the recorder shall keep up the general indexes described in the next preceding section, *or* any other indexes authorized by the county commissioners. He shall receive for indexing any lot or parcel of land, ten cents, to be paid from the county treasury."

Said section 2767 of the General Code is a codification of section 1155, Revised Statutes, which reads as follows:

"When general indexes, such as are described in the next preceding section, or any other indexes authorized by the county commissioners, are brought up and completed, the recorder shall keep up the same; and he shall receive for indexing any lot or parcel of land, ten cents, to be paid out of the county treasury."

You state in your letter that the Campbell system was adopted in your county in 1872 and that the county recorder has been paid for keeping it up on the order of the county commissioners. Therefore, I assume that the indexes kept up under the Campbell system are authorized by the county commissioners.

From a reading of section 2765, supra, it is clear that it is the duty of the county recorder to keep up an alphabetical register of the deeds and mortgages. This the county recorder has failed to do unless the Campbell system may be considered as a compliance with said section. A reference to the sample page of the Campbell system which you furnished will disclose that it is more than what is required by said section, but in no sense can be considered such an index as is required by section 2766, supra. Such being the case, the question

then arises whether it can be considered under section 2767 as "any other indexes authorized by the county commissioners." A reading of section 1155, Revised Statutes, of which section 2767, supra, is a codification, will clear up the language used in said section 2767 and will disclose that it was the purpose of said section to allow the county recorder the compensation of ten cents a lot for keeping up the general indexes provided for under section 2766, supra, *or for keeping up any other system of indexing which may have been authorized by the county commissioners.*

The difficulty in the case in question is that the county recorder has not kept an alphabetical register as required of him by section 2765, supra; had he done so the question would have been clear.

Coming now to answer the question set out in your letter, I am of opinion, that while the county recorder was derelict in his duty in not keeping up the register required by him to be kept under section 2765, supra, yet as you state, the county commissioners have recognized the Campbell system as one *authorized* by them under section 2767, supra, by paying such recorder the fees called for under said section, said Campbell system is to be considered as falling within the words "or any other indexes *authorized* by the county commissioners" and is such an index as entitles him to receive ten cents for indexing each lot or parcel of land from the county treasury.

In conclusion, I would say, however, that the county recorder should keep up the alphabetical register called for by section 2767, as the law specifically makes it his duty so to do.

Trusting that you will find my opinion as given above to be sufficiently comprehensive to cover the three questions asked by you in your letter, I beg to remain,

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

A 264.

SOLDIERS' RELIEF COMMITTEE—EXPENSES OF PREPARATION AND FUNERAL OF SOLDIER TO BE BURIED OUTSIDE OF STATE.

Though a "soldiers' relief committee" may not incur the expense of burying an indigent soldier outside of the state, they may pay for the preparation of the body and the funeral, leaving the expense of actual burial outside of the state, to other parties.

COLUMBUS, OHIO, June 3, 1911.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 24th, in which you call attention to the conclusion of my opinion of April 19th to the effect that "a soldiers' relief committee may not enter into a contract with an undertaker providing for the burial of an indigent soldier in a burial ground outside the state of Ohio," and requesting my opinion further as to whether or not such committee may contract with an undertaker for the preparation of the body and the funeral in this state, leaving the expense of the actual burial in another state to be defrayed by the family of the soldier.

While the question is not exactly clear from a reading of sections 2950 to

2957, General Code, and while no express authority is therein found for the making of any contracts other than the one generally referred to in section 2950 and specifically set forth in section 2954; and while also section 2951 expressly provides that the committee so appointed shall "use the forms of contracts herein prescribed and abide by the regulations herein provided," and section 2952 expressly directs the committee to "cause to be buried such indigent soldier" and to report to the commissioners the place of the burial of the indigent soldier, I am, nevertheless, constrained to hold that the committee may lawfully contract with an undertaker for all the items specified in section 2954 excepting the actual interment of the body. This conclusion is fairly inferable from section 2956 which provides that:

> "If a saving of money is effected, by reason of donations of carriages, owning of cemetery lot, *or other items mentioned in the bill of expense*, the amount of such saving shall go to the family of the deceased, or to those who may have cared for the deceased in life, *or remain in the general fund of the county*, at the discretion of the committee. * * *"

This section clearly recognizes the possibility of a contract being made containing fewer items than those specifically required by section 2954. I know of no reason why the actual interment of the body may not be omitted as well as other items such as the furnishing of two carriages.

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

B 264.

BLIND RELIEF COMMISSION—NEEDY BLIND—PERSON RECEIVING A PENSION.

Those persons are such "needy blind" as to be entitled to assistance from the "blind relief commission" who have not sufficient means to obtain the necessities of life and who, without assistance would become a charge upon the county.

The question of such need is one of fact in the determination of which the fact that such person receives a U. S. pension, is an element to be considered by the blind relief commission, in connection with all other circumstances.

COLUMBUS, OHIO, June 5, 1911.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In reply to your letter of April 5th, 1911, in which you ask this department for a written opinion upon the following question, viz:

> "Is a blind person, who became blind while a resident of this state and who has been a resident of the county for one year, entitled to

assistance from the 'blind relief commission' while receiving a pension from the United States government?"

Beg to advise that section 2965 of the General Code defines "needy blind" in the following language:

> "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 these provisions would become a charge upon the public or upon those not required by law to support him, shall be deemed a needy blind person."
>
> Section 2965, General Code.

It was the intention of the legislature to provide a method for giving assistance to a blind person who because of loss of sight is unable to provide the necessities of life and who has not the means of maintenance, but who, without assistance from the county would become a charge upon the public or those not required by law to furnish support and maintenance.

There are certain jurisdictional qualifications necessary before the blind relief commission can consider an application, which are set forth in section 2966 of the General Code.

> "In order to receive relief under these a needy blind person must become blind while a resident of this state and shall be a resident of the county for one year."
>
> Section 2966, General Code.

The jurisdictional qualifications being present the blind relief commission is authorized to hear evidence and the question as to whether or not assistance is to be granted to an applicant is a question of fact and not a question of law; and the finding of the commission is final and not subject to collateral attack.

The fact that an applicant receives a pension from the United States government should be considered by the blind relief commission in arriving at its judgment as to whether or not the applicant is without sufficient means for his own maintenance, and the fact that the applicant receives a pension from the United States government should only be considered in so far as arriving at a just and proper amount of assistance to be extended in the event that the applicant is found to be a needy blind person, who, without assistance would become a charge upon the public or upon those not required by law to support him.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

266.

FINDING OF BUREAU AGAINST COURT BAILIFF—SETTLEMENT OF CLAIMS—APROVAL OF ATTORNEY GENERAL.

A settlement of claims against a court bailiff for illegal payments by the clerk of courts, would not effect a settlement of other claims for drawing salary as deputy sheriff while holding the office of court bailiff, unless the terms included such settlement, or unless judgment was taken on both causes of action.

Notice should be given to the attorney general before such settlement is made.

COLUMBUS, OHIO, June 7, 1911.

HON. T. E. MCELHINEY, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—I herewith note the receipt of your inquiry of March 3rd, a copy of which is as follows:

> "The court bailiff appointed by the court of common pleas in Morgan county, received payment upon the certificate of the clerk of courts, duplicate payments for a number of dates, the amount being claimed for services rendered at night sessions of the court. The state bureau of inspection, etc., made a finding against said bailiff in the amount of $52.50 for such duplicate payments. During a part of the time that said bailiff was so drawing pay for services as bailiff, he was duly appointed and acting deputy sheriff, drawing a salary of $100 per year as deputy sheriff. Said bailiff has refused to pay the finding made by said bureau and I have suit prepared to file. Under the recommendation of the bureau, I prepared suit to cover the periods that said party was receiving salary as deputy and also compensation as court bailiff. Their further recommendation was to the effect that if said party would settle for the amounts received for said sessions that the settlement should be made.
>
> "My inquiry is this, would settlement of this amount be a bar to a future recovery of such amounts as were drawn when said party was acting as deputy sheriff also?
>
> "Would the approval of your department be necessary to such settlement, when made in accordance with the finding and recommendation of the bureau?"

Answering your first question, I would say that the settlement would not bar a future recovery of the amounts drawn by the party while he was acting as deputy sheriff unless the terms of settlement included such amounts or unless a judgment was taken against the party on both causes of action.

In answer to your second question would say section 286 as found in 101 O. L., 384, provides in substance that, before or after a civil action is commenced to recover fees illegally or unlawfully drawn, it shall not be lawful for the county commissioners or any board or officer to make a settlement or compromise of any claim, such civil action arising out of such malfeasance or misfeasance or neglect of duty so reported upon by the state board of inspection, nor for any court to enter any compromise or settlement of such action without first giving notice thereof to the attorney general and allowing him to be heard in the matter.

So it would appear that at least the tacit approval of this department is

necessary, and such settlement, since the statute provides for the giving of notice to the attorney general and allowing him to be heard in the matter if he so desires.

Regarding the finding of the bureau against your party it might be well for you to look at the case of State ex rel. vs. Shaffer, 18 Ohio Decisions, 303.

I regret very much that I have been unable to get this opinion to you at an earlier date.

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

C 266.

PROSECUTING ATTORNEY—LEGAL ADVISER OF SCHOOL BOARD IN INJUNCTION SUIT BROUGHT BY MEMBER TO PREVENT REMOVAL.

Unless a valid reason exists which prevents the prosecuting attorney from serving, that official is obliged to act as legal counsel for the board of education in defending an injunction suit brought against said board by a member, to prevent his removal for non-attendance at meetings.

COLUMBUS, OHIO, June 8, 1911.

HON. CHARLES F. RIBBLE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Under date of May 6th you ask for my opinion as to whether or not the board of education in a special school district has the power to employ and pay out of the school funds, legal counsel to represent it in defending an injunction suit brought by one of its own members to prevent said board from declaring his office vacant because of alleged non-attendance at meetings of the board, as provided for in section 4748 of the General Code, and you call my attention to sections 2918 and 4761 of the General Code.

Section 2917 of the General Code provides:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Section 2918 provides in part as follows:

> "Nothing in the preceding two sections shall prevent a school

board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

Section 4761 provides in part as follows:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them."

I assume from your question that the special school district to which you refer is one, the territory of which is all within Muskingum county.

Section 2917, supra, makes the prosecuting attorney the legal adviser of all county officers and boards and of township officers.

Section 2918, supra, provides that nothing contained in section 2917 shall prevent a school board from employing counsel to represent it.

Section 4761 makes it the duty of the prosecuting attorney to represent all boards of education in the county in which he is serving, except city school districts, and *provides that he shall conduct all civil actions brought by or against them.* There are certain instances, however, wherein a prosecuting attorney is not required to act, as for example, where the action is between two or more boards of education; also when he is made the legal adviser of both parties to a controversy he may choose which he will represent. The prosecuting attorney being the legal adviser of so many and various officers and boards, it often happens that when a controversy arises between various officers or boards, he being the legal adviser of both parties, it is necessary for him to decide which party he shall represent in the matter.

As I understand the law, it is that unless there is some reason that the prosecuting attorney cannot act in a suit against a board of education it is his duty so to do, and the duty of the board to permit him so to do. If, however, there is some reason that the prosecuting attorney cannot act the board may by virtue of section 2918, supra, employ counsel to represent it.

Since a board of education by virtue of section 4749 is a body politic and corporate, and as such is capable of suing and being sued, it was necessary to provide for the contingency that might arise where the prosecuting attorney could not represent the board and, therefore, it was provided for in section 2918, supra.

I am, therefore, of the opinion that if the special school district to which you refer is wholly within the county, and there is no reason why the prosecuting attorney cannot represent the board of education of said school district, it is the duty of the prosecuting attorney to so represent said board and said board is without authority to employ legal counsel to represent it in place of the prosecuting attorney and pay such legal counsel out of the school funds.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

D 266.

TAXES AND TAXATION—TUBERCULOSIS HOSPITAL—JOINT BOARD OF COUNTY COMMISSIONERS OF ADJOINING COUNTIES—BOND ISSUES —TAX LEVIES—SHARE OF EACH COUNTY—LIMITATIONS.

When the county commissioners of adjoining counties form themselves into a joint board for the purpose of erecting and maintaining a tuberculosis hospital, the financial burdens must be borne by the counties and not by the joint board, as such and the levies must be made and bonds issued by the respective counties in proportion to their tax valuation.

As the statutes so provide, bonds issued for the purchase of a site for a district tuberculosis hospital and for other purposes connected with its establishment are limited to an amount which can be raised by the respective counties by a single levy.

COLUMBUS, OHIO, June 8, 1911.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 18th, submitting for my opinion thereon the following questions:

> "The boards of county commissioners of Montgomery and Preble counties have organized as a joint board for a district tuberculosis hospital and have determined to purchase a site and to erect thereon the buildings necessary to accomplish the purposes set forth in section 3148, et seq., of the General Code. Sufficient money is not at the present time available for these purposes.
>
> "1. May bonds be issued for the purchase of a site?
>
> "2. If bonds may be issued by whom may they be issued and against what tax duplicate are they a charge?
>
> "3. If bonds may be issued may the amount of the issue exceed a sum that will be in anticipation of, and can be paid by, the proceeds of a single levy for one year; or can the amount be in a sum which would have to be paid by a series of levies from year to year."

The sections of the General Code involved in your several inquiries are in part as follows:

> "Section 3148. In accordance with the purposes, provisions and regulations of the foregoing sections. except as hereinafter provided, 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 purposes hereinbefore provided.
>
> "Section 3152. 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 * * *. The boards of commissioners of counties jointly maintaining a district hospital for tuber-

culosis shall make annual assessments of taxes sufficient to support and defray all necessary expenses of such hospital."

The reference in section 3148 to the "foregoing sections" and to "the manner and purposes hereinbefore provided" is manifestly to the appropriate provisions of section 3139, et seq., of the General Code, immediately preceding section 3148, which provide for county tuberculosis hospitals. The following provisions of these sections are important:

> "Section 3140. * * * the board of county commissioners may construct a suitable building * * * to be known as the county hospital for tuberculosis, and the provisions of law requiring the commissioners to submit the question of the policy of building such building to the voters of the county shall not apply thereto.
>
> "Section 3141. The county commissioners shall provide for the proper furnishing and equipment of such hospital. When, in any county, funds are not available to carry out *these provisions*, the commissioners shall levy for that purpose, and set aside the sum necessary, which shall not be used for any other purpose, and they may issue and sell the bonds of the county in anticipation of such levy."

A doubt concerning the first question arises from the use of the italicized phrase in the section last above quoted. At first glance "these provisions" would seem to refer to the duties specifically imposed upon the county commissioners under the section itself, to wit: "the proper furnishing and equipment of such hospital." It is manifest, however, that this limited meaning ought not to be given to this language. Section 3141 is a part only of section 2 of the act found in 100 Ohio Laws, page 86. The remainder of that section provides that the county commissioners may construct a suitable building or buildings; and manifestly, the power of the commissioners to levy extends at least to the making of a levy for the purpose of construction.

But in my opinion the power of the commissioners to make a levy and to issue bonds in anticipation thereof is not confined even to the proposition of construction, furnishing and equipment. The phrase "these provisions" which is manifestly ambiguous and uncertain in its meaning as used in the codified section was clear in its meaning when used in the original act. It was a part of the act above cited, 100 O. L., 86. Not only were sections 3140 and 3141 above quoted parts of this act, but sections 3148, 3149 and 3152, also above quoted, were likewise parts of the same act. "These provisions" then, means in my opinion all the provisions of the act of 1909, and refers as well to the powers of the county commisisoners as members of a joint board under section 3148, as to their powers with respect to county tuberculosis hospitals under section 3140. That is to say, one of "these provisions" is the provision for the selection and acquirement of a site by the joint board.

It is clear I think that the effect of section 3152 is to impose upon the counties in proportion to the taxable property thereof all financial burdens of the district. That is to say, such financial burdens are not the burdens of the district as such, but of the counties composing the district. Therefore, section 3148 in providing 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 * * * tuberculosis, and may provide the necessary funds for the purchase of a site * * * in the manner and for the purposes hereinbefore provided" means, in my opinion, that the commissioners

as commissioners, and not as a joint board, must provide the necessary funds for the purchase of a site.

The effect of all these related sections, in my opinion, is to authorize the county commissioners of any two or more counties as a joint board to ascertain the first cost of the hospital, including the cost of the acquisition of a site therefor, and to apportion the same by the rule laid down in section 3152 to the counties themselves; then, as boards of county commissioners to proceed under section 3141 to levy in each county a special tax to meet the apportioned cost as thus determined. Such special tax may at least be anticipated by an issuance of the bonds of the two counties.

From the foregoing the answer to the second question suggested by you is clear. I think the bonds must be issued by the county commissioners, not by the joint board, and are the bonds of the counties themselves. They may be issued without submission of the policy thereof to a popular vote.

A more difficult question is presented by the third question asked by you. The sections above quoted on their face limit the power of county commissioners in the issuance of bonds for district or county tuberculosis hospital purposes to such bonds as may be paid for by a single levy. Upon careful consideration of the question thus presented I am of the opinion that this strict construction must be given to section 3141 and that the commissioners have no authority under favor of this section to borrow money for a period of years necessitating successive levies for the retirement of the bonds issued. I reach this conclusion upon comparison of related sections. Section 3133, providing for the establishment of county hospitals, in explicit language authorizes the issuance and sale of bonds in anticipation of taxes "to be levied for such purpose," and for an annual levy and the creation of a sinking fund. No authority is found in section 2433, et seq., General Code, for the issuance of bonds for the specific purpose under consideration. I am, therefore, of the opinion that bonds for the purchase of a site for a district tuberculosis hospital, as well as for other purposes in connection with the establishment and maintenance of such hospital when issued by the county commissioners of the several counties comprising the district must be limited in amount as to each county to a sum which may be provided for in a single levy.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 267.

BOARD OF EDUCATION OF VILLAGE SCHOOL DISTRICTS NOT LIABLE FOR TUITION OF BOXWELL GRADUATES AT HIGH SCHOOLS OF OUTSIDE DISTRICTS.

As village school districts are not enumerated in Section 7747, General Code, the boards of education of such districts are not required to pay tuition of pupils residing therein who hold Boxwell diplomas and attend high schools of other districts.

Under Section 7750, however, the boards of village school districts may, if they so desire, enter into agreement with other districts for payment of tuition at high schools, of pupils resident in said village district.

COLUMBUS, OHIO, June 9, 1911.

HON. STANLEY W. MERRELL, *Assistant Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your favor of April 15, in which you state:

"Under General Code, sec. 7747 (Revised Statutes, sec. 4029-3), the obligation of a board of education not maintaining a high school to pay high school tuition for pupils who have passed the Boxwell examination is limited to pupils residing in township or special school districts. Under this provision, boards of education of village school districts are not included unless by implication.

Under Code sec. 7748, boards of education maintaining first, second or third grade high schools may be required to pay the tuition of pupils residing in such districts who desire to attend high school for four years, that is, such boards may be obligated to pay tuition for such pupils for the balance of a four-year high school course. I note that this section has, by the opinion of a prior attorney general, been held to be a general obligation and to include in its terms village districts. The result of these two sections herein referred to would be to require a village district maintaining a one-year high school course to pay high school tuition for its pupils who attend the high school of another district for the remaining three years of a full high school course, and to exonerate a village district maintaining no high school from paying any high school tuition at all. I should be obliged if you will give me your views of the interpretation of General Code, sec. 7747, taken either alone or in connection with other provisions of the law as regards the liability, if any, of a village school district maintaining no high school to pay the high school tuition of its pupils."

Section 7740 of the General Code, as amended April 15, 1910, reads as follows:

"Each board of county school examiners shall hold examinations of pupils of townships and special districts, *and of village districts* in the subjects of orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, including civil government and physiology. Two such examinations must be held annually, on the third Saturday of April and one on the third Saturday of May, at such place or places as such board designates."

Prior to April 15, 1910, said section did not contain the words italicized above, to wit: "and of village districts." Consequently prior to that time there was no provision in the law allowing a pupil of a village school district to take the Boxwell examination and receive a diploma thereunder permitting said pupil under section 7744 of the General Code to enter any high school in the state.

The general assembly sought by said amendment to said section 7740 to correct the law in that respect, but failed to also amend section 7747 of the General Code, which in part reads as follows:

"The tuition of pupils holding diplomas and residing in township or special districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month."

I am, therefore, of opinion that the board of education of a village school district which does not maintain a high school is not required to pay the tuition

of its pupils when attending a high school. In other words, as I view said section 7747, it places the obligation to pay tuition of its pupils when attending a high school upon township and special districts, but does not place the same obligation upon a village district.

Section 7750 of the General Code reads as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil townships, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Above section 7750 as I view it may well be construed to include within its terms village school districts as well as township and special districts, and is to be construed in connection with section 7747, supra.

That is to say, in reading said section 7750 the provisions of section 7747 must be kept in mind. As I view it, section 7750 authorizes the board of education not having a high school to enter into an agreement with a board of education maintaining a high school for the schooling of all its high school pupils; that when such agreement is made the board making it shall be exempt from the provisions of section 7747, supra (to wit: township and special districts), from the payment of tuition at other high schools as provided in section 7750, and that if no such agreement is entered into if the board is required to pay the tuition under section 7747 the school to be attended can be selected by the pupil holding a diploma.

I am, therefore, of the opinion that although a board of education of a village school district is *not required* to pay the tuition of its pupils while attending a school, yet by virtue of the provisions of section 7750 such board of education of a village school district is authorized, if it sees fit, to enter into an agreement with another board of education for the schooling of its high school pupils.

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

C 267.

TAXES AND TAXATION—EXEMPTION OF HOUSES USED AND OCCUPIED BY NUNS OF THE CATHOLIC CHURCH.

Houses used and occupied by the nuns of the Roman Catholic church, are exempt from taxation.

COLUMBUS, OHIO, June 10, 1911.

HON. HENRY HART, *Prosecuting Attorney. Sandusky, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your recent communication, in which you inquire as follows:

> "The county auditor of this county has placed on the tax duplicate a house used and occupied by the sisters of the Roman Catholic church for taxation. The taxes were not paid and the property was sold at tax sale. The reason for not paying the taxes was because of the opinion of W. D. Gilbert, auditor of state, which was furnished to Mr. Otto Hasserodt, auditor of Lorain county at Elyria, Ohio, which letter is as follows:
>
> " 'MR. OTTO HASSERODT, *Auditor, Lorain Co., Elyria, Ohio.*
>
> " 'DEAR SIR:—Referring to correspondence in relation to the taxation of sisters' and brothers' houses, beg to advise that the circuit court of Franklin county decided that the sisters' and brothers' houses are, under the provisions of section 2732, Revised Statutes, exempt from taxation, which decision was affirmed by the supreme court of Ohio in the case of Watterson vs. Halliday, et al.
>
> " 'You are therefore authorized and directed to place upon the exemption list of your county, the property of that description.
>
> " 'Yours very truly,
>
> " 'W. D. GILBERT,
>
> " '*Auditor of State.*' "
>
> "Our auditor has refused to follow this opinion. Please advise me at your earliest convenience whether or not in your opinion this property is exempt from taxation. My understanding is that these houses are used exclusively by the sisters of said church."

In reply to your letter I wish to say that this department has recently rendered an opinion, which opinion is based upon the decision as held by the supreme court in the case of Watterson vs Halliday et al., and in which opinion we hold that houses used and occupied by the sisters of the Roman Catholic church are exempt from taxation. I think that the opinion to which I refer to answers your inquiry and I am enclosing a copy of same herewith.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 272.

EXAMINATIONS FOR VETERINARY SURGEONS—SPECIAL MEETING, ILLEGAL—CERTIFICATES WITHOUT EXAMINATIONS, ILLEGAL.

The board of examiners may not grant certificates of right to practice veterinary surgery, except upon examinations held at a regular meeting of the board as provided by sections 1174 *and* 1175, *General Code, with the one exception provided in section* 1174, *for persons who have practiced prior to May* 21, 1894.

COLUMBUS, OHIO, June 20, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 13, 1911, in which communication you submit the following inquiry:

> "On complaint made to me by parties in Elyria, and by people in Huron county, concerning a veterinary surgeon so-called, who commenced the practice of his profession in that city under the following conditions: The practice was commenced without the certificate required by section 1174 of the General Code, and since the time of commencing the practice, no examinations have been held under section 1172.
>
> "I am informed, however, that the state board of examiners appear to have granted a certificate to the applicant at a special meeting, and examination, which seems to be in conflict with section 1174 of the General Code. Please advise me:
>
> "First, whether the board of examiners can meet in special sessions and grant a certificate; and whether a certificate so granted would be a valid certificate, entitling the applicant and the holder to practice veterinary medicine and surgery."

In answer to your inquiry, section 1174 of the General Code provides:

> "Before entering upon the practice of veterinary medicine and surgery in this state, each person shall pass an examination as to his qualifications and fitness to engage in such practice, before the state board of veterinary examiners."

On May 10, 1910 (101 O. L., 355), said section was amended to read as follows:

> "Before entering upon the practice of veterinary medicine and surgery in this state each person, except such as qualify as hereinafter provided, shall pass an examination as to his qualifications and fitness to engage in such practice. Said examination shall be conducted by the state board of veterinary examiners and shall include veterinary anatomy, veterinary physiology, general pathology, veterinary pathology, materia medica, veterinary therapeutics, principles and practice of veterinary medicine, veterinary surgery, veterinary obstetrics, and the control of contagious diseases of domestic animals; and an average grade of at least 70% shall be required for passage.
>
> "Any person who within six months after the passage of this act, submits satisfactory evidence to the state board of veterinary examiners

that he was engaged in the practice of veterinary medicine and surgery in this state prior to May 21st, 1894, and who pays a fee of $2.50 to said board, shall be entitled to practice veterinary medicine and surgery in this state and shall receive a certificate from the said board signed by the members thereof, which certificate shall state that the person to whom it is given is legally entitled to practice veterinary medicine and surgery in this state; and no person shall, after six months following the passage of this act, practice veterninary medicine and surgery in this state without first having obtained from the state board of veterinary examiners a certificate entitling him to engage in such practice."

Said section, both before and after the amendment thereof, very clearly and distinctly provides that before entering upon the practice of veterinary medicine and surgery in this state, each person shall pass an examination as to his qualifications and fitness to engage in such practice, and I am by reason thereof firmly of the opinion that it is mandatory upon the state board of veterinary examiners to grant certificates only in the manner set forth in said section 1174 of the General Code, and that any certificate issued otherwise than in conformity with the said section would not be a valid certificate entitling the holder to practice veterinary medicine and surgery in this state, and this is especially true in view of the fact that section 1175 of the General Code specified that:

"An applicant for such examination shall present himself at a regular meeting of the state board of veterinary examiners, and pay five dollars for each examination. The fee shall accompany his written application and be paid to the secretary of the board previous to such meeting. One-half the amount of the fee shall be returned to the applicant if he fails in an examination or if a diploma is accepted in place of any examination."

I believe that I have fully answered your inquiries and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 273.

COUNTY AUDITOR—ADDITIONAL ALLOWANCE FOR OFFICE EXPENSES UPON APPLICATION TO JUDGE OF COMMON PLEAS—TRANSFER OF ALLOWANCE FROM GENERAL FUND TO FEE FUND, BY COUNTY COMMISSIONERS.

When special circumstances exist which make it necessary for a county auditor to expend for salaries and other expenses more than is allowed by the county commissioners, section 2980-1, General Code, provides for an additional allowance by a judge of common pleas upon application therefor and good cause shown. The money is not available, however, until transfer is made of the amount from the general fund by the county commissioners, which ministerial duty may be compelled by mandamus.

COLUMBUS, OHIO, June 22, 1911.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 7th, setting

forth a statement of facts upon which, at the request of Hon. A. Z. Blair, judge of the common pleas court of Adams county, you request my opinion.

I am very sorry that I have been unable to give immediate attention to this matter. I have been prevented from doing so by an unusual pressure of trial work in the department. The statement of facts and the question submitted are as follows:

> "The receipts of the auditor's office of this county for the year ending September, 1910, were approximately $1,800.00.
>
> "The county commissioners on December 6th, 1910, fixed the aggregate amount for deputies, etc., in said auditor's office at $600.00 for the fiscal year.
>
> "By reason of quadrennial appraisement and the restoration of various records destroyed in the court house fire, the commissioners by resolution on their journal have found that it will require $400.00 additional allowance to have the necessary work done in said office, and said auditor has made application to a judge of the court of common pleas for said additional allowance of $400.00 under the provisions of section 2980-1 as enacted and approved by the general assembly May 25th, 1911.
>
> "*Question*: Is the allowance of said sum of $400.00, made by said judge upon the proper findings thereof, a good and valid allowance of said additional amount?"

Said section 2980-1, as enacted May 25th, 1911, provides in part as follows:

> "Provided, however, that if at any time any one of such officers requires additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries."

This language is plain and clearly contemplates the making of an allowance such as that described in your question. The only question of which I am able to conceive arising under the law and the facts as stated by you is, as to whether the power conferred upon the common pleas judge by section 2980-1 may be exercised during the present year. That is to say, section 2980-1 in that portion of the same not above quoted regulates the amount of the allowance which may be made to each of the county officers embraced within the county officers' salary law, so-called, and manifestly is not effective until the date when the next such regular allowance is to be made, viz: in November, 1911. Some ground would, therefore, appear for holding that the remainder of the section above quoted relating to the making of additional allowances will not be applicable until regular allowances have been made.

I am not, however, disposed to attach any importance to this possible objection to the procedure suggested in your question. The act of May 25th, 1911, as a whole, took effect upon its approval by the governor upon that date. The portion of it as above quoted is in the form of a supplement to section

2980. That section creates the power and duty of making an annual allowance. Section 2980-1 simply limits this power in some respects and amplifies it in others. The limitations, to be sure, are not effective until next November. No intention, however, appears, it seems to me, to postpone the effect of the section in those respects in which it amplifies the power of the commissioners until after they have made their next allowance under section 2980.

I am, therefore, of the opinion that section 2980-1 is effective at the present time and now operates to confer upon the county commissioners the power, upon the order of the judge of the common pleas court, to make additional allowances from time to time as necessity may require. I know of no other possible reason why the question which you suggest should be answered in the negative. I might say, however, that the money allowed by the common pleas judge is not, under section 2980-1, available until the commissioners have transferred the same from the general county fund to the fee fund affected by such allowance. That is to say, the allowance of the judge is insufficient in itself to authorize the expenditure of the money allowed by him. However, the commissioners may be compelled by mandamus to discharge their ministerial duty in the premises.

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

D 273.

TAXES AND TAXATION—BANK AND BANKING—REAL ESTATE LISTED AS ASSETS OF BANK CANNOT EXCEED CAPITAL STOCK.

A banking company in making a report for taxation, to the auditor, is required to list all real estate upon which capital stock is issued, as assets of the bank, and it therefore cannot happen that the value of the real estate would exceed the capital stock of the bank, as was stated to be the case with certain Columbus banks owning buildings upon which a rental income was realized outside of the particular business of the bank.

COLUMBUS, OHIO, June 21, 1911.

HON. H. C. SHERMAN, *Assistant Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 27th, in which you inquire as follows:

> "Mr. Frederick M. Sayre, auditor of Franklin county, has asked this office to interpret section 5412 of the General Code with reference to the duty of the auditor in fixing the value of property owned by banking institutions. The above section provides:
>
> > "'Upon receiving such report (referred to in the preceding section), the county auditor shall fix the total value of the shares of such banks and the value of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares, each according to their true value in money, and deduct from the aggregate sum so found, of each, the value of the real estate included in the state-

ment of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier, manager or owner with the valuation of such shares of property representing capital employed as so fixed by the auditor.'

"The question naturally arises in this connection whether or not a banking company, owning a large building containing offices or rooms which produce a large amount of revenue to the owners of said bank, can deduct the entire assessed valuation thereof from the valuation of its capital stock. We have a number of banking institutions in this city owning buildings and occupying only a small portion of said buildings for banking purposes, the rest of said buildings being divided into suites of rooms which are revenue producing. The taxable value of such real estate has heretofore exceeded the valuation of their capital stock, and therefore they were exempt from taxation so far as the banking business is concerned. Does the statute above referred to really permit this, or should such institutions only be allowed to deduct that part of their real estate used in the daily operation of the banking business?"

Section 5411 of the General Code provides as follows:

"The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liadilities of such bank at the close of business on the Wednesday next preceeding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank."

Section 5412 is copied in your inquiry, quoted above.

It is my judgment that the value of the buildings in which the respective banks in the state are located enters into and becomes a part of the assets of the banks, inasmuch as the cashiers of the respective state banks of Ohio return to the county auditor their annual report containing in detail the resources and liabilities of their respective banks as provided by section 5411, General Code. Section 5412 provides that, based upon the said annual report provided for by section 5411, the county auditor shall fix the total value of the shares of such bank and the value of the property representing the capital employed by unincorporated banks according to their true value in money (which in both cases includes the building and real estate occupied by such respective banks), and from that true value in money, so found by the auditor, he shall deduct the value of the real estate, included in the report of the cashier so made to the auditor as provided by section 5411. In other words, the true value in money of the real estate occupied by the respective banks is in fact listed in the assets of the banks, then the value of such real estate in which the respective banks are located is deducted by the auditor as provided by statute, and if proper returns are made by the banks and a proper valuation

made thereon by the county auditor, it could not happen that the valuation of a bank's real estate would exceed the capital stock of the bank, for, as I have above pointed out, the value of the real estate upon which part of the capital stock of the various banks is issued must necessarily enter into and make up part of the capital of the respective banks. The court very aptly makes this same explanation in the case of National Bank vs. Treasurer, 5 O. F. D., at page 474 of the opinion.

I believe I have fully and satisfactorily answered your inquiry.

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

275.

TAXES AND TAXATION—INTOXICATING LIQUORS—DOW-AIKEN TAX—CEDAR POINT RESORT COMPANY TAXED FOR EACH "PLACE" WHERE LIQUOR IS SOLD.

The meaning of section 6071, General Code, intends that the Dow- Aiken tax shall be assessed against the Cedar Point Resort Company for each "place" within the area of the resort wherein the traffic in intoxicating liquors is carried on, and therefore $1,000.00 may be assessed both for the traffic in the Breakers Hotel and in the Coliseum.

COLUMBUS, OHIO, June 22, 1911.

HON. HENRY HART, *Prosecuting Attorney, Erie County, Sandusky, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 14th, wherein you state:

> "I am advised that the Cedar Point Resort Company, which operates a resort within the corporate limits of Sandusky known as Cedar Point, has asked for an opinion as to the provisions of section 6071 of the General Code imposing a tax of $1,000.00 upon the business of trafficking in intoxicating liquors for each place where such business is carried on. The resort company operates two places upon its grounds, one in its hotel known as the "Breakers,' and the other known locally as the 'Coliseum.' The county auditor contends that the company is liable to pay the tax upon each place. Inasmuch as the resort company is relying for its claim that it is liable but for the payment of a tax on one place upon the information obtained from a state inspector or traveling tax officer, I deem it not improper to request your opinion as to the proper construction of the law."

Section 6071 of the General Code provides:

> "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

Section 6072 of the General Code provides:

> "Such assessment, with any penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within this state, to wit: one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December of each year."

Section 6065 of the General Code provides that, the phrase "trafficking in intoxicating liquors," as used in the chapter and in the penal statutes of this state, means "the buying or procuring and selling of intoxicating liquor otherwise than upon prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes. * * *"

From a consideration of section 6071, supra, it is plainly evident that each person, corporation or co-partnership *for each place* where such business is carried on is liable to the payment of the tax. The only question is, "What is meant by the word 'place'?" As used in the statutes, this word "place" has a variable meaning depending upon the connection and the circumstances. "A *place* of business is the place *actually occupied* either continually or at regular periods by a person or his clerks or those in his employment for the purpose of carrying on his business." American and English Encyclopedia of Law, page 631.

Webster defines "place" as "an area—any portion of space regarded as distinct from other places."

Century Dictionary defines "place" as "an area or portion of land marked off or regarded as marked off or separated from the rest as by occupancy, use or character; locality; site; spot."

I am of the opinion that each "place" means each particular site used for the carrying on of the business and that under the Aiken tax law the operation of a bar in the hotel and the conducting of another bar in a different building and at a distance from the hotel is conducting two separate places, rendering the proprietors thereof liable for the payment of two separate taxes.

This view is emphasized by consideration of section 13051. This section provides:

> "In regular hotels and eating houses the word 'place' as used in the next preceding section, shall mean the room or part thereof where such liquors are usually sold or exposed for sale and the keeping of such rooms or part thereof securely closed shall be a closing of such place within the meaning of the section."

Thus under the Sunday closing law, the keeping of a bar in a hotel securely closed complies with the law. Of course, it could not be contended that the closing of the bar in the "Breakers" Hotel would be a closing of the other place where intoxicating liquors are sold as would follow if the two places spoken of in your question were in law regarded as one. Again, section 12957 makes it unlawful for a minor to enter a saloon, beer garden, or other place where intoxicating liquor is sold or offered for sale, and I take it there would be no question but that if a minor entered both the bar at the hotel and the other bar at the Coliseum, he would be guilty of two offenses—of entering two forbidden places.

The provisions of section 6072 providing that the tax is a lien upon the

real property *on and in* which such business is conducted; as also the requirement of section 6081 that amongst other things the blank to be returned by the assessor containing a statement "as to each place within his jurisdiction where such business is conducted showing the name of the person, corporation or copartnership engaged therein, a brief and *accurate* description of the premises where it is conducted and by whom sold; with the other statutes before mentioned tend to confirm the view that the *situs* of the business, the *spot* where the business of selling intoxicating liquors is conducted, is the "*place*" to be taxed under the statutes.

I therefore hold that the Cedar Point Resort Company must pay the tax of one thousand dollars for each bar that it so conducts, as described in your letter.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 284.

TAXES AND TAXATION—COUNTY AGRICULTURAL SOCIETIES—CONTROL OF BUILDINGS AND PERMANENT LEASE OF FAIR GROUNDS—LEVY BY COUNTY COMMISSIONERS FOR ASSISTANCE.

Inasmuch as the fair grounds used by the Harrison County Agricultural Society, being held for only a week each year, are not held by a "permanent lease" and as the control and management of the buildings is left in the hands of the lessor, the commissioners are not authorized, under section 9894, General Code, to make a levy of one-tenth of one mill for the purpose of assisting said society.

COLUMBUS, OHIO, June 30, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Your letter of recent date duly received. I am sorry that immediate reply could not have deen made, but the work of this office is such that I could not reply sooner. In your letter you state:

> "Two or three weeks ago the present general assembly of the state amended section 9894 of the General Code of Ohio, which provides for the county commissioners assisting the county fair boys by making a tax levy 1-10 a mill, etc. The section as amended reads in part: 'When a county or county agricultural society owns or holds under a lease real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners shall on request of the agricultural society annually levy taxes, etc.'
>
> "Now, there is prodadly not another county agricultural association in the state that holds its grounds and its fairs in the manner that the Harrison County Agricultural Society does, but the society desires the benefit of this new statute, and the question is, Does the statute, as amended, cover its case?
>
> "The facts are these: the fair grounds and buildings used by the Harrison County Agricultural Society for holding its annual county fair, is owned by an individual, grounds, buildings and all. The owner of the property leases the said grounds and buildings to the said agricultural

society for one week each year for fair purposes, reserving, however, the hotel building, and some horse stalls located on the said grounds, the lessor also keeping the buildings in proper repair and having the grounds in proper shape for the fair when fair time comes, but the fair boys have nothing to do with the grounds or buildings at any time in the year except for the one week.

"Now the question is: Will section 9894, as amended, cover this case and permit the commissioners to make the levy provided for in said section?"

Section 9894 of the General Code, as amended May 10, 1910, reads as follows:

"When a county or a county agricultural society, owns or holds under lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall, on the request of the agricultural society, annually levy taxes of not exceeding one-tenth of one mill upon all taxable property of the county, but in no event to exceed the amount of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated in anticipation of such levy."

Section 9894 of the General Code, prior to the amendment, reads as follows:

"When a county owns real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of the lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners may annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Prior to the levy of any such tax, if they determine it to be for the best interest of the county and society, such commissioners may pay out of the treasury any sum of money in the general fund not otherwise appropriated in anticipation of such levy."

The purpose of the amendment was to extend the provisions of the section beyond the agricultural society where the county owned the real estate used as a site whereon to hold fairs, also to make mandatory the provision granting aid by way of a tax levy.

You will observe further that section 9894, General Code, prior to the amendment provided when a county owned real estate whereon to hold fairs the county agricultural society has the control and management of the lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners may annually levy taxes, etc., while section 9894 of the General Code, as amended May 10, 1910, reads:

"When a county or county agricultural society *owns* or *holds under a lease*, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such

lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society *annually* levy taxes, etc."

It is perfectly apparent from the expression which is mandatory that the commissioners shall annually levy taxes, the idea of ownership is permanent on the one hand, and a leasehold on the other, and it is my judgement that by the expression "leasehold" here is included a permanent leasehold, because it is the duty of the county commissioners to make an annual levy. This idea of permanency is further sustained by the language of the statute, "and the county agricultural society therein has the control and management of such lands and buildings." This expenditure is for the purpose of encouraging agricultural fairs wherein the erection of buildings and structures play an important part, and it is not to be assumed that this is to be done for temporary purposes.

It is clear to my mind that the lease mentioned lasts at least as long as the county agricultural society may desire. I take it that the character of the lease described in your question falls entirely short of the one required by statute.

I would like to be able to hold otherwise by reason of a desire to help out institutions of the kind you describe, but the language of the statute forbids.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

290.

"SALARY" OF DEPUTY COUNTY SEALER OF WEIGHTS AND MEASURES—PER DIEM "COMPENSATION" ILLEGAL.

Section 2622 providing that the "salary" of the deputy county sealer of weights and measures is to be fixed by the commissioners, comprehends a periodical or annual payment, and not a compensation for services as rendered. Such officer therefore, may not be given a "per diem" compensation.

COLUMBUS, OHIO, July 8, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 26th, in which you submit for my opinion thereon the following question:

"Should the compensation of the deputy county sealer of weights and measures provided for by section 2622 of the General Code as amended June 8, 1911, be a monthly or annually determined amount, or may the county commissioners provide a per diem compensation for such deputy sealer?"

Section 2622 as amended provides in part as follows:

"Each county sealer of weights and measures shall appoint * * * a deputy * * * who * * * shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. * * *"

The word "salary" is defined by lexicographers to mean:

> "The recompense or consideration stipulated to be paid to a person *periodically* for services, *usually a fixed sum to be paid by the year, half year or quarter.*" (Century Dictionary.)
>
> "The recompense or consideration stipulated to be paid to a person for services; annual or periodical wages or pay." (Webster's Dictionary.)

It is clear from these popular definitions of the word that even in the broadest significance the element of periodical payment as distinguished from payment for specific services is found. The courts of this state have been frequently called upon to pass upon the meaning of the word "salary" as used in article 2, section 20 of the constitution of this state, in all of which cases the decision has been that the term means an annual or periodical payment for services dependent upon the time and not upon the amount of the services rendered.

> Thompson vs. Phillips, 12 O. S., 617.
> Gobrecht vs. Cincinnati, 51 O. S., 68.
> State vs. Madison County, 13 O. D. N. P., 97.
> Cricket vs. State, 18 O. S., 9.

These decisions, of course, are not strictly in point, inasmuch as they involve the meaning of the word as used in a particular context. In the light of the popular definitions above referred to, however, it appears I think, that the technical meaning given to the word "salary" in the constitutional provision is not far different from its definite popular meaning. It is true that the word "salary" is sometimes used to denote any sort of compensation; but use is not accurate.

Our statutes abound in words and phrases pertaining to the compensation of public officers, as of necessity must be the case. In such statutes the word "compensation" and the word "salary" are both found. Under all the circumstances I think it is fair to presume that when the general assembly uses the word "salary" it will be presumed to have used it in its accurate or narrower sense, and not as synonymous with "compensation."

A per diem compensation is not a salary within the strict meaning of that word. (Gobrecht vs, Cincinnati, supra.) Such a compensation, which appears at first blush to be based upon time rather than upon the amount of services rendered, is not in fact so based. In reality, a per diem compensation is in the nature of a fee. If the officer is employed on a given day he receives his per diem compensation; if he is not employed he does not receive any compensation on such day. The amount of his compensation for a given period of time greater than a day cannot be with definiteness ascertained in advance. This definiteness of ascertainment is necessary to the existence of a salary.

For the foregoing reasons I am of the opinion that the compensation of the deputy county sealer of weights and measures, required by section 2622 of the General Code as amended to be fixed by the county commissioners, must be an annual or a monthly stipend and may not be a per diem.

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

B 291.

SHERIFF'S FEES—$300 ALLOWANCE IN ADDITION TO SALARY FOR SERVICES—CERTAIN CRIMINAL CASES—APPROVAL OF COMMISSIONERS NOT NECESSARY.

The $300 allowance, permitted for reimbursement to the sheriff for services in criminal cases when the state fails to convict or the defendant proves insolvent and for other services not particularly provided for, is expressly exempted from the salary law provisions and is payable in addition to that official's salary.

As such amounts are allowed by an "officer or tribunal" authorized so to do, i. e., the common pleas court, the approval of the county commissioners is not essential to their payment.

COLUMBUS, OHIO, July 10, 1911.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your letter of May 6th received. It will be unnecessary for me to explain to you the delay in answering for you are aware that I have been engaged continuously for the past two months in the bribery investigation.

You request my opinion as to the force and effect of section 2846, General Code, formerly section 1231, Revised statutes.

Section 2846 of the General Code provides as follows:

> "In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for services in criminal cases, where the state fails to convict, or the defendant proves insolvent, and for other services not particularly provided for. Such allowance shall be paid from the county treasury"

Under section 2998 of the General Code this allowance was specifically exempted from the application of the salary law, so that there is no question but that the sheriff is entitled to a sum not to exceed three hundred dollars, the amount being fixed by the court of common pleas, in addition to his salary, for services in criminal cases where the state fails to convict or the defendant proves insolvent and for other services not particularly provided for.

You inquire whether the amount fixed by the court for these services is to be passed upon by the county commissioners or whether the county commissioners have any jurisdiction over the matter whatever.

Section 2570 of the General Code provides as follows:

> "Except moneys due the state which shall be paid upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from such treasury, upon presentation of the proper order or voucher therefor, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose and on what fund. *He shall not issue a warrant for the payment of any claim against the county, unless allowed by the county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal authorized by law so to do.*"

The amount due the sheriff under section 2846 of the General Code is allowed by an "*officer or tribunal authorized by law so to do*," to-wit, the common pleas court and the county auditor, under authority of section 2570 of the General Code is authorized to issue a warrant in favor of the sheriff on the authority of the order of the court of common pleas, and the county commissioners have no jurisdiction to pass upon the amount allowed by the court for services under section 2846 General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General

C 291.

TWO DAYS' LABOR ON HIGHWAYS—NUMBER OF HOURS IN A DAY—DISCRETION OF ROAD COMMISSIONER.

As the statute does not fix the number of hours which shall constitute a day's labor under the provision requiring two days' labor on the highways, the determination of that question is left to the road commissioner.

COLUMBUS, OHIO, July 10, 1911.

HON. W. V. CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your letter of May 4th received. On account of my connection with the bribery cases and other cases in the courts requiring my attention it was impossible to give you a reply at an earlier date.

You inquire as to the number of hours which constitute a day's work under the two days' labor law required on the public roads.

Section 3375 of the General Code provides who are liable to perform the two days' labor on the highways, under the direction of the road superintendent of the road district in which he resides.

Section 3381 of the General Code provides that any person called upon to perform labor upon the public roads and highways under the provisions of chapter 7, shall appear at the place appointed by the road superintendent at the hour of seven o'clock in the morning with necessary tools and implements, but there is no provision in said chapter that provides for the number of hours that shall constitute a days' work.

Section 6241 of the General Code provides for the number of hours that constitute a days' work in mechanical, manufacturing or mining business, but does not provide for the number of hours that constitute a days' labor on the public roads or public employment.

The number of hours constituting a day's labor on the highways not being fixed by statute, it is, therefore, left to the road superintendent as to the number of hours he shall work the men under his control, and he should be governed by the custom prevailing in that neighborhood.

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

293.

PROSECUTING ATTORNEY——DUTIES IN STATE CASES RESTRICTED TO COURTS OF RECORD.

The duties of the prosecuting attorney in cases in which the state is a party, are confined to cases in courts of record and he is not obliged to appear in such cases in justice of the peace and mayors' courts.

COLUMBUS, OHIO, July 11, 1911.

HON. B. C. SAYLES, *Prosecuting Attorney, Sandusky County, Fremont, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of June 12, 1911, in which communication you inquire as follows:

> "Under section 2916 passed April 18, 1911, is it your opinion that the prosecuting attorney of a county is obliged to prosecute all complaints, suits and controversies in which state is a party,' outside of the courts of record? A question is raised in my county as to whether or not I am obliged to appear in justices of the peace and mayors' courts where the state is made a party. I do not so construe the statute, and it could not have been the intention of the legislature, because it would entail a great expense upon the county in addition to the expense already borne upon the prosecutors' departments. I construe the section to mean that his services will be confined to the courts of record."

In reply to your inquiry, the supreme court has held in the case of Smith vs. Commissioners of Portage county, 9 Ohio, 25, as follows:

> "It is no part of the legal duty of a prosecuting attorney to attend to prosecutions in behalf of the state before justices of the peace; his duties are confined to the courts of common pleas and the supreme court."

In the above case, at page 20 of the opinion, the court says:

> "The act, 31 O. L., 13, provides that it shall be his duty 'to prosecute for and on behalf of the state, all complaints, suits or controversies in which the state shall be a party, within the county for which he shall have been elected, both in the supreme court and in the court of common pleas.' It thus appears that the duty of the county attorney is confined to the supreme court and the court of common pleas, and his appearance in an inferior court is a mere voluntary act, for which the county is not liable unless by express contract."

Section 2916 of the General Code, as amended April 18, 1911, provides as follows:

> "The prosecuting attorney shall have power to inquire into the commission of crimes within the county and shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is

directed by law to prosecute wtihin or without the county, in the probate court, common pleas court and circuit court. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is effected, or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which come into his possession as fines, forfeitures, costs or otherwise."

In view of section 2916 of the General Code as amended April 18, 1911, and the holding of the court in the case of Smith vs. Commissioners of Portage county, cited supra, I am of the opinion that the prosecuting attorney is not obliged to prosecute all complaints, suits and controversies in which the state is a party outside of the courts of record, and that the prosecuting attorney is not legally required to appear in a magistrate's court whether it be the court of the justice of the peace or a mayor's court.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

295.

COUNTY SURVEYOR—EXPENSES—MILEAGE IN ADDITION TO PER DIEM COMPENSATION.

From March 1, 1905, to January, 1906, the county surveyor was not entitled to charge and receive a fee of five cents per mile for mileage going to and returning from his work in addition to the fee of four dollars when employed by the day.

Section 1183, General Code, as amended, however, entitled that official to make and receive said mileage charge in addition to the five dollars per day therein allowed.

July 12, 1911.

HON. H. C. SHERMAN, *Assistant Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of June 27th wherein you state:

"I am enclosing a copy of an opinion rendered to Mr. Hugh K Lindsey, surveyor of Franklin county, on the meaning and construction of section 1183 of the Revised Statutes as it stood prior to the amendment, as found in 98 Ohio Laws, p. 296. Inasmuch as the state bureau of inspection and supervision of public offices has made a finding against Mr. Walter Braun, ex-county surveyor, for fees drawn by the said Mr. Braun from March, 1905, to January, 1906, and their finding is based on an opinion rendered to said bureau from the office of the attorney general during its incumbency by Mr. Wade H. Ellis, I would like to have an opinion from you as to the meaning and construction of the aforesaid section of the Revised Statutes."

In the opinion rendered by you to Mr. Hugh K. Lindsey, surveyor of Franklin county, you conclude as follows:

"I am of the opinion, therefore, that the surveyor was entitled to

charge and receive a fee of five cents per mile for mileage going to and returning from his work from March, 1905, to January, 1906, in addition to the fee of four dollars per day when employed by the day."

Section 1183, Revised Statutes, in force at the time Mr. Walter Braun, ex-county surveyor, drew the fees mentioned, reads as follows:

"The surveyor shall be entitled to charge and receive the following fees: When employed by the day, four dollars for each day; when not so employed, for each rod run, not exceeding one mile, three-fourths of one cent; and for each rod over one mile, one-half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents; for each one hundred words or figures therein, six cents; for calculating the contents of a tract not exceeding four sides, fifty cents, and for each additional line, ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services; and chain carriers and markers are entitled, each, to one dollar."

Subsequently said section was amended so as to read as follows:

"The surveyor shall be entitled to charge and receive the following fees: When employed by the day, five dollars for each day and necessary and actual expenses; when not so employed, for each rod run, not exceeding one mile, three-fourths of one cent; and for each rod over one mile, one-half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents; for each one hundred words or figures therein, six cents; for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line, ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services; and chain carriers and markers are entitled, each, to two dollars."

I am of the opinion that the opinion heretofore rendered by my distinguished predecessor, Hon. Wade H. Ellis, to the effect that the surveyor is not entitled to charge and receive a fee of five cents per mile for mileage going to and returning from his work from March, 1905, to January, 1906, in addition to the fee of four dollars per day when employed by the day, is correct.

While it is true that the punctuation used in such statute may be considered as faulty, yet it is so used throughout the entire statute, and as I view it, it was the intention of the legislature that when the county surveyor is working at a fixed compensation per day he was not entitled to any mileage. This likewise seems to have been the view of the legislature in changing the statute so as to provide in addition to his per diem of five dollars per day, that such county surveyor should receive his actual expenses.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

298.

DITCHES—DUTIES AND RIGHTS OF TOWNSHIP TRUSTEES AND SUPERVISOR OF DITCHES—BILLS IN EXCESS OF AMOUNT IN DITCH FUND NOT ALLOWED.

The township trustees are supervisors of the township ditch fund and they may lawfully refuse to pay bills of the ditch supervisor or any one employed by him, in excess of the amount of the fund in any current year.

COLUMBUS, OHIO, July 19, 1911.

HON. W. F. CORBETT, *Prosecuting Attorney, Paulding Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 17th in which you inquire what, if any, check there is upon a township ditch supervisor with respect to the amount of money which he may expend in apportioning the ditches within his jurisdiction, as required by section 6691, General Code, with particular reference to a case in which the supervisor incurs or attempts to incur liability in excess of the proceeds of a levy made under section 6708 within a given current year.

Section 6691, General Code, provides in part that:

> "For the cleaning and keeping in repair of township and county ditches, the township ditch supervisor shall divide them into working sections and apportion such sections to the land owners * * * according to the benefits received. * * *"

Section 6692 provides that:

> "With the consent of the township trustees, the ditch supervisor may secure the services of a surveyor in making the apportionment and constructing the work."

Section 6708 provides as follows:

> "The township trustees may levy a tax upon all the taxable property of said township, not to exceed five-tenths 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 chapter."

Section 3388 provides that:

> "Such supervisor shall be allowed two dollars per diem, for the time actually engaged in performing the duties of his office, *to be paid by the township trustees*, from the township ditch fund, upon presentation of an itemized account, verified upon oath by the township ditch supervisor. When actually engaged in measuring a ditch or ditches, the supervisor shall be allowed one assistant, who shall receive one dollar and fifty cents per day for the time actually employed, and shall be paid by the trustees from the township ditch fund, upon the certificate of the ditch supervisor."

The sections in pari materia with the sections above quoted provide for the assessments of costs of cleaning out ditches upon the property owners to

whom under section 6691, above quoted, the particular portion of the ditch so cleaned out is apportioned. Quite evidently the per diem of the supervisor and his assistant, and the compensation of the surveyor employed under section 6692, in apportioning the ditches do not constitute a part of the costs to be assessed upon the property owners. These items constitute in my opinion the only charges upon the township ditch fund created under favor of section 6708. Indeed, the compensation of the supervisor and his assistant is expressly made a charge upon this fund; while the compensation of the surveyor appears by necessary inference to be a similar charge.

From the foregoing sections it clearly appears that the township ditch fund is to be expended by the township trustees and not by the township ditch supervisor. Section 3388 expressly requires the compensation of the supervisor and his assistant to be paid by the trustees, while section 6692 requires that the consent of the trustees be secured before the supervisor may employ a surveyor.

From all the foregoing I am of the opinion that it is incumbent upon the township trustees to supervise the expenditure of the township ditch fund and that said trustees may lawfully refuse to pay bills presented by the township ditch supervisor, or by any person employed by him, in excess of the amount of the fund in any current year.

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

A 298.

BOARD OF EDUCATION—CONVEYANCE OF HIGH SCHOOL PUPILS TO OTHER DISTRICTS.

A village board of education is not authorized to make expenditures for the conveyance of its high school pupils to a neighboring district upon abandonment of its high school.

Such board may not include in a tuition contract with neighboring boards of education, a provision for conveyance of high school pupils to and from such district.

COLUMBUS, OHIO, July 19, 1911.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Owing to the vast amount of work that has accumulated in this office in the past few months I have been unable to give attention to your inquiry of May 25th until the present moment.

Under that date you submitted for my opinion the following questions:

> "(1) Has the village board of education authority to make expenditures for the payment of the conveyance of its high school pupils to a neighboring district upon the abandonment of its high school?
>
> "(2) May a village board of education enter into a contract with a neighboring but not adjoining city (or village) district, whereby in consideration of a fixed amount the city (or village) agrees to admit the pupils to its schools and provide for their conveyance to and from the district from which they come?"

The only provisions in the General Code authorizing boards of education to furnish transportation for pupils residing within their jurisdiction are the following:

Section 7730 of the General Code provides:

"The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No subdistrict school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

Section 7732 of the General Code, as amended 101 O. L., 167, provides:

"Boards of education of special school districts may provide for the conveyance of the pupils of such districts to the school or schools of the districts or to a school of any adjoining district, the expense of such conveyance to be paid from the school fund of the special school districts. But boards of education of such districts as provide transportation for the pupils thereof, shall not be required to transport pupils living less than one mile from the schoolhouse; and such boards of education shall not discriminate between different portions of said districts or between pupils of similar ages or residing at similar distances from the schoolhouse."

Section 7733 of the General Code, as amended 101 Ohio Laws, 307, provides:

"At its option the board of education in any village school district may provide for the conveyance of the pupils of the district or any adjoining district, to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district in which such pupils reside. But such boards as so provide transportation, shall not be required to transport pupils living less than one mile from the schoolhouse or houses."

Section 7749 of the General Code provides:

"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 such township district, and the board of education thereof shall be exempt from the payment of the tuition of such 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 includes."

You will note that section 7730, supra, deals exclusively with a township board of education; that section 7732, supra, deals with the board of education of a special school district; that section 7733, supra, provides for the conveyance of pupils of a village school district or *any adjoining district* to schools of the district, which I construe to mean the village school district; that section 7749, supra, deals with township school districts.

Coming now to answer your first question, I am of the opinion that the village board of education has no authority to make expenditures for the conveyance of its high school pupils to a neighboring district upon the abandonment of its high school.

In answer to your second question in regard to the right of the board of education to enter into the contract with the neighboring, but not adjoining board of education, for the schooling of its high school pupils, I respectfully refer you to an opinion rendered by me to Hon. Stanley W. Merrell, assistant prosecuting attorney of Hamilton county, under date of June 9, 1911, a copy of which I herewith enclose.

I am of opinion, however, that there is no authority in the village board of education to have included in such contract a provision for the conveyance of such pupils to and from the district from which they come.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 301.

SOLDIERS' RELIEF COMMISSION—EXPENSE OF RELIEF TO SOLDIER IN LAST ILLNESS WITHOUT FORMAL APPLICATION, ALLOWED.

A county auditor may honor a bill presented for the expense of relief extended to an indigent soldier during last illness without the making of formal application for such relief.

COLUMBUS, OHIO, July 19, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 30th in which you state that the soldiers' relief commission of Harrison county at the suggestion of a ward committeeman extended relief to an indigent soldier during his last illness without the making of any formal application for such relief, and that after his death they presented to the county auditor the bill of expenses so incurred. You state that you are in doubt as to the authority of the auditor to pay the bill under these circumstances, and in particular as to the legality of any receipt that might be given to the county auditor for the money to be allowed.

The following provisions of the statutes relating to the soldiers' relief commission are pertinent:

> "Section 2939. To each person certified by the relief commission to the county auditor, not included in any list *furnished township clerks*, the auditor shall issue his warrant upon the county treasurer for the monthly allowance awarded to such person. *Upon proper cause shown, such commission may appoint a suitable person to draw, receipt for and*

properly expend the allowance made to any person under these provisions, for the benefit of such person, and the indigent members of his family. * * *

"Section 2941. In case of sickness, accident or great destitution, upon the recommendation of a township or ward committee, the relief commission may, at any time, grant immediate relief to any person entitled thereto under those provisions, *under such rules* as it may designate. If any money so awarded as relief shall not be called for by the applicant before the first Monday in December, each year, such amounts shall be paid into the county treasury to the credit of the relief fund."

The relief described by you was granted under the special provisions of section 2941, above quoted. This section does not in so many words provide against the probable contingency of sickness of the technical applicant to a degree which would render him physically unable to make formal application; nor does it provide against the equally probable contingency of the death of the formal applicant without being able to receipt for the money expended in his behalf. It is significant, however, in my judgment, that said section 2941 authorizes the relief commission to designate rules under which immediate relief shall be granted. It would be quite proper, in my judgment, under section 2941 standing alone for the relief commission to promulgate rules which would be binding upon themselves and would constitute adequate authority for the expenditure of money by the county auditor in such cases.

The above quoted provisions of section 2939 are, however, in my opinion, entitled to great weight in connection with the construction of section 2941. As these sections are at present arranged they are seperate, but in the original act, 87 O. L., 354, they were all a part of section 4 thereof. The phrase "under these provisions" as used in section 2939 clearly means therefore "under all the provisions of the related sections." I am, therefore, of the opinion that without the adoption of any rules, such as are referred to in section 2941, it is proper for the commission to appoint a suitable person to draw and receipt for the allowance made to any person under section 2941.

I am further of the opinion that the mere fact that the person to whom relief was extended died before formal application was made does not invalidate the subsequent application of the commission to the county auditor for reimbursement on account of moneys expended by them. Section 2941 speaks of "the applicant," but does not in any express terms require formal application in the name of the person to be relieved. In fact, as already pointed out herein, the very nature of the relief granted negatives any idea of such formal application.

From all the foregoing, then, I am of the opinion that the relief commission may now formally award the amount expended by them as relief to the deceased person in question and may appoint a suitable person to make formal receipt and draft for and of the moneys so awarded. The county auditor would be justified in honoring such award and accepting the receipt of the person so appointed.

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

303.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—BUDGET OF MUNICIPALITY EXCEEDING FIVE MILL LEVY—DUTY OF CITY COUNCIL TO REDUCE LEVY.

When the council of a municipality submits to the county auditor a budget whose amount exceeds a five mill levy upon the tax valuation of the corporation, the budget should be returned to the city council to be brought within the legal maximum.

COLUMBUS, OHIO, July 22, 1911.

HON. HENRY T. HUNT, *Prosecuting Attorney Hamilton County, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of July 22, 1911, requesting my opinion upon the following statement of facts:

> "The budget commission of Hamilton county is in receipt of the budget of the city of Cincinnati from the council of the said city. This budget states that the amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the year commencing January 1, 1912, is the sum of $3,549,044.34.
>
> "The tax duplicate for the city of Cincinnati for said year is approximately $475,000,000.00.
>
> "The law of Ohio provides, section 5649-3*a*, that the aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation for corporation purposes on the tax list shall not exceed in any one year five mills.
>
> "Five mills on $475,000,000.00 will produce $2,375,000.00. The levy made by the city council of Cincinnati is $1,174.044.34 in excess of what the law provides may be levied by the city of Cincinnati.
>
> "The question is what is to be done with this budget? Shall the budget commission proceed to scale this levy down in proportion to the amount levied by the council if this levy, together with all other levies in Hamilton county, shall aggregate more than ten mills; or shall this city levy be returned to the city council with instructions to bring it within the legal maximum of five mills?"

In answering your questions it is necessary to consider sections 5649-3*a* and 5649-3*c*, and these sections are as follows:

> "Section 5649-3*a*. On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes, within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budget shall specifically set forth:
>
> "(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.
>
> "(2) The balance standing to the credit or debit of the several funds at the end of the last fiscal year.
>
> "(3) The monthly expenditures from each fund in the twelve

months and the monthly expenditures from all funds in the twelve months of the last fiscal year.

"(4) The annual expenditures from each fund for each year of the last five fiscal years.

"(5) The monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.

"(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources.

"(7) The amount of the bonded indebtedness setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

"(8) The amount of all indebtedness incurred under authority of section 5649-4 and the amount of such additional taxes as may have been authorized as provided in section 5649-5 of the General Code, setting out each issue in detail as provided in the next preceding paragraph.

"(9) Such other facts and information as the tax commission of Ohio or the budget commission may require.

"The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may be worked out by the tax payers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control.

"Such budget shall be made up annually at the time or times now fixed by law when such boards or officers are required to determine the amount in money to be raised or the rate of taxes to be levied in their respective taxing districts.

"The county auditor shall provide and furnish such boards and officers blank forms and instructions for making up such budgets.

"Section 5649-3b. The county auditor, the mayor of the largest municipality in the county as shown by the last federal census, and the prosecuting attorney shall constitute a board to be known as the budget commissioners, for the annual adjustment of the rates of taxation. The budget commissioners shall meet at the auditor's office in each county on the first Monday in July next following. Each member thereof shall be sworn faithfully and impartially, to perform the duties imposed upon

him by this act. Two members shall constitute a quorum. The auditor shall be the secretary of the budget commissioners and shall keep a full and accurate record of their proceedings. The auditor shall appoint such messengers and clerks as the board deem necessary, who shall receive not to exceed three dollars per day for their services for the time actually employed, which shall be paid out of the county treasury. The budget commissioners shall be allowed their actual and necessary expenses, such expenses to be itemized and sworn to by the person who incurred them, and paid out of the county treasury when approved by the budget commissioners.

"Section 5649-3c. The auditor shall lay before the budget commissioners the annual budget submitted to him by the boards and officers named in section 5649-3*a* of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commissioner of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budget, and may reduce any or all the items in any such budget, and shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law.

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of each township, city, village, school district, or other taxing district, returned on the grand duplicate, and place it on the tax list of the county."

It will be noted from the first paragraph of section 5649-3*a* that the council of each municipal corporation is the board authorized to levy taxes in taxing districts which consist of that particular municipality, and therefore, keeping that fact in mind the further provision contained in section 5649-3*a*, namely "the aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the county, for county purposes, on the tax list, shall not exceed in any one year five mills" it seems to be clear that the intention of the legislature (and to my mind it is clearly expressed by the act itself) is that the aggregate of all taxes to be levied by a municipal corporation, in the corporation, for corporation purposes, must not exceed in any one year five mills;

that is, that under the law the taxing authorities of the municipality are prohibited from certifying to the county auditor that such corporation will require for corporation purposes a greater sum than a levy of five mills upon the tax duplicate of a municipality will produce.

I suppose the difficulty which has occasioned your request, namely, that the city council of Cincinnati has made a levy in excess of the amount which five mills upon the tax duplicate of the city would produce, arises from the language of section 5649-3*a* which provides:

> "The council of each municipal corporation * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budget shall specifically set forth:
>
> "(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year."

then follows nine other items which are required to be stated in making up the said budget. But though the word "estimate" is used in this part of section 5649-3*a*, and although there is no direct statement in this part of the said section, that the council are prohibited from including in the said estimate a greater amount that the levy of five mills upon the tax duplicate of the municipality would produce, still it seems to be beyond all question to me, in taking this new section in its entirety, it can only mean that the specification of the first item required to be set forth in the budget, namely, "the amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year" directs the manner in which council makes the levy; that is, when council specifies in its budget the amount to be raised for the incoming year, it thereby makes the levy, and by the expressed provisions of the latter part of this same section, above quoted, it is specifically limited to an amount that shall not exceed in any one year five mills in the aggregate upon the taxable property in the corporation.

This is further made clear by the provisions of section 5649-3*c* directing that the budget commissioners are to examine the budget and estimate and ascertain the total amount proposed to be raised in each taxing district, and if they find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in such taxing district in the county, to certify that fact to the county auditor; but if such total is found to exceed the amount authorized in any taxing district in the county, the budget commissioners are then to adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein.

If it were held that council, in the estimate, or in the levy, submitted by it to the county auditor could specify an amount in excess of what a five mill levy upon the tax duplicate of the municipality would produce, then, provided they could exceed said limit of five mills, there would be no limit as to the extent to which it could be exceeded, and the further expressed provision of section 5643-3*a*—that the aggregate levy by the taxing authorities in a municipality must not exceed five mills—would be not only inoperative but entirely without meaning; and it can readily be seen that if such a construction were placed upon this statute and the authorities of a taxing district were to be allowed to place in the budget an estimate in excess of the amount limited by law, then section 5649-3*c* would be valueless, because the purpose contemplated by the said law would be disarranged and there would be nothing to prevent a taxing district from levying a greater amount of the taxes than is allowed by law; all

that would be necessary would be to place the amount in the estimate large enough to that when scaled in proportion to the amount returned by other taxing districts, the amount left would exceed the limit prescribed by law.

It seems to me, further, that this question is decided by the decision of the supreme court handed down June 30, 1911, in the case of State ex rel. City of Toledo vs. Charles J. Sanzenberger. The first four paragraphs of the syllabus in this case are as follows:

> "1. The taxing authorities of any taxing district may levy taxes not exceeding the aggregate of ten mills on each dollar of the tax valuation of the property of such taxing district for state, county, township, school and municipal purposes, subject to the further limitation of the paragraphs following.
>
> "2. In addition thereto levies may be made for sinking fund and interest purposes necessary to provide for any indebtedness incurred before the passage of said act, and any indebtedness that may be incurred after the passage of said act by a vote of the people.
>
> "3. In case such levy for the year 1911 shall produce an amount greater than the amount of taxes levied in the year 1910, then such levy of ten mills on the dollar must be reduced to such a rate as will produce no more money than the taxes levied for the year 1910.
>
> "4. A municipal corporation may levy for general purposes, as provided in preceding paragraphs 1, 2 and 3, an aggregate of five mills on the taxable property within such corporation only in the event that such levy of five mills, when added to the levy of state, county, township and school purposes, shall not in the aggregate exceed ten mills on the dollar, and whenever such levies exceed ten mills on the dollar, then it is the duty of the budget commission to scale said levies down in proportion to the amount of each until the total levies so made aggregate ten mills or less."

In this case section 5649-3*a* was construed and the fourth paragraph of the syllabus seems to be decisive of the question submitted by you, by holding that a municipal corporation may levy an aggregate of five mills on the taxable property within the corporation; and that they can reach the maximum of five mills only when said maximum added to the levy for state, county, township and school purposes does not exceed an aggregate of ten mills on the dollar; and that it is the duty of the budget commission, when the aggregate exceeds ten mills, to scale said levy down in proportion to the amount of each until the total levy aggregates ten mills or less.

Therefore, as the law provides, and as the supreme court says, that a municipal corporation may make a levy of not to exceed five mills, it seems beyond question that such levy is to be made by a municipality, and that the only method prescribed by law for making it is by the budget prepared and submitted to the county auditor, and necessarily if such levy, when submitted to the county auditor by the council, is in an amount in excess of what a five-mills levy upon the tax duplicate of a corporation would produce, then said statement or estimate should be returned to the city council with directions to reduce it to the limit fixed and prescribed by law, namely, not to exceed five mills.

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

A 303.

CHILDREN'S HOME—EXPENSES PAID BY TRUSTEES OUT OF APPROPRIATION MADE BY COUNTY COMMISSIONERS.

Out of an appropriation made for the purpose by the county commissioners, the trustees of a county children's home shall pay all bills for the expense of maintaining said institution. Upon the order of these officials, warrants shall be issued by the county auditor upon the county treasurer.

COLUMBUS, OHIO, July 22, 1911.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 22d and wish to say that the delay in answering the same has been due entirely to the large number of opinions which this department has been called upon to render. In your letter you inquire as follows:

> "Who should allow the expense bills of the board of trustees of a county children's home, supported in part by endowment and in part by local taxation, said trustees being appointed to manage and control said home by the county commissioners."

In reply to your inquiry, section 3104, General Code, provides that the board of trustees of the children's home shall make an estimate as to the wants of the home and report such estimate to the county commissioners, quarterly, as follows:

> "The board of trustees shall report quarterly to the commissioners of the county the condition of the home, and make out and deliver to the commissioners a carefully prepared estimate, in writing, of the wants of the home for the succeeding quarter. Such estimate shall specify separately the amounts required for each of the following purposes, to-wit: First—Feed, fuel and forage. Second—Clothing. Third—Pay of officers and employes. Fourth—Repairs. Fifth—Improvement of buildings and grounds. Sixth—Books and stationery. Seventh—Furniture. Eighth—Transportation of inmates. Ninth—Live stock. Tenth—Other expenses."

Section 3105 provides that the county commissioners shall make an appropriation for the children's home and after such appropriation is made the amount of the appropriations shall be paid out upon the order of the trustees of the home, as follows, to-wit:

> "At their regular quarterly meeting at which such estimate is presented to them, the commissioners shall carefully examine the estimate, and if, in their judgment, it is reasonable and ratably within the assessment for the support of the home for the current year, or so much thereof as they deem reasonable and within such assessment, the board of commissioners shall allow and approve, and shall appropriate and set apart such amount for the use of the home. Upon the order of the trustees of the home, the county auditor shall draw his warrant upon the county treasurer, who shall pay such warrant from the fund so appropriated and set apart."

So that in conclusion, it is my opinion by reason of the provisions of the above quoted sections that it is the duty of the county commissioners to make an appropriation of such an amount from the public funds as is necessary to maintain and operate the children's home and that the funds so appropriated are paid out upon the order of the trustees of the children's home. The last sentence of section 3105 of the General Code clearly provides that the trustees of the children's home shall pass upon all expense bills and that upon their order the county auditor shall draw a warrant upon the county treasurer who shall pay such warrant from the funds appropriated and set apart for such children's home.

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

B 303.

WITNESSES—FAILURE TO ATTEND FOR COUNTY AUDITOR AND BOARD OF EQUALIZATION AND REVIEW—ENFORCEMENT BY PROBATE COURT.

County auditors and boards of equalization and review are empowered to compel attendance of witnesses through the probate court under penalty of the procedure generally applicable for such purposes by that tribunal.

COLUMBUS, OHIO, July 22, 1911.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—As a partial answer to your letter of June 8th, which has remained unanswered for some time on account of the unusual pressure of business in this department, I beg to enclose you herewith copy of my opinion to the tax commission relating in general to the inquisitorial powers of the county auditors and the boards of equalization and review.

The second question which you ask in your letter is as follows:

"Upon the failure of a witness to appear to testify after being notified, is there any provision for proceeding in contempt?"

Section 5403 of the General Code provides as follows:

"When a person summoned to appear before the county auditor and give testimony, under the provisions of the next two preceding sections, or in proceedings against companies or corporations required to make return to the county auditor for taxation, neglects or refuses to appear, or neglects or refuses to answer a question that is put to him by the auditor touching the matter under examination, the auditor shall apply to the probate judge of the county to issue a subpoena for the appearance of such person before him. On the application of the county auditor, the probate judge shall issue a subpoena for the appearance of such person forthwith before him to give testimony. If any person so summoned fails to appear, or appearing, refuses to testify,

he shall be subject to like proceedings and penalties for contempt as witnesses in actions pending in the probate court."

Section 5585 General Code provides as follows:

"If a person notified to appear before the board (of equalization) refuses or neglects to appear at the time required, or appearing, refuses to be sworn, or answer any question put to him by the board, or by its order, the presiding officer shall make complaint thereof, in writing to the probate judge of the county, who shall proceed against such person in like manner as is provided for in the last subdivision of chapter three of this title."

Section 5624 of the General Code, amended at the last session of the general assembly specifically confers upon boards of review the same powers as those conferred upon boards of equalization.

The nature of the compulsion which the county auditor and the board of equalization or review respectively may exert upon an unwilling witness appears, I think, very clearly from the forgoing sections. I may add that if your question relates particularly to the quadrennial boards of review section 5579 of the General Code, which confers upon quadrennial boards all the powers of annual boards, operates to make section 5585 specifically appliable to such quadrennial board.

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

A 309.

TOWNSHIP BOARD OF EDUCATION—LIABILITY FOR TUITION OF RESIDENT PUPILS AT HIGHER GRADE HIGH SCHOOLS—NECESSITY FOR GRADUATION OF PUPIL AT LOCAL HIGH SCHOOL OF LOWER GRADE.

When a township board of education maintains a third grade high school, such board is in no sense liable for tuition of pupils at other high schools of higher grade, when such pupils are not graduates of the said third grade local high school.

COLUMBUS, OHIO, July 31, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communisation of May 2, 1911, and to say in explanation of the delay in answering your inquiry that it has been due to the large number of inquiries which this department has received for its attention. In your letter you inquire as follows:

"The following question has been submitted to me and as to which I wish your opinion, as I am not able to satisfy myself on an examination of the statutes with reference thereto.

"A citizen of Brighton township school district, which maintains a two-year high school, instead of sending his boy, who is a Boxwell graduate, to the local high school sends him to the Wellington high school which is a school of his own selecting.

"Prior to sending this boy to this high school the father gave notice

to the board September 1, 1908, of his intention so to do. For each of the two years that the boy has attended the Wellington high school no liability of course, arose against the Brighton school district because it maintains its own two year high school.

"The boy now has begun upon his third year in the high school at Wellington and the father is claiming that the Brighton school district is chargeable with the tuition under the notice given him September 1, 1908, he having never given any other notice.

"The inquiry is whether or not Brighton school district, under these circumstances is liable for this tuition."

Under date of June 11th you submitted supplementary statement as follows:

"Answering your favor of 12th inst., relative to inquiry made to you May 2nd and answering your question as to whether or not the father of the boy in question has paid the boy's tuition for the two years that he has already attended the Wellington high school would say that I am advised the father of the boy has so done.

"The point at issue is whether one notification given at the beginning of the first year is all that is required of a Boxwell graduate under section 7750 G. C. to entitle said Boxwell graduate to the full four years free tuition."

In answer to your inquiry, section 7748 of the General Code as amended, 101 O. L. 296, provides 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 such 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. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicant attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course shall be entitled to all the rights and priviledges of a Boxwell Patterson graduate."

Sections 7651, 7652, 7653 and 7654 of the General Code classify all high schools of the state as follows, to wit:

Section 7651 provides as follows:

> "The high schools of the state shall be classified into schools of the first, second, and third grades. All courses of study offered in such schools shall be in branches enumerated in section seventy-six hundred and forty-nine."

Section 7652 provides as follows:

> "A high school of the first grade shall be a school in which the courses offered cover a period of not less than four years, of not less than thirty-two weeks each, in which not less than sixteen courses are required for graduation."

Section 7653 provides as follows:

> "A high school of the second grade shall cover a period of not less than three years, of not less than thirty-two weeks each, in which not less than twelve courses of study are required for graduation."

Section 7654 provides as follows:

> "A high school of the third grade shall cover a period of not less than two years, of not less than twenty-eight weeks each, in which not less than eight courses of study are required for graduation."

I take it from your inquiry that the Brighton township high school, being a two year high school, is a high school of the third grade, as high schools are graded and classified by the sections of the General Code above quoted. It is my opinion by virtue of the provisions contained in section 7748 as amended 101 O. L. 296, and cited above, that the Brighton township school board can be required to pay the tuition of only its graduates to a first grade high school for two years; or to a second grade high school for one year and a first grade high school for one year.

It is further my opinion under the above cited sections that inasmuch as the pupil concerning whom you inquire is not a graduate of the Brighton township high school, he cannot therefore take advantage of the provisions of section 7748 of the General Code as amended, 101 O. L. 296, which is quoted above. In other words, the said Brighton township board of education is not legally required to pay the tuition of any pupil residing in its said district, while attending another high school, unless said pupil is a graduate of its own high school.

The question of notice as provided for in section 7750 of the General Code does not in any manner enter into the controversy, for the reason that the said section 7750 applies only to boards of education not having any high school. I herewith quote section 7750, as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment

of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

I am therefore of the final opinion that the Brighton township school board, for the reasons above given, is not liable for the tuition of said pupil, for the reason that said pupil is not a graduate of the Brighton township high school, and that therefore the Brighton township school board is not chargeable with his tuition for the remaining two years that he intends to attend the Wellington high school.

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

315.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LEVIES FOR STATE HIGHWAY IMPROVEMENTS—COUNTY THREE MILL LIMITATION—"SPECIFIC PURPOSE LIMITATION"—TOWNSHIP ASSISTANCE WITHIN LIMITATIONS—VETO OF GOVERNOR OF SINGLE SECTION OF ACT—ROAD TAXES TO BE WORKED OUT BY TAX PAYER.

Section 5649-3a General Code limits the levy which may be made upon all property in a county, to three mills and excepts from this limitation, 1st: levies for road taxes that may be worked out by the taxpayer and 2nd, levies and assessments in special districts for road or ditch improvements over which the budget commission has control.

Levies by a county for state highway purposes under section 1224 General Code, are not within either exception and therefore, subject to the three mill limitation.

Section 5649 provides for the working out by the tax payer of township taxes only and for the purpose of only township road improvements and therefore, does not apply to this limitation on county levies.

Neither is the township aid to state highway improvements included within said exception for the reason that under section 35 of the act of June 9, 1911, this assistance is rendered not by means of a specific "levy" but by payment from the township general fund, and there is therefore, no "levy that may be worked out by tax payers."

This construction is furthermore supported by the expression of the legislature's own construction of said section 1224 in the attempt of the General Assembly by amendment to make the levies under said section 1224 General Code exclusive of all other limitations "upon the aggregate amount of such levies not in force." Said attempted amendment, however, being the act of June 9, 1911, was properly repealed by the governor, though vetoed at such time as to make it impossible for the bill to be returned to the General Assembly.

Section 5649-3 limiting the taxes to be raised for specific purposes, restricts the amount which may be raised for said state highway purposes, under

section 1224 *General Code aforesaid to the amount which one mill would raise if levied on all property in the county in the year* 1910.

COLUMBUS, OHIO, August 4, 1911.

HON. N. CRAIG MCBRIDE, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 17th requesting my opinion upon the following question:

> "Under the provision of section 5649-3a of the General Code which provides that 'the aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list shall not exceed in any one year three mills.' Will you please advise whether the county can levy in addition to the three mills provided for in this section, a levy for the construstion of a road under the state highway laws, section 1224 of the General Code, or must any amount levied for the construction of a road under the highway laws be included within the 3 mills?
>
> "Please also state if any different rule applies to the township trustees who desire to make a levy for their portion for the construction of the same highway."

Said section 5649-3a of the General Code provides in part as follows:

> "The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. * * * Such limits for county * * * levies shall be exclusive of any * * * levies for road taxes that may be worked out by the tax payers, and levies and assessments in special districts created for road or ditch improvements over which the budget commission shall have no control."

Examination of the entire act of June 2, 1911, popularly referred to as the Smith One Per Cent. Law, fails to disclose any other express mention of road levies of any kind.

Section 1224 of the General Code, to which you refer, provides as follows:

> "At their March and June session each year, the county commissioners may levy on each dollar of valuation of taxable property within the county, not exceeding one mill, for the creation of a fund to be known as the state and county road improvement fund. The amount so levied and collected shall be used for the improvement of state and county roads within the county, and shall be in addition to the amount levied for road and bridge purposes."

This section was not repealed by the act approved June 9, 1911, entitled "An act creating a state highway department, etc." That is to say, section 1224 was specifically sought to be repealed by section 58 of that act, but this section was vetoed by the governor. Furthermore, the only section which corresponds to section 1224 in the act of June 9, 1911, is section 52 which specifically authorizes commissioners "to levy a tax not exceeding one and one-half mills upon all the taxable property of the county * * * in addition to all other levies * * * notwithstanding any limitation upon the aggregate amount of such levies now in force," and makes a similar provision for levies for such purposes by township trustees. This section was also vetoed by the governor and the effect of the executive action described is in my judgment to leave section 1224

in force; otherwise, there would be no specific authority in the county commissioners to levy any sum whatever for road improvements under the state highway department law.

In your letter of August 3rd, just received by me, you question the method adopted by the governor in vetoing section 52 of the act of June 9, 1911. The following provisions of article 11, section 16, of the Constitution, relates to this manner of exercising the power of veto:

> "If any bill passed by both houses of the general assembly and presented to the governor contains two or more sections * * * he may object to one or more of said sections * * * and approve the other portions of said bill, in which case said approved portion shall be signed and then shall be law; and such section or sections * * * objected to shall be returned within the time and in the manner prescribed for, and shall be separately reconsidered as in the case of a whole bill; but if final adjournment of the general assembly prevents such return (as in the case at hand) the governor shall file the said section or sections * * * together with his objection thereto in writing, with the secretary of state, as in the case of a whole bill, and the secretary of state shall then make public said fact, but shall not further act as in the case of a whole bill."

The reference to "the case of a whole bill" is to the earlier provision of the same section, which is as follows:

> "If any bill passed by both houses of the general assembly and presented to the governor is not signed and is not returned to the house wherein it originated within ten days after being so presented * * * such bill shall be law * * * unless objected to by the governor and filed together with his objection thereto in writing, by him, in the office of the secretary of state within the prescribed ten days; and the secretary of state shall at once make public said fact and shall return said bill together with said objection upon the opening of the next following session of the general assembly to the house wherein said bill originated, where it shall be treated in like manner as if returned within the prescribed ten days."

It seems to me that these provisions are clear. No phrase of any of the above quoted language in any way qualifies the controlling phrase that in case the governor signs a part of a bill and dissaproves certain sections thereof "said approved portion * * * shall be law." On the other hand, there is no portion of any of the above quoted language or the related provisions of the constitution which makes the disapproved sections law. The direction is that the secretary of state under the circumstances existing in this case "shall not further act as in the case of a whole bill;" from which the inference irresistibly follows that the effect of the governor's veto, after the adjournment of the general assembly, of separate sections of a bill is to deprive such sections finally of any force and effect in law.

I might add that in the case at hand the governor has addressed a message to the secretary of state, stating his objections as required by the above quoted constitutional provision, although this message does not appear in the copy of the law which you have. I am, therefore, of the opinion that section 52 of the act of June 9, 1911, never became law.

Now the levy provided for in said section 1224 General Code is a maximum

levy "not exceeding one mill." It is governed, therefore, in my opinion by that provision of section 5649-3 of the act of June 2, 1911, which is as follows:

> "Section 5649-3. The maximum rate of taxation in any taxing district for any purpose, as now fixed, shall be and is hereby changed so that such maximum rate, as levied, on the total valuation of all taxable property in the district for the year 1911 * * * and any year thereafter would produce no greater amount of taxes, than the present maximum rate for such purpose, if levied on the total valuation for all the taxable property therein for the year 1910 would produce. * * *"

That is to say, instead of the ordinary limit on the amount which may be levied by the county commissioners under section 1224, now being one mill on the tax duplicate of the county, it is the amount which would have been produced by a levy of one mill upon the duplicate of 1910.

This leaves but one question with regard to county levies, namely, Are such levies for state highway purposes excluded from the three-mill limitation by virtue of the above quoted provision of section 5648-3a? In considering this question, the following subsidiary questions must be answered:

1. Is a levy for state highway purposes one, "for road taxes that may be worked out by the tax payers?"

2. Is such a levy one, "in a special district created for road or ditch improvements?"

As to the second of these two questions no doubt can arise. The levy described by section 1224 is a general levy on the tax duplicate of the county and is in no sense a levy in a special district created for road improvement.

The difficulty as to the first question arises from the following provisions of the act of April 7, 1910, 101 O. L. 113, entitled "an act to amend sections 3370, 3371 and 5649 of the General Code, pertaining to road districts in townships and relating to the appointment of road superintendents for said road districts, and the collection and distribution of road tax for said districts." Section 5649 as therein amended provides in part that:

> "Any person charged with a road tax may discharge the same by labor on the public highways within the proper time * * * under the direction of the superintendent of the proper district, who shall give to such person a certificate specifying the amount of tax so paid, and the district and township wherein such labor was performed, which certificate shall in no case be given for any greater sum than the tax charged against such person; and the county treasurer shal receive all such certificates as money in the discharge of said road tax. * * * When such road tax is paid in labor such labor shall be performed by the first day of September, in the year in which levied. All road taxes collected by the county treasurer shall be paid over to the treasurer of the township or municipal corporation from which the same are collected, and shall be expended on the public roads * * * under the direction of the trustees of the proper township, or council of such municipal corporation; and all funds heretofore levied for road purposes, and not expended, shall be expended by the trustees of the township or council of the municipal corporation from which the same were collected, as other taxes collected under the provisions of this title."

The question of course is as to whether the language above quoted from

amended section 5649 now authorizes the payment of all taxes levied for road purposes by labor. If this is the case then of course any tax levied for road or highway purposes is excluded from the three mill and corresponding limitations of section 5649-3a of the act of June 2, 1911.

On careful consideration, however, the seemingly broad language of section 5649 as amended will be found, I think, to convey a somewhat restricted meaning. In the first place, the whole act of April 7, 1910, as disclosed by the title thereof above quoted, and by the other sections amended therein, being sections 3370 and 3371 providing for the appointment by township trustees of a road superintendent and the duties of such superintendent, is to regulate the performance of road labor under the direction of such road superintendent and the expenditure of taxes levied for *township* road improvement.

Original section 5649 relates exclusively to township taxes, not because of the language employed in it, but rather because of the context in which it is found.

I am, therefore, of the opinion that a levy for road purposes made by the county commissioners is not such levy as may be worked out by the taxpayers, and is therefore not excluded form section 5649-3a.

Section 1224 above quoted does not purport to authorize a levy in addition to all other levies, and even if it did, the manifest intention of the Smith law would override such a provision. I am, therefore of the opinion as to the first question that a levy made by county commissioners for the county's portion of a highway improvement within such county for a given year must be included within the internal limitation of three mills imposed by section 5649-3a of the act of June 2, 1911.

The question is somewhat different as to township trustees. Section 35 of the act of June 9, 1911, which corresponds roughly to section 1201, which must be regarded as repealed by implication, provides as follows:

> "Except as otherwise provided one-fourth of the cost and expense of such improvement shall be apportioned to the township or townships in which said road is located. Of the amount so apportioned three-fifths shall be a charge upon the whole township or townships and two-fifths shall be a charge upon the property abutting on the improvement. * * *
>
> "When an improvement of a highway shall be made by the state in conjunction with the township or townships thirty-five per cent. of the total cost or expense thereof shall be assessed on the township or townships and fifteen per cent. of the total cost or expense thereof shall be assessed on the land abutting on such highway."

Section 37 of the act of June 9, 1911, corresponding roughly to section 1210 General Code, and in my opinion repealing the same by implication, provides in part as follows:

> "The township trustees shall pay the portion of the cost and expense assessed to the township in the same manner as other claims are paid"

No section of the law now in force specifically directs the township trustees to make a separate levy for the above defined purpose or to create a distinct fund therefore. On the contrary, the trustees are directed to pay the township's portion of a state improvement "in the same manner as other claims are paid" that is, from the general township fund.

The statutes pertaining to the powers and duties of the trustees seem to require separate handling of funds levied for road purposes (see section 3274), and though the trustees are nowhere directed to levy a specific tax for road purposes, yet the existence of such specific levy or fund is tacitly recognized by section 5649 above quoted.

In spite of these facts, however, I am of the opinion that the road taxes mentioned in section 5649 are quite different from the fund from which, under section 37 of the act of 1911, the township trustees must pay the portion of the cost and expense of a highway improvement assessed to the township. The manifest intention of amended section 5649 is to regulate the payment of taxes specifically levied by township trustees for road purposes, and this intention is not affected as I have already indicated by the absence of any express authority to make such a specific levy.

Is it then a road tax which may be worked out by the tax payers? The primary meaning of section 5649 and related sections would seem to point to an affirmative answer to this question. In my opinion it is not. I have already stated in effect that the township's portion of the cost of the state highway improvement is not a charge upon the "road fund" to which section 5649 as amended refers; but is rather a charge upon the general township fund. Therefore, in my opinion, no specific levy need be made by township trustees to meet the township's portion of such cost. Hence, there is no separate "levy which may be worked out by the tax payers."

To hold otherwise would demoralize the administration of the state highway department. Without quoting specific sections of that law suffice it to say that the manner of making the improvements provided for therein contemplates that the state highway commissioner shall let a contract calling for the furnishing of labor as well as of materials. Such work would be seriously interfered with if it were true that a township would have the right, so to speak, to tender as its portion the labor of its taxpayers under the direction of the road superintendent of a given district.

I am therefore of the opinion that the township's portion of the cost of a state highway improvement need not be made the subject of a separate levy, but that if it is, such levy is included within the limitation of the act of 1911.

I might add also that section 52 of the act of June 9, 1911, vetoed by the governor, is very clear evidence of the general assembly's own construction of the law upon both of these points. In that section the general assembly took the trouble, so to speak, expressly to exclude county and township levies for state highway department purposes from the limitations "upon the aggregate amount of such levy now in force," which is a clear reference to the Smith law which had just been passed at the time of the enactment of the act of June 9th. If the limitations of the Smith law were not applicable to state highway department levies this language of said section 52 would have been superfluous.

Again, the governor in vetoing section 52 expressed in his message the opinion that state highway department levies ought not be excluded from the limitations of the Smith law.

All considerations, then, point to the same conclusion, which is that which I have above expressed.

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

A 315.

SALARY OF SECRET SERVICE OFFICER APPOINTED BY PROSECUTING ATTORNEY—PRESIDING JUDGE OF SUBDIVISION OF JUDICIAL DISTRICT, NONENTITY.

Section 2915-1 General Code provided that the salary of secret service officer appointed by the prosecutor shall be fixed by the "presiding judge" of the court of the common pleas of the subdivision of that judicial district, but there is no such office designated in the statutes and therefore, there being no authority which can fix the same, there is no way of paying such salary.

COLUMBUS, OHIO, August 5, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

MY DEAR SIR:—I have your letter of June 20, 1911, in which you call my attention to supplemental section 2915-1 of the General Code, passed April 18, 1911, and which is as follows:

> "The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. The compensation of said officer shall be fixed by the presiding judge of the court of common pleas of (the subdivision) of that judicial district and shall not be less than one-fourth nor more than one-half the official salary of the prosecuting attorney per year, payable monthly, out of the county fund, upon the warrant of the county auditor."

And you ask my opinion as to what is meant by the words, "*the presiding judge of the court of common pleas of the subdivision of that judicial district*" as used in the said section.

An examination of the General Code fails to disclose a designation, or manner of designating, of any of the common pleas judges of any of the subdivisions of any common pleas judicial district as a "presiding judge."

Section 1540 of the General Code provides for the designating of a "supervising judge of each judicial district," but as the districts are practically all quite large, comprising different subdivisions and in many cases each subdivision being composed of two or more counties, it is self-evident that the "presiding judge" as used in the act does not mean the supervising judge of the district.

Section 1557 refers to the president judge of the court of common pleas of Hamilton county, and confers the authority formerly given to such president judge to any one of the judges of such county, and, of course, being applicable to only Hamilton County, has no bearing upon your question. Therefore, it seems to me, as this act provides, compensation of such secret officer "shall be fixed *by the presiding judge of the court of common pleas of the subdivision of that judicial district*" and as there is no provision of law defining who shall be the presiding judge of the court of common pleas of any subdivision of any judicial district of the state, and no authority of law authorizing or establishing such an office or position; there is no one authorized by this act to fix such compensation, and, therefore, though the prosecuting attorney may appoint a secret service officer there is no way of compensating him under this act, as his compensation would have to be fixed before it could be paid and the act, by designating an official unknown to law, as the one to fix the compensation

must be held to have the same effect as if no one had been named to perform such duty.

This department has given much attention to the question involved, particularly because of our disinclination to render ineffective any act of the General Assembly. We tried to find some solution to the question whereby the act of the General Assembly of April 18, 1911, might become operative, but in the end, after the most careful investigation and consideration, we are not able to find, through any interpretation, that any judge would have the authority under the statute in fixing the compensation, to certify that he was "the presiding judge of the court of common pleas of the subdivision of that judicial district" because there is no such officer known to the law in Ohio.

If the statute read "presiding judge of the court of common pleas of the judicial district" I would be constrained to give way to the spirit and disregard the letter of the act, and hold that "supervising judge of the district" could fix the compensation, but when the statute provides "presiding judge of the court of common pleas of the subdivision of that judicial district," and there is not an officer in Ohio that can legally sign his name with that title, the conclusion inevitably follows that there is no one to fix the compensation.

Suppose that the question as to the fixing of compensation be presented to any judge in a subdivision and he refuses to fix the compensation, who could be mandamused under the statute? There would be no defendant.

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

316.

TEACHERS' INSTITUTE COMMITTEE—ENROLLMENT FEE, ILLEGAL.

Every teacher not only has the right, but is in duty bound to attend a teachers' institute and a charge by an executive committee of a teachers' institute, of fifty cents for enrollment, is unauthorized by statute and illegal.

COLUMBUS, OHIO, August 7, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I have comunication from Jackson county dated August 4th, from a very prominent citizen and a man that has been identified with teachers' institutes for perhaps forty years there, wherein he says:

> "Our institute convenes Monday, and teachers must register with the secretary in order to get the benefit of the allowance by law for attendance.
>
> "Our committee requires a fee of fifty cents from every teacher as a prerequisite for enrollment and consequent credit for attendance. To me, this seems to be a petty exhibition of arbitrary power, inconsistent and unlawful, and I want to enter a protest."

You are aware from your experience that the most delicate things which reach officials are generally things that come from a private citizen who is not legally entitled to an opinion from your office or mine. However, it happens often that the very best suggestions come in this way. Wherever the law is violated I feel it the duty of the attorney general and prosecuting attorney to take notice of it, especially when it comes to an unlawful act against a private

citizen by a public officer or the paying out of unlawful funds by a public officer.

While we have not had much time to consider the question, yet I have gone over it with several counsel in the office and we are unable to find anything in chapter eight relating to teachers institutes, section 7859 et seq. General Code, that warrants an executive committee of a teachers' institute in exacting a fee from a teacher. Under the spirit of the statutes it is the duty of a teacher to attend the institute and everything in relation to it seems to be controlled by law. It is true, section 7863 provides that "such executive committee shall manage the affairs of the institute." However, I do not think this relates to the collection of any fee from a teacher. This appears to be more apparent from the next sentence in said section, as follows:

> "The committee must enter into a bond, payable to the state, 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 comes into its possession, and make the report to the commissioner of common schools, required in section seventy-eight hundred and sixty-five."

Section 7865 General Code provides:

> "Within five days after the adjournment of its institute, its secretary shall report to the state commissioner of common schools the number of teachers in attendance, the names of instructors and lecturers attending, the amount of money received and disbursed by the committee and such other information relating to the institute as the commissioner requires."

Now, as to the amount of money received by the committee, this unquestionably means the amount of money received by virtue of the provisions of the statute whereby money may be received. I refer especially to section 7820 which reads:

> "The clerk of the board of county school examiners must promptly collect all fees from applicants at each examination and pay them into the county treasury quarterly. He shall file with the county auditor a written statement of the amount, and the number of applicants, male and female, examined during the quarter All money thus received, must be set apart by the auditor for the support of county teachers' institutes, to be applied as provided for in chapter eight of this title."

I cannot conceive that the state has any jurisdiction over contributions that would be purely voluntary; and in matters of this kind we may not mix voluntary matters with legal obligations. I would be pleased if you would look the matter up carefully and if, in your judgment, the executive committee has not the authority to collect this fee, you take the matter up with them and give them the necessary advice as to their duty, and request them to return the money to those who paid in and to desist from this practice in the future.

I will be pleased to hear from you without delay, especially to have your own notion as to whether or not the executive committee of the teachers' institute is acting within the law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

P. S. Going over the matter more fully with counsel we are the more firmly convinced that every teacher in a given county has a right to attend teachers' institute without any enrollment fees. Not only has the teacher such right, but it is his or her duty to do so.

We are not passing upon the right of a teacher who has voluntarily paid the committee the enrollment fee; but we are quite certain of the proposition that the collection of this fee is unlawful and should be by appropriate remedy inhibited.

T. S. H.

318.

COUNTY CHILDREN'S HOME—OMISSION OF SPECIAL LEGISLATON STATUTE FROM GENERAL CODE—SUBSTITUTE PROVISIONS—ELECTIONS.

Section 929-2 of the revised statutes being special legislation, was omitted from the General Code.

Where the county commissioners desire to erect a childrens' home, they may do so under sections 3077-3080 General Codc.

If the election therein provided for, concludes favorably, donations may be received in aid of said establishment, under section 3080 General Code.

COLUMBUS, OHIO, August 8, 1911.

HON. JAS. S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letters of May 2 and 19, 1911, which are respectively as follows:

May 2, 1911.

* * * * * *

"Section 929-2 of the revised statutes authorizes county commissioners to aid incorporated children's homes. I am unable to find said section in the General Code. I am unable to find anywhere in the General Code a law which authorizes the commissioners to aid children's homes in the way provided by the revised statutes.

"Under the present law, is there any way that the county commissioners can aid in establishing, or maintaining children's homes, except as provided by section 3077, et seq. of the revised statutes?"

May 19, 1911.

* * * * * *

"Following our talk over the telephone I desire to say that I was anxious to get a reply to the letter I wrote you under date of May 2, 1911, desiring to know if the commissioners under the present code could aid in the construction of, or maintenance of a children's home as they could under a former law which seems to have been omitted under the present code.

"The cause of our anxiety is based upon the fact that an old

gentleman seventy-eight years old has offered the county about seventy-five thousand dollars ($75,000) for a children's home if the county will help in a small way. The old man is very feeble and I am of the opinion that the acceptance should not be delayed if we desire to profit from his very liberal offer. I send you a copy of the former letter.

"While the question does not involve very much research, the commissioners are anxious to get your opinion upon which they shall base their action. If it is necessary to hold an election they desire to proceed at once with the same."

In reply to your inquiries I wish to say that the delay in answering the same has been due entirely to the large number of inquiries which this department has received for its consideration, and the large amount of litigation we have had to look after during the last three or four months.

Section 929-2 of the revised statutes provides as follows:

"In any county in this state where there now is an incorporated children's home whose object is the care, aid and education of neglected or destitute children, and where the county commissioners of any such county have aided such children's home to purchase land or erect buildings, either by subscription with others to raise a fund for that purpose or by direct aid or donation, or otherwise, in any amount not exceeding six thousand dollars, such commissioners are hereby authorized and empowered to contribute such additional sum to complete such purchase of land and the erection of buildings not exceeding the sum of twenty-five hundred dollars, provided that in case such children's home shall cease to exist so that such property so purchased shall cease to be used for the purpose of such children's home, by such corporation such county shall have a lien upon such property so purchased for the amount of money contributed for its purchase and if such corporation shall fail or be unable from any cause to maintain, manage and control such home so as to subserve the purpose of a children's home for which the same was incorporated then such commissioners may enforce such lien or if they so prefer and desire they are hereby authorized and empowered to organize such home into a county children's home, under the general laws of the state of Ohio, and the title to such property, where the county has contributed the whole amount of the purchase money shall vest in and be the property of such county."

Said section is special legislation and for that reason was left out of the General Code by the codifying commissioners; and also for that reason, when the General Code was adopted by the legislature said section 929-2 of the revised statutes was left out of the General Code as said General Code was adopted by the legislature of Ohio. In other words, the reason that the Ohio legislature failed to incorporate said section 929-2 of the revised statutes in the General Code was that said section was considered as being in the nature of special legislation and therefore was not adopted as part of the General Code of Ohio.

Section 3077 of the General Code provides as follows:

"When in their opinion the interests of the public so demand, the commissioners of a county may, or upon the written petition of two

hundred or more taxpayers, shall, at the next regular election submit to the qualified electors of such county, or of counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. Notice of such election shall be published for at least two weeks prior to taking such vote, in two or more newspapers printed and of general circulation in such county or in the counties of the district, and shall state the maximum amount of money to be expended in establishing such home."

Section 3078 of the General Code provides as follows:

"If at such election a majority of electors voting on the proposition are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof. Such institution shall be styled the children's home for such county or district."

Section 3080 of the General Code provides as follows:

"Such commissioners may receive and hold in trust for the use and benefit of the home, any grant or devise of land and any donation, bequest, money or other personal property that may be made for the establishment and support of such home."

So that, therefore, in direct answer to your inquiry I am of the opinion that sections 3077, 3078 and 3080 of the General Code apply and govern in the matter of establishing and providing for children's homes, and that the safe course for the county commissioners of your county to follow would be to follow the provisions of said sections 3077, 3078 and 3080 General Code et seq.

I believe that this fully answers your inquiry and that in accordance with the above opinion it is necessary for the commissioners of your county to hold an election if they desire to proceed at once with the building and establishment of a children's home in your county.

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

C 318.

FEES OF POLICE JUSTICE AND MARSHAL IN MISDEMEANOR CASES—PARTY FILING AFFIDAVIT INSOLVENT—SECURITY FOR COSTS.

The only provision afforded a police justice and marshal in misdemeanor cases, where the state fails to convict, is that providing for security of costs and when this provision is not taken advantage of, there is no remedy when the party filing the affidavit proves insolvent.

COLUMBUS, OHIO, August 8, 1911.

HON. JOHN H. WILLIS, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—I acknowledge receipt of your favor of July 3, 1911, in which you ask an opinion upon the following:

W is appointed police justice of the village of Marysville by the mayor and the appointment is confirmed by the council of said village.

On or about the first day of May, 1911, A files an affidavit with W as police Justice charging B with a violation of section 13225 of General Code.

The marshal of the village serves all processes and attends the trial.

Trial is had and B is acquited. No security for costs is taken by the police justice.

No schedule of fees for these officers has been provided by ordinances.

The fees of the police justice and marshal are taxed in this case in the same amount as those of a justice of peace in a like case.

A is totally insolvent and unable to pay costs.

From what source if any shall the fees of the police justice and marshal in this case be paid?

An ordinance passed by council could have no effect upon the payment of fees in this case. The charge made was for a violation of the county local option law, which is a misdemeanor and a state criminal case.

The syllabus in the case of Portsmouth (city) v. Milstead, 18 Cir. Dec. page 384 reads as follows:

"The provisions of 96 O. L. 61, section 126 (Rev. Stat. 1536-633; Lan. 3228) requiring that "all fees pertaining to any office shall be paid into the city treasury" has reference to municipal fees solely, such fees as may be fixed by municipal authority.

"Said section does not authorize cities to interfere with the fees of mayor or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

The payment of fees to an officer from a public fund must be by authority of statute, or ordinance when that power is conferred on council.

This principle is laid down by the supreme court in the case of Clark v. County Commissioners, 50 O. S. page 107.

"To warrant the payment of fees or compensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute."

There are several sections of the statute governing the payment of fees in criminal cases.

Section 3019 of the General Code provides as follows:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

The officers referred to are enumerated in section 3017 and include a police justice and a marshal.

Section 4556 General Code regulates the payment of fees in cases for violation of ordinances; section 4555 provides for witness and jury fees in state and city cases; and section 13439 provides for payment in cases where punishment by imprisonment is a part of the penalty. The charge upon which this action was brought was not such an offense. None of these sections govern the case under consideration.

The legislature has provided the means by which the police justice can secure the payment of costs of himself and the marshal. Section 13499 of the General Code authorizes the magistrate to require the person filing the affidavit in cases of a misdemeanor, to give security for costs.

Inasmuch as the police justice has failed to act under this section he cannot now complain. There is no provision in the statutes for the payment, out of any public fund, of the fees of a police justice or marshal, in a state criminal case, wherein the charge was the commission of a misdemeanor punishable by fine only, and wherein the state has failed to convict. The police justice and marshal must look to the person who filed the affidavit for their fees.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

B 320.

TITLE OF DESCENT—TRANSFER BY AUDITOR AFTER TAX SALE AND AFTER SALE OF PROPERTY OF MINOR HEIR IN GUARDIANSHIP PROCEEDINGS— NECESSITY FOR FILING AFFIDAVIT OF DESCENT BY RECORDER.

The intention of section 2768 General Code, as amended, is when property passes by descent, to have the identification of the heirs appear as a matter of record in the recorder's office, whether or not transfer is necessary in the auditor's office. Therefore, where property has passed by descent and subsequently sold for taxes, and all parties quit claim to the holder of the tax title, the affidavit required by the statute aforesaid must nevertheless be filed.

So also, though in the statute such transfer is not specifically mentioned, when property of a sole minor heir is sold through guardianship proceedings the auditor should refuse to make the transfer until said affidavit has been filed.

COLUMBUS, OHIO, August 9, 1911.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 19th submitting for my opinion thereon the following questions:

> "First, with regard to section 2768 General Code, as amended at the at the recent session of legislature, House Bill No. 22, under the following circumstances:
>
> "A, owning real estate, dies intestate, leaving six children, B, C, D, E, F and G. The taxes on said real estate not being paid it was sold for taxes to H. Afterwards five of the heirs at law, B, C, D, E and F quit claim their interest to C, and C deeds the property to X. H assigns his tax title to X. The two deeds and tax title are presented to the auditor who transfers the tax title and marks each deed 'no transfer

required.' Query: Shall the recorder record these two deeds, or must he require the presentation of the affidavit mentioned in section 2768, in view of the following language therein:

"'and before any deed or conveyance of real estate made by any such heir at law or next of kin shall be presented to or filed for record with the recorder of any county * * *?'

"Second: A dies intestate, owning numerous pieces of real estate and leaving one minor child his sole heir at law. By an action in the probate court by the guardian of this heir at law, certain tracts of real estate are sold by order of the court, this real estate still remaining on the duplicate of the auditor in the name of the ancestor. Query: Can the auditor transfer the property described in this guardian's deed until by proper certificate from the probate court or the affidavits prescribed by section 2768 G. C., the property has been transferred from the name of the ancestor to the name of the minor heir?"

Said section 2768, as amended, provides in part as follows:

"The county recorder shall not record any deed of absolute conveyance of land until it has been presented to the county auditor and by him endorsed 'transferred' or 'transfer not necessary,' before any real estate, the title to which shall have passed under the laws of descent shall be transferred * * * from the name of the ancestor to the heir at law * * * or to any grantee of such heir at law * * *; and *before any deed or conveyance of real estate made by any such heir at law * * * shall be presented to or filed for record by the recorder of any county* such heir at law * * * or his * * * grantee * * * shall present to such auditor the affidavit of such heir * * * or of two persons resident of the state of Ohio, * * * which affidavit shall set forth the date of such ancestor's death and the place of residence at the time of his or her death; that fact that he or she died intestate; the names, ages and addresses * * * of each of such ancestors, heirs at law and next of kin * * * and the part or portion of such real estate inherited by each * * * and such auditor shall endorse upon such deed or conveyance the fact that such transfer was made by affidavit. Such affidavit shall be filed with the recorder of the county in which such real estate is situated * * * before the time when such deed of conveyance shall be filed with such recorder for record, and shall be by him recorded in the record of deeds and such affidavit of descent by him indexed in the general index of deeds. * * *"

In the first case which you present the legal title had passed from the ancestor by virtue of the tax deed, and for this reason, doubtless, the auditor marked the quit claim deeds, etc. "transfer not necessary." However the said deeds are presented to the recorder for record, and as presented to him they are "deeds of conveyance from heirs at law." I am of the opinion that the intention of the amended section is to require the identification of the heirs at law as a matter of record in the recorder's office, whether or not transfer is necessary in the auditor's office. Therefore, the recorder should require presentation of the affidavits mentioned in the section before recording the quit claim deed and the warranty deed referred to in your first question.

Similarly, the auditor should, in my opinion, refuse to transfer the property of a minor heir sold through guardianship proceedings, until affidavits are

presented to him in accordance with section 2768 as amended. It is true that in such a case there would be a showing of the identity of the heirs of the intestate in the petition filed by the guardian in the probate court, and it is true also that section 2768 does not specifically mention lands sold in this manner. Having in mind, however, the principal purpose of section 2768, which is to make the recorder's office in all cases show the identity of the heirs at law or next of kin of a decedent; and having in mind also, the principle that a guardian stands in the place of his ward and his acts are to all intents and purposes, and in law, those of his ward, I am of the opinion that the section should be construed to supply in cases of this sort, and that a county auditor should not transfer property deeded under a guardian's deed in cases in which the ward is the heir at law of a deceased intestate, in whose name property stands on the duplicate, without requiring the filing of the affidavits referred to in said section.

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

A 321.

TAXES AND TAXATION—BUILDINGS RESERVED ON GRANT OF REAL ESTATE ARE PERSONAL PROPERTY OF GRANTOR—EFFECT OF LISTING SUCH AS REAL ESTATE—POWERS OF TAXING AUTHORITIES TO CORRECT ERROR— OMITTED PERSONAL PROPERTIES.

When certain real property has been deeded to the United States and the buildings thereon reserved by the grantor, such buildings must be listed for taxation as personal property of the grantor.

When such buildings have been erroneously placed upon the duplicate as real estate:

FIRST: The valuation by the board of real estate appraisers is void.

SECOND: The quadrennial board of equalization has no authority to change these valuations, for the reason that it is not real property.

THIRD: The county board of equalization cannot change the valuation because the property was not properly placed upon the duplicate as personal property for the year 1911.

FOURTH: The county auditor's authority to correct valuations of personal property only extends to years preceeding 1911, *when the valuation has been made.*

FIFTH: The auditor cannot place such property upon the duplicate as personal property omitted prior to the year 1911.

COLUMBUS, OHIO, August 10, 1911.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 20th in which you submit for my opinion thereon the following question:

> "In 1909 a parcel of real estate with buildings thereon was deeded to the United States government. The understanding was that the buildings were not to be conveyed and no question is made by the

parties as to the effectiveness of the oral reservation of such buildings as personal property. In 1910 the quadrennial appraisers of real estate discovered the facts of the case and the buildings were placed upon the tax duplicate (presumably by the county auditor) for the year 1911, and for the years 1909 and 1910 as well, in the name of the government's granter. The valuation affixed to the buildings was that of the quadrennial board of appraisers of real estate. Objection was made to this valuation by the owner, who does not, however, object to the payment of taxes thereon at a proper valuation. The board of review of the city of Wooster having been appealed to for a reduction in valuation denied its power to reduce the value for the years following the sale of the real estate but considered that it has power to reduce such valuation for future years."

As you correctly apprehend these buildings are not to be taxed as real estate, if at all, but as personal property. As such, the quadrennial board of equalization or review, as the case may be, of course, has no jurisdiction in the matter at all, as its jurisdiction is confined exclusively to the equalization and revision of real estate values.

The annual state board of equalization and the city board of review sitting as an annual board of equalization, have power under section 5591 General Code, upon complaint to "deduct from the valuation of any personal property * * * of any person, returned by the assessor or county auditor, or which may have been omitted by them * * * whether the return is made upon oath of each person or upon the valuation of the assessor or county auditor." This power in my opinion is broad enough to permit the annual board of equalization or the city board of review, as the case may be, to act as to the valuations for the current year at least.

There may be some question as to the right of the board of equalization to reduce valuations for the years 1909 and 1910. Section 5401 General Code in effect authorizes the county auditor to place omitted personal property upon the duplicate. This section, however, provides that the auditor shall not "reduce the amount returned by the assessors without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor."

In the case at hand the valuation is not that of the "assessor" referred to in section 5401. These buildings should have been returned by the *personal* property assessors, not by the board of real estate assessors.

Section 5571 of the General Code provides for the correction by the county auditor of errors in the tax list "of *real property* in his county." This section however, manifestly has no application for the reason that the buildings are not real property. In the same manner section 5574, while it speaks of "structures," manifestly has application only to real property.

It is my opinion, therefore, that inasmuch as these buildings are personal property for all purposes they should have been placed on the duplicate in the first instance, not by the action of the quadrennial board of appraisers of real estate, but by the personal property assessors, and that the assessments now made are probably invalid in toto for this reason. It would be proper, then, for the county auditor to proceed *de novo* to place the buildings upon the personal property duplicate for the year 1911. The buildings, however, in my opinion, cannot be placed upon the personal property duplicate for the years 1909 and 1910. This is because section 5401 and its related sections were amended in 1910, 101 O. L. 432, so as to preclude the county auditor from placing upon the duplicate any personal property omitted therefrom prior to the year

1911. Furthermore, in the Smith one per cent. bill, so-called, passed at the last session of the general assembly there is a section, the last section thereof, which expressly prohibits any taxing authorities from placing upon the tax duplicate of personal property any such property not returned prior to the year 1911; excepting, of course, for the year 1911 or any year thereafter.

The object of these amendments was to encourage the return of personal property. In the case at hand they seem to create a condition of absurdity, but that fact alone does not impair their application.

I am of the opinion, therefore, that the board of appraisers of real estate in 1910 had no authority to value these buildings for taxation because they were personal property; that the quadrennial board of equalization and review has no authority to change these valuations for the same reason; that the annual county board of equalization has authority to correct the valuation of personal property properly on the duplicate for the year 1911, but not for preceding years; that the county auditor would have the right to correct the valuation of this personal property for the years preceding the year 1911 if the valuation had been properly made; but that the valuation not having been properly made there is nothing for the auditor to correct; and that the auditor cannot at this time, because of the provisions of the acts of 1910 and 1911, restricting his power in such matters, place the buildings upon the personal property duplicate as in the case of omitted personal taxes.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

C 323.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—VOTE OF ELECTORS UNDER OLD LAW—LIMITATIONS UPON MUNICIPAL LEVIES.

Section 3786, General Code, providing for votes of electors authorizing a levy in excess of ten mills in a municipality, has been repealed by the Smith law, and furthermore, as this section only authorized a single levy, a vote of electors taken thereunder cannot possibly extend to levies made in future years.

When the five mill limitation of the Smith law, therefore, is unable to care for a village needs, resort must be had to Section 5649-5 of the Smith law, authorizing a vote of electors on the questions of increased levy.

COLUMBUS, OHIO, August 14, 1911.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 28th, submitting for my opinion thereon the following question:

> "In 1909 the electors of a village voted to authorize a levy of three mills in addition to the then maximum levy of ten mills for municipal purposes, in order to enable the village to discharge its obligation under a contract for electric lights for the village. It is now feared that the limitation of five mills for municipal purposes, imposed by section 5649-3a of the Smith one per cent. law, so called, will not afford the village sufficient revenue to discharge its contractural obligations. Is the former action of the electors authorizing the levy of three mills in addition to that then authorized by law now effective, or will it be

necessary for the electors again to vote on the proposition of additional taxes under section 5649-5 of the Smith law?"

Sections 3785 and 3786 of the General Code, as they existed prior to the enactment of June 2, 1911, provided as follows:

> "Sec. 3785. The aggregate of all taxes levied by a 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."
>
> "Sec. 3786. A greater tax than that authorized herein may be levied by the council of a municipal corporation for any purpose for which such corporation is authorized to levy taxes, if the proposition to make such additional levy is first submitted to a vote of the electors of the corporation, under an ordinance prescribing the time, place and manner of voting thereon, and approved by two-thirds of those voting on the proposition."

Section 5649-3a of the Smith bill provides in part as follows:

> "The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation for corporation purposes on the tax list shall not exceed in any one year five mills * * *. Such limitation * * * shall be exclusive of any special levy provided for by vote of the electors * * * over which the budget commissioners shall have no control."

Section 5649-5 and succeeding sections provide in effect that an increase of rate above the maximum rate of taxation authorized in the bill may be secured for a period not exceeding five years, and in an amount not exceeding five mills in excess of ten mills, the external limitation of the act, by submitting the proposition of increased tax to a vote of the electors; and if a majority of the electors voting at the election favor such increased tax the same may be levied.

In my opinion the Smith bill clearly repeals section 3785, above quoted, by implication. Furthermore, at least as to the future, section 3786 is repealed by implication. This follows because it authorized the levy of an additional tax upon the authority of two-thirds of the voting electors, while section 5649 authorizes an additional levy upon authority of a majority of the electors. The two sections relate to precisely the same subject matter and cannot be reconciled. What, then, is the effect of the exclusion from the internal limitations of "special levies provided for by vote of the electors" as mentioned in section 5649-3a? In my opinion, this language must be given its primary meaning. The levy must be a special one; that is, one for a special purpose, as well as one authorized by vote of the electors. Now section 3786 did not authorize a vote upon a special proposition; the only proposition submitted to the electors thereunder was to be the general proposition of a tax in excess of ten mills. Therefore, in my opinion, the former vote of the village in question is not effective to authorize the village to levy three mills in addition to the five mills allotted to it by section 5649-3a.

In the same connection, section 5049-3 excludes from the ten mill limita-

tion "levies authorized by a vote of the people as provided in section 5649-5 * * * as herein enacted," and does not expressly exclude additional levies authorized under pre-existing law. The expression of one thing being the exclusion of all others, I am of the opinion that the vote of 1909, referred to by you, is not effective to authorize the levy of three mills within the village in addition to the ten mills, provided for by section 5649-3.

The obligation being a continuing one, rather than a fixed indebtedness, it would of course be impossible to fund it so as to come within the exception of section 5649-2 and 5649-3 in favor of levies "for sinking fund and interest purposes * * * necessary to provide for any indebtedness heretofore incurred."

Under all the circumstances, I believe that it will be necessary in the event that sufficient revenue cannot be raised under the ordinary provisions of the Smith bill, for the village in question to have recourse to the extraordinary provisions of section 5649-5, and have the electors authorize an additional tax.

There is a consideration to which I have not yet referred, which may be conclusive of the whole matter, regardless of the correctness of reasoning which I have tried to set forth in the earlier portions of this opinion. Section 3786 provides simply that,

> "A greater tax than that authorized herein may be levied * * * for any purpose for which such corporation is authorized to levy taxes * * *"

No section in pari materia prescribes the length of time during which the additional authority of council, created by virtue of proceedings under this section, shall exist. It could not have been the intention that the authority should exist indefinitely or that a single vote in any one year might authorize the coucil to levy, say thirteen mills, for all time and in every succeeding year. On the contrary, I incline strongly to the view that the approval of the electors under section 3786 authorized council to make a single levy over and above ten mills only, and that when that levy had been made the power and authority of council under and by vote of the electors were discharged and became *functus officio.*

Putting it in other words, the apparent primary meaning of section 3786 is that council may, by the proceedings therein provided for, be authorized to make a single levy in excess of ten mills.

If this is so, and it is my opinion that it is so, then the vote cast by the electors of the village in question in the year 1909 could not have had any effect upon the authority of council to levy taxes for the year 1911, even if the Smith one per cent. law had not been enacted. The fact that the vote was occasioned by an obligation of a continuing nature does not alter the case. Such obligation might have been founded by proper proceedings and additional levies during a period of years thus authorized. Not being funded, however, the only way in which it could have been taken care of under the old law without impairing current revenues was for the electors to vote each year on the proposition of levying additional taxes.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 324.

PUBLIC OFFICIALS—ILLEGAL INTEREST IN PUBLIC CONTRACTS OF INSTITUTION—DEPUTY SUPERVISOR OF ELECTIONS—REMEDIAL AND PENAL STATUTE.

Though Section 12910, General Code, is penal in its application, it is remedial in principle and, therefore, may be liberally construed. Under such construction, a member of the board of deputy supervisors of elections who is himself interested in a contract for the printing of ballots to be used by the board at a primary election, is guilty of a violation of Section 12910, General Code, prohibiting interest by a public official "in a contract for purchase of supplies for the use of the institution with which he is connected."

COLUMBUS, OHIO, August 15, 1911.

HON. JOHN H. WILLIS, *Prosecuting Attorney, Marysville, Ohio.*

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

> "Can a member of the election board enter a bid under the provisions, sections 12910 and 12911, General Code, for the printing of the ballots to be used at primaries, when the letting of the contract for the printing is done at competitive bidding?"

Sections 12910 and 12911 of the General Code, referred to by you, are as follows:

> "Section 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.
>
> "Section 12911. Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

If either of these sections applies to the case at hand it would be section 12910, because the contract is one for the use of the institution with which the officer is connected.

In my opinion section 12910 must be regarded as a statute remedial in its principle, although penal in its particular application. Authorities agree that statutes enforced by sanction of a criminal penalty may, in their operation on things as distinguished from their effect upon persons, be given a liberal construction if the primary legislative intent embodied in them is remedial.

The word "supplies" as used in section 12910 has a very broad meaning. It

evidently means something besides tangible things which would ordinarily be included within the meaning of the word "property" which immediately pre cedes it, and in my opinion it means anything which supplies a necessity of the public authority, authorized to purchase it; something in the nature of a fixed charge.

Now it is evident, of course, that it is the duty of the board of elections to provide printed ballots at primaries, therefore the printing of such ballots is to be regarded, in my judgment, as within the definition of the word supplies above formulated.

In like manner it is my opinion that the word "purchase" must be given a liberal construction to accomplish the manifest object of the entire section. By applying such liberal construction to the section, I think it follows that a member of the board of deputy state supervisors of elections, who is himself interested in a contract for the printing of the ballots to be used by the board at primary elections is "interested in a contract for the purchase of supplies for the use of the institution with which he is connected" within the meaning of section 12910. Inasmuch as under section 12910 the letting of such a contract at competitive bidding is immaterial, it follows that the case stated by you would constitute a violation of that section.

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

D 328

NEWSPAPERS—PUBLICATION IN CITIES OF EIGHT THOUSAND OR MORE—MUNICIPAL CENSUS GOVERNS.

A municipality is empowered to take a census of its own, under Section 3625, General Code, and when such is properly taken, at a later period than the last Federal census and shows a population of more than 8,000 in a city, the newspapers in such city are entitled to the legal advertisement stipulated for in Section 6252, General Code, prescribing for such publication in cities "of eight thousand inhabitants or more."

COLUMBUS, OHIO, August 30, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney of Crawford County, Bucyrus, Ohio.*

DEAR SIR:—Owing to the extra amount of work thrown upon this department by reason of the bribery trials and other cases, it has been impossible to give office work the prompt attention that I would like to give it. On that account an opinion has not been sent you at an earlier date.

You ask an opinion of this department upon the following:

> "The city of Galion, Crawford county, was dissatisfied with the result of the U. S. census department, and under authority of the Municipal Code passed a resolution, a copy of which is herewith enclosed, employed persons to take the census enumeration. The result of the enumeration taken by the parties employed by the city is 8,172, while the report of the Federal census for Galion is 7,214.
>
> "The question presented to me is, whether or not the Galion newspapers are entitled under section 6252 of the General Code to legal advertisements, by reason of the report of their own census enumeration

and the approval of the city council, finding that they have more than 8,000 inhabitants. The question is, does the statute mean 8,000 or more inhabitants according to the U. S. census, or of the census taken, as was that of Galion?

"I am unable to find any reported case or opinion rendered on this point, hence this letter to your department for an opinion."

Section 6252 of the General Code, referred to, reads as follows:

"A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. *In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city.* This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

The legislature has granted to municipal corporations the power to take a census of such municipality, by virtue of the following statutes:

Section 3616, General Code, provides:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3625, General Code, provides:

"To take and authenticate a census of the municipality."

The statute in question, section 6252, General Code, does not refer to any particular census, but says, "In counties having cities of eight thousand inhabitants or more."

The questions to be determined are: How is the number of inhabitants to be ascertained? and, Is the federal census exclusive of all other means of determining the population of a municipality?

The legislature has passed several statutes, the operation of which is based upon population. A few examples might be given. In dividing municipalities into cities and villages, in section 3497, General Code, these words are found, "Muncipal corporations, which, at the *last federal census*, had a population of 5,000 or more." Also in section 4870, General Code, as to registration of electors, "In cities in which at the *last preceding federal census* had." The term "Federal census" is also found in sections 2990 to 2995, inclusive, governing the salaries of county officers; and also in section 4212, pertaining to wards of a city. These statutes make the "federal census" the exclusive method of determining population. The intent of the legislature is clearly expressed. In section 6252, General Code, there is silence as to the method of determining the population. Was this silence due to inadvertence, or was it intentional?

I find no decision in Ohio upon this question. However, I find the following opinion from Louisiana which will aid in reaching a conclusion.

The opinion of Breaux, J., in case of McFarlan v. Town of Jennings, 106 La. 541, on pages 543 and 544, reads as follows:

> "As relates to the ascertaining if in the town there are as many persons as just mentioned, no reference is made to a census whether by the U. S. or by the state. The statute is absolutely silent upon the subject. The question arises, should the number taken from the census be controlling, in the absence of statutory direction? If the population can only be determined by the U. S. census it would result in not carrying the legislative will into effect. It might well occur that a town would have the requisite number and yet for a period of nine years, or more, the law would remain a dead letter. As the law reads at present, it contains no reference to a census, as relates to the special power in question, and we take it that without special enactment the census is not exclusive of all other methods of ascertaining the number of members of a corporation."

In my opinion the silence of the legislature as to the method of determining the population, in section 6252, is not due to inadvertence. It has specifically provided that the federal census should govern in the sections referred to. If it was intended that the federal census should govern, exclusively, under section 6252, General Code, it should have been so stated. The federal census is not exclusive, and any other legal method of determining the census will comply with the requirements of the section in question.

You state the census of Galion was properly taken by the municipality. If so, its census is the latest evidence of its population, as it was taken since the last federal census.

The city of Galion having a population of more than 8,000 as ascertained by the latest legal census, its newspapers are entitled to the legal advertisements as prescribed in section 6252, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

331.

FEES—JUSTICE OF PEACE IN MISDEMEANOR CASES WHEN STATE FAILS—JUSTICE OF PEACE AS EXAMINING COURT—SERVICES GRATUITOUS.

In state criminal cases, charging the commission of a misdemeanor, wherein the state fails and wherein the justice of the peace acts only as an examining court, the services of the justice are services required by law for the benefit of the public for which no compensation is provided, and are therefore, presumed to be gratuitous.

COLUMBUS, OHIO, August 31, 1911.

CHARLES F. CLOSE, *Prosecuting Attorney Wyandot County, Upper Sandusky, Ohio.*

DEAR SIR:—The time of this department has been so taken up in the bribery trials and other extra work that it has been impossible to give your inquiry the prompt attention that I would have liked to give it.

You ask an opinion of this department upon the following:

"Sometime in April of this year G. D. Allen, a Pennsylvania Railway patrolman and holding an appointment as a police officer signed by the Governor of Ohio, swore out an affidavit charging two men of this town with petit larceny.

"The justice of peace before whom the affidavit was made duly issued a warrant upon this affidavit and gave it to the constable of his court, directing him to take the accused men into custody, and this being done, a preliminary hearing was had and the men accused were bound over to the grand jury.

"At the meeting of the grand jury in June the cases were adversely considered.

"Now, by reason of section 13499, the justice of the peace did not and could not require security from the complaining officer.

"The justice of the peace and the constable have presented their cost bills to the county commissioners for allowance, and the question now presents itself, Can the officers be allowed their fees in the two cases which they were obliged, by reason of the above-mentioned section, to take without security for costs first being given?

"Will you kindly give me your opinion as to whether the allowance of their bills would be proper?"

The charge made in the affidavit was the commission of a misdemeanor, punishable by fine or imprisonment, or both. It was a state criminal case. See section 12447, General Code, for definition and punishment of larceny.

The section by which security for costs may be taken provides as follows:

Section 13,499, General Code:

"When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable, and such magistrate shall enter such acknowledgment on his docket. *Such bond shall not be required of a* sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or *police officer, when in the discharge of his official duty.*"

The complainant in the case at hand was a police officer and no security for costs could be required.

The payment of fees to an officer must be by authority of statute. This principle is laid down by the Supreme Court in the case of Clark v. County Commissioners, 58 O. S., page 107:

"To warrant the payment of fees or compensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute."

There are several statutes governing the payment of fees in criminal cases.

Section 3016, General Code, provides:

"In felonies, when the defendant is convicted the costs of the jus-

tice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses shall be paid from the country treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Section 3017, General Code, provides:

"In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable."

Section 3019, General Code, provides:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

Section 4555, General Code, provides for payment of witnesses and jury fees in state and city cases; section 4556 regulates the payment of fees in cases of violation of ordinances.

Section 13432, General Code, provides:

"In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

Section 13439, General Code, in the same chapter as above section, provides:

"In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. *If the defendant be acquitted or discharged* from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, *all costs of such case* shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

The case in question does not come within the provisions of section 3016, nor 3019; nor is it covered by sections 4555 and 4556.

Sections 13432 and 13439 govern in cases that are prosecuted before a justice of the peace, or mayor, and not in cases wherein the magistrate acts as an examining court, as he did in the case in question.

None of the sections referred to apply, and I find no statute authorizing

payment of fees from the county to a justice of the peace or constable in a case such as you have set forth.

The Supreme Court of Ohio has laid down this rule in the case of Anderson v. Commissioners, 25 O. S., 13, on page 15, in its opinion, viz:

> "Where a service for the benefit of the public is required by law and no provision for its payment is made, it must be regarded as gratuitous and no claim for compensation can be enforced."

A justice of the peace is required to act as an examining court. This service is for the benefit of the public. Unless there is a provision of the statute authorizing payment of his fees the service is to be gratuitous.

In a state criminal case, charging the commission of a misdemeanor, wherein the state fails, and wherein a justice of the peace acts as an examining court, the fees of such justice of the peace and constable acting therein, are not payable from any public fund.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

332.

MAYOR'S COURT—JURISDICTION IN TRIAL BY JURY OF MISDEMEANORS—JUDGMENT FOR COSTS INVALID FOR WANT OF JURISDICTION.

When a complaint is made before a mayor for violation of section 12856, *General Code, for abuse or resistance of an officer and a jury is drawn and trial had under section* 13432, *General Code, et seq., without complying with section* 4540, *General Code, and the defendant acquitted, such trial is void for want of jurisdiction and the mayor has no authority to render judgment for costs.*

COLUMBUS, OHIO, August 31, 1911.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Lucas County, Toledo, Ohio.*

DEAR SIR:—Your favor of July 10, 1911, is received, in which you ask an opinion upon the following:

> An affidavit was filed recently before the mayor of the village of Maumee, this county, charging certain persons with resisting, obstructing and abusing an officer, to wit, the village marshal, in the execution of his office, complaint being made under section 12856 of the General Code, which reads as follows:
>
> "'Whoever abuses a judge or justice of the peace in the execution of his office, or knowingly and wilfully resists, obstructs or abuses a sheriff, constable or other officer in the execution of his office, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.'
>
> "Upon arraignment the defendants entered a plea of not guilty and thereupon demanded a jury trial under and by virtue of the provisions of section 13432 and following sections of Chapter 3, Volume 3, of the General Code. A jury was drawn pursuant to said provisions and a trial

had, resulting in a verdict of not guilty by the jury. The defendant was thereupon released and a cost bill aggregating approximately $200 has been presented to the county auditor for payment, the jury fees alone, including mileage, amounting to more than $100.

"This matter presents a question of vital interest to the taxpayers of each and every county of the state; and, without attempting to express my opinion thereon, I submit the same to you for your consideration. Persons claiming fees and costs in the case are making demands in accordance with cost bill filed, and payment is withheld awaiting your ruling."

The offense charged, as defined in section 12858, General Code, quoted in your letter, is a misdemeanor punishable by fine, or imprisonment, or both, and it is a state criminal case.

The first question that presents itself is as to the jurisdiction of the mayor to prosecute such an offense.

The following sections of the General Code are to be considered in reaching a conclusion in this case:

Section 4536, General Code, provides:

"*He (mayor of a village) shall have final jurisdiction* to hear and determine any prosecution for a misdemeanor, *unless the accused is by the constitution entitled to a trial by jury.* His jurisdiction in such cases shall be co-extensive with the county."

Section 4537, General Code, provides:

"*He shall have the jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial a waiver in writing, subscribed by the accused, is filed in the case.*"

Section 4540, General Code, provides:

"In misdemeanors prosecuted in the name of the state he may summon a jury and try the case, notwithstanding the accused has a right to a jury which he has not waived, if a request for such trial subscribed by the accused is filed in the case, before the commencement of the trial. In such case the trial shall be had on the affidavit in the same manner and with like effect as a trial is had on indictment for such offense in the court of common pleas."

Section 13423, General Code, provides:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to"—

Here follows an enumeration of thirteen classes of offenses pertaining to the pure food laws; cruelty to animals and children; employment of children, etc., but does not include the offense charged in the case of which you make inquiry.

Section 13432, General Code, provides:

"*In prosecutions before a justice, police judge or mayor*, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

Section 13439, General Code, in same chapter as section 13432, provides:

"*In such prosecutions*, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

Section 13494, General Code, provides:

"Justices of the peace, police judges and mayors of cities and villages may issue process for the apprehension of a person charged with an offense and execute the powers conferred and duties enjoined in this title."

Section 13511, General Code, provides:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. *If the offense charged is a misdemeanor and the accused, in writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment.*"

That the mayor's court is a court of limited jurisdiction and that he has only such jurisdiction as is conferred upon him by statute is expressed in the opinion of Bradbury, J., on page 525, in the case of Truman v. Walton, 59 O. S., 517, as follows:

"The court held by a village mayor is of limited jurisdiction. His power to try persons accused of violating village ordinances or the criminal laws of the state is only such as has been conferred by statute. If such jurisdiction has not been thus created, it does not exist."

The jurisdiction of courts of limited jurisdiction cannot be enlarged by implication. Such courts are held strictly within the limits of their authority.

> "The jurisdiction of a justice's court will not be extended, by construction, beyond the letter and probable policy of the statute creating it, especially in a class of cases where it is proverbial that its exercise is so frequently invoked for the more successful accomplishment of little schemes of extortion and oppression."

The above is the last syllabus in the case of McCleary v. McLain, 2 O. S., page 368.

The provisions of the statutes, therefore, must determine the jurisdiction of a mayor to prosecute the case in question.

Section 13423 grants to mayors jurisdiction to prosecute in cases therein enumerated. The offense charged in the case in question is not therein included. Section 4536 does not confer final jurisdiction upon the mayor in this case, as the offense charged was one triable by jury.

Sections 4537 and 13511 did not confer jurisdiction, because defendant did not waive a trial by jury. Nor has section 4540 been complied with.

Section 13432, General Code, does not confer, by implication or otherwise, jurisdiction upon mayors or justices of the peace to try state criminal cases punishable by imprisonment. This section prescribes the duty of the magistrate when a jury is not waived in prosecutions before him. The words "In prosecutions before a justice, police judge, or mayor," therein used, have reference to prosecutions, in which such officers have jurisdiction, as those enumerated in section 13423, General Code. The mayor's jurisdiction to prosecute for offenses must appear specifically by statute, and section 13432 does not confer any such jurisdiction.

In carrying section 3718a, Rev. Stat., into the General Code it has been modified and subdivided into several sections placed under separate chapters. For example, section 13423 is placed under Chapter 1, and sections 13432 et seq. under Chapter 3. This arrangement does not extend the jurisdiction of mayors or justices.

In construing sections 13423 and 13432, et seq., the decision you cite, viz: Martindale v. State, 2 C. C. 2 (1 Cir. Dec., 328), still applies. The second syllabus is as follows:

> Sections 7147 (now section 13511, G. C.), and 3718a, Rev. Stat. (now 13423, 13432 et seq.), are not in pari materi.

As held in that decision, section 13511 applies to an examination and sections 13432 et seq. apply to prosecutions. In the case in question the mayor had jurisdiction as an examining court, and should have acted as prescribed in section 13511, General Code. He had no final jurisdiction unless trial by jury was waived in writing.

The acts of a court without jurisdiction are void, and such court cannot render judgment for costs.

Bradbury, J., in rendering the opinion in the case of Truman v. Walton, 59 O. S., 517, on page 529, says:

> "The authorities are quite unanimous in holding that the acts of any court, whether its jurisdiction is general or limited only, is void unless within the scope of its authority."

The third syllabus in the case of Rathmell v. Wintersterm, 42 O. S., 249, is as follows:

"A court without jurisdiction has no power to render judgment for costs."

In conclusion, the General Code has not enlarged the final jurisdiction of mayors in state criminal cases.

The mayor of the village of Maumee exceeded his authority in trying the case to a jury. He should have acted only as an examining court.

The costs incurred were made while he was acting beyond his jurisdiction. All his acts were void and he could render no judgment for costs.

All payments from a public fund must be by authority of statute. The expense incurred by an officer while acting beyond his authority would not come within the provisions of any statute.

The fees and costs in the case at hand cannot be paid from the county treasury or from any other public fund.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

A 332.

LOCAL OPTION ELECTIONS—LAPSE OF THREE YEARS BEFORE FILING OF PETITIONS FOR NEXT ELECTION—CORRUPT PRACTICES ACT—EXPENSE OF PROCURING PETITIONS.

The signing, circulating and filing of petitions and the local option election itself, are to be viewed as one general scheme under section 6115, General Code, providing for a lapse of three years from the last preceding local option election, and said statute will not permit a circulation and signing of such petitions prior to the lapse of three years, even though they contemplate an election to be held after such time.

Under the corrupt practice act, expenditures necessary to secure the requisite number of signatures to a petition for such election, are not expenditures "in connection with or in respect to an election" as is contemplated by the act, but merely preliminary, and therefore such expenditures are not limited in any way. All other regulations of the corrupt practice act, however, must be complied with by committees and organizations conducting local option contests.

COLUMBUS, OHIO, August 31, 1911.

HON. CHARLES F. CLOSE, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—Your letter of August 24th received, in which the following matters are submitted for my opinion:

"1. Under the provisions of section 6115 may a petition for a local option election be circulated and signed before the expiration of the three years from the date of the preceding election and filed after the three years have elapsed, or must the circulation and signing of such petition be delayed until after the three years have expired?

"2. In what amount, if at all, are the committees having charge of a contest under the Rose county local option law limited as to the money that they may expend, and if such committees are limited, is the expenditure necessary to secure the requisite number of signatures to a

petition for an election to be included within and form a part of such amount? (102 O. L., pages 321-331.)"

As to your first question, the language of section 6115 seems open to one, and only one, construction consistent with the letter as well as the spirit of the local option enactment, namely: that the circulation and signing of the petitions referred to by you must be delayed until the expiration of three years from the date of the preceding election.

Although the filing of the petition is a condition precedent to the granting of a new election, yet it is simply a condition. The document itself, the petition, is the salient feature, the commanding element, and to argue that the time of filing was regulated, but the time of signing and circulating discretionary, would be to argue that the legislature in grasping at the shadow lost sight of the substance.

If the circulating and signing on the one hand, and the filing of the petition on the other, are all part of one general scheme whereby a new submission of the liquor question may be secured, then the one law contemplates and applies to this one general scheme as a unit.

Your second question involves an examination of the corrupt practice act, passed by the last legislature and found in Volume 102, Ohio Laws, pages 321 to 331. The limitation of the amount of money to be expended is found in section 29 of this act, which provides as follows:

> "The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in section 26 of this act, for contributions to political committees, as that term is defined in section 1 of this act, or for any other purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination or election, shall not exceed the amount specified herein: By a candidate for governor, the sum of five thousand dollars; by a candidate for other elective state office, the sum of two thousand five hundred dollars; by a candidate for the office of representative in congress or presidential elector, the sum of two thousand dollars; by a candidate for the office of state senator, the sum of three hundred dollars in each county of his district; by a candidate for the office of state representative, the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars. If the total number of votes cast therein at such last preceding state election be in excess of five thousand the sum of five dollars for each one hundred in excess of such number may be added to the amounts above specified. Any candidate for a public office who shall expend for the purposes above mentioned an amount in excess of the amounts herein specified, shall be guilty of a corrupt practice."

It will be noticed that this section refers only to the total amount to be expended "by a candidate for public office," and there is no provision referring to an election on a proposition submitted to a vote of the people. So as far as an allowance of an amount to be spent by a person, committee or organization to aid or promote the success or defeat of any proposition submitted to the people at an election, is concerned, this section makes no provision.

Section 26 of the act provides what shall constitute the guilt of a corrupt practice, as follows:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value:
>
> "Rent of halls and compensation of speakers, music and fireworks for public meetings, and expenses of advertising the same, together with the usual expenses incident thereto;
>
> "The preparation, printing and publication of posters, lithographs, banners, notices and literary material, the compensation of agents to supervise and prepare articles and advertisements in the newspapers, to examine questions of public interest bearing on the election, and the report on the same; the pay of newspapers for advertisements, pictures, reading matter and additional circulation, the preparation and circulation of letters, pamphlets and literature bearing on the election;
>
> "Rent of offices and club rooms, compensation of such clerks and agents as shall be required to manage the necessary and reasonable business of the election and of attorneys at law for actual legal services rendered in connection with the election; the preparation of lists of voters and payment of necessary personal expenses by a candidate; the reasonable traveling expenses of the committeemen, agents, clerks and speakers; postage, express, telegrams and telephones; the expenses of preparing, circulating and filing petitions for nomination. No party organization or candidate shall compensate or hire in any one election precinct more than one person to prepare lists of voters. Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, whose name shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisors of elections, at least two (2) days before such registration or election day, and who may be paid for their services by such committee or candidate not in excess of five ($5.00) dollars per day each.
>
> "Any payment, contribution or expenditure or agreement or offer to pay, contribute or expend any money or thing of value for any purpose whatsoever except as herein provided is hereby declared to be corrupt practice and invalidate the election of any person guilty thereof."

It will be noted that the dereliction is if a person "in connection with or in respect of any election, pays * * * for any other purpose than the following matters and services * * *"

I do not think that the expenditure of money, if such is necessary, to secure the requisite number of signatures to a petition for an election is an expenditure in connection with or in respect of any election.

While it might be said a petition, being a prerequisite, is necessarily, in connection or in respect of an election, and any expense thereby incurred would come within the purview of this section, I am not prepared to say from a consideration of the language of the entire act that there was any intention in the legislative mind as shown by the language employed which would permit of this

construction. It would be possible that the expense of obtaining signatures to a petition might be incurred and yet, owing to not having the required number of qualified signers, no election could be ordered. Could it be said that this was in connection with, or in respect of, an election that was never held?

Again, section 1 of the act, defining "committee" or "organization" where it speaks of "persons co-operating to aid or promote the success or defeat * * * of any proposition submitted to be voted for at any election" fails entirely to make mention of any of the proceedings prior to the election itself; while when the section refers to the aiding and taking part in the election or defeat of any candidate for nomination at a primary election or convention, it specifically adds "including all proceedings prior to such primary election."

As stated in State v. McCoy (Delaware), 43 Atl., 270-3:

> "An election under the constitution involves every element necessary to the complete ascertainment of the expression of the popular will, embracing the entire range from the deposit of the ballot by the elector up to the final ascertainment and certification of the result."
>
> "The casting and receiving of the ballots from the voters, counting of the ballots and making returns." (State v. Tucker, 54 Ala., 205.)

This is the meaning of the word "election" in the ordinary usage, and it must be so construed, there being nothing in the law suggesting that the legislature intended to use it in a different sense. (Norman v, Thompson, 76 S. W. 62.)

So it is evident that for a person to be guilty of a corrupt practice act he must directly or indirectly, by himself or through any other person, *in connection with or in respect of an election*, pay, lend or contribute money or other valuable consideration, for some other purpose than itemized in section 26 of said corrupt practice act; and since the payment for the work of obtaining signatures to a petition for an election under the local option law is not "in connection with or respect of an election" as contemplated by the act, but is merely preliminary, I am of the opinion that such expenditure does not come within the corrupt practice act and that the amount of money expended is not limited in any way.

Of course, I do not mean to say that the other provisions of the corrupt practice act do not apply to persons, committees and organizations conducting local option contests. They must comply with all the regulations of the statute, as to the statement of expenditures, the keeping of accounts, acting through a regularly constituted treasurer, the taking of receipts—in fact, all of such provisions contained in the act.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

334.

"TEMPERANCE BEER"—LOCAL OPTION AND DOW-AIKEN TAX PROVISIONS—"MALT LIQUORS."

Whether or not the sale of a certain "temperance beer" would be a violation of the municipal local option law and the statute providing for the Aiken law, depends upon the chemical ingredients of the beer. If it is a "malt" beer, it is included in local option provisions and also in the Dow-Aiken tax provisions.

COLUMBUS, OHIO, September 1, 1911.

HON. T. E. MCELHINEY, *Prosecuting Attorney, McConnelsvile, Ohio*

DEAR SIR:—Replying to your inquiries under date of July 26th and August 17th, as to whether the sale of certain "temperance beer," the advertisement of which you enclose, would be a violation of the municipal local option law and the statute providing for the Aiken tax, I would say it all depends in each individual case upon of what the so-called temperance beer is constituted.

Section 6064, of the General Code, defines intoxicating liquor as follows:

> "The phrase 'intoxicating liquor,' as used in this chapter and in the penal statutes relating thereto, means any distilled, malt, vinous or any intoxicating liquor except in sub-divisions II and VI of this chapter, entitled 'taxation' and 'local option in municipal corporations' respectively, and the penal statutes relating thereto, in which cases such phrase means any distilled, malt, vinous or any other intoxicating liquor."

It would be impossible to say that this or that so-called temperance beer, or, rather, so-called temperance drink, came within the definition of the statute, except after an analysis of the specific liquor.

The case of State v. Kauffman, 68 O. S. 635, to which you refer (as well as the more recent case of State v. Walder, 83 O. S., 68), decides inter alia that it is unlawful to sell intoxicating or non-intoxicating *malt* liquors, to be used as a beverage, in a place where local option laws are in force; while the case of La Follette, Treasurer, v. Murray, 81 O. S. 474, holds that the provisions of section 4364-9, Revised Statutes (Dow Law, 98 O. L., 100), in effect April 10, 1906, applies to the business of trafficking in *malt* liquors, whether intoxicating or non-intoxicating. So, in my opinion, if the so-called temperance beer is a *malt* liquor, whether intoxicating or not, it would come within these decisions; but whether or not it is a "distilled, malt, vinous or any intoxicating liquor" or a "distilled, malt, vinous or any other intoxicating liquor" could only be determined after a chemical analysis of an individual sample, and not from an advertisement.

I respectfully call your attention to the fact that a fermented liquor is not necessarily a malt liquor, and that all fermented liquors are not intoxicating. While the primary definition of "beer," as given by Webster, is "fermented liquor made from any malted grain with hops or other bitter flavoring matter," still the secondary definition, to wit: "a fermented extract of the roots or other parts of various plants, as spruce, ginger, sassafras, etc.," is well understood and frequently used. We have root beer, spruce beer, ginger beer, etc., which are not malted liquors and may be really temperance beers.

In conclusion, I can only say that an analysis of the temperance beers you mention would be the only method of determining whether or not they are included in the prohibited liquors.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 336.

SALARY FEE FUNDS—COUNTY AUDITOR--EFFECT UPON DISPOSITION OF FEES AND PAYMENT OF SALARY OF CHANGE OF SALARY LAW—PAYMENT FROM GENERAL FUND.

Section 2989, General Code, as amended, making the county auditor's salary payable out of the general fund instead of the fee fund, does not state the time it shall take effect, and therefore takes effect at the beginning of the day of its approval by the governor, i. e., May 25th.

Up to and including the 25th, therefore, the auditor's salary shall be paid from the fee fund and after that time from the general fund.

Fees collected prior to May 25, 1911, for and upon completion of work done, should be paid into the fee fund. Fees payable as a percentage upon taxes collected at semi-annual settlements should be apportioned so that a like portion of such fees should be paid into the fee fund as the number of months during which the salary was payable from the fee fund bears to the entire period which such collections cover.

COLUMBUS, OHIO, September 2, 1911.

HON. T. J. KREMER, *Prosecuting Attorney, Monroe County, Woodsfield, Ohio.*

DEAR SIR:—Your favor was received in due time, but owing to the press of work caused by the bribery trials and other unlooked for matters, it has not been possible to give it attention sooner.

You ask an opinion upon the following:

> "In May of this year senate bill No. 141 became a law, supplementing section 2980 of the General Code by section 2980-1 and sections 2983-4-5-7-9 of the General Code were amended, and I would like to have a reply by return mail, if possible, to the following inquiries:
>
> "First: Is the entire salary for the month of May for officers therein enumerated payable out of the general county fund?
>
> "Second: There being no money in the fee fund of the auditor for the months of March and April, the auditor did not draw his salary for those two months and they are now unpaid, and from what fund will he draw his salary for the months of March and April?
>
> "I have my individual opinion as to this matter, but as we necessarily must comply with the department of accounting, we would be glad to have your advice as to your opinion in the matter. As this should not take a very long time to decide, I hope you will be able to send me your opinion by return mail."

Section 2985, General Code, as amended May 25, 1911, 102 Ohio Laws, page 137, provides:

> "The county commissioners may at any time transfer from the fee fund of any office any amount therein in excess of that necessary to pay the compensation of the deputies, assistants, bookkeepers, clerks or employes, except court constables, in said office, to the general county fund or to any fund from which transfers have heretofore been made to any of such fee funds, provided, that when any transfer of moneys has heretofore been made to any such fee fund the fund from which such transfers have been made shall be fully reimbursed before any trans-

fers may be made to the general county fund. Such transfers may be made upon authority herein provided, any law to the contrary notwithstanding.

"For such action of the commissioners, an appeal may be taken to the common pleas court by a taxpayer of the county, which shall be heard and determined by the court or judge thereof within twenty days after being perfected."

Section 2989, General Code, as amended May 25, 1911, 102 Ohio Laws, page 137, provides:

"Each county officer herein named shall receive out *of the general county fund the annual salary hereinafter* provided, payable monthly upon warrant of the county auditor."

Before the above amendment was passed, said section 2989, General Code, read as follows:

"After deducting from the proper fee fund the compensation of all deputies, assistants, clerks, bookkeepers, and other employes, as fixed and authorized herein, *each county officer herein named shall receive, from the balance therein the annual salary hereinafter provided,* payable monthly upon warrant of the county auditor."

The above amendments were passed May 17th, 1911, and approved by the governor on May 25th, 1911.

The amendment to section 2989 changes the method of paying the salaries of county officers. Before its passage such salaries were paid from the balance in the fee fund of such office, remaining after the compensation of all deputies and other employes of such office was paid. By virtue of the amendment such salaries are now paid from the general fund of the county.

The act amending section 2989 does not state the time when it shall become effective. It, therefore, takes effect on and after its passage and approval by the governor.

The rule is laid down in 36 Cyc., page 1196, as follows:

"Where no time is expressly fixed by a general constitutional or a statutory provision, or by a provision in the act itself, a statute takes effect from its passage."

The time of day it takes effect is stated in the syllabus of the case of Arrowsmith v. Hamering, 39 O. S., 573, as follows:

"This act took effect on the day of its passage, *and by presumption of law, from the commencement of that day, and not from its expiration.*"

The amendment to section 2989 took effect at the beginning of the day of its approval, namely, May 25, 1911.

The salary of all county officials up to and including May 24, 1911, should be paid in accordance with section 2989 as it existed prior to the above amendment. Such salary should be paid in accordance with the act of May 25, 1911, after said May 24, 1911.

Your second question involves the disposition of the fees of the auditor.

Section 2624, General Code, provides:

"On all moneys collected by the country treasurer on any tax duplicates of the county, other than the liquor and cigarette duplicates, the county auditor on settlement semi-annually with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:

"On the first one hundred thousand dollars, one and one-half per cent.; on the next two million dollars, five-tenths of one per cent.; on the next two million dollars, four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, townships, corporations and school districts."

Section 2626, General Code, provides:

"The county auditor may also charge and receive fees as follows: For certificate of sale of school land, to be paid by the purchaser, twenty-five cents; for certificate of payment of installment into the treasury on school lands, to be paid by the purchaser, fifteen cents; for final certificate of payment for school lands, to be paid by the purchaser, seventy-five cents; for deeds of land sold for taxes to be paid by the purchaser, one dollar; for the transfer of an entry of land, lot or part of lot, to be paid by the person requiring it, ten cents; but the whole amount of fees for transfers of real estate described in any one deed, plat, or other instrument, shall not exceed one dollar and fifty cents."

Sections 2624 and 2626 as set forth above are as amended May 31, 1911, 102 Ohio Laws, pages 278 and 279. The change is as to the amount of the percentages and fees.

The auditor is also entitled to other fees for specific work performed.

The fees provided for in section 2626, and for the other work to be performed by him are collected as the work is done. The amount of such fees earned prior to May 25, 1911, can be easily ascertained. Such fees so earned prior to May 25, 1911, should be paid into the auditor's fee fund, from which his salary should be paid, as set forth in answer to your first question herein.

The work to be performed for which percentage is allowed the auditor by virtue of section 2624, General Code, covers the entire year, while settlement is made but twice a year, and the money upon which such percentages are allowed is collected only during taxpaying periods, which covers but a part of the year. The months of March and April, of which you inquire, are not in a taxpaying period and, therefore, little if any of the percentages prescribed in section 2624 would be collected or earned during that period.

It would be unfair to the auditor to require him to pay all percentages received from the tax collection of June 20, 1911, into the fee fund, to be transferred to the general county fund as prescribed in section 2985 as amended May 25, 1911, and leave nothing for his salary for March and April. This certainly was not the intention of the legislature.

The following is the syllabus in the case of State v. Lewis, 10 Nisi Prius, N. S., page 234:

"A county auditor who completed the grand duplicate for his county prior to October 1, 1906, and continued to be such auditor until after the semi-annual settlement with the treasurer in February, 1907, is not entitled to the entire amount of the percentages accruing at that settlement, as provided by section 1068, Revised Statutes (General Code, 2624), but only to such proportion of the percentages arising upon such duplicate as the part of his official year that elapsed prior to January 21, 1907, is to the whole official year."

This rule can well be applied to the case at hand. The percentages of taxes collected, as prescribed in section 2624, General Code, should be proportioned throughout the official year. Such proportion of said percentages as the time of his official year that has elapsed prior to May 25, 1911, bears to his entire official year, should be paid into the auditor's fee fund, from which his salary should be paid up to and including May 24, 1911, in accordance with the law as it existed prior to said May 25, 1911. The remainder of said percentages should be paid into the fee fund in accordance with the act of May 25, 1911.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

340.

TAXES AND TAXATION—EXEMPTIONS—COLLEGES AND INSTITUTIONS OF PUBLIC CHARITY ONLY—LANDS AND DORMITORIES—"PROPERTY"—OBERLIN COLLEGE.

Oberlin College being conducted without a view to individual pecuniary gain is, therefore, a public college within the meaning of section 5349, General Code. The further requirement of section 5349 referring to "lands not used with a view to profit" comprehends a profit for the institution itself.

Therefore, land owned by Oberlin College and so used and also "all buildings connected therewith," such as dormitories from which a rental is charged and devoted to the aims of the institution, are exempt from taxation.

The endowment fund of Oberlin College, under section 2732, Revised Statutes, was exempt under the phrase "moneys and credits appropriated solely to sustain and belonging exclusively to said institutions," and now, under said section as codified, i. e., section 5353, General Code, such fund is consistently exempt by virtue of the phrase "property belonging to institutions of public charity only."

COLUMBUS, OHIO, September 5, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 13th and to apologize for the delay in answering the same. This department has been overwhelmed by an unusual pressure of business, and the question which you submit being of some difficulty and importance was reserved for careful consideration.

You request my opinion upon certain inquiries submitted to you by Hon. O. E. Haserodt, auditor of Lorain county, which said inquiries are as follows:

"1. Oberlin college owns several buildings of a residential charac-

ter, none of them on the college campus proper, and all of them used as dormitories exclusively for the boarding and lodging of students and other persons connected with the college. From the operation of these dormitories the college derives a revenue, all of which is used to enhance the general fund of Oberlin college corporation for college purposes, which said fund is expended by the trustees of the college for such purposes as they may see fit to expend it. Said dormitories are operated and managed directly under the supervision of the college authorities and are not leased to private persons or individuals as entireties although, of course, the rooms therein are rented to students and other persons as aforesaid. The college is a corporation not for profit, all earnings of which are either expended for current needs of the college, or for the purchase of property necessary or convenient for the college or for the enhancement of the endowment fund of the college.

"Are the properties above described taxable under the existing statutes and the rule in Kenyon college v. Schnebly, 12 O. C. C. n. s. 1.

"2. Is the endowment fund of Oberlin college consisting of moneys and credits appropriated wholly to sustain the college as an institution exempted from taxation as personal property under existing statutes?

The decision in Kenyon college v. Schnebly referred to by the county auditor related to the construction of that portion of section 2732 R. S., which has been carried without verbal change into the General Code section 5349 as follows:

"Public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation."

In the opinion in the Kenyon College case, per Taggart J., occurs the following language:

"The plaintiff is incorporated under the laws of Ohio as an educational institution * * *. The property involved herein may be grouped into the following classes.

"1. Residences occupied by the president and professors in the college, and by the head janitor of the college.

"2. Lands, a portion of which are used for agricultural purposes, and from which revenue is derived, either in crops or rental for pastures.

"3. Vacant lands.

"4. Pumping station and standpipe.

"5. The academy grounds and buildings.

"It appears that the college has a number of residences which are occupied by the members of the faculty of the college. It has been the policy of the college to permit such of its professors as are married, and also its president, *to use these residences, rent free.* It further appear that they are primarily residences, and no literary exercises or instructions are conducted therein. One of the houses is occupied by the head janitor, who resides therein under a similar arrangement. There are also several tracts of land which are farmed; or, under the direction of a superintendent, are rented for pasturage, and from these a profit is realized.

"There are also several tracts that are vacant, not devoted to agriculture, and from which no profit is derived; unless in the future the same should be sold at an enhanced value. * * * *

"The academy buildings and grounds were prior to 1900 occupied by the preparatory department of the college and at or about this time the trustees contracted with Hills & Wyant to conduct a school which should prepare its students for Kenyon College. This contract was to continue for three years, with the privilege of a two years' extension. Among other things contained in this contract was a stipulation that there should be a rental of $2,000, together with provisions that there should be close relations established between the school and the college, and that a portion of the money received for room rent from students sent from the school of Kenyon College should be returned to Hills & Wyant and devoted to the improvement of the buildings and grounds. This arrangement continued until about the year 1906, when fire destroyed all the buildings or a greater part of the same, since which time the school has not been in operation.

"The plaintiff claims exemption from taxation on all this property under favor of section 2732, revised statutes, a portion of which is as follows:

"The following property shall be exempt from taxation: * * * all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, *not used with a view to profit.*

" '* * * It is apparently conceded that Kenyon College so far as some of its lands and buildings are concerned, falls within the class of institutions that are exempt from taxation. So that the question in this case arises on the construction of this part of the statute just quoted. As to the rule or construction to be employed, it is contended by the defendant that, "when an exception or exemption is claimed, the intention of the general assembly to except, must be expressed in clear and unambiguous terms." 46 O. S. 153-159.'

"But the supreme court in the case of Watterson v. Halliday, 77 O. S. 169, has adopted a different rule:

" 'When religious, charitable or educational institutions seek exemption, we think such right of exemption should appear in the language of the constitution or statutes with *reasonable certainty*, and not depend upon their doubtful construction.'

"In the case of Little v. Seminary, 72 O. S. 428, the supreme court in effect, say:

" 'That the court in its interpretation of statutes is not permitted or required to go beyond the plain meaning of the language which the legislature has used to express its intention.'

"So that we must determine whether or not it was the legislative intent that the residences of professors, or residences occupied by the president and professors, are exempt from taxation, judging from the plain meaning of the language employed. * * * *. The plain meaning of this statute is as follows: 'All public colleges, public academies, all buildings connected with the same, are exempt from taxation.' All buildings connected with the same refers to 'public colleges' and 'public academies' and refer to buildings that are associated with or assist in carrying out the uses and purposes of the institution known and designated by the terms, college or academy.

"It is urged upon our attention by the defendant that these houses or residences are not used, '*exclusively*,' for literary purposes, and that unless used exclusively for literary purposes, or for the purpose of instruction, that they are not exempt.

"But there are many buildings connected with colleges and academies which are necessary for the proper conduct of the business of the college, in which literary exercises do not take place, and which are not employed for the purpose of giving instruction. * * * *.

"It appears that the occupation of these residences grew up from the necessities of the case; that adequate accommodations and facilities were not at hand for the president and professors. We can see no difference between these members of the faculty occupying these residences *free of rent*, than if they were lodging in the other buildings of the college. But the plain language of the statute is, 'all public colleges, public academies, all buildings connected with the same, are exempt.' And we think it was the purpose to exempt all buildings that were with *reasonable certainty* used in furthering or carrying out the necessary objects and purposes of the college. We do not think the term 'not used with a view to profit' refers to or controls the clauses 'all public colleges, public academies, all buildings connected with the same,' but refers to simply the clause preceding it in the statute, 'all lands connected with public institutions of learning, not used with a view to profit' * * *

"So that with this view of the law and its construction, we think the residence occupied by the president and professors and the janitor are exempt from taxation. And that brings us to the next question, in respect to lands, a portion of which are not used for agricultural purposes, and from which a revenue is derived. We think the statute is clear, that all lands connected with public institutions of learning, *'not used with a view to profit'* are exempt, but the portions of the land herein, which are given up to agricultural purposes, and which are rented for pasturage are subject to taxation. * * * * *.

"In respect to the academy grounds: we are of the opinion, that while the arrangement was entered into between Hills & Wyant for the conduct of a school in the buildings, and on said grounds * * * * its primary purpose was not to rent this property for the purpose of securing a revenue, but its primary object was to carry out the purpose contained in its charter, viz., the conduct and maintenance of the preparatory school; that the same was a public academy, and that * * * * the same were directly connected with Kenyon College, and directly and necessarily associated therewith and a part thereof. * * * * *"

The foregoing decision was affirmed by the supreme court in an unreported decision.

The case of Kenyon College v. Schnebly, quoted, is the only case under existing laws involving the exemption of college buildings, from taxation, and is to be regarded as establishing the law in such cases. That is to say, other decisions relating to the exemption of parsonages and parish houses from taxation do not apply to the question of exemption of college buildings for the obvious reason, as pointed out, by judge Taggart in a portion of the opinion not above quoted, that such other decisions are under other provisions of the statute essentially dissimilar in language from that provision which relates to the examination of college buildings. The Kenyon College case is not absolutely decisive of the question which you present for the reason that the residences occupied by the president, certain professors and the janitor of Kenyon College, the taxation of which was involved in that case, were occupied rent free, and it does not appear from the record in the case that this abatement of rent was an indirect method of paying

salaries, although this would seem to be highly probable. In the case submitted by the auditor of Lorain county, on the other hand, the students and other persons connected with Oberlin College who reside in the dormitories described by him pay rent to the college, and the college conducts boarding tables in such buildings so that a profit or revenue is derived by the college from the use of such buildings.

By analysis of the opinion of judge Taggart it will be observed that the question as to the exemption of the residences involved in the case before him turned upon the question as to whether or not a building not exclusively used for the purpose of imparting instruction could be said to be "connected with" a college. His decision, of course, was that the use of the building for the purpose of imparting instruction is not essential to establish its connection with the college. Inasmuch as the buildings were found in fact to be occupied rent free, the question as to whether or not a building, the use of which in a manner other than the imparting of instruction produces a profit is exempt from taxation was not presented, and of course was not decided in the Kenyon College case.

It becomes necessary, therefore, to approach the precise question involved in the auditor's inquiry with its distinction from the Kenyon College case clearly in mind.

The authority of the general assembly to pass any and all exemption laws is derived from article 12, section 2 of the constitution, which provides in part as follows:

> "Burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose * * * may, by general laws, be exempt from taxation * * *."

It will be noted that public colleges are not expressly mentioned in the clause above quoted. If the general assembly, therefore, had any power expressly to exempt public colleges and academies from taxation, it must have been because such institutions were of "purely public charity." That this is the case, and that also a private corporation organized not for profit and for the purpose of conducting an institution of learning similar to Oberlin College is a "public college" within the meaning of secton 5349 is well settled.

I enclose herewith a copy of an opinion of my predecessor, addressed to the tax commission, in which authorities are collated establishing both of these points, and in the conclusion of which I heartily concur.

Assuming, therefore, that Oberlin College is a privately incorporated institution conducted without a view to profit for the purpose of imparting higher education, it follows that it is entitled to whatever exemption from taxation is afforded to "public colleges" by section 5349 General Code, above quoted.

As will be apparent from an examination of my predecessor's opinion, Oberlin College is also entitled to the benefits of the exemption contained in section 5353, which provides that, "property belonging to institutions of public charity only shall be exempt from taxation."

As above stated there is no decision under the present tax laws of this state upon the point as to whether or not buildings belonging to a public college and used in connection with it from which a profit is derived by the college are "connected with the college" within the meaning of section 5349.

In strict logic the derivation of a profit from the use of a college building in a way intimately associated with the objects and purposes of the college would seem to be immaterial under section 5349, for the section provides that,

"Public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, *not used with a view to profit*, shall be exempt from taxation."

Now in order to be a "public college" within the meaning of section 5349 a college must be one not managed with a view to profit to private individuals. This is clear from the decisions cited in the opinion of my predecessor. Therefore, it necessarily follows the phrase "not used with a view to profit" employed in section 5349 must refer to and mean a profit to be reaped by the institution itself, although the profit so reaped is in no sense a private or individual profit but itself serves merely to enhance a fund devoted to the object of education—the object of purely public charity.

As Judge Taggart points out in the Kenyon College case, this phrase "not used with a view to profit" modifies the word "lands," the noun immediately preceding it and subject to modification: and by grammatical construction does not modify the word "buildings." The construction of the learned judge appeals to me as the only one which can be made of the section consistent with English grammar. What then is the significance of the unqualified exemption of "buildings connected therewith?" It seems to me that in connection with the context this phrase can only mean that buildings connected with a public college, whether or not they are used with a view to profit to the college, are exempt from taxation.

If the grammatical construction of section 5349 were alone involved in the case it would of itself constitute an answer to the auditor's question, for I think there can be but little doubt that a college dormitory is a building connected with the college itself. The dormitory is an essential adjunct to the college and is an institution as old as colleges themselves. In the English system of higher education upon which our own was originally founded, it was and still is considered essential that the student should live in quarters maintained by and under the supervision of the authorities of the college or university. Almost all the institutions of higher education in this country maintain dormitories, although at the present time comparatively few of them require all students to live therein.

From all of these facts it cannot be denied, and I think it follows as a matter of law, that a dormitory—a living and boarding place wherein students of a college are subject to the continuing discipline of the college authorities—is a part of what may be termed the plant or equipment of such college and its maintenance and one of the proper if not of the essential functions of an institution of this kind. Nor is this reasoning opposed at all to the rule established in this state by the case of Gerke v. Purcell, O. S. 229, and Halliday v. Watterson, 77 O. S. 150.

In these cases it was held simply that parish houses and parsonages owned by a society in connection with churches but occupied by ministers and priests of such churches as places of private residence were not exempt from taxation. This was because the church itself in each case was held not to be "an institution of purely public charity" but entitled to exemption under that other provision of the constitution and the statute enacted in pursuance thereof that "houses used exclusively for public worship" should be exempt from taxation. Indeed, the reasoning in both these cases, and particularly that of Price, J., in Halliday v. Watterson, *supra*, shows very clearly that if the court had been able to reach the conclusion that the church was an institution of purely public charity, its conclusion on the main question would have been entirely different.

The question is rendered doubtful by the decision in the case of Library Association v. Pelton, 36 O. S. 253. That case involved the construction of that

clause of former section 2732 R. S., which exempted from taxation "all buildings belonging to institutions of purely public charity, together with the land occupied by such institutions, not leased or otherwise used with a view to profit." The library association (the original plaintiff in the action) owned a certain building, most of the rooms in which were used directly by the association for the accomplishment of its principal purpose. The rooms not thus used, however, were rented to other parties, and the rentals thus received were applied in furtherance of the objects of the association, which were conceded to be those of purely public charity. The court held that as to so much of the building as was thus rented, the association was subject to taxation. The reasoning of the court, as expressed in the opinion of Johnson, J., is not clear in that it is not stated as to whether the phrase "not leased or otherwise used with a view to profit" in the statute under consideration was regarded as modifying the word "buildings." If this had been the reasoning of the court, the same would be diametrically opposed to the reasoning of Judge Taggart in the Kenyon College case above quoted. On the contrary the following language was used:

> "If such institution embraced other objects and uses its buildings for other purposes, as for instance, renting with a view to profit, it is not an institution of purely public charity, and the fact that the income derived from rents of parts of the building not used is devoted exclusively to the objects and purposes of the association and not used for the benefit of its members, can make no difference."

In other words, if we are to follow the opinion in the Pelton case we would have to conclude that as soon as an institution rents its property and receives an income therefrom it ceases to be an institution of purely public charity. But the logic of this argument does not support the decision of the court in the Pelton case, for the court held the institution exempt as to all property and as to all parts of its building not rented with a view to profit, and in the first branch of the syllabus directly declared the association to be "an institution of purely public charity." There would seem to be here a *reductis ad absurdum*. An institution is held to be one of purely public charity and yet denied complete exemption because it was not an institution of purely public charity. The faulty logic of the opinion in the Pelton case would lend support to the theory that in following it, as it often has, the supreme court has preferred to assume that the phrase "not leased or otherwise used with a view to profit" in the statute construed in that case, modified the word "buildings" as well as the word "lands." Yet this conclusion also is involved in difficulty in view of the supreme court's affirmance of Judge Taggart's opinion, which holds that in the almost identical clause of what is now section 5349 General Code the phrase "not used with a view to profit" does not modify the word "buildings."

I am free to state that if the two opinions of the supreme court, that in the Kenyon College case and that in the Pelton case, are to be regarded as incomsistent, I should prefer the later, not only because it is of later date but because of what seems to me to be the better reasoning embodied in Judge Taggart's opinion. But it is incumbent upon me to reconcile the two decisions if they can be reconciled, regardless of my own view as to the grammatical construction of the section involved. Judge Taggart, it will be observed, placed no stress upon the fact that the residence of the professors involved in the Kenyon college case were occupied rent free, and that therefore they might be said, in a sense, not to be used with a view to profit. He preferred apparently, to place his decision upon the ground that the phrase "not leased or otherwise used with a view to profit" did not modify the word "building." The supreme court did not

state its reason for affirming the judgment of the circuit court (81 O. S. 514). We are warrented in concluding, therefore, that the only thing affirmed by the supreme court was the judgment itself and not the opinion. Now it is manifest that the supreme court could have regarded the fact that the residences of the professors were occupied by them free of rent, as a compliance with the phrase "not used with a view to profit," so that that court could have affirmed Judge Taggart's decision, and at the same time approved the only tenable ground of the decision in the Pelton case.

Though the question is involved in very serious doubt, I have come to the conclusion that sound as Judge Taggart's reasoning respecting the grammatical construction respecting section 5349 General Code is, it has not received the sanction of the supreme court, and that if the buildings are connected with a public college and used with a view to profit they are not exempt from taxation.

Does then the use of the buildings in question by Oberlin College as dormitories constitute a use with a view to profit?

Upon a careful consideration of this question, with regard to which there is very little authority, I am of the opinion that such use as described by the auditor in his letter is not a use "with a view to profit" as contemplated by the section under consideration. The exact limitations of the meaning of this phrase in the statute is not clear. In the Pelton case the rooms rented by the Library Association were not necessary for the use of the association, and the use to which they are devoted by the lessees had no relation whatever to the objects and purposes of the association. The contrary is true of the dormitories of Oberlin College. I have already stated reasons for holding that these dormitories constitute a part of the college itself. The room rent and board charged by the college authorities of students residing in these dormitories is not in the nature of "profits," although they may produce an income in excess of the expense in maintaining such dormitories.

The case is more nearly like that presented in Davis v. Campmeeting Association, 57 O. S., 257. Although this decision has since been criticised by the court which rendered it as going to the limit of literal construction of an exemption law presumably subject to the strict construction, it contains certain principles which are undoubtedly good law and which are appropriately applied to this question. The decision is per curiam, and is in part as follows:

> "The court found * * * * 'that none of said real estate is leased by plaintiff, nor is any of said real estate in any manner used with a view of profit, nor has any of said real estate been either leased or used for profit.' And though charges are made for the use of certain privileges, these are not inconsistent with the finding, that none of its property is leased or used with a view to profit. None of its lands, as shown by the finding, are used for any other purpose than to provide for convenience and comfort of those who may attend the meetings; and those are not sufficient to meet the expenses of the association, and have to be met in part by donations from those interested in the maintenance of the meeting. So that the charges are not then made with a *view to profit.*
>
> "The auditor relies principally on two cases heretofore decided by this court. In the case of Cincinnati College v. The State, 19 Ohio, 110, after a fire the buildings of the college were restored, and were constructed with special reference to a renting of a part of them for secular purposes, such as stores for the carrying on of ordinary business, and were so rented for profit only, not to uses that would be ancillary to the

necessary uses and purposes of the college, *such as dormitories and the like.* Such parts of the buildings so constructed and rented, were held subject to taxation; and the same distinction exists in the case of Library Association v. Pelton, 36 Ohio St., 253."

The principle is here laid down then that property is not leased or otherwise "used with a view to profit" within the meaning of that phrase as it is frequently employed in the tax exemption law if a charge is made for its use incidental to the principal objects of the institution owning it.

This view of the case makes it unnecessary for me to consider the broad language of section 5353 of the General Code above quoted. By a comparison of this section with the corresponding portion of section 2732 R. S., a fundamental verbal change will be found to have been made herein. The former section was as follows, being the same provision construed in Library Association v. Pelton, *supra:*

"All buildings belonging to institutions of purely public charity * * * together with the land actually occupied by such institutions * * * not leased or otherwise used with a view to profit (shall be exempt from taxation)."

Section 5353 on the other hand provides that,

"property belonging to institutions of purely public charity only shall be exempt from taxation."

Whatever may be the meaning of the codified provision it is, it seems to me, clear that the buildings, described by the auditor of Lorain county, being used as dormitories under the management and supervision of the college itself, are "connected with" the college, and are not "used with a view to profit." Inasmuch then as Oberlin College itself is, under the decisions cited in the opinion of my predecessor, both a "public college" and "an institution of purely public charity," the buildings themselves are exempt from taxation.

Difficult as the question heretofore discussed is, a still more difficult question is presented by the auditor's second inquiry, which relates to the taxability of the endowment fund of Oberlin College as personal property.

College endowment funds have been held to be exempt from taxation in the case of Little v. Seminary, O. S., 417. This decision, however, was, of course, under original section 2732 R. S. and particularly under the sixth subdivision thereof which is as follows:

"All buildings belonging to institutions of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls of the governor for troops in case of war, riot, insurection or invasion together with the land actually occupied by such institutions, and that owned and used as sites for such armory buildings of said military organizations not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions and military organization" (shall be exempt from taxation).

The court held, per Shauck, J., first, that a public college is an institution

of purely public charity, and, second, that an endowment fund of such a college could be nothing else than "moneys and credits appropriated solely to sustain, and belonging exclusively to" the college.

By necessary inference, as will be apparent from a reading of the entire opinion, it would have to follow that the court found no other language in the tax exemption law sufficient to sustain the exemption of an endowment fund. The court might have relied upon that portion of section 2732 R. S., which has become section 5349 General Code, and which provides that, "public colleges and academies * * * shall be exempt from taxation." This, however, was not done and there are excellent reasons for not relying upon this portion of the exemption law for this purpose. These reasons are found in the context of section 5349 itself. If the mere mention of "public colleges and academies" sufficed to exempt all things owned by them from taxation then there would be no necessity for specifically mentioning "buildings connected therewith and all lands connected with public institutions of learning," so that whatever may be the meaning of the express exemption of "public colleges and academies" it cannot be that all property and all things owned by such a public college or academy is exempt from taxation.

I think it is perfectly clear then without the sixth subdivision of section 2732 R. S. the supreme court would not have been able to hold that endowment funds of colleges are exempt from taxation. Section 5353 General Code above quoted exempts "property belonging to institutions of public charity only."

Section 5354 provides as follows:

> "Buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations * * * and the land owned and used as sites for armory buildings of such military organization * * * and moneys and credits appropriated solely to sustain and belonging exclusively to such organization, shall be exempt from taxation."

It is apparent, therefore, that the phrase "moneys and credits appropriated solely to sustain and belonging exclusively to" no longer modifies and refers to institutions "of public charity only."

This verbal change was made, of course, in process of codification and is presumed not to have been made with intent to change the law. It is well settled, however, unless the meaning of the statute is plainly changed in process of codification and the purport of the codified statute is clear and unambiguous this presumption is not overcome and the law will be given effect according to the intent of the legislature as expressed in the original act as well as in the codification. Does then the portion changed in section 5353 and section 5354 amount to a change in substance, and are the codified sections and particularly section 5353 of meaning so definite and certain as to preclude recourse to the pre-existing law for the purpose of construction? It seems to me that the answer to these questions depends upon whether or not the word "property" used in section 5353 is capable of a meaning which will include the phrase "moneys and credits." If it is capable of such a meaning, and the question is as to whether that meaning should be given to it, then under favor of the rule above stated, and upon recourse to the pre-existing law, as construed in Little v. Seminary, supra, the conclusion would follow that the endowment fund of public colleges are still exempt from taxation.

On careful consideration I have reached the conclusion that the word "property" must be given a meaning broad enough to include the phrase "moneys and

credits." Section 5353 is a part of the taxation laws of the state. Section 2 of article 12 of the constitution provides:

> "Laws shall be passed taxing by a uniform rule all moneys, credits, investments, * * *: and *also* all real and personal property according to its true value in money."

Plainly in this section the phrase "personal property" does not include all the things which precede it. It is to be presumed then, I think, that when the word "property" is used in section 5353, it is used in the broad sense and must be held to include all the classes of *property* enumerated in the original section, as it is not limited by the words "real" or "personal." The presumption is that codification does not change the law.

Because, then, the language upon which the decision in Little v. Seminary is based has not been expressly eliminated from our statutes and in its place is found language which can be given a meaning equivalent to that relied upon by the court in that case, and because furthermore there is no specific mention in any of the exemption laws of the endowment fund of a public college or of its moneys, credits or investments, I am of the opinion that under the General Code the endowment fund of Oberlin College is included by the word "property" and is therefore not taxable.

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

A 345.

BANKS AND BANKING—DIRECTORS REQUIRED TO OWN FIVE OR MORE SHARES OF STOCK—FALSE STATEMENT OF OWNERSHIP OF SUCH STOCK BY DIRECTOR IS PERJURY, WHEN—CORONER'S INQUEST—SECRECY—REQUIREMENT OF OATH OF SECRECY FROM WITNESS BEFORE GRAND JURY.

It is the intention of the statutes that on or before April 1, 1910, every banking company should have conformed its business and organization to the provisions of the Thomas banking act except the provisions with regard to amount of capital stock. Therefore, every director of banking corporations including savings' and trust companies, organized prior to 1908, must now be the owner of at least, five shares of unpledged and unincumbered stock. The superintendent of banks in examinations may inquire of a director, under oath, with regard to such fact and if a director answers falsely in such proceeding, he is guilty of perjury.

A false statement with regard to such facts by a director in the report required by law to be filed with banks, would not be perjury, inasmuch as the law does not prescribe such statements in such report.

As the law does not require coroner's inquests to be open to the public, the coroner in the interest of justice may make the proceedings secret.

Section 2856 General Code requiring testimony of witnesses at a coroner's inquest, to be reduced to writing and subscribed by them in the absence of an official stenographer and returned by the coroner to the clerk of common pleas court is mandatory and the clerk of courts can compel such testimony to be turned over to him when it has been given to the prosecuting attorney.

A witness before a grand jury cannot be compelled to take an oath, not to make disclosure of his testimony except in a court of justice but if such oath has been demanded, that fact would not afford ground for a plea in abatement.

COLUMBUS, OHIO, September 6, 1911.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of two letters from you, one under date of July 31st and the other under date of August 1st, submitting to me for my opinion thereon various questions stated therein; and also of your letter of August 9th, stating your views in regard to the question which you have asked. The questions are as follows:

"1. Under section 5597 General Code, as amended June 7, 1911, what is the compensation of the members of the quadrennial county board of equalization?

"2. Must each director of a savings bank or savings and trust company, incorporated prior to 1908, now own at least five shares of the stock of such bank?

"3. May a coroner in holding an inquest, where the facts warrant secrecy, exclude the general public therefrom?

"4. Must the testimony taken at a coroner's inquest be turned over to the clerk of courts under section 2856 of the General Code; and in the event that the coroner turns over such testimony to the prosecuting attorney instead of the clerk of courts, what proceeding could be brought to compel compliance with section 2856, if the same is mandatory?

"5. May the oath of a witness before the grand jury contain a

clause reading 'and you shall keep secret all the proceedings that take place unless called upon to make disclosures in a court of justice?' What effect if any would such a clause in the oath have upon the validity of an indictment found by a grand jury?

"6. If a bank director owning five shares of stock falsely swears in a statement filed with the banking department that said five shares are unpledged and unincumbered, has he committed the crime of perjury?"

I shall have to ask you to excuse me from answering your first question at the present time. I have the same under advisement upon requests emanating from various sources. The question is a difficult one and I have not yet made up my mind thereon.

Your second question involves consideration of the following sections of the General Code, all of which were enacted as parts of the banking law of 1908 (99 O. L. 269):

"Section 9702. (Section 1 of the original act). Any number of persons, not less than five, a majority of whom are citizens of this state, may associate and become incorporated to establish a * * * bank * * * upon the terms and conditions, and subject to the limitations hereinafter and by law prescribed.

"Section 9703. (Provides for the form of the articles of incorporation of banking companies.)

"Section 9704. (Provides the minimum capital stock of different kinds of banking companies.)

"Section 9705 to 9722, inclusive, provide in general for the formation of banking companies and the commencement of business by them.

"Section 9723. Hereafter, all corporations incorporated as commercial banks, saving banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, and savings and trust companies, or a corporation having departments for two or more, or all of such classes of business, shall be incorporated and organized with a capital stock, and under the provisions of this chapter. The secretary of state shall not file or record articles of incorporation unless in accordance therewith.

"Sections 9724 to 9738, inclusive, provide for the internal management of corporations "doing business under the provisions of this chapter" (section 9725), otherwise described as "corporations formed under this chapter" (section 9727).

Section 9727 in particular is the first of some nine sections dealing directly with the boards of directors of banking companies. The first sentence as I have already pointed out, refers to "corporations formed under this chapter.

Section 9731, to which you call my particular attention, 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, and at least three-fourths of the directors must be residents of this state."

From all the foregoing I think it is apparent that so far as any section heretofore alluded to is concerned, and so far as the preceding provisions of the act of 1908, as included in the chapter commencing with section 9702, General Code,

are concerned, the provisions of section 9731 apply only to banks organized under the act of 1908 and of course, since that date. That is to say, up to this point the act does not purport to be an amendment of existing corporate charters, but merely an enabling act, under which corporations may in the future be formed.

In line with this conclusion are the provisions of section 9739, which are as follows:

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

Section 9741 provides for an election on the part of banks organized prior to the passage of the act. Its language is as follows:

> "Banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and trust companies, and combinations of any two or more of such corporations, heretofore incorporated in this state which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred, by signifying such election and declaration under their seal, attested by the signature of the president and secretary, to the secretary of state and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all the privileges and powers conferred by this chapter, and from that time such associations or corporation shall be governed by its provision."

Section 9742, formerly a part of the same section of the act of 1908, further provides as to such election, that,

> "Such election and declaration shall be made only when authorized by a vote of at least two-thirds of the capital stock at a meeting of stockholders, thirty days' notice of which meeting, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where such association or corporation has its principal place of business. But after April 1, 1910, every such corporation or association in all respects must conform its business and transactions to the provisions of this chapter."

Section 9793 of the General Code provides as follows:

> "Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or

which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section."

Section 9794 of the General Code provides as follows:

"No such association or corporation, may avail itself of any of the privileges or powers conferred by this chapter until it has complied with the provisions of sections ninety-seven hundred and forty-one and ninety-seven hundred and forty-two. No corporation, or association, shall be required to comply with the provisions of this chapter before April first, 1910, but every such corporation and association, shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided by law."

I think it is apparent that some of the provisions of the above quoted sections are seemingly mutually inconsistent. The act as a whole is clearly an enabling act; yet, there is language in it, especially in section 9742 and section 9793, above quoted, which seems to indicate that the intention of the general assembly was that banking business in the state should, after April 1, 1910, be conducted on a uniform basis and that all banking corporations should in all respects be amenable to its provisions. If this language is to be given the strictest possible construction, then the act becomes in effect not only an enabling act but also an amendment and alteration of existing corporation charters. This, of course, the general assembly has the right to do. The precise question is as to whether in the face of the provisions of section 9739, above quoted, the general assembly has exercised its right.

A somewhat similar question was involved in the case of The American Trust & Savings Bank Company of Zanesville, Ohio, vs. B. B. Seymour, superintendent of banks, in the common pleas court of Franklin county, No. 56258, decided June 26,1909. This was a friendly suit, in the bringing of which the department of banks and the then attorney general corporated, for the purpose of deciding the question as to whether or not a bank existing at the time of the adoption of the act of 1908 would be obliged to increase its capital stock so as to conform to the provisions of section 2 of the act, now section 9704 above referred to, on or before April 1, 1910. The following language is quoted from the unreported decision of Bigger, J., therein:

"In construing an act, of course the whole act is to be construed together, so that every possible effect shall be given to all of its provisions, and that one part shall not defeat the operation of another. It seems, from a reading of the act, that sections 2, 18, 35, 36 and 91 are the only sections of the act which refer to the matter, and construing them together, I am of opinion it does not require banking institutions which were incorporated prior to the passage of the Thomas act to increase their capital stock to comply with the provisions of section 2 of that act.

"Section 35 provides that 'all banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and 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 of 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.'

"Section 91 is even more specific. It provides that 'such companies now existing and chartered or incorporated or which may hereafter become incorporated shall be subject to the provisions of this act, provided that no such corporation or association having a less capital stock than the minimum amount provided in section 2 hereof shall be required to increase its capital stock in order to conform to the provisions of that section, but no such association or corporation may avail itself of any of the privileges or powers conferred by this act until it has complied with the provisions of section 36 of this act.' No language could be plainer than this.

"Section 36, which is relied upon as authorizing the defendant to enforce this requirement, does not seem to me, when rightly interpreted, to be in conflict at all with the provisions of sections 35 and 91. Section 36 provides that existing banks may, 'if they so elect,' avail themselves of the privileges and powers conferred by the act. This is optional with existing banks. This section further provides that 'after April 1st, 1910, every such corporation or association shall in all respects conform their business and transactions to the provisions of the act.' It is this language which gives rise to the claim that it is mandatory upon all such institutions after the 1st of April, 1910, to increase their capital stock so as to conform to the provisions of section 2 of the act. Construing this language with the provisions of sections 35 and 91, and in the light of the rule which requires that effect be given to all of the provisions of the act and that it shall not be so construed as to make one part defeat another, I am of opinion this provision of section 36 is not susceptible of the construction put upon it by the superintendent of banks. Section 36 provides that when existing banking institutions elect to avail themselves of the provisions of this act, they shall signify their election to the secretary of state and that, when such election is recorded by the secretary of state in his office, such association shall thereafter have all the privileges and powers conferred by the act, and from that time shall be governed by its provisions. The provision relates to 'every such corporation,' that is, to such existing corporations as elect to avail themselves of the privileges of the act, and it requires them after April 1st, 1910, to conform their business and transactions to the provisions of this act. It is not very clear just why this proviso should have been inserted as the section provides that from the time when the election is recorded, the bank shall be governed by the provisions of this act. But in the light of the plain provisions of sections 35 and 91, I am of opinion the language contained in the provision must be restricted to such existing institutions as shall elect to avail themselves of its provisions. To give to it the effect claimed by the defendant is to defeat the plain and specific provisions of sections 35 and 91, which is not permissible.

"For these reasons I conclude that the act does not authorize the defendant to make or enforce this requirement against the plaintiff, and it is, therefore, unnecessary to consider the question of the constitutionality of the act."

The holding of the court in this case, then, is in brief, that banking cor-

porations organized prior to the passage of the act of 1908 were not obliged to conform the amount of their capital stock to the requirements of said act prior to April 1, 1910. This decision has been allowed to stand; that is to say, no appeal or proceedings in error were prosecuted from it to any higher court; and I am informed that the superintendent of banks and banking has been guided by it since its rendition.

Judge Bigger's opinion does away with the contention that section 9742 of the General Code requires every banking corporation to conform its business and transactions to the provisions of the act of 1908 after April 1, 1910. The judge construes the phrase "every such corporation or association," as used therein, to mean "every banking corporation or association which has elected to avail itself of the privileges and powers conferred by the act of 1908."

This decision is, however, not decisive of the question which you ask. It related solely to the application of the capital stock provision of the act of 1908 to corporations organized prior to its passage. It was in part founded upon section 91 of the act of 1908, now section 9793 of the General Code, above quoted. That section in plain terms requires every banking company "now existing and chartered or incorporated" to "be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four shall be required to increase its capital stock in order to conform to the provisions of such section."

Here then, we have an express exemption of corporations organized prior to the passage of the act of 1908, from the requirement that it have the capital stock mentioned in section 9704, General Code. By fair inference from the language of section 9793 the conclusion would follow that in all respects, other than with respect to the capital stock of banking corporations organized prior to the passage of the act of 1908, such corporations would be required to conform their business and transactions to the provisions of that act.

The exact meaning of section 9793 is best indicated by reading it in connection with section 9794. Both of these sections were parts of original section 91 of the act of 1908. The meaning of these two sections is rendered even clearer by referring to said original section 91, which provides in part (99 O. L. 288-9):

> "Every banking company * * * now existing and chartered or incorporated, or which may hereafter become incorporated, shall be subject to the provisions of this act, provided that no such corporation * * * having less capital stock than the minimum amount provided in section 2 hereof shall be required to increase its capital stock in order to conform to the provisions of that section * * * *and no corporation * * * shall be required to comply with the provisions of sections* 1 *to* 77 *inclusive of this act, before April* 1, 1910. * * *"

Sections 1 to 77, inclusive, contain section 25, which is now section 9731 of the General Code. Apparently, then, the meaning of the original act was that on or before April 1, 1910, every banking company should have conformed its business and organization to the provisions of the Thomas banking law, excepting those provisions relating to the amount of the capital stock. This conclusion is in harmony with the decision of the common pleas court of Franklin county, in the case above cited and quoted from. It harmonizes all the sections of the original act and gives a special force to section 91 thereof. The verbal changes made in said section 91, and particularly in that portion which has become section 9794, in process of codification, do not change its meaning.

It is a familiar principle of statutory construction that such verbal changes so made are presumed not to change the meaning of the original law.

I am, therefore, of the opinion in answer to your second question that every director of every banking corporation, including savings and trust companies organized prior to 1908, is now required to own at least five shares of stock in such corporation, in his own name and right, unpledged and unincumbered in any way, as required by section 9731, General Code.

Your sixth question should be considered in connection with your second question. I am frank to state that I do not quite understand its purport. The question seems to imply that a false statement was made in a report filed with the banking department. Section 738 of the General Code prescribes the form of reports to be made by banking companies to the superintendent of banks. This section does not require a sworn report as to the number of shares owned by each director. Section 740 authorizes the superintendent of banks to call for special reports whenever in his judgment they are necessary to inform him fully of the condition of any company, and further provides that such report shall be verified "as provided in this chapter for other reports to the superintendent." The verification required is that of the "president, vice-president, cashier, secretary or treasurer" of the company (section 738, G. C.). Apparently, therefore, the superintendent of banks is without authority to require a director to swear that his shares of stock are unpledged and unincumbered.

However, in connection with the *examination* of banks—as distinguished from the reports required to be made by banking companies—the superintendent of banks may "summon in writing under his seal any * * * officer, agent, clerk, customer, depositor, shareholder or any person resident of the state, to appear before him and testify in relation thereto." (Section 726 G. C.) The examination itself may be into the "cash, bills, collaterals or securities, books of account and affairs of each bank * * * incorporated under any law of this state;" and the superintendent is required to ascertain "if any such corporation * * * is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation." (Section 724, G. C.) Therefore, the superintendent of banks is authorized to inquire into the matter to which your sixth question refers, and in aid of such inquiry is empowered to place any person under oath and inquire of him as to such matter.

The perjury statute, section 12842, provides in part as follows:

> "Whoever, either orally or in writing, on oath lawfully administered, wilfully and corruptly states a falsehood as to a material matter in a proceeding before a court, tribunal or officer created by law, or in a matter in relation to which an oath is authorized by law, is guilty of perjury. * * *"

The matter of the ownership of shares of stock by a director, being material, when so regarded by the superintendent of banks in conducting an examination into the affairs of the bank, I am of the opinion that a false statement under oath made by a director testifying as to the quality of his ownership of such shares, in the course of such an examination, would constitute the crime of perjury. Inasmuch, however, as there is no requirement of law that reports be filed with the department of banks, specifying the number of shares of stock owned by each director of a bank, in his own name and right, unpledged and unincumbered, I am of the opinion that if the false statement be in such a report the making of it would not constitute the crime of perjury.

Answering your third question I beg to state that section 2856 of the General Code, which relates to the coroner's inquest, does not require that it be

public. I am of the opinion, that in the interest of justice, the coroner may lawfully exclude the general public from such an inquest.

Answering your fourth question I beg to state that said section 2856 of the General Code provides in part that:

> "The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county."

I am clearly of the opinion that this language is mandatory in spite of the inconvenience to which it may put the prosecuting attorney, and the opportunity which it might afford to an unscrupulous defendant in a criminal case growing out of the act which gave rise to the coroner's inquest, to suppress material evidence.

I doubt very much the right of a person, accused by the coroner in his report, of being responsible for the death which gave rise to his inquest, to compel the coroner to file his report with the testimony of the witnesses in the office of the clerk of courts. It would seem clear, however, that the clerk of courts himself could compel such action if he saw fit, by proceedings in mandamus.

Answering your fifth question I beg to state that section 13564 of the General Code provides that:

> "Before a witness shall be examined by the grand jury, an oath shall be administered to him by the clerk of the court, truly to testify of such matters and things as may lawfully be inquired of before such jury."

This section does not exactly prescribe the form of such oath. It is associated, however, with other sections prescribing oaths that shall be taken by the other persons concerned in the grand jury inquest. Section 13556 of the General Code requires the foreman and the grand jurors with him to take oath, among other things to keep secret the matters and things that shall be given them in charge. So also, the official stenographer, if called upon by the prosecuting attorney to take shorthand notes of the testimony, must, by section 13561, be sworn to secrecy.

In view of these provisions I am of the opinion that the maxim "the expression of one thing is the exclusion of others," must be applied to the construction of section 13564, and that there is no authority in law for compelling a witness before a grand jury to take an oath of secrecy.

Your further question as to the effect of the inclusion of such an oath in that required to be taken by the witnesses before the grand jury upon the validity of the indictment is very doubtful. It is the spirit of our criminal code that defects or imperfections in proceedings shall not vitiate them unless they tend to prejudice the substantial rights of the defendant upon the merits. See in particular, section 12581, which provides in effect that indictments shall not be held invalid for formal defects or imperfections. I know of no authority upon the point. On the one hand, as you suggest, the fact that the proceedings of the grand jury are supposed to be secret would seem to justify the throwing of the cloak of secrecy about all their proceedings in the manner you suggest. On the other hand, however, witnesses before a grand jury are presumably persons having accurate knowledge of the alleged crime; if the defendant be

precluded from conferring with witnesses in the preparation of his defense, it would seem that a substantial right of his would be thereby violated. The mere taking of this oath, however, does not preclude the defendant from conferring with witnesses. Even if the oath be regarded as binding on the witness it does not bind him not to divulge his knowledge of the alleged offense but merely not to divulge what took place in the grand jury room. It is my opinion, therefore, that a plea in abatement filed to an indictment returned by a grand jury which had imposed an oath of secrecy upon all witnesses testifying before it would not lie.

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

346.

JUSTICE OF THE PEACE—TERM OF OFFICE—ELECTION OF SUCCESSOR —BIENNIAL ELECTION AMENDMENT TO CONSTITUTION.

Justices of the peace elected in November, 1904, began their term of office in January, 1905, and held office until January, 1910, or as soon thereafter as a successor elected in November, 1909, had qualified. Said successor by virtue of the biennial election amendment, Article 17, section 2 of the constitution, holds four years from January 1, 1910, to January 1, 1914. The successor to the latter will be elected in November, 1913.

COLUMBUS, OHIO, September 7, 1911.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 28th, enclosing for my opinion thereon a question submitted to you by Thomas L. Moore, attorney at law, as follows:

> "In April, 1904, A was elected justice of the peace in a certain township and assumed the duties of his office soon thereafter. In November, 1907, an election was held for a successor to said A, and B was the successful candidate. B assumed the duties of his office, but in quo warranto proceedings instituted by A, was ousted therefrom by the circuit court upon the authority of State ex rel. vs. Brown, 20 C. D., 422, and State ex rel. vs. Morrow, 30 C. C., 422, affirmed without report, 78 O. S., 452. A then served until January 1, 1910, when he was again succeeded by B, who had been elected at the November election, 1909. B was commissioned for the term of office beginning January 1, 1910, and extending four years. At the primary election in 1911 nominations were made for successor to B, apparently upon the theory that B's term expires on January 1, 1912.
>
> "When does B's term expire, and when must his successor be elected?"

There seems to be an error in the statement of facts which ought to be corrected and in order that the question may be clearly stated. A could not have been elected at an April election in 1904 for the act abolishing spring elections, so-called, was passed March 17, 1904, and went into effect immediately

upon its passage. (97 O. L., 87, Sec. 1442.) I take it, therefore, that A was, in point of fact, elected at the November election in 1904 for a term commencing in April, 1905. If this is the fact the case decided by your circuit court would be exactly similar to the two cases cited in your question, otherwise the two decisions would not have been in point. The effect of the two decisions cited is that justices of the peace whose terms of office began in 1905 expired on January 1, 1910, or as soon thereafter as their successors elected in November, 1909, should have qualified. Therefore, it follows that A's term of office, under his election in 1904, extended until January 1, 1910. B then under his election in 1909 was entitled by virtue of Article 17, section 2 of the constitution, being the so-called biennial election amendment thereto, to hold his office for the period of four years commencing on January 1, 1910, and ending January 1, 1914. B's successor must, under sections 4831 and 1713, General Code, be elected at the November election in 1913.

It follows from the foregoing that the primary nominations to which your question refers are void. My opinion is, of course, based upon the statement of facts as I have amended it. If the same is not correct the conclusion which I have expressed would not necessarily follow.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

B 346.

BOARD OF EDUCATION — IMPROVEMENT AND REPAIR OF SCHOOL BUILDING UPON ORDER OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES—ADVERTISEMENT FOR BIDS DISPENSED WITH IN "URGENT NECESSITY."

Cases of urgent necessity are excepted from the provisions of section 7623, General Code, providing for certain procedure when the cost of repairing or improving a school house in other than city districts exceeds five hundred dollars.

Inasmuch, therefore, as the board of education is required to provide for at least thirty-two school weeks in a year, and as the mayor may prohibit use of school buildings until compliance has been made with the orders of the chief inspector of workshops and factories, the board of education of a village, upon such order from the chief inspector of workshops and factories, made after the school year has begun, may dispense with the procedure of section 7623 and execute necessary repairs without advertising for bids.

COLUMBUS, OHIO, September 7, 1911.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Under date of September 6th, you requested an opinion upon the following:

> "Please advise me as to whether or not under the provisions of section 7623 of the General Code, the board of education of a village or village district can, without advertising for bids, where the amount exceeds five hundred dollars, make improvements in a school house or school houses (such improvements having been ordered by the state inspector of workshops and factories, and such improvements and altera-

tions to be made immediately) where the alterations and improvements are urgent and are made for the safety and protection of the school property—this being an exception to the general statute requiring the advertising for bids.

"The board of education informs me that the state inspector of workshops and factories has directed the board to proceed immediately with such improvements and alterations, and the said improvements, as I understand the matter, include fire escapes and cutting in of doors and exits throughout the buildings."

Section 7689 of the General Code provides:

"The school year shall begin on the first day of September of each year, and close on the thirty-first day of August of the succeeding year. A school week shall consist of five days, and a school month of four school weeks."

Section 7644 of the General Code provides:

"Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue *not less than thirty-two nor more than forty weeks in each school year.* All the elementary schools within the same school district shall be so continued."

Section 4657, General Code, in part provides:

"The chief inspector of workshops and factories, or his district inspectors, shall make inspections of buildings named in the first section of this chapter (being section 4649, G. C., and in which section 'school house' is specifically mentioned) as often as he deems necessary, * * *; and they shall have access to such buildings at any time it is deemed necessary to inspect them."

Section 4654 of the General Code provides:

"When a structure referred to in the first section of this chapter has been inspected by the chief inspector of workshops and factories, and he has issued to the owner thereof or to his agent, a certificate that it is properly arranged for the safe and speedy egress of persons assembled therein, and also properly provided with means for the extinguishment of fire at or in such structures, as required by law, such certificate shall dispense with all other such inspections and certificates in regard to the safety of such structures."

Section 4655 of the General Code provides:

"If such inspector finds that such structure is not properly arranged for the safe and speedy egress of persons therein assembled, or not properly provided with means for the extinguishment of fire at or in such structure, as required by law, or that it is such as to endanger the lives of the persons there assembled, from fire or other cause, he

shall notify in writing the owner, officer or agent in charge thereof, and the mayor of the municipal corporation if such structure is located in a municipal corporation, if not, the prosecuting attorney of the county wherein it is located, that he refuses such certificate, specifying his reasons and the alterations, additions and appliances necessary to be made and furnished before a certificate will be issued."

Section 4656 of the General Code provides:

"No certificate required by law, in regard to the safety of such structure, shall be issued by the mayor or any officer or person under any provision of law until the requirements of such notice are complied with to the satisfaction of the chief inspector, and the mayor of the municipality, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, upon receiving such notice, shall prohibit the use of such buildings for the assemblage of people until such changes, alterations and additions have been made and the inspector's certificate has been issued."

Section 7623 of the General Code provides that "when a board of education determines to * * * repair * * * a school house or school houses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts five hundred dollars, *except in cases of urgent necessity*, or for the security and protection of school property, it must proceed as follows," and then provides for the letting of bids for such work by due advertisement for a period of four weeks.

As I view the matter the question arises as to whether or not the order of the chief inspector of workshops and factories for the improvements and alterations, to-wit: For providing fire escapes and cutting in of doors and exits throughout the buildings, is of urgent necessity.

I assume for the purpose of answering this question that the order upon the board of education of the village school district was but recently made for such improvement, and that the order requires said board of education to immediately proceed to make such improvement.

The board of education by virtue of section 7644, General Code, supra, is required to provide for not less than thirty-two nor more than forty weeks of schooling.

By virtue of section 4646 of the General Code, supra, it is made the duty of the proper officer to prohibit the use of the school buildings for school purposes until the changes, alterations and additions have been made in compliance with the order of the chief inspector of workshops and factories.

The school year having begun and the order of the chief inspector of workshops and factories not having been complied with, and, therefore, said board of education not being able to use its school building until it does comply with the law, I am of opinion that the improvements so ordered by the chief inspector of workshops and factories are of urgent necessity, and that, therefore, under the provisions of section 7623, of the General Code, supra, the said board of education can without advertising for bids make the improvements so ordered by the chief inspector of workshops and factories.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

348.

TOWNSHIP DITCH SUPERVISOR—RIGHT OF ELECTOR IN VILLAGE WITHIN TOWNSHIP TO VOTE FOR.

The electors of a village within a township are entitled to vote for a township ditch supervisor after the manner of the election of other township officers.

COLUMBUS, OHIO, September 8, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 15th, requesting my opinion as to whether the electors of a village within the boundaries of the township are entitled to participate in the election of a township ditch supervisor in such township.

Section 3386 of the General Code provides that:

> "In any township in which county or township ditches have been located and established, at the time and in the manner provided by law for the election of township officers, there may be elected a township ditch supervisor, who shall serve for a term of four years. * * *"

Section 3387 of the General Code provides that:

> "The township ditch supervisor shall have the supervision of all county and township ditches in his township. * * *"

Section 3388 provides in effect that the compensation of the supervisor shall be paid out of the township ditch fund.

It is thus expressly required that the election of a ditch supervisor shall be in the manner provided by law for the election of township officers. For this reason and for the further reason that the duties of the ditch supervisor are to be discharged throughout the township, regardless of municipal corporations therein, and his compensation is to be paid out of the fund produced by a tax levied upon the taxable property of the entire township, regardless of municipal corporations therein, I am of the opinion that the electors within a municipal corporation are entitled to participate in the election of a ditch supervisor for the township in which the municipality is located in the same manner in which they are entitled to participate in the election of other officers of the whole township.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

349.

BOARD OF EDUCATION—RESOLUTION EMPLOYING TEACHERS—PROVISIONS FOR MAKE UP OF TIME LOST ON LEGAL HOLIDAYS AND DURING EPIDEMICS, VOID.

When a board of education passed a resolution legal in form, employing certain teachers, the effect thereof would be to employ said teachers, though certain provisions of said resolution requiring said teachers to enter into a written contract "to make up for legal holidays and for the time lost in the event of epidemic" would be void because against the statutes and public policy of the state of Ohio.

COLUMBUS, OHIO, September 8, 1911.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication dated August 30, 1911, in which you give the following statement of facts:

> "A board of education passed a resolution fixing a schedule of prices for payment of teachers based upon the experience of said teachers, and in the same resolution employed said teachers, and at the same time provided that the teachers should enter into a written contract to make up for legal holidays and for the time lost in the event of epidemic. The teachers refused to sign the contracts."

and request my opinion upon the question "Is there a legal employment of the teachers?" In reply I desire to say that section 4752 of the General Code provides in part as follows:

> "Upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property or to employ a superintendent or teacher, etc., the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting 'aye' and the names of those voting 'no.' If a majority of all the members of the board vote 'aye,' the president *shall* declare the motion carried."

Section 7595 of the General Code provides as follows:

> "*No person shall be employed to teach in any public school in Ohio for less than forty dollars per month.*"

Section 7644 of the General Code provides:

> "Each board of education shall establish a sufficient number of schools to provide for the free education of the youth of school age in the district under its control, and said school shall continue not less than thirty-two nor more than forty weeks in each school year."

Section 7691 of the General Code provides:

> "*No person shall be appointed as a teacher for a longer term than four school years nor for less than one year.*"

Section 7690 of the General Code provides in part as follows:

> "*Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity.*"

Section 7687 of the General Code provides:

> "Teachers in the public schools may dismiss their schools, without forfeiture of pay, on the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the twenty-fifth day of December, and on any day set apart by proclamation of the president of the United States, or the governor of this state as a day of fast, thanksgiving or mourning."

It is apparent from your letter that the board of education, as far as the necessary number of votes and the recording of them is concerned, complied with the law, and that being the case, the only remaining question is: "*Have the board of education the legal authority to compel teachers duly elected to execute a written contract which in part is in contravention to statutes of our state?*"

From an examination of the sections of the General Code above quoted we find that the legislature has enacted the same with a view to promulgate the best interests of the public through its public schools by fixing a minimum salary for teachers to be fixed by the boards of education; the minimum number of days for each school year; the mandatory payment to teachers for days on which their respective schools were dismissed to observe legal holidays, and the provision of section 7690 that "*teachers must be paid for all time lost when the schools in which the are employed are closed owing to an epidemic or other public calamity.*"

Any contract which is in contravention to the above quoted sections of the General Code would not, in my opinion, bind any teacher, as it would be contrary to public policy, illegal and void.

The supreme court, in passing upon contracts against public policy, in the case of Salt Co. vs. Guthrie, 35 O. S., 672, says:

> "Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

I am of the opinion that when the board of education passed the resolution referred to in your letter that they legally elected the teachers designated in the resolution, but the board cannot compel the teachers to sign a written contract to make up for legal holidays and for time lost in the event of epidemic for the reason above stated—that an agreement which is in contravention to statutory provisions, whose waiver would violate public policy expressed therein, or the rights of the public which the statute was intended to protect, are involved, would to that extent be illegal and void.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 352.

PROSECUTING ATTORNEY—REQUIREMENT OF BOND BEFORE DRAWING EXPENSES.

Section 3004, General Code, provides that before a prosecutor may draw the expenses therein allowed in an amount equal to one-half his salary, he shall give a bond in a sum not less than his salary.

When a prosecutor has drawn expenses, after the enactment of the bond requirement without giving bond, he is guilty of a technical violation of said statute, but if the expenditure were legitimate and made without knowledge of the statute's requirements, a finding will not be recommended. Such prosecutor, however, should enter into the proper bond immediately.

COLUMBUS, OHIO, September 11, 1911.

HON. GEO. D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Your letter of August 21st received. You state:

> "I received this morning from the secretary of state a copy of the laws of Ohio of the last session, and on page 74 I notice House Bill No. 127, with regard to the expenses of the prosecuting attorney, and if my understanding of said act is correct, I cannot get my expenses without filing an additional bond as provided for in said act.
>
> "I have already drawn my expenses since said act went into effect under section 3004 of the General Code."

and request my opinion on the construction of said House Bill No. 127, now section 3004 of the General Code, Section 3004 of the General Code provides as follows:

> "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.
>
> "Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.
>
> "The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which (such) fund has been expended during the current year, and shall if any part of such fund re-

mains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

Said section 3004 authorizes the prosecuting attorney to draw from the county treasury an amount equal to one-half of his official salary to provide for the expenses incurred by him in the performance of his official duties and in the furtherance of justice. But before the prosecuting attorney is paid this amount he must first give bond to the state in a sum not less than his official salary, the bond to be fixed by the court of common pleas or probate court, with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys received by him in his official capacity. Said bond, together with his oath of office inclosed must be deposited with the county treasurer.

You state you have drawn your expenses since April, 1911, when said section 3004, as amended, went into effect, without giving the bond required by said section. You drew the same illegally, but having expended the amount in payment of legitimate expenses of your office, I would advise that no finding be made against you for the technical violation of this statute. I would further advise that you proceed at once to enter into the bond required by section 3004 of the General Code.

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

C 352.

NEWSPAPERS—PUBLICATION OF ANNUAL REPORT OF COUNTY COMMISSIONERS.

The publication of the annual report of the county commissioners is expressly provided for in section 2508, General Code, which stipulates that said report shall be published once in two newspapers of different political parties, and as the statutes no place else treat expressly on the subject this statute must govern.

COLUMBUS, OHIO, September 11, 1911.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—Your letter of September 5th received. You inquire:

"Does the county commissioners' annual report fall within the purview of the General Code, No. 6252? That is to say, *must* it be printed in two papers of opposite politics in the county seat?"

Section 2507 of the General Code provides as follows:

"On or before the third Monday in September of each year, the county commissioners shall make to the court of common pleas of the county a detailed report of their financial transactions during the year

next preceding such date. Such report shall be in writing, and itemized as to amount, to whom paid, and for what purpose."

Section 2508 of the General Code provides as follows:

"Such report shall be published immediately in a compact form one time in two newspapers of different political parties, printed and of general circulation in such county. If two such papers are not so published, the publication shall be in one paper only. In addition to such publication, the report shall be published in the same manner in one newspaper, if there be such, printed in the county in the German language and having a bona fide general circulation of not less than six hundred among the inhabitants of such county speaking that language."

The publication of the annual report of the county commissioners is governed by section 2508 of the General Code, which requires that said report shall be published in a compact form one time in two newspapers of different political parties, printed and of general circulation in such county.

Section 6252 of the General Code provides as follows:

"A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

You will note that it provides specifically what *must* be published in two newspapers of opposite politics in the *county seat.* It mentions proclamations for an election; order fixing times for holding court; notice of the rates of taxation; bridge and pike notices, and notices to contractors; but does not specifically mention the printing of the commissioners' report, which is specifically provided for in section 2508 of the General Code, above quoted.

The supreme court in passing upon another question involving the legality of county printing, in the case of Printing Company vs. State, 68 O. S., 362, said:

"Publication of the commissioners' financial report, together with that of the examiners, is provided for by section 917, Revised statutes (now section 2508). They are to be published for one week in two weekly newspapers of opposite politics."

It is, therefore, my opinion that the publication of the commissioners' annual report is governed by section 2508 of the General Code, and that the publication of the same in two newspapers of opposite politics, printed and of general circulation in the county, is all that is required of the county commissioners.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

G 352.

FEES IN CASES FILED IN COMMON PLEAS COURT—EFFECT OF CHANGE OF LAW.

In cases filed in the common pleas court, fees should be charged in accordance with the law at the time the service was rendered. Therefore, for services rendered after May 31st, *fees should be charged under the act passed on that day and services rendered before that date should be compensated in accordance with the prior law.*

COLUMBUS, OHIO, September 11, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—On July 12th you submitted for my opinion the following:

> "In cases filed in the common pleas court, prior to the 31st day of May, 1911, should the fees be taxed under the new bill (known as H. B. No. 163) or under the old fee bill, or should the fees made while the old fee bill was in force be taxed under it, until the passage and approval of the new, and then the balance under the new one? In other words, when does the new fee bill become effective as to pending cases?
>
> "This question might be answered in three ways and sustained on good reasons:
>
> "First: The fee law in effect at the time of the filing of the case should govern throughout the case.
>
> "Second: It might be construed to mean that fees should be taxed according to the law in effect at the time they are made.
>
> "Third: It might be construed to mean that fees should be taxed according to the law in effect at the time of the rendition of the judgment.
>
> "I believe you will agree with me that either of the above can be supported by good reasons, hence this inquiry. This is an important matter, and should receive uniform operation throughout the state, and I believe an opinion from your office is very important, not only to every officer affected, but to the litigants as well, and will greatly aid in adjusting the operation thereof."

House Bill 163, 102 Ohio Laws, 277, does not contain any provision excepting pending suits from the operation thereof.

As I view the law it is the duty of the various officials to make a charge in each case for the service performed therein at the time the service is rendered, and, consequently, the law in force at the time of the rendition of the service is the one that governs the amount of the charges to be made therefor.

Therefore, the fees made in pending cases should be taxed under the law as it existed prior to the enactment of House Bill No. 163 for services rendered prior to such enactment, and under House Bill No. 163 for services rendered since the enactment thereof.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 353.

SALARY OF CLERK OF BOARD OF ELECTIONS—TERM OF OFFICE—ELECTED FOR "ONE YEAR"—SUCCESSOR NOT ELECTED UNTIL AFTER EXPIRATION OF CALENDAR YEAR.

Section 4811 *providing that the clerk of the board of elections shall continue in office "one year" intends that such year shall not necessarily be a calendar year, but the time which intervenes between the date of legal election of said clerk and the time limited by law for the election of a successor, i. e., within fifteen days after the appointment of the members of the deputy state supervisors of elections.*

An incumbent is entitled to hold until his successor is elected and qualified, but after the said time limit for the successor's election has expired, he holds not as a "de facto" but as a de jure" officer.

When the clerk is elected within the time limit, the predecessor cannot, under any circumstances, receive more than the salary allowed for said "one year" even though the calendar year has been exceeded.

COLUMBUS, OHIO, September 12, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 23d, requesting my opinion upon the following question:

> "A board of deputy state supervisors of election fails to organize until the 18th of August. At such time a new clerk is elected. The out-going clerk has performed services up to the date of the reorganization of the board and claims compensation therefor. May he be paid at the statutory rate for the days during which he performed services or does the term of office of the new clerk under the law commence on the first of August?"

You refer me to certain decisions of the secretary of state as found in the compiled election laws. These decisions are in effect that the term of the clerk begins on August 1st, and extends for one year, but where the board fails to organize until a later date, the old clerk holds over and the term of the new clerk is shortened to that extent.

I cannot fully agree with this line of decisions. The statutes involved are as follows:

Section 4804, General Code:

> "On or before the first Monday in August of each year, the state supervisor of elections shall appoint for each such county two members of the board of deputy state supervisors of elections, who shall each serve for a term of two years from such first Monday in August."

Section 4811, General Code:

> "Within fifteen days after such appointments in each year, the deputy state supervisors shall meet in the office of the county commissioners and organize by selecting one of their number as chief deputy * * * and a resident elector of such county, other than a member of

the board, as clerk, both of which officers shall continue in office for one year."

Section 8 of the General Code:

"A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

In my opinion the term of office of a clerk of the board of deputy state supervisors of elections is not an exact calendar year nor even the year from the first Monday in August in one year to the first Monday in August of the next year. The term, in my judgement, is from the date of election within the time limited by law in one year to the date of the election of a successor within the time limited by law in the next year. If a successor is not elected within the time limited by law then an incumbent by virtue of section 8, General Code, *supra*, would be entitled to hold over until his successor is elected and qualified, and to receive pro rata compensation not alone as defacto clerk but as a dejure officer for such additional time. Such time, however, does not begin until the fifteen days after the appointment of the board of elections, prescribed by section 4811, General Code, supra, have expired.

In the case you submit, of course, the clerk was elected within the time limited by law and the organization of the board was in all respects regular. The time then between August 1st and August 18th is not to be regarded as an extension of the incumbency of the clerk beyond the expiration of his term but as a part of his term, and more accurately, as a part of the "year" for which he was elected.

Section 4822, General Code, provides that the compensation of the clerk "shall be paid quarterly from the general revenue of the county upon the vouchers of the board. * * *" In like manner the additional compensation of the clerk in counties containing registration cities under section 4942 "shall be paid monthly from the city treasury on warrants drawn by the city auditor * * *," and the additional compensation of the clerk for conducting primary elections under section 4990 is, I believe, to be paid to the clerk actually rendering the service.

All of these sections prescribe an annual compensation for members of the board and clerk, determined by the number of precincts in the county. No member or clerk can, in my judgment, lawfully receive more than one year's compensation for services rendered during an official year or term. In the case you mention if the clerk has already drawn his annual compensation, as prescribed by the three sections above quoted, he cannot receive any additional compensation, as the time for which he claims compensation is a part of his official year. On the other hand, if he has not drawn the full amount of his annual compensation he is entitled to draw the remainder thereof, regardless of quarterly or monthly apportionment thereof on the time basis.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

C 356.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATIONS—BOND ISSUE FOR COUNTY ROAD IMPROVEMENTS IN ANTICIPATION OF SPECIAL ASSESSMENTS.

The power of the county commissioners to issue bonds in anticipation of special assessments to improve a county road, under section 6912-1, General Code, is not affected by the passage of the Smith one per cent. law.

The various limitations of the Smith law must be observed, however, and its general provisions applied as in the case of other tax levies.

Levies for bond issues, therefore, are included within the "interior limitations," "the amount raised" in 1910 limitations, and the specific purpose limitation. Levies for the purpose of discharging principal and interest on such bonds issued prior to June 2, 1911, however, are excluded from said limitations but included in the fifteen mill limitation.

COLUMBUS, OHIO, September 12, 1911.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 2nd, in which you request my opinion as to whether or not section 5649-2 of the Smith one per cent. law, so-called, has the effect of doing away with the power of the county commissioners under section 6912-1 of the General Code, enacted May 21, 1910, 101 O. L., 336, to issue bonds in anticipation of the collection of special assessments made in the course of proceedings under the related sections, to improve a county road, being sections 6903 to 6914, inclusive, General Code.

Section 6912 of the General Code, as amended in 1910, provides that:

> "The assessment so made shall be certified * * * to the auditor of the county, who shall place it on the tax list against such taxable property * * * and it shall thereupon be collected in not to exceed ten annual installments."

Section 6912-1 provides that:

> "After so certifying said assessment * * * the commissioners may, in anticipation of the collection of all moneys from all sources, required to be raised for said improvement * * * borrow a sum of money * * * and may issue and sell negotiable notes or bonds of the county bearing a rate of interest not to exceed five per cent. per annum. For the purpose of paying their respective shares of the principal and interest on the notes or bonds authorized to be sold, the county commissioners and township trustees may levy a tax on all the taxable property of the county or township in addition to all other taxes authorized by law of not to exceed two mills in any one year until said notes or bonds and interest are paid."

The improvement proceedings are substantially similar to those provided by other road improvement acts, being inaugurated by a petition and concluding with the assessment of a part of the damages, cost and expense of the improvement upon the owners of abutting property. The levy to pay the bonds

issued in anticipation of such assessments, however, is, as provided in section 6912-1 above quoted, a tax "upon all the taxable property of the county." Section 5649-2 of the Smith law, so-called, 102 O. L., 266-268, provides in effect that the aggregate of all taxes that may be levied in a taxing district by all subdivisions levying therein shall not exceed the amount levied within the same district in the year 1910, or such less amount as would be produced by a rate of ten mills, the latter rate being exclusive, however, of "such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred, or any indebtedness that may hereafter be incurred by a vote of the people." In this connection permit me to call attention to section 5649-3, which provides in part:

> "The maximum rate of taxation in any taxing district for any purpose, as now fixed, shall be and is hereby changed so that such maximum rate, as levied on the total valuation of all taxable property in the district for the year 1911 and any year thereafter would produce no greater amount of taxes, than the present maximum rate for such purpose, if levied on the total valuation for all the taxable property therein for the year 1910, would produce. * * *"

Section 5649-3*a* of the Smith one per cent. law provides the internal limitation upon the amounts which may be levied for county, township, municipal and school district purposes. The limitations so fixed are declared to be "exclusive of any special levy provided for by vote of the electors, special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road and ditch purposes, over which the budget commission shall have no control."

It think it is quite apparent that the effect of the foregoing provisions of the Smith law—the only ones necessary to be quoted in this connection—upon the power of the commissioners to issue bonds and levy taxes for the payment thereof under section 6912-1, also above quoted, is as follows:

1. The power to issue bonds is not affected at all. The Smith law does not purport to take away any power to borrow money. True, it does not exempt interest and sinking fund levies made for the purpose of discharging the principal and interest of bonds issued after June 2, 1911, without a vote of the people from any of its limitations. The effect of this, however, is merely to require that if bonds are issued under any provisions of law after June 2, 1911, without a vote of the people, the levies for the interest and sinking fund purposes made for the purpose of paying such bonds must be taken into consideration in ascertaining the various limitations of the act.

2. As already stated, levies under section 6912-1 will hereafter be included within the limitations of the Smith law unless made prior to June 2, 1911, in which case such levies are to be counted in ascertaining but one such limitation, namely, the first one mentioned in section 5649-2 and measured by the amount of taxes raised in the district in the year 1910.

3. The phrase "in addition to all other taxes authorized by law," as used in section 6912-1, is virtually nullified by the Smith law.

4. Instead of the limitation of section 6912-1 upon the amount which may be levied in any year for the purpose of retiring bonds issued under the section being henceforth two mills as provided in the original section, this limitation or maximum rate will become by virtue of the provisions of section 5649-3, above quoted, such a maximum rate as levied on the total valuation of the district—in this case the county—for the year 1911, or any year thereafter,

would produce no greater amount of taxes than a levy of two mills upon the 1910 duplicate would have produced.

5. The levy made under section 6912-1 is not a "special levy provided for by vote of the electors," "a special assessment," "a levy for road taxes that may be worked out by the taxpayers," or "a levy or assessment in a special district created for road or ditch improvements," within the meaning of section 5649-3*a*; and such a levy, therefore, when made after June 2, 1911, is within the internal limitations of five, three and two mills respectively, imposed by section 5649-3*a*, as well as within the other limitations of the Smith law.

From all the foregoing it follows that the ability of the county commissioners of a given county to issue bonds under section 6912-1 without impairing revenues necessary for current expenses is a question of fact in each case. The *power* to issue such bonds remains unaffected by the Smith law. By applying the principles above set forth it is believed that the advisability of making such an issue can in a given case be easily determined.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 357.

TAXES AND TAXATION — BOARD OF EDUCATION — SMITH ONE PER CENT. LAW — LIMITATIONS — BOND ISSUES WITHOUT VOTE OF ELECTORS.

Section 7629, General Code, still empowers the board of education to issue such amount of bonds without authority of the electors in any one year as does not exceed in the aggregate a tax of two mills for the year next preceding the issue. The limitation of the Smith law must be observed, however.

COLUMBUS, OHIO, September 13, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 4th, requesting my opinion upon the following question:

> "Does the power of boards of education to issue bonds without authority of the electors of the district as contained in sections 7629 and 7630, General Code of Ohio, remain unaffected by the provisions of the Smith one per cent. tax law or any other legislation passed by the last general assembly?"

Sections 7629 and 7630 of the General Code provide as follows:

> "Section 7629. 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 issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall * * * provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue. * * *

"Section 7630. In no case shall a board of education issue bonds under the provisions of the next preceding section in a greater amount than can be provided for and paid with the tax levy authorized by sections seventy-five hundred and ninety-one and seventy-five hundred and ninety-two, and paid within forty years after issue on the basis of the tax valuation at the time of issue."

The sections referred to and adopted in these two sections are as follows:

Section 7626 provides for the submission of the proposition to issue bonds to a vote of the people and for the passage of a resolution fixing the amount of each bond, the length of time they shall run, etc.

I have already held that under proceedings under section 7629 the board of education need not submit an issue of bonds to a vote of the electors, despite the reference therein to section 7626.

Section 7627 prescribes the formalities to be observed by the clerk of the board, the rate of interest to be borne by such bonds and provides that the bonds shall not be sold for less than their par value nor bear interest until the purchase money for them has been paid.

Section 7591 provides that:

"Except as hereinafter provided, the local tax levy for all school purpose shall not exceed twelve mills * * * and in city school districts shall not be less than six mills. Such levy shall not include any special levy for a specified purpose, provided for by a vote of the people."

Section 7592 provides in part that:

"* * * Any board of education may make an additional annual levy of not more than five mills for any number of consecutive years not exceeding five, if the proposition to make such levy or levies has been submitted * * * to a vote of the electors * * * and approved. * * *"

The Smith one per cent. law, so-called, provides in section 5649-3*a* that

"The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district * * * exclusive of any special levy provided for by a vote of the electors. * * *"

In my opinion this provision, by implication, repeals the provisions of sections 7591 and 7592, above quoted, and must be read together with section 7630 as if the reference therein were in terms to "section 5649-3*a*" instead of "sections 7591 and 7592."

There are, of course, other limitations of the Smith one per cent. law, with which I presume you are familiar. Levies for sinking fund and interest purposes made for the purpose of paying bonds not issued upon the approval of the electors must be counted in ascertaining all of such other limitations, as well as in ascertaining the limitation of five mills already referred to. I mention this fact, not because it has directly to do with the *power* of the board of education to issue bonds under section 7629 and section 7630 as affected by the

Smith law, but rather because in a given case it might affect the *policy* of issuing such bonds.

I know of no other effect which the Smith one per cent. law could be held to have upon the *power* of the board of education to issue bonds without a vote of the electors under sections 7629 and 7630 of the General Code. I do not agree with your suggestion that, as a matter of law that limitation of section 7629 upon the amount of bonds which may be issued in any one year, and being such amount as "would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue," must be reduced proportionately. This limitation is upon the power to levy taxes. Accordingly section 5649-3 of the Smith law, the effect of which is automatically to reduce all maximum levies for any special purposes in proportion to the increase in the tax duplicate, has no application.

You refer to the reductions that have been made in the limitations of the Longworth act. It would indeed seem appropriate from the legislative standpoint to reduce in like manner the limitation of section 7629. The legislature, however, has not done so and until such reduction is made the board of education will have power to issue under section 7629 such amount of bonds in any one year as does not exceed in the aggregate a tax at the rate of two mills for the year next preceding the issue.

I know of no other legislation passed by the late session of the general assembly in any way affecting the power of the board of education under sections 7629 and 7630 of the General Code.

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

A 358.

EXPENSES OF COUNTY RECORDER'S OFFICE—LIMITATION TO ALLOWANCE BY COUNTY COMMISSIONERS—APPEAL TO COMMON PLEAS COURT.

Prior to the passage of section 2980-1, General Code, when the commissioners had once fixed the allowance for the county recorder's office, under section 2980, such allowance was final and the auditor could not go beyond the amount so allowed Now, however section 2980-1, General Code aforesaid, authorizes an appeal to common pleas court whereby emergencies may be cared for.

COLUMBUS, OHIO, September 13, 1911.

HON. G. P. GILMER, *Prosecuting Attorney, Trumbull County, Warren, Ohio.*

DEAR SIR:—Your favor asking an opinion of this department was received in due time. The extra amount of work thrown upon this department by reason of the bribery cases, and other matters, has made it impossible to give office work the prompt attention that I would like to give it.

You ask an opinion upon the following:

> "I am in receipt of a letter from the recorder of this county, of which I am enclosing a copy. It would seem the recorder sent in his estimate at $100 for contingent expenses; that subsequent to making such estimate he received an order from the county commissioners for

additional work transcribing for which it was necessary to hire additional help at an expense in excess of the $100. The auditor has indicated his intention to refuse to issue his voucher for such additional work. The question now is, How shall such work be paid for, if done, and what is the duty of the recorder under such circumstances? I understand that the question is one made all over the state and it is the desire of the auditors to have your department pass on it so there will be some general rule."

Your question involves a construction of the statutes governing allowances for deputies, assistants and other employes of county officials, by virtue of the salary law.

Section 2980, General Code, as amended May 21, 1910, Vol. 101, page 346, Ohio Laws, provides:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January first next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. *Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes* of such officers, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

Section 2980-1, General Code, approved May 25, 1911, Vol. 102, page 136, Ohio Laws, provides as follows:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon said judge shall hear said application and if, upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board

of county commisisoners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

"When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

The supplement to section 2980, approved May 21, 1911, and known as section 2980-1, does not affect your question as this supplement became effective after the occurrence of the things of which you inquire.

The county commissioners are to fix the aggregate allowance for the year for compensation of deputies, and other employes of the respective county offices, including that of a recorder. They are required to act within the bounds prescribed by statute.

Sutliff, C. J., in the opinion, on page 415, of the case of Beebe vs. Scheidt, 13 O. S., 406, states the principle as follows:

"But a different rule is generally applicable to inferior jurisdictions, which are governed in their proceedings strictly by statutory provisions. The general rule applicable to such inferior jurisdictions is, that in their proceedings they are to be held to the strict limits of their authority, as conferred and prescribed by the statute. And this rule is doubtless applicable to county commissioners as well as to justices of the peace."

Section 2980 authorizes the commissioners "not later than five days after the filing" of the statement therein required, to fix an aggregate sum to be expended for such office during the succeeding year for deputies, etc. Section 2981 authorizes such officer to appoint and employ his deputies and assistants and fix their compensation, and such "compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office."

The provisions of the statute are plain and must be followed. After the commissioners have once fixed the allowance they have no authority by statute or otherwise to modify or alter the same. The county officer in fixing the compensation of his deputies and assistants must remain within the allowance made by the commissioners.

Prior to the passing of section 2980-1, General Code, no method was provided to meet contingencies such as you set forth. This section will now cover all such emergencies.

The commissioners are not authorized to increase or alter the allowance once made for compensation of deputies and assistants of a county officer. Such officer must keep such expense within such allowance. The auditor cannot legally pay out any more than the allowance made by the commissioners.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

364.

BOARD OF EDUCATION—SPECIAL SCHOOL DISTRICT CARVED OUT OF TOWNSHIP SCHOOL DISTRICT—EFFECT UPON CONTRACTS OF LATTER DISTRICT.

When a board of education of a township school district has contracted and hired teachers for the coming year and subsequently in the same year, a special district is carved out of the township district, the board of education of the special district may make arrangements and contract for teachers, independent of any such arrangements made by the township board.

Any contracts made by the township district board which are rendered ineffective by reason of the change, are to that extent, abrogated. The effect is not an impairment of the obligation of contract by law for the reason that the law and the possibility existed at the time the contracts were made and such a possibility entered into such contract as a condition thereof.

COLUMBUS, OHIO, September 15, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I am in receipt of your favor of June 3d, wherein you state as follows:

> "A board of education of a township school district have fixed their levy for school purposes, contracted and hired their teachers, have done everything that is necessary to operate the school for the coming season. A portion of the same township school district wish to take the proper legal steps, to establish a special school district. This cannot now be done until after the schools for the coming season have been in session for several months. Now the question is, when the special school district is established, can the board of education of that special district hire teachers for the same, and discharge those who are already hired? This question may be more simple than it seems, at least I am not satisfied in my own mind as to what the correct answer would be."

Section 4732 of the General Code provides:

> "The probate judge may hear and determine the question of the establishment of such special school district, and may subpoena and examine witnesses under oath. He may change the boundaries of the proposed special school district, shall fix and determine the amount of money due and payable to the special district from the surplus money in the treasury or in process of collection in the district or districts from which it was formed, or, in case of the indebtedness of such district, or districts, he shall determine the amount of money due and payable by the special school district to the district or districts, from

which it was formed. In either case, the amount so found due, shall be a valid and binding obligation upon the board of education of such district or districts."

It will be seen from an examination of section 4732, supra, that on the establishment of a special school district it is made the duty of the probate judge to fix and determine the amount of money which shall be paid over from surplus money in the treasury, or in process of collection in the district in which such special district is formed, and further provides in case of indebtedness, such judge shall determine the amount of money due and payable by the special district to the district from which it is formed. In no part of said section is the probate judge called upon to determine the right to contract between the teachers and the township board from which the special district is to be carved.

Upon the formation of such district the township board of education loses jurisdiction over the territory embraced in such special district, and as the board of directors of such special district can in no sense be considered as the successors of the township board of education, but as an independent corporate body, the contract of the teachers made between the township board of education and such teachers do not become a liability upon the new board when formed.

Furthermore, I am of opinion that when the contract or various contracts between the board of education of the township district and the teacher were entered into, it is an implied condition of such contract, that the board of education entering into such contract continue to have jurisdiction over the territory in which the teacher so contracted with shall perform the service, and that should such territory by operation of law be withdrawn from the jurisdiction of such township board the contract with such teacher for services to be performed in said territory is immediately, upon the board losing jurisdiction of such territory, entirely abrogated.

This is not an enactment of a law impairing the obligation of a contract as the law at the time the contract was entered into has not been changed in the least, but is simply a condition subsequent, which having arisen, abrogates the contract.

The specific question that you desire answered is whether when a special school district is established the board of education of the special district can hire teachers for the same, and discharge those who were previously hired by the board of education of the district from which said special district was carved.

I am of opinion that when a special school district is established the board of education of such school district, not being the board of education of the district from which the special district is formed, nor the successor thereof, such board of education is not concerned in any way with the contract previously entered into by the board of education of the district from which such special district was formed, and that the board of education of such special district may employ the teachers for such district.

The teachers who have been previously employed by the board of education of the district from which such special district is carved are not entitled to teach in such special district by reason of their former contract. Such contract not being binding upon the board of education of said special district it is not necessary for such board to formally discharge such teachers.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

365.

BOARD OF EDUCATION—POWER TO FUND INDEBTEDNESS—BOND ISSUE—ORDER OF INSPECTOR OF WORKSHOPS AND FACTORIES.

When a board of education has been authorized to issue bonds in the sum of $25,000 for the erection of a building and has so done, and later, on order of the inspector of workshops and factories makes necessary a further expenditure of $7,000, which the electors have twice refused the authority to liquidate, the board may fund such indebtedness by issuing bonds, under section 5656, General Code.

COLUMBUS, OHIO, September 16, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 24th, in which you state that during the year 1907 the board of education of the village school district of Byesville, in pursuance of authority conferred upon it by the electors of the district, issued bonds in the sum of twenty-five thousand dollars for the purpose of erecting a building; that the contract was let for said sum; that thereafter, partly by order and direction of the inspector of workshops and factories, certain changes in the plans of said building were made, causing an additional cost of about seven thousand dollars; that this additional expenditure remains a debt of the school district, part of it being due to the contractors for labor performed and material furnished, and part being due on orders issued by the board of education upon a bank and paid by the bank; that since the incurring of this indebtedness the electors of the district have twice rejected the proposition of issuing bonds to liquidate the same, which said proposition has been submitted to them by the board of education.

You request my opinion as to the present authority of the board of education to secure funds to liquidate this indebtedness.

Section 5656 of the General Code seems to contain this authority. It provides as follows:

> "The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

In this connection see also sections 5658 and 5659 of the General Code, which provide in part as follows:

> "Section 5658. No indebtedness * * * shall be funded * * * or extended, unless such indebtedness is first determined to be an existing, binding and valid obligation of such * * * school district, by a formal resolution of the * * * board of education. * * *
>
> "Section 5659. For the payment of the bonds issued under the next three preceding sections, the * * * board of education * * * shall levy a tax, in addition to the amount otherwise author-

ized, each year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature."

I know of no reason why the facts stated by you do not afford a proper case for action by the board of education under the above quoted sections.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General

366.

SPECIAL SCHOOL DISTRICT, ESTABLISHMENT — CERTIFICATION OF COUNTY AUDITOR OF TOTAL TAX VALUATION OF TERRITORY FROM ACTUAL TAX DUPLICATE.

To comply with section 4729, *General Code, providing for the establishment of a special school district, the auditor's certificate therein prescribed for may not certify what the total tax valuation of said territory "will be" on the* 1911 *duplicate, but must be postponed until the duplicate is made up so that it may state what the actual valuation place upon the duplicate really is.*

COLUMBUS, OHIO, September 16, 1911.

HON. JOHN F. MAHAR, *Prosecuting Attorney, Darke County, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 12, requesting my opinion upon the following question: Under section 4728 of the General Code, et seq., is there authority of law for the establishment of a special school district at this time based upon the total tax valuation of the territory as it will be shown upon the 1911 duplicate?

Section 4728 of the General Code provides as follows:

"A special school district may be formed of any contiguous territory, not included within the limits of a city or village, which has a total tax valuation of not less than one hundred thousand dollars."

Section 4729 of the General Code provides in part as follows:

"To establish a special school district, a petition * * * shall be filed in the office of the probate judge. * * * Such petition * * * shall contain a description of the territory * * * and be accompanied by a statement giving the total *tax valuation* of such territory certified to by the county auditor or auditors, * * *"

The remainder of the section vests in the probate judge the power and jurisdiction to hear the petition and determine whether a special school district ought to be formed.

In view of this latter provision, I hesitate somewhat to express an opinion upon the question you submit.

You say that a petition has actually been filed in the probate court of Darke county and that pending the case it will, of course, be necessary for the probate judge to determine the question you ask in order to pass upon the petition which is before him.

I have made it a rule not to venture to express an official opinion upon a question which is before a court for judicial determination.

If, however, the probate judge desires my advice and assistance in the matter, I shall be glad to give it. To save time, and upon the assumption that the probate judge would entertain the suggestion which I might make, permit me to state that in my opinion the "total tax valuation" of any territory within a county cannot be ascertained and certified to by the county auditor until the grand duplicate upon which the certificate is based is finally made up; that is to say the county auditor is not permitted to certify as to what the total tax valuation *will be*, but only as to what it *is*. The valuations which will become part of the 1911 duplicate to be made up in October of this year are not yet completed, and the auditor could not know or certify to the total tax valuation of any territory in the county. It so happens that this year the tax valuations are rising in nearly every district in the state, so that in practice a county auditor would know the tax valuation of a given territory would probably exceed a certain amount. This, however, is not a statement of fact which the auditor should make—it is merely his estimate or guess.

It is my opinion, therefore—and I trust it may be of some service to the probate judge—that the tax valuation of territory sought to be erected into a special school district by petition filed at the present time is the tax valuation as shown by the grand duplicate of the year 1910, and that the county auditor has no right to base the certificate required by section 4729 upon any other tax valuation.

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

368.

INITIATIVE AND REFERENDUM ACT—ELECTIONS—PETITIONS—CERTIFICATION OF FILING BY CLERK TO STATE DEPUTY SUPERVISORS OF ELECTIONS—"EXPENDITURE" FOR FIRE ENGINE.

An ordinance of council appropriating $10,000 *for the purchase of a fire engine and authorizing an "expenditure" of the money for that purpose, is within the initative and referendum act and does not become affective in less than sixty days.*

As the act requires petitions to be signed by fifteen per cent. of "the highest numder of votes cast for the office of mayor," said fifteen per cent. shall be computed upon the votes cast for the successful candidate for mayor.

The board of state deputy supervisors of elections are the "officers having control of elections within the municipal corporation" to whom the clerk shall certify the fact of the filing of the petitions.

Resolutions specified in paragraph 2 *of section* 4227-2 *of the initiative and referendum act are governed in like manner as those specified in paragraph* 1 *and therefore petitions regarding the same must be filed within thirty days, though the fact of their filing may be certified within sixty days.*

COLUMBUS, OHIO, September 16, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Under date of August 24th, 1911, you submitted certain questions for my opinion upon the following state of facts:

"At the request of the board of deputy state supervisors of elections, I desire your opinion with reference to the initiative and referendum act, known as the 'Crosser bill,' in the following state of facts: The city council of Norwalk upon August 15, 1911, passed a resolution appropriating $10,000 for the purchase of a fire engine, and authorized the expenditure of that money for such purpose."

I assume that the ordinance referred to by you was for the issue of bonds in the sum of $10,000 for the purchase of a fire engine.

You refer in your letter to section 2 of the "Crosser act." Section 4227-2 of the General Code, 102 O. L., 521 (being section 2 of what you designate as the "Crosser bill"), in its entirety provides as follows:

"Any ordinance, resolution or other measure of a municipal corporation, granting a franchise creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance, resolution or measure by the council, there be filed with the clerk of such municipal corporation, a petition or petitions signed by fifteen per cent. of the qualified electors of such municipal corporation as determined by the highest number of votes cast for the office of mayor of such municipal election immediately preceding, ordering the submission of such ordinance, resolution or measure to the vote of the electors of such municipal corporation. Within ten days after the filing of such petition or petitions with the clerk as aforesaid, such clerk shall certify such ordinance, resolution or other measure to the officer or officers having control of elections in such municipal corporation who shall submit such ordinance, resolution or other measure to the vote of the electors of such municipal corporation at the next general election.

"No resolution, ordinance or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways, or other public or quasi public utility shall become effective in less than sixty days after its passage, during which time, if petitions signed by fifteen per cent. of the qualified electors of such municipal corporation as determined by the highest number of votes cast for the office of mayor of such municipal corporation, at the municipal election immediately, are filed with the clerk of such municipal corporation petitioning for the submission of any such ordinance or resolution to a vote of the people, such clerk shall certify the fact of the filing of such petition to the officers having control of the elections in such municipal corporation, who shall cause said resolution or ordinance to be voted on at the next regular election; provided, however, that at least thirty days' notice of the election upon such ordinance, resolution or measure must be given, when such election is to be held."

You first inquire whether the resolution in question is one governed by the "Crosser bill."

As such resolution is one for the purchase of a fire engine, I am of the

opinion that it is clearly a resolution involving the expenditure of money and is, therefore, governed by the "Crosser bill."

You inquire secondly if the sixty day limitation set forth in section 4227-2, *supra*, has application.

As the law states that no resolution, ordinance or measure involving the expenditure of money shall become effective in less than sixty days after its passage, and as this resolution does so involve the expenditure of money, I am of the opinion that such limitation has application.

You inquire thirdly if the fifteen per cent. in amount required for the petition is to be computed upon the vote cast for the successful candidate for mayor at the preceding election, or should the mayoralty vote be totaled.

The language used in section 4227-2, *supra*, is "the highest number of votes cast for the office of mayor," not the *total* number of votes cast for mayor. Had the legislature intended that the total vote for the office of mayor should be the basis of the petition, I am of the opinion that it would have so stated, but instead thereof it used the word "highest." By so using the word "highest" it seems to me that the legislature intended to have a comparison between the votes cast for mayor. In other words, that it intended that the basis of petition should be the highest number of votes cast for the various candidates for the office of mayor at the municipal election immediately preceeding, and that, therefore, the highest number would, of course, be the vote cast for the successful candidate for mayor.

You inquire fourthly as to what is meant by the language "such clerk shall certify the fact of the filing of such petition to the officers having control of the elections in such municipal corporation," that is, as to whether it means the board of deputy state supervisors of elections as the officers referred to therein. The board of state deputy supervisors of elections are the officers that control the election, and, therefore, I conclude that such board is the same as the officers referred to.

Finally you state "the council's resolution having been passed August 15th, the sixty days would not expire until October 14th; if this petition should be filed upon October 14th, the last clause of section 2 would prevent the election being held upon November 7th, the general election day. If this should be the case, would it be necessary for the board of elections to postpone the balloting until the general election in 1912?"

An examination of the first paragraph of section 4227-2, *supra*, discloses that all resolutions and ordinances of a municipal corporation shall be submitted to the qualified electors if within thirty days a petition be filed with the clerk therefor, ordering the submission of such resolution, etc., to a vote of the electors, and that within ten days thereafter such clerk shall certify such resolution, etc., to the officers having control of elections, who shall submit the same to a vote of the electors at the next general election.

The second paragraph states that certain kinds of resolutions, etc., shall not become effective in less than sixty days after passage, *during which time*, if petitions are filed with the clerk, he shall certify the fact to the officers having control of the election, who shall cause such resolution, etc., to be voted on at the next regular election—at least thirty days' notice of such election to be given when such election is to be held.

It will be noted that the first paragraph of section 4227-2, *supra*, is so general in its provisions as to cover all the resolutions and ordinances embraced in the second paragraph thereof, and provides that if a petition be filed within thirty days the clerk shall so certify within ten days.

Paragraph 2 of said section which singles out resolutions relating to certain of the powers of such municipality embraced in paragraph 1 of said sec-

tion, does not prescribe any specific time within which a petition shall be filed, but simply provides that "during which time," to-wit, sixty days, the clerk shall certify.

The petition to be filed and the percentage of signers thereof being the same in both instances, and the resolutions, etc., embraced in the second paragraph being included within those mentioned in the first paragraph, I am of the opinion that the petition referred to in the second paragraph is the same as that referred to in the first paragraph, and consequently that the thirty-day limitation of the first paragraph should govern.

Such being my opinion as to the time within which a petition should be filed, I hold that a petition filed on October 14th, as stated in your question, would not be within time and consequently of no force or effect, and the question submitted by you thereon would not arise.

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

369.

BLIND RELIEF COMMISSION—REMOVAL TO OTHER COUNTY BY PERSON RECEIVING RELIEF DOES NOT DISQUALIFY—ELECTION OF RELIEF FROM ONE OF TWO COUNTIES.

After a person has become qualified for relief for the blind relief commission, the mere fact of removal from the county will not preclude such person from relief. A person who has received relief from one county and moves to another wherein he resides one year, may elect and receive such relief from either county.

COLUMBUS, OHIO, September 16, 1911.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 19th, and I desire to state that the delay in answering the same has been due entirely to the large number of matters which this department has been required to look after during the last three or four months. In your letter you inquire as follows:

> "Our blind relief commission has requested me to write you for an opinion of section 2966 of the General Code, as to whether the removal from the county of a person receiving relief under such section forfeits his right to such relief. We have quite a few cases here of this kind and the board is at a loss to know whether to pay the relief in case of a removal from the county."

and in reply to your inquiry I desire to say that section 2965 of the General Code provides as follows:

> "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 these provisions would become a charge upon the pub-

> lic or upon those not required by law to support him, shall be deemed a needy blind person."

and section 2966 of the General Code provides as follows:

> "In order to receive relief under these provisions a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year."

I am inclined to the belief that under and by virtue of the provisions of section 2965 of the General Code, supra, it is the purpose of the blind relief law to prevent persons who are in needy circumstances by reason of being blind becoming a "charge upon the public." I am further inclined to the belief that a mere removal to another county after having received said relief as a needy blind person does not disquality such person from the relief provided for by section 2965 cited above, although section 2966 of the General Code provides that before a person shall receive relief on account of being blind that such person must become blind while a resident of the state and shall be a resident of the county for one year.

There is no provision of the statute whereby a person, after the blind commission has decided such person is entitled to the blind relief, becomes disqualified from receiving such relief by reason of removing from the county in which he had his residence at the time of receiving such relief into another county of the state, and I am, therefore, of the opinion that the county from which he received such relief would continue liable for the payment of such relief even after the party so receiving such relief had removed to another county.

I am furthermore of the opinion that any blind person so removing from the county in which he first received the relief provided for by section 2965 of the General Code would have the optional right to apply for relief from the blind commission of the county to which he so removed, but as to whether or not such person so entitled to the blind relief shall or shall not make application for relief from the blind commission of the county to which he removes is entirely optional with the party himself, provided he has been a resident of the latter county for one year, and if he does not choose to apply for relief to the county to which he removes, then the county from which he receives relief as a blind person in the first instance continues liable to provide such relief under the provisions of sections 2965 and 2966 of the General Code, which I have cited above.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

372.

OFFICES COMPATIBLE—CLERK OF COURTS AND MEMBER OF BOARD OF EDUCATION.

As the language of section 11, *General Code, the only relative statute, does not prohibit a clerk of courts from holding the office of member of a board of education, and as there is no incompatibility in the offices, there is no legal objection thereto.*

COLUMBUS, OHIO, September 16, 1911.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 12th, in

which you request my opinion as to whether the same person may lawfully hold the offices of clerk of courts of Darke county and member of the board of education of the Greenville city school district, which said school district is located in Darke county.

Section 11 of the General Code provides as follows:

> "No person shall hold at the same time by appointment or election more than one of the following offices: Sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge and justice of the peace."

Similar provisions are found in sections 2565 and 2783 of the General Code.

None of these provisions, however, in my opinion, preclude a person from holding at the same time, by appointment or election, one of the offices mentioned in said sections, and another office not therein mentioned. The prohibition is against holding more than one of the offices mentioned, and by clear implication it follows that the prohibition is not intended to be extended to holding one of the enumerated offices and another unenumerated office at the same time.

The question then becomes one of common law compatibility. I have carefully examined the statutes relating to the powers and duties of the clerk of courts and of boards of education of city school districts, and find therein no provision by virtue of which the two offices in question could under any conceivable circumstances be brought into adverse mutual relations.

I am, therefore, of the opinion in the absence of any possible occasion for the adverse exercise of the powers of the two offices in question, and in the absence further of any express provision of statute prohibiting the holding of the two offices by a single individual, that the positions of clerk of courts and member of the board of education of a city school district, located in the county, may lawfully be held by the same person at the same time; and that, therefore, a person now holding the office of clerk of courts may lawfully be elected as member of such board of education.

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

375.

SALARY FEE FUND—COUNTY RECORDER—FEES EARNED BUT NOT COLLECTED—PAYMENT OF SALARY OF PREVIOUS YEARS.

Section 2986, General Code, intends that the salary of a county recorder and the expenses of the office shall be paid only from fees earned during the year for which the salary is payable.

A recorder must be able to determine, therefore, just what amount was earned by him in any given year before his salary may be paid from fees earned in that year, but not collected until subsequent years.

COLUMBUS, OHIO, September 17, 1911.

HON. ALTON F. BROWN, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I am in receipt of your favor of July 12th, wherein you state as follows:

"The recorder of Warren county has been such recorder since September 1, 1903, and since September 18, 1907, has been making a general index under the authority of section 2766, General Code.

"From September 25th, 1907, to January 1, 1908, he drew no salary for himself as such recorder, but only drew sufficient money to pay the clerks in his office; during said time he was engaged in the making of the general index as above stated; the recorder is not now able to say how many of the tracts were described as provided in section 2766 during said time, neither is he able to say how much was earned during that time in fees, all he can say with certainty is that during said time he worked on the indexing and that now by reason of said indexing, which has covered the time from September 18, 1907, to the present date, there is a surplus in his fee fund sufficient to pay the balance claimed to be due.

"Under the circumstances does the section 2986 authorize the county commissioners to allow a sum sufficient to pay the recorder's salary from September 25, 1907, to January 1, 1908."

The law in force at the time stated in your inquiry, to-wit: From September 25, 1907, to January 1, 1908, which embodied what is now section 2986 of the General Code is to be found in 98 Vol. Ohio Laws, page 92, section 8, and reads as follows:

"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 in this act 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, assistants, bookkeepers, clerks and other employes, he shall be entitled to receive from the proper fee fund, on the allowance of the county commissioners, an amount equal to the difference between his salary for such year paid to him during his incumbency and the salary for that year, as herein fixed, 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 the same as may be so collected."

Said provision of law was carried into the General Code as section 2986, which reads as follows:

"If a probate judge, sheriff, clerk of the court of common pleas, or recorder has not received the full amount of his salary for any year, as provided in this chapter, but, during such year, has 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, assistants, bookkeepers, clerks and other employes, he shall be entitled to receive from the proper fee fund, on the allowance of the county commissioners, an amount equal to the difference between his salary for such year paid to him during his incumbency and the salary for that year, as herein fixed, whenever that amount is collected by a successor to him in office from the unpaid fees earned during such year, or, if the entire difference be not collected, he shall receive such part thereof as is so collected."

Section 2986, supra, was amended, 101 O. L., 346, but the amendment thereof does not affect the question at issue. The intent of the provisions of section 8, 98 O. L., 92, foregoing set forth and of the provisions of section 2986 of the General Code, supra, as I view the same, is: The county recorder shall receive his salary only in the event that the fees earned by his office shall equal the amount of his salary and the compensation paid to his clerk hire in any one particular year. Unless the fees earned during such year are of an amount equal to the aggregate of his salary and compensation paid to his subordinates he is not entitled to receive any allowance in excess thereof on the allowance of the county commissioners.

You state in your letter that the recorder is not able to say how much was earned during that time in fees.

I am of opinion that it is necessary in order for the recorder to obtain any allowance by way of salary for the time mentioned in your inquiry, it must clearly appear that the fees earned by his office were sufficient to pay him such salary or part of salary over and above the amount necessary for clerk hire.

For your information I beg to state that section 2986, referred to in your letter of July 12th, was repealed by Senate Bill No. 141, passed May 19, 1911.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

376.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—PROHIBITION OF CHANGE OF VALUES IN PERSONAL PROPERTY FOR YEARS 1910 AND PRECEDING—NO EFFECT ON PENDING COMPLAINTS.

While section 2 of the Smith bill prohibits change of valuations of personal property as of the years 1910 and preceding, after the passage of the act, it cannot be construed to apply to complaints filed prior to the act demanding a decrease in such valuations. Section 26, General Code, providing against the affecting of pending proceedings by the passage of repeals or amendments, further supports this construction of the intent of section 2 of the Smith law aforesaid.

COLUMBUS, OHIO, September 18, 1911.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 16th, regretting the delay in replying to the same, which has been occasioned by an unusual pressure of business in this department.

You ask if section 2 of the Smith bill, to-wit:

> "From and after the passage of this act no county auditor, assessor or other official shall place upon the tax list or duplicate for taxation as of the year nineteen hundred and ten, or as of any year preceding said year, any personal property which should have been assessed for taxation as of such year but which was not returned for taxation therein; nor shall any such officer change in any manner the valuation of the year nineteen hundred and ten, or for any preced-

> ing year, of personal property returned for taxation in such year, any act heretofore passed to the contrary notwithstanding; and all acts and parts of acts insofar as they relate to the assessment and valuation of personal property for taxation for the year nineteen hundred and ten, or any preceding year, and insofar as they are inconsistent with the provisions of this section are hereby repealed."

prohibits boards of equalization from *decreasing* personal tax returns where complaints and requests for such course were filed with the board in March, 1911, some three months before the Smith bill was passed.

In reply I desire to say that the sole object of section 2, quoted above, was to emphasize the intention of the legislature that no additions should be made to personalty for any year prior to 1911.

Section 9 of the act of May 10, 1910 (101 O. L., 434), excepting the levy, collection and assessment of taxes for 1910 from all of the provisions of the act therein contained, left the matter in such shape that it became necessary to enact such a provision as is found in section 2 of the Smith law, approved June 2, 1911. While the section to which you refer prohibits "change in any valuation" it must be read in connection with the entire act and the intention of the legislature, and does not refer to *decrease* in a personal tax on complaint filed prior to the passage of the section. Then again, section 26 of the General Code provides:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such actions, prosecutions, or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This section would save the matter involved in the complaints filed prior to the enactment of section 2, above quoted.

I am therefore of the opinion that the board of equalization has full jurisdiction to decrease the personal tax return under the circumstances stated in your communication.

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

A 383.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—BOARDS OF TOWNSHIP PARK COMMISSIONERS—LIMITATIONS—STATUTE MAKING TOWNSHIP OFFICERS APPOINTIVE IS UNCONSTITUTIONAL.

Assuming to be constitutional, section 3423, General Code, authorizing the township park commissioners to levy each year one mill on all property for park purposes, over and above "all other limitations authorized by law," it is not expressly excepted from the provisions of the Smith law and therefore subject to all its limitations.

Since, however, Article X, section 4 of the constitution provides that "township officers shall be elected by the electors of each township," and since the board of park commissioners are given the exercise of continuing powers, highly governmental in their nature, with respect to the whole township, including the right of eminent domain and the power to levy taxes, they are clearly included within the class of "township officers," and therefore the statutes making their office appointive is clearly unconstitutional.

COLUMBUS, OHIO, September 21, 1911.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 14th, in which you call my attention to the provisions of section 3423, General Code, and request my opinion as to the effect thereon of the Smith one per cent. law, so-called. Said section 3423 provides as follows:

> "To defray the expenses of purchasing, appropriating and improving lands for park purposes and maintaining them as a free public park, the township park commissioners may levy, each year, a sufficient tax, not to exceed one mill on each dollar of valuation on all real and personal property, including property within any municipal corporation within the limits of the township, over and above all other taxes and limitations thereon, authorized by law. * * *"

This section was, of course, based prior to the passage of June 2, 1911. 102 O. L., 266. It will not be necessary for me to quote the provisions of the latter act. Its purpose and intent are stated in such definite and unmistakable language that there can be no doubt concerning them. In addition to the repealing clause to which you refer, there are many other evidences in the act of a controlling intention on the part of the general assembly to make the law of 1911 apply to the levy of all taxes except those expressly excluded therefrom, and to impose the limitations of that law upon the amount and rate of taxes that might be levied for all purposes, excepting only such purposes as are expressly excepted in the law itself from the operation of such limitations.

Section 3423 and the taxes levied under its favor are not expressly excepted from the provisions and limitations of the Smith law. The phrase of said section "over and above all other taxes and limitations thereon authorized by law" must be construed as applying to such limitations as were in force at the time of the adoption of the section. It is not construed as referring to the Smith law; and if so construed it is clearly in conflict therewith and must yield thereto, as the Smith law is the later in point of enactment.

The phrase in question, then, must be regarded either as not applicable to the Smith law, or as repealed thereby. In either event, of course, it is simply ineffective.

There is another effect, however, which the Smith law has upon the operation of section 3423 of the General Code, and which I feel impelled to mention, although you do not inquire particularly concerning it. Section 5649-3 of the Smith law provides in effect that the maximum rate for any purpose shall be changed, so that such maximum rate will in no case produce a greater amount of taxes than the present rate for the same purpose if levied on the total valuation of all the taxable property in a district in the year 1910. That is to say, instead of the amount which may be levied under section 3423, General Code, now being one mill (in case other limitations of the Smith law allow a levy of one mill), it is the amount which would have been produced by a levy of one mill on the duplicate of the township in the year 1910, and in no case more than one mill.

I may add that the only consideration which points to a conclusion opposite to that which I have reached is the fact that a township park is established by vote of the people under section 3420, General Code, in pari materia with section 3423. However, the popular vote had upon the proposition establishing the township park is not, in my judgment, such a vote of the people authorizing special levies as is contemplated by section 5649-3*a*, which exempts such levies from the two mill limitation of the Smith law, but not from the ten mill limitation and the other limitations thereof.

There is another point, however, which is conclusive of the whole matter. I have hesitated to mention this point, but on careful consideration of the question, as you present it, I am satisfied that it is fairly before me, and that I cannot escape from expressing my opinion thereon.

Section 3415 of the General Code provides that the board of park commissioners shall be appointed by the court of common pleas.

Section 3420 provides that when the vote of the people is in favor of establishing a free public park the commissioners shall constitute a board, with power to locate, establish, improve and maintain a free public park.

These commissioners are also to have power, under section 3421, to award contracts, to appoint officers and employ persons necessary to care for the parks, to pass ordinances prohibiting the selling, giving away or using of intoxicating liquors as a beverage in the park, to pass by-laws, rules and regulations for the government of the park and to impose fines and penalties for violation thereof.

Section 3422 seeks to authorize the commissioners to exercise the right of eminent domain; while section 3423, as we have already seen, seeks to authorize this board to levy a tax without the interposition of any other public authority.

It is difficult to conceive of a more complete vesting of powers of government in any public officer or board than that which these statutes seek to make in the board of park commissioners with respect to the management and control of public parks.

Article X, section 4 of the constitution, provides that:

> "Township officers shall be elected by the electors of each township. * * *"

This is quite like the second section of the same article, which provides that:

> "County officers shall be elected * * * by the electors of each county. * * *"

Under this second section it has been held repeatedly that an act provid-

ing for the exercise of official powers for and on behalf of a county by appointive officers is unconstitutional.

State vs. Brennan, 49 O. S., 39.
State vs. Halliday, 61 O. S., 171.
State vs. Thrall, 59 O. S., 369.

There are numerous decisions of circuit courts to the same effect.

That the board of park commissioners are township officers is too plain for argument. Their powers are continuing, not temporary. They are exercised with respect to the whole township, and are highly governmental in their nature, including as they do the exercise of the right of eminent domain and the power to levy taxes.

For this reason the whole act relating to township parks is unconstitutional, and clearly so; and while I have made it a rule of this office not to express an opinion upon the constitutionality of an act, and particularly against the constitutionality of a given act, unless the matter is clear and unless my opinion is solicited, yet, what I may term, the glaring unconstitutionality of these provisions has constrained me to make an exception to the rule in this case.

For this reason I should be inclined to hold that, so far from any question being raised as to the power of park commissioners to levy inside or outside of the limitations of the Smith law, such commissioners have no power to levy taxes at all, because the act creating them, and providing for their powers and duties, is unconstitutional.

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

386.

TAXES AND TAXATION—RETURNS OF CORPORATIONS AND BANKS TO COUNTY AUDITOR—BANKS AND BANKING—DEDUCTION OF REAL ESTATE.

A bank is required to make its returns to the auditor, under section 5404, *General Code, and a corporation under* 5407, *General Code. In both cases all properties must be returned to the auditor and deductions for real estate values must be made by that official himself.*

In the case of a bank, however, the board of review has nothing whatever to do with the equalization or revision of returns, while in the case of a corporation the board of review may exercise its powers.

COLUMBUS, OHIO, September 22, 1911.

HON. C. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 6th, in which you state that it is the understanding of the board of review of Warren that the tax commission of Ohio has ruled that the surplus and undivided profits of a savings and loan company are subject to taxation without deduction on account of the real estate included therein and otherwise taxed. You wish me to state the position of this office upon this matter.

Replying to your letter I beg to advise that I am informed that the tax commission has made no such ruling as that referred to. The whole matter is covered by the provisions of section 5405, General Code, as amended, 102 O. L., 61. This section, which relates to the returns to be made by incorporated companies whose taxation is not otherwise specifically provided for, provides in part that:

> "Upon receiving such returns the auditor shall ascertain and determine the value of the property of such companies and deduct from the aggregate sum so found, of each, the value so assessed for taxation of any real estate included in the return. * * *"

If the return, then, is made under this section, it is the duty of the corporation to return its entire personal property, including the real estate necessary to its daily operations, at its true value in money. It is then the duty of the county auditor to deduct the assessed value of the real estate from the aggregate value of the personal property as determined by him. That is to say, the intention of the law is that the real estate shall not be twice taxed, once specifically and once as an element in the value of the personal property of the corporation; but the law does not excuse the corporation from returning the actual value of its real estate.

The foregoing is upon the assumption that the corporation concerning which you inquire is not a bank. From the name which you give to me I am unable to determine whether or not this is the case. If the corporation in question is a banking company, then it is required to make its returns under sections 5467, et seq., General Code. The scheme under these sections is practically the same as that under section 5404 et seq.; that is to say, the resources and liabilities of the bank in gross must be returned to the county auditor, who is to determine the par value of the shares in the aggregate, and he must then deduct from the result so ascertained the assessed value of the real estate.

There is this difference, however, between the machinery for the assessment of banks and that for the assessment of other corporations. In the case of banks the function of equalization is to be discharged by the state tax commission under and by virtue of sections 136 to 140, inclusive, of the act of June 2, 1911, 102 O. L., 256. For this reason, in my opinion the board of review has no jurisdiction over the returns of a banking company.

It is important, therefore, to determine whether or not the corporation concerning which you inquire is a banking company required to make its returns under section 5407, or a corporation required to make its returns under section 5404 of the General Code. In both cases the assessed value of real estate may not be deducted *by the corporation itself* from the return, but must be deducted by the county auditor; in the first case, however, the board of review has nothing whatever to do with the equalization or revision of the returns, while in the second case the board of review may rightfully exercise its powers in the premises.

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

389.

ALTERATION OF COUNTY ROAD—PETITIONERS—"DAMAGES" ALLOWED BY VIEWERS INCLUDE "COMPENSATION"—POWER OF COMMISSIONERS TO MAKE PETITIONERS PAY DAMAGES AND TO GIVE COUNTY ASSISTANCE—NO POWER OF TOWNSHIP TRUSTEES TO ASSIST.

The word "damages" as used in section 6883, General Code, providing for the allowance of such to property owners by viewers when a county road is altered upon petition of neighboring freeholders, includes "compensation."

Under said statute, the commissioners are authorized to pay a portion of the same from the county treasury and require the balance to be paid by the petitioners and they may refuse to establish the road as a public highway unless said damages are paid by the petitioners.

Where both the petitioners and the commissioners refuse to pay such damages, the township trustees have no power or authority to pay the same.

COLUMBUS, OHIO, September 22, 1911.

HON. FRED W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Under date of August 23d you submit for my opinion the following question:

> "Certain petitioners of Columbia township, Meigs county, Ohio, filed with the county auditor of said county a petition to the county commissioners of said county according to law, asking for the alteration of a *county road* in said township, and certain damages and compensation were duly and legally assessed by viewers to the persons through whose premises the said road is proposed to be altered. The county commissioners of Meigs county have ordered the township trustees of said township to open and alter the said county road as asked for in said petition. If the county commissioners of said county and the petitioners for the alteration of said county road or either refuse to pay the compensation and damages to the person or persons through whose premises the said road is proposed to be altered, have the township trustees of said township power and authority to pay the said owner or owners of said lands through which the said road is proposed to be altered the said compensation and damages? In other words, have the trustees of the township power and authority to pay persons through whose premises a county road is proposed to be altered, the damages and compensation awarded by viewers, in order to secure the alteration of a county road, when the commissioners of said county and the petitioners asking for said alteration refuse to pay the same?"

Under the head of "County Roads," Chapter 2 of Title 4, Public Highways, are the following sections:

Section 6861 provides as follows:

> "Applications for laying out, altering, changing the width of, or vacating a county road shall be by petition to the county commissioners, signed by at least twelve free-holders of the county residing in the vicinity of the road to be laid out, viewed or reviewed, altered or va-

cated. One of more of the signers to such petition shall enter into bond with sufficient surety, payable to the state for the use of the county, conditioned that the persons making such application shall pay into the treasury of the county the amount of all costs and expenses accruing thereon in case the application fails. (R. S., Sec. 4638.)"

Section 6867, General Code, provides as follows:

"On the presentation of the petition, if the county commissioners are satisfied that lawful notice has been given, they shall appoint three disinterested free-holders of the county as viewers, who shall also be a jury to assess and determine the compensation to be paid in money for the properties sought to be appropriated, without deduction for benefit to any property of the owner, and to assess and determine how much less valuable, if any, the land or premises from which such appropriations may be taken, will be rendered by the opening and construction of the road. The county surveyor shall survey the road. (R. S., Sec. 4642.)"

Section 6875, General Code, provides as follows:

"As a jury the viewers and surveyor shall also discharge the duties required of them in section sixty-eight hundred and sixty-eight, and assess and determine the damages sustained by any person through whose premises the road is proposed to be established, altered or vacated. (R. S. 4646.)"

Section 6876, General Code, provides as follows:

"The viewers shall not be required to assess or award damages or compensation to any person except minors, idiots or lunatics, in consequence of the opening of the road, unless the owner or his agent, having notice, as provided in sections sixty-eight hundred and seventy-two and sixty-eight hundred and seventy-three, of the application and proceedings by which his property is sought to be appropriated or may be injured, has filed a written application with the viewers, giving a description of the premises on which damages or compensation is claimed. Application for damages shall be barred unless they are presented as provided in this chapter. (R. S. 4647.)"

Section 6882, General Code, provides as follows:

"The viewers, at the time they make their report of the view, shall make a separate report, in writing, stating the amount of damages, if any, and to whom by them assessed, which would accrue by the opening of the road. They shall file the written applications, on which such assessments have been made, with the county auditor. (R. S. 4651.)"

Section 6883 of the General Code provides as follows:

"The county commissioners shall cause such report to be publicly read on the third day of the session at which it was received, and if no petition for review or alteration has been presented and received, and they are satisfied that the amount so assessed and determined is just

> and equitable, and that the road will be of sufficient importance to the public to cause the damages which have been assessed to be paid by the county, they shall order them to be paid to the applicants from the county treasury. If in their opinion the road is not of sufficient importance to the public to cause the damages to be paid by the county, they may refuse to establish the road as a public highway unless the damages which have been assessed are paid by the petitioners. The commissioners may order a portion of such damages to be paid out of the county treasury and require the petitioners to pay the remainder thereof before such roads are opened. (R. S., Sec. 4651.)"

It will be noted that in section 6883, *supra*, it is provided that if the county commissioners are satisfied that the amount as assessed and determined by the viewers is just and equitable, and that the road would be of sufficient importance to the public to cause the damages which have been assessed by such viewers to be paid by the county, such commissioners shall order them to be paid from the county treasury, but if in the opinion of the county commissioners the road is not of sufficient importance to the public to cause the *damages* to be paid by the county, such commissioners may refuse to establish the road as a public highway unless the *damages* which have been assessed are paid by the petitioners. It is further provided that the county commissioners may order a portion of such damages to be paid out of the county treasury, and require the petitioners to pay the remainder thereof before such roads are opened.

In the case of Grove vs. Commissioners, 8 Ohio Circuit Court Report, page 166, at pages 168 and 169 Judge Shearer says:

> "Referring to those chapters, we find in section 4642 a provision for the appointment of viewers to determine compensation to be paid for lands taken, and to assess how much less valuable the premises will be rendered by opening the road. Section 4645 provides for notice of land owners of the time and place of the meeting of the viewers and of the day by which claims for compensation shall be filed. Section 4646 enacts that such viewers shall assess the compensation and damages sustained by land owners, through whose lands the road is to be located, etc., who have complied with the requirements of section 4647, respecting filing their claims, and section 4651 provides for the payment of such damages. We find no express provision for the payment of compensation, although it is required to be determined by the viewers. The money to be paid is called damages."

and on page 170:

> "We incline to the opinion that, notwithstanding the omission of any express provision for compensation to land owners for lands appropriated for the construction of roads, the proper construction is that 'damages' where used alone in these statutes, includes compensation. Certainly it was not the purpose of the general assembly to provide for the ascertainment of the value of lands taken for public use, for appeals from the assessment of such value, etc., and provide no means for their payment.
>
> "There is no great violence to language in treating 'compensation' and 'damages' as synonymous. Compensation is defined, 'what is given to supply a loss.' Damages—'money awarded by a court of law on account of loss or injury.'"

I am, therefore, of the opinion that the word "damages" as used in section 6883, *supra*, would likewise include compensation. The above section providing exactly how damages and compensation are to be paid, to-wit, either by the petitioners for the road or from the county treasury, and there being no provision that the township trustees may pay the same on failure of either the petitioners or the county commissioners so to do, I am of the opinion that the trustees of the township have no power or authority to pay damages or compensation to persons through whose premises a county road is proposed to be altered.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

392.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—TEN MILL AND FIFTEEN MILL LIMITATIONS—SINKING FUND LEVIES AUTHORIZED BY VOTE OF ELECTORS—DESTRUCTION OF SCHOOL HOUSE NOT AN EMERGENCY.

Under section 5649-5b, General Code, interest and sinking fund levies to pay for indebtedness created subsequent to June 2, 1911, under authorization of a popular vote, are excluded only from the ten mill limitation of the Smith one per cent. law.

Under section 5649-4, General Code, the taxing authorities are authorized to exceed all limitations for certain emergencies referred to therein.

The destruction of a school house is not such an emergency, however, and therefore when, because of such a casualty, it becomes necessary to borrow money and issue bonds, the amounts authorized by vote of electors on the question of additional taxes and bond issues necessary, must be within the limitation of fifteen mills.

COLUMBUS, OHIO, September 25, 1911.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 21st, requesting my opinion as to whether under the one per cent. tax limitation law, so-called, 102 O. L., 266, a tax exceeding fifteen mills may by vote of the people or otherwise be levied within a taxing district, if the excess consists of interest and sinking fund levies for the purpose of discharging indebtedness created after June 2, 1911, by vote of the people.

Section 5649-5b of said act, 102 O. L., 273, provides that:

> "In no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

Analysis of this provision establishes the following facts:

1. "Taxes levied under the provisions of this and the two preceding sections" includes all additional taxes authorized by vote of the people.

2. "Taxes levied under the provisions of sections 5649-2 and 5649-3 of the General Code" embraces interest and sinking fund levies of all kinds.

This follows because section 5649-2 imposes its limitation, measured by

the amount of taxes for all purposes, raised in the district in the year 1910, upon such sinking fund levies, as well as levies for other purposes, and the supreme court has expressly held in the case of State ex. rel. vs. Sanzenbacher, that this is the case. A careful reading of this section establishes the fact, I think, that interest and sinking fund levies to pay for indebtedness "hereafter incurred by vote of the people" are not thereby excluded from any limitation excepting the limitation of ten mills.

In view of the foregoing I am of the opinion that in only one class of cases, to which I shall hereafter refer, is there any authority to exceed the maximum and all inclusive limitation of fifteen mills, whether by vote of the people or for interest and sinking fund purposes or otherwise.

The exception to which I refer is that embodied in section 4 of the act of May 10, 1910, therein designated as section 5649-4, General Code, which provides that:

> "For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine and seventy-four hundred and nineteen of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any of the limitations of this act."
>
> (101 O. L., 431.)

I have heretofore held that the phrase "any of the limitations of this act" refers, since the adoption of the act of June 2, 1911, which is in form an amendment to the remaining provisions of the act of May 10, 1910, to all the limitations of the act of 1911, and that the emergency levies referred to in said section 4 are exempted from all of the limitations of the act of 1911, including the limitation of fifteen mills.

Unfortunately for the case which you mention, the emergency created by the destruction of a school house is not one of the emergencies referred to in section 5649-4.

I am of the opinion, therefore, that when it becomes necessary through the destruction of a school house to borrow money and issue bonds therefor, and when a popular vote is taken, both upon the proposition of additional taxes under the Smith law and upon the proposition of issuing bonds, borrowing money and levying taxes under the statutes relating to boards of education, the annual taxes levied for the purpose of discharging the bonded indebtedness so created must be counted in ascertaining whether or not the limitation of fifteen mills imposed by section 5649-5*b*, above quoted, will be exceeded.

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

C 392.

SHERIFF'S FEES IN LUNACY CASES, ETC., NOT IN ADDITION TO SALARY—DISPOSITION.

As the statutory provision for fees of sheriffs in cases of lunacy, epilepsy, etc., does not expressly provide that they will be in addition to his salary as does the provision for fees in cases where the state fails to convict, such fees must be paid into the county treasury in accordance with section 2916, *General Code.*

COLUMBUS, OHIO, September 25, 1911.

HON. DANIEL W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 7th, in which you request my opinion as follows:

> "Thomas Teal, as sheriff of Clermont county, Ohio, claims that he is entitled in addition to his salary and his allowance of three hundred dollars in cases where the state fails to convict, the fees in cases of lunacy, etc., as set forth in the concluding paragraph in section 2846, General Code, as amended in volume 102, Laws 1911.
>
> "My contention is that all the sheriff's fees mentioned in the concluding paragraph should go into the fee fund, but the sheriff of Clermont county contends that they should not, but that they should go direct to him for services rendered.
>
> "Kindly advise me if the contention of the sheriff should be allowed."

The sheriff bases his contention on the amendment of section 2846 of the General Code, which became a law June 7, 1911. Section 2846, prior to the amendment, related only to the additional allowance to the sheriff and read as follows:

> "In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided for. Such allowance shall be paid from the county treasury."

Section 2846 as amended, 102 O. L., 287, reads as follows:

> "Upon the certificate of the clerk and the allowance of the county commissioners the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term. The fees of the sheriff in cases of lunacy, epilepsy, feeble-minded, boys' industrial school, girls' industrial home, school for blind, school for deaf, and for serving subpoenas for grand jury witnesses, and summoning jurors, except in appropriation cases, shall be paid out of the county treasury upon the certificate of the proper officer of the court in which the services were rendered."

The legislature, in addition to a slight modification of the old section, added the following:

> "The fees of the sheriff in cases of lunacy, epilepsy, feeble-minded, boys' industrial school, girls' industrial home, school for blind, school for deaf, and for serving subpoenas for grand jury witnesses, and summoning jurors, except in appropriation cases, shall be paid out of the county treasury upon certificate of the proper officer of the court in which the services were rendered."

You will note that the language added in the way of amendment to section 2846, General Code, does not expressly authorize county commissioners to allow from the county treasury the fees mentioned *in addition to the salary of the sheriff* but simply authorizes the fees mentioned in such cases *to be paid out of the county treasury.*

Section 2916, General Code, referring to the salaries of county officers provides:

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

Section 2983, General Code, as amended 102 O. L., 290, provides as follows:

> "At the end of each quarter, each such officer shall 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 such quarter, for his official services, which money shall be kept in separate funds by the county treasurer, and credited to the office from which they were received for the sole use of the treasury of the county in which such officers are elected and shall be held as public moneys belonging to such county and accounted for and paid over as provided in Division III. * * *"

I have repeatedly held under authority of sections 2996 and 2983 of the General Code that no county officer is allowed any additional fees, compensation or allowances unless there is express authority given by statute for such additional allowance, as for example, the first sentence of section 2846, General Code.

It is therefore my opinion that section 2846, General Code, as amended, does not entitle the sheriff in addition to his salary and his allowance of $300, in cases where the state fails to convict, to the fees in cases of lunacy and the other cases mentioned therein. Therefore, the contention of the sheriff should not be allowed.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

393.

TAXES AND TAXATION—CATTLE DEALER A MERCHANT—TAXED FOR AVERAGE AMOUNT OF STOCK DURING YEAR.

One who buys and sells cattle with a view to profit is a merchant within the meaning of section 5381, General Code. Such person shall be taxed for such cattle according to the average amount of his stock during the preceding year regardless of the fact that all stock had been disposed of by him, when the assessor calls to assess his property for taxation.

COLUMBUS, OHIO, September 25, 1911.

HON. R. H. PATCHIN, *Prosecuting Attorney, Geauga County, Chardon, Ohio.*

DEAR SIR:—Under favor of May 22, 1911, you ask an opinion of this department upon the following:

> "I have been asked to obtain an opinion from your office upon the following question: A person is in business as a cattle dealer; buys and sells cattle and other stock the entire year; about the first of April he disposes of all his stock and when the assessor calls on him to assess his property for taxation he says that he has sold all of his stock and that the money derived therefrom was used to pay his debts. Can a person dealing in this way be classed as a merchant and be compelled to give the average monthly amount invested in his business? If not, what would be the proper method of getting returns on this man's property?"

A merchant for purposes of taxation is defined in section 5381, General Code, as follows:

> "A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

Section 5382, General Code, provides:

> "When a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property, he shall state the value of such property appertaining to his business as a merchant. In estimating the value thereof, he shall take as the criterion the average value of such property, as provided in the next preceding section, which he has had from time to time in his possession or under his control during the year next previous to the time of making such statement, if he has been engaged in business so long, *and if not, then during such time as he has been so engaged.* Such average shall be ascertained by taking the amount in value on hand, as nearly as possible, in each month of the next preceding year in which he has been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that he has been in business during such year."

The supreme court of Ohio in the case of Engle vs. Sohn, 41 O. S., 691, holds as follows:

> "A person who purchases and slaughters hogs, for the purpose of adding to the value thereof by certain processes and combination with other materials—whereby they are converted into bacon, lard and cured meats—with a view of making a gain or profit thereby, is a manufacturer and taxable, as such, under section 2742 of the Revised Statutes."

In the above case the question was whether such person was a merchant as defined in section 5381, General Code, or a manufacturer, as defined in section 5385, General Code.

In construing the two sections on page 694, Dickman, J., says:

> "In both definitions there is the common element of purchasing personal property, with a view of making a gain or profit. But the definition of a manufacturer contemplates the attainment of such object by adding to the value of the property after purchase, by some process or combination with other materials, while the merchant is supposed to get his advanced price or profit by selling the article as it is, without subjecting it to any change by hand, by machinery, or by art."

The syllabus in the case of Rosenbaum vs. City of Newbern, 118 N. C., 83, defines a merchant as follows:

> "The term merchant embraces all who buy and sell any species of movable goods for gain or profit."

In the case of Myers & Housman vs. Commissioners, 83 Md., 385, the first syllabus is as follows:

> "Appellants, cattle dealers, received shipments of cattle bought by them, every Wednesday at the stock yards, where they seldom remained longer than one day, being then disposed of to purchasers or exported. They had on hand for one or two days every week an average of $20,000 worth of cattle. Held, that such average quantity of cattle being the stock in trade of the parties, is liable to taxation as property within the state just as goods bougnt by other merchants, since the cattle are not brought into the state for a temporary purpose, but to be held until sold, and it is only owing to the course of trade that they are generally disposed of in one day."

A merchant as defined in section 5381, General Code, is one who sells with a view to profit personal property owned, or controlled by him, or which he has in his possession, with authority to sell it, and which has been purchased within or without the state, or which has been consigned to him from without the state for the purpose of being sold within the state.

Applying this definition to your inquiry: Cattle is personal property. One who buys cattle and sells it with a view to profit is a merchant as defined by the statute.

It is not required by section 5382 that the property should be in the possession of the merchant upon day the taxes are levied. What is taxed is the average amount of his stock in trade during the preceding year. He may have nothing during April and yet be liable for the average value of his stock.

A cattle dealer should be assessed for taxation in accordance with section 5382, General Code.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

394.

ELECTIONS ON QUESTION OF RELEASING FINDINGS AGAINST OFFICERS—"GENERAL ELECTION" OF COUNTY, TOWNSHIP, CITY AND VILLAGE—COUNTY OFFICER.

Section 2307, General Code, providing for the submission to the electors of a county, township, city, village or school district at the next "general election" the question whether or not findings for loss of funds against officers of such subdivisions shall or shall not be released, comprehends that when the findings are against a county officer, the question should be submitted at the next election for county officers; that is, in the even numbered year, and that when the finding is against officers of other subdivisions, the question may be submitted at elections in odd numbered years at which officers of such subdivisions are elected..

COLUMBUS, OHIO, September 26, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 19th, in which you inquire as follows:

> "On the ..... day of ....., 1911, our board of county commissioners adopted a resolution determining to submit to the qualified electors of this county, the question as to whether or not W. L. Alexander, a former county treasurer, and his sureties, should be released and discharged from all liability to or demands of Crawford county, Ohio, by reason of a loss of county funds occurring at the time of the failure of the Galion National Bank.
>
> "The above resolution was adopted in pursuance to section 2303, General Code of Ohio.
>
> "Section 2307 of the General Code provides, after the adoption of such resolution, 'such board may, *at the next ensuing general election*, * * * submit to the qualified electors thereof, the question whether such treasurer and the sureties upon his official bond shall be discharged from liability on account of such loss of funds.'
>
> "The question now presents itself, whether or not the November election is, or is not a general election."

Section 1 of Article XVII of the constitution provides as follows:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

Section 4826 of the General Code provides as follows:

> "All general elections for governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, state commissioner of common schools, state dairy and food commissioner, member of the board of public works, judge of the supreme court, clerk of the supreme court, judge of the circuit court, judge of the common

pleas court, senators and representatives to the general assembly, judge of the probate court, county commissioner, infirmary director, county auditor, county treasurer, county recorder, county surveyor, sheriff, coroner, clerk of the common pleas court and prosecuting attorney shall be held on the first Tuesday after the first Monday in November in the even numbered years. All votes for any judge for an elective office, except a judicial office, under authority of this state, given by the general assembly, or the people, shall be void."

Section 4831 of the General Code provides as follows:

"Township officers and justices of the peace shall be chosen by the electors of each township on the first Tuesday after the first Monday in November in the odd numbered years."

Section 4832, General Code, provides as follows:

"At least twenty days before the regular election for township officers, the township trustees shall issue their warrant to a constable of the township, directing him to notify the electors of the township to assemble at the time and place appointed for the regular election. The warrant shall enumerate the officers to be chosen at the election. On application of two or more freeholders of the township for that purpose, the trustees shall insert in the warrant such other question, if any, as may be proposed to be submitted at such election."

Section 2307, General Code, provides as follows:

"If the finding of such county commissioners, township trustees, city or village council or board of education, as the case may be, has been made and entered on the record book of its proceedings, such board or council may, at the next ensuing general election to be held in the county, township, city, village or school district, submit to the qualified electors thereof, the question whether such treasurer and the sureties upon his official bond shall be discharged from liability on account of such loss of funds."

Before passing upon this question it is well to quote two other sections of the General Code, to-wit:

First, section 4840:

Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and *notice that such question is to be voted upon shall be embodied in the proclamation for such election.*"

Second, section 5827:

"At least fifteen days before the holding of any such general election, the sheriff of each county shall give notice by proclamation

throughout his county of the time and place of holding such election and the officers at that time to be chosen. One copy of the proclamation shall be posted at each place where elections are appointed to be held, and such proclamation shall also be inserted in a newspaper published in the county."

This notice refers to the time of the state and county elections as provided for in section 4826.

Sections 4840 and 4827 just quoted in conjunction with section 2307 of the General Code in my judgment are decisive of the question. A careful study of section 2307 of the General Code, which as aforesaid provides, such board or council may at the next ensuing *general* election to be held in the *county, township*, city, village or school district submit to the qualified electors thereof will disclose that in the case of a county officer to be relieved the county is the unit and the electors thereof are electors of the county, while if it is a township officer that is to be relieved the township is the unit and the electors thereof are electors of the township, and from a consideration of this section alone I would arrive at the conclusion hereinafter referred to.

As to a county officer the matter is regarded as a county proposition, and townships, cities and villages as such have nothing to do with the matter except that these political divisions are used as instrumentalities for determining the county vote.

When you supplement these reasons with the additional ones disclosed by section 4840, which provides for the necessity of a notice, in connection with section 4827, which provides that as to a county election the sheriff shall give fifteen days' notice by proclamation throughout his county of the time and place of holding such election, and of the question to be submitted, the conclusion is irresistible that the election referred to is one known as state and county election, because the sheriff does not issue any proclamation for township, city, village or school district election.

Reasoning from the foregoing premises I have no hesitancy in arriving at the conclusion that the board of county commissioners is without authority to submit the question to which you refer at the coming November election; that the earliest time at which the question may be submitted under existing law is at the November election to be held in 1912.

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

A 394.

CENTRALIZATION OF SCHOOLS—TRANSPORTATION OF PUPILS TO WITHIN ONE-HALF MILE OF RESIDENCE—CONSTRUCTION OF STATUTE.

Section 7731, General Code, providing that, when transportation of pupils is provided for upon the centralization of schools, the conveyance must pass within at least one-half mile from the residence of each pupil, except where the residence is more than one-half mile distant from a public road, is satisfied when a vehicle stops within a half mile of such residence even though good road exists to a nearer distance.

COLUMBUS, OHIO, September 26, 1911.

HON. E. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 11th, in which you request my opinion as follows:

"A question of transportation has arisen in the Parkman schools, which are centralized. I refer you to section 7731, General Code, which reads: 'When transportation of pupils is provided for the conveyance must pass within at least the distance of one-half mile of the respective residences of all pupils, except when said residences are situated more than one-half of a mile from the public road.' Under this section the following query has arisen:

"A lives more than one-half mile from the main road; the hack hauling the children passes along the main road and when it comes to the road on which A lives it goes down that road far enough that it is within one-half mile of A's residence, and there turns around and requires A's children to walk to that point. Is that proper, or would the hack be required to go clear to A's residence? I am of the opinion that it is proper for the hack to stop and turn around as soon as it is within the one-half mile limit.

"Second, would it make any difference if this were the main road, for instance, suppose that A lived at the end of the main road and that the hack traveled down the main road to within one-half mile of A's residence and then turned around and compelled A's children to walk to the hack. Would this be following the law? I am of the opinion that it would, but I have been asked to obtain a ruling from you upon the proposition."

In reply to your inquiry, section 7731 of the General Code provides as follows:

"No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

The above section provides that the conveyance provided by the school board must pass within at least a distance of one-half mile from the respective residences of all the pupils of the township.

I am of the opinion that your version of the law is correct, as applied to the situation which you describe in the first part of your inquiry. In other words, the conveyance furnished by the school board is only required to pass within one-half mile of the respective residences of the pupils of the township; and therefore, when the conveyance goes along the road on which the pupil lives to within one-half mile of the residence of such pupil, it is legally proper for the conveyance to stop at that point, turn around, and require the pupil to walk to that point. I am further of the opinion, however, that if such pupil lives more than one-half mile from the public road then the conveyance must go to such point or place on the public road which is nearest to the residence of such pupil.

As to the second part of your inquiry, I am of the opinion that where the

pupil lives at the end of the main road it would be within the law for the conveyance to go over such main road to within one-half mile of such pupil's residence and that such pupil should walk to that point.

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

C 394.

COUNTY AND TOWNSHIP ROADS—AGREEMENTS BETWEEN COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—"LINE ROAD OR PUBLIC HIGHWAY."

Section 6995, General Code, providing for improvements of "any line road or public highway" by joint agreements between county commissioners and township trustees, refers only to county line or township line roads; that is, roads dividing townships, or a county and a township.

A road therefore which is wholly within a township and partly in an incorporated village, within such township, is not within the purview of said section 6995, General Code.

COLUMBUS, OHIO, September 26, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Under date of June 26th, you wrote me as follows:

"I desire a construction of section 6995, General Code, and also whether or not the following situation is within it.

"The township of Wellington and the village of Wellington desire to improve a township road which is a line road between the village and the township; 15 feet being within the township and 45 feet within the corporation. The improvement will be a 12-foot macadam road in the center of the road so that you see no part of the improvement will come within the township, but all will be in the village. Under these circumstances, are the commissioners authorized to agree with the township trustees under section 6995 and join in the payment of the cost of the same?"

Upon a subsequent inquiry of you, you state on July 31st as follows:

"I find that the road mentioned in my letter does not run along a township line, but that the road runs along the line between the township and the village, the village of Wellington being wholly within the township of Wellington.

"This road runs between the township proper and the incorporated village which is wholly within the township."

Section 6995 of the General Code provides:

"The county commissioners and the township trustees may improve any county or township line road or public highway by jointly agreeing in regard thereto, and paying for said improvement under any plan and specifications authorized by law for road improvement in any county and township in the state."

The question arises what is meant by the words "any county or township line road or public highway" as used in section 6995, supra, and in order to determine the meaning of such words the said section must be read in connection with the subject-matter legislated upon.

It will be noted that section 6995 is included among sections under the general heading "Township roads—Roads partly in a municipality," and that such sections authorize the trustees of the township to improve by general taxation the *public* roads within such township, including roads running into and through a village or city, providing the policy of the improvement of the public roads of such township by general taxation shall be submitted to the electors of such township and shall receive a majority vote.

Upon receiving a majority vote at the election the trustees of the township shall appoint three commissioners who shall designate and determine the established roads and streets in the township which in their opinion shall be improved.

Section 6987 of the General Code provides:

> "After the report of the commissioners, and the map and profiles have been filed with the township clerk, the township trustees, in determining which roads shall be first improved, of those designated by the commissioners, shall select those nearest the center line of such township, north and south. If, in their opinion, it is not expedient to improve all roads in all directions at one time, they shall improve the roads which in their opinion are the most traveled and used within such township."

Upon an investigation of the sections of the statutes under the heading of "Roads partly in a municipality," it will be noted that except for section 6995 of the General Code, supra, there is no provision for such trustees to improve any road or street that did not lie wholly within the township; that while they were authorized to improve by means of general taxation all the public roads *within* such township, there was no provision for the improvement which was either a county line road or a township line road; that is, a road one side of which only was within the township.

I am, therefore, of the opinion that the words "county or township line road or public highway" as used in section 6995, supra, because under the provisions of the subheading in which such section is found, the township trustees are to improve all public roads in said township, can only mean a county line road or a township line road. In other words, whenever the trustees are improving the public highways generally under such sections, and in said township there is a county line road the trustees may improve such road by jointly agreeing with the county commissioners of the *adjacent* county so to do, and whenever in said township it is a township line road the trustees may improve such road by jointly agreeing with the trustees of the *adjacent* township in the same county so to do.

This view of the law is more clearly shown by reference to section 4686-13, Revised Statutes. Prior to the codification of the statutes so much thereof as is codified under section 6995, General Code, supra, is found in the latter part of section 4686-13 of the Revised Statutes in the following language:

> "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 improvement under any plan and specifications authorized by law for road improvement in any county and township in the state of Ohio."

As you state in your letter that the road in question is wholly within the township, being partly in an incorporated village within such township, and partly in the township exclusive of such incorporated village, I hold that such road is not within the purview of section 6995, supra.

I would call your attention to section 6596-20, General Code, being section 3 of "An act to define the jurisdiction of county commissioners and township trustees over roads and highways" as found in 101 Ohio Laws, 292, which reads as follows:

"The officers named in the foregoing section shall exercise their jurisdiction under the existing laws over those roads as they now stand. The board of county commissioners and the township trustees may enter into an agreement between said boards whereby they may jointly supervise, *repair*, or maintain any state, county or township road in their respective jurisdictions."

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

395.

TAXES AND TAXATION—EXEMPTIONS—GERMANIA TURNVEREIN VORWAERTZ GYMNASIUM ASSOCIATION—"PUBLIC CHARITY"—"INSTITUTION OF LEARNING."

The Germania Turnverein Vorwaertz Gymnasium Association is not a "public institution of learning," and as there exists a reasonable doubt as to whether physical and gymnastic training may be classed as a public charity, such institution may not be deemed an "institution of public charity." The institution is, therefore, not exempted from taxation by the statutes.

COLUMBUS, OHIO, September 27, 1911.

HON. WALTER D. MEALS, *Assistant Prosecuting Attorney, Cuyahoga County, Cleveland, Ohio.*

DEAR SIR:—Under favor of May 22, 1911, you ask an opinion of this department upon the following:

"Application has been made to the auditor of this county by the Germania Turnverein Vorwaertz Gymnasium Association to have exempted from taxation certain lands and buildings used by it as a gymnasium. The entire building and land on which it is situated is exclusively used for physical instruction and culture, and is open generally to the public on the payment of a small tuition, to-wit, twenty-five cents per month for each person. The children of the members of the society are entitled to the privileges of the institution without charge. In your opinion, is this property subject to taxation?"

If this property is exempt it must be because it is land connected with a

public institution of learning, or because it is property belonging to an institution of public charity only.

Educational institutions are exempted by section 5349, General Code, which provides:

> "Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies and all buildings connected therewith, *and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation.* This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state, but leaseholds, or other estates or property, real or personal, the rents, issues, profits and income of which is given to a city, village, school district, or subdistrict in this state, exclusively for the use, endowment or support of schools for the free education of youth without charge, shall be exempt from taxation as long as such property, or the rents, issues, profits or income thereof is used and exclusively applied for the support of free education by such city, village, district or subdistrict."

Institutions of public charity are exempted by section 5353, General Code, as follows:

> "Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, *and property belonging to institutions of public charity only, shall be exempt from taxation.*"

The rule of construction as applied to exemptions of property of educational and charitable institutions is stated by Price, J., on page 169 of the opinion in the case of Watterson vs. Halliday, 77 O. S., 150, as follows:

> "* * * And while we do not apply strict rules of construction in cases where religious, charitable and educational institutions seek exemption, we think such right to exemption should appear in the language of the constitution or statute, with reasonable certainty, and not depend on their doubtful construction."

An institution of learning is defined as follows in 22 Cyc., page 1375:

> "Institution of Learning. A term which includes every description of enterprise undertaken for educational purposes which is of higher grade than the public schools."

The syllabus in the case of McCullough vs. Board of Review, 183 Ill., 373, is as follows:

> "The expression 'institution of learning' as used in Rev. Stat. c. 120, Sec. 2, exempting from taxation all property of institutions of learning, etc., includes every description of enterprise undertaken for educational purposes which is of a higher grade than the public schools provided for in the statute."

While gymnastics and physical culture have become a part of the training of almost every college student, it can hardly be said that the teaching of physical culture is such a part of education that the institution teaching it can be classed as an institution of learning. Certainly it cannot be claimed that the work of a gymnasium is of a higher grade than the work of the public schools. This association is not an institution of learning, nor does it come within the provisions of any other part of section 5349, General Code.

Is this association an institution of public charity only?

The fourth syllabus in the case of Gerke vs. Purcell, 25 O. S., 229, is as follows:

> "A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor.

On page 242, White, J., says:

> "The exemption of 'burying grounds,' 'houses used exclusively for public worship,' and 'institutions of purely public charity' does not depend on the ownership of the property. The uses that such property subserves, constitute the grounds for its exemptions. The burying grounds may be either public or private; but the houses of worship must be houses of public worship, *and the institutions of charity must be of a charity that is purely public.*"

A public charity is described in the syllabus of the case of Episcopal Academy vs. Phila., 150 Pa. St., 565, as follows:

> "Whatever is done or given gratuitously in relief of the public burdens or for the advancement of the public good is a public charity. Where the public is the beneficiary the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity, the word 'purely' being equivalent to wholly."

Charity is defined in 6 Cyc., page 897, as follows:

> "In the broadest sense charity includes whatever proceeds from a sense of moral duty or from humane feelings toward others, uninfluenced by one's own advantage or pleasure."

Even though it were granted that the work which the association in question is doing is a charity within the above definition, it must further appear that it is a public charity and that the association is an institution of "public charity only," before it can be entitled to exemption from taxation.

There is no doubt that many persons, especially in our large cities, need physical training, and that the work which gymnasiums do is a worthy and beneficial one.

It cannot be successfully urged that physical training is a public burden, that is, a burden which the state should bear, as it does in the education of its youth. Has the development of this line of work developed to such an ex-

tent that it can be classed as a public need, or that it is for the advancement of the public good? The time may come when physical training and gymnastics may be classed as a public charity and that the public will bear part of its maintenance by relieving such associations from taxation, but that time has not yet arrived.

At the time our exemption statutes were first enacted gymnasium associations were not as prevalent as now, and there is grave doubt if the legislature intended that the phrase "institutions of public charity only," formerly stated as "institutions of purely public charity" should include institutions for physical culture and gymnastics.

In Wisconsin the legislature has specifically provided that Turner societies, which do the same kind of work as the association in question, shall be exempt from taxation.

In the case of Gymnastic Association vs. Milwaukee, 129 Wis., 429, although the particular question was not in issue, Dodge, J., on page 433, of the opinion, says:

> "Then we have the many Turner societies organized for similar purposes under general statutes and having no such individual exemption, unless, perhaps, under the general exemption to charitable and educational associations, the applicability of which might be considered doubtful."

The rule of construction as laid down in the case of Watterson vs. Halliday, 77 O. S., 150, supra, that the right of exemption must appear in the language of the statute with reasonable certainty, applies to this case. There must be reasonable certainty that this association is an institution of public charity only and that the work which it does is a public charity. There is considerable doubt on both of these propositions. There is doubt as to whether the work done is a public charity, and if it is not a public charity, the association cannot be an institution of public charity only.

In my opinion this property is not exempt from taxation under our statutes.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

A 395.

BLIND RELIEF COMMISSION—INMATE OF STATE SCHOOL FOR BLIND —NO RIGHT TO FURTHER RELIEF.

As a person who is an inmate of the state school for the blind is provided with the necessities of life, and as furthermore, the statutes provide that relief through the blind relief commission shall be in "place of all other relief of a public nature," the only time when such a person would be entitled to relief from the blind relief commission would be in vacation or other times when not attending the school for the blind. And then such relief would be limited to the actual necessities of life not otherwise obtainable.

COLUMBUS, OHIO, September 27, 1911.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Lucas County, Toledo, Ohio.*

DEAR SIR:—Your favor of July 3, 1911, is received, in which you state as follows:

> "Enclosed find copy of communication of even date herewith to our county auditor, which is self-explanatory. Kindly render us an opinion at your earliest possible convenience, covering the question therein involved, and oblige."

The communication enclosed reads as follows:

> "In reply to your inquiry of recent date relative to blind relief granted certain persons in this county, and who during a portion of the time covered by said relief have been in attendance at the State School for the Blind at Columbus, Ohio, I beg leave to advise that section 2967 of the General Code provides that 'such relief shall be in place of all other relief of a public nature.' It is currently reported that numerous counties over the state have paid such relief to parties entitled to the same during the time they were in attendance at such school; but, as far as I have been able to learn, this question has not been passed upon by the attorney general's office or by any court. The relief in question is certainly 'relief of a public nature,' and until such time as the question is ruled upon by the attorney general's office, or by some court of competent jurisdiction, you will withhold payment on orders for relief granted by the commission, in so far as such orders cover time spent by such persons in the State School for the Blind. It appears that transportation to and from, and all expenses of such persons for wearing apparel at the State School for the Blind, heretofore have been and now are being paid by the county, all other expenses at said school being paid by the state."

Your inquiry raises this question: Can the blind relief commission of a county grant relief to needy blind during the time such blind are attending the State School for the Blind?

Section 2965, General Code, defines a needy blind person:

> "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 these provisions would become a charge upon the public or upon those not required by law to support him, shall be deemed a needy blind person."

Section 2967, General Code, provides for relief by the county as follows:

> "At least ten days prior to action on any claim for relief hereunder, the person claiming shall file with the commission, a duly verified statement of the facts bringing him within these provisions. The list of claims shall be filed in a book furnished for that purpose by the county commissioners in the order of filing, which record shall be open to the public. No certificate of qualification for drawing money

hereunder shall be granted until the commission shall be satisfied, from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they know the applicant to be blind, and that he has the residential qualifications to entitle him to the relief asked. Such evidence shall be in writing, subscribed to by such witnesses, and be subject to the right of cross-examination by the commission or other person. *If the commission is satisfied upon such testimony that the applicant is entitled to relief hereunder, it shall issue an order therefor, in such sum as it finds needed not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the fund herein provided, on the warrant of the county auditor, and such relief shall be in place of all other relief of a public nature.*"

Section 1815, General Code, Ohio Laws, 101, page 157, provides:

"All persons now inmates of, or hereafter admitted to, a benevolent institution, except as otherwise provided in this chapter, and except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state. They shall be neatly and comfortably clothed and their traveling and incidental expenses paid by themselves or those having them in charge."

Section 1816, General Code, provides:

"In case of failure to pay incidental expenses, or furnish necessary clothing, the steward or other financial officer of the institution may pay such expenses, and furnish the requisite clothing, and pay therefor from the appropriation for the current expenses of the institution, keeping and reporting a separate account thereof. The account so drawn, signed by such officer, countersigned by the superintendent, and sealed with the seal of the institution, shall be forwarded to the auditor of the county, from which the person came, who shall pay the amount of such bill from the county funds to the financial officer of the institution and charge the amount to the current expense fund. The county auditor shall then collect the account, in the name of the state, as other debts are collected."

While a blind person is attending the State School for the Blind he is maintained at the expense of the state, except that his clothing and traveling and incidental expenses are to be paid by himself or those having him in charge. In case he is unable to pay these latter expenses, then such expenses are certified to the county auditor for payment from the county.

A needy blind person, whom the blind relief commission may relieve is defined in section 2965, General Code, as one who is unable to provide himself with the necessities of life, or who has not sufficient means to support himself. Section 2967, General Code, in granting power to the commission to grant relief provides that if the commission is satisfied that the applicant is entitled to relief it shall issue an order "in such sum as it finds needed." The intention is to provide the blind with the necessities of life, in order that they may not become a charge upon the public or upon those not required to support them.

The necessities of those attending the State School for the Blind are provided for by the state and county in another manner. It is not the purpose to grant double relief. The only relief, if any at all, that the blind relief com-

mission of a county could grant to the blind attending the state school would be for the time they are not in actual attendance at the school, that is, during vacation period; and then only if it is needed and not otherwise provided for.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

B 395.

COMPENSATION OF BOARD OF APPRAISERS AND ASSESSORS—WORK DONE AFTER TIME LIMIT FOR COMPLETION OF WORK, UPON ORDER OF COUNTY AUDITOR.

The time within which a board of appraisers shall perform their work is fixed by law and when after this time has expired, the county auditor caused the board to reconvene and fix the valuations of exempted properties which had been omitted, held:

If such valuations had been omitted through an honest mistake, compensation for work when reconvening should be allowed, but if the omissions were intended purely as a ruse to avoid the time limit for the completion of the work, compensation should be refused for the reason that it is against public policy to permit a person to do indirectly what the law will not permit, directly.

COLUMBUS, OHIO, September 27, 1911.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Richland County, Mansfield, Ohio.*

DEAR SIR:—Under favor of June 24, 1911, you ask an opinion of this department upon the following:

> "Mr. C. A. Balmer, et al., members of the city board of land appraisers of the city of Mansfield, Ohio, presented bills to the county commissioners asking for compensation at the rate of $3.50 per day or a total of thirty-five dollars ($35.00) each for services rendered as land appraisers for the city of Mansfield from September 24th to October 5th, 1910, including in all ten days.
>
> "It appears that they were recalled or reconvened as a board by County Auditor Courtney 'to place valuations on exempt property omitted.'
>
> "Personally I am of the opinion that these bills cannot be legally paid; but as I have only a few of the printed bills passed by the general assembly, it is possible that some act might have been passed to allow compensation for extended time or further services. I will appreciate if you will give me your opinion at as early a date as is possible."

You also give in your letter the different statutes governing your question.

Senate Bil No. 1, referred to in your inquiry, is found in 102 Ohio Laws, page 28, and cannot apply to your question, as the things inquired of occurred prior to its passage. Furthermore, that act fixes the compensation when the board of assessors is called together by the state taxing commission.

Section 3368 of the General Code provides for the compensation of realty appraisers as follows:

"The county commissioners of each county shall fix the salary of each township, village and city assessor in such county. *Such salary shall be not less than three dollars and fifty cents per day and shall not exceed one hundred and fifty dollars per month for the time necessarily employed in the performance of their duties.* Such salary shall be payable monthly from the county treasury on the allowance thereof by the commissioners upon the warrant of the county auditor."

It appears from your letter that the county commissioners had fixed $3.50 per day as the minimum.

The time in which the work must be completed is provided in section 5547, General Code, which reads:

"Each assessor of real estate shall begin the valuation of the real property in his district on or before the fifteenth day of January after his election and shall complete such valuation on or before July first following."

In addition to the above limitation the latter part of section 3366, General Code, provides:

"* * * In townships and villages the county, and in cities the mayor, president of council and county auditor shall determine and limit, between the dates provided, the time necessary for such assessor or board of assessors to perform the duties required of them by law."

The duties of the board of assessors as to property exempt from taxation is prescribed in section 5570, General Code, as follows:

"An assessor, at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, and public buildings and property used exclusively for any public purpose, with the lot or tract of land on which such house, institution or public building is situated, and which are exempt from taxation. He shall value such houses, buildings, property and lots and tracts of land at their true value in money, in like manner as he is required to value other real property, designating in each case the township, city or village, and number of the school district, or the name or designation of the school, religious society, or institution to which such house, lot, or tract belongs. If such property is held and used for other public purposes, he shall state by whom or how it is held."

The duty of the auditor on discovery of omissions is provided in section 5573, General Code, as follows:

"*On careful examination of the returns of an assessor, if the county auditor discovers that any tract of land or any lot or part of either, has been omitted,* he shall add it to the list of real property, with the name of the owner, and *forthwith notify the proper assessor of such omission. Such assessor shall forthwith ascertain and return the value of such tract or lot, or part thereof,* and in case of his inability or neg-

lect, the auditor may ascertain the value thereof and place it opposite such property."

By virtue of section 5573 the auditor making the discovery of an omission is required to notify the assessor who shall then make the appraisement. The acts of the board of assessors in reconvening was authorized by this section.

Section 5570, General Code, requires the quadrennial appraisers to ascertain the value of real property exempt from taxation. This should have been done within the time prescribed by section 5547, General Code, and within the limits fixed by the mayor, president of council and the city auditor by virtue of section 3366, General Code. It appears that this work was not done within the time prescribed by section 5547, and your inquiry does not state if it was done within the time fixed by the mayor, city auditor and president of council. Taxation districts are of different sizes and it is intended that no more time than necessary should be consumed in making the appraisement.

Section 3368, General Code, provides that the assessors shall be paid "for the time necessarily employed in the performance of their duties." It was their duty to appraise exempt property. It is my opinion that this section applies to work done by a board when called to appraise property omitted, for the time necessarily required.

The board in your case failed to perform its full duty in its omission to appraise exempt property. If this failure was due to inadvertence or from an honest mistake of their duty in this regard, I am of the opinion that the compensation should be paid. However, if the omission was purposely made, or was done to evade the limitation of time fixed for their work, I am of the opinion that compensation should be withheld, as it is against public policy to permit a thing to be done indirectly which cannot be done directly.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

B 399.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—INTEREST AND SINKING FUND LEVIES CREATED BEFORE SMITH LAW—FIFTEEN MILL LIMITATION.

Interest and sinking fund levies, whether for the retirement of bonds issued or for indebtedness incurred prior to the passage of the Smith law by the vote of the people or otherwise, are within the fifteen mill limitation of said law.

COLUMBUS, OHIO, September 29, 1911.

HON. POPE GREGG, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 23rd, in which you state that the total levy of taxes within a certain municipal corporation about to be made by the budget commission amounts to 14 mills; the excess over 10 mills thereof being for interest and sinking fund purposes for the retirement of a bonded indebtedness incurred prior to the passage of the act of June 2, 1911, and authorized by a vote of the people; that the special school district which includes the municipal corporation at present, has a considerable surplus in its locally levied funds, and upon which the district will

have to draw for the maintenance of the schools during the current year; that by the beginning of the next fiscal year it is estimated that this surplus will have been exhausted, and having due regard to the needs of the other subdivisions levying within the same territory, it is almost certain that extra taxes will have to be authorized by vote of the people in order to maintain the schools for the year 1913.

You require my opinion as to whether or not under all the circumstances a favorable decision of the electors at an election held under 5649-5*b*, the so-called one per cent. tax limitation law would authorize the levy of a tax in excess of 15 mills, including interest and sinking fund levies.

You point out that if the 15 mill limitation imposed by section 5649-5*b* does include levies for interest and sinking fund purposes, the additional tax which can be obtained in the particular taxing district will be limited to one mill, the difference between 14 mills now levied and 15 mills.

I have already passed upon the abstract question involved in your letter but for the sake of clearness have preferred to set out the facts as you submit them in full.

My opinion is that a general consideration of sections 5649-5*b*, 5649-2 and 5649-3 as enacted June 2, 1911, establishes the conclusion that interest and sinking fund levies, whether for the retirement of bonds issued or for indebtedness incurred prior to the passage of the act, or by vote of the people or otherwise, are within the all inclusive limitation of 15 mills imposed by the first of these three sections. This conclusion being established it follows that if existing sinking fund obligations require a levy of 15 mills within a taxing district, the proposition to levy additional taxes cannot be submitted under sections 5649-5*a*; and that in any event the additional tax authorized by proceeding under section 5649-5*a* can only be the difference between the total levy already necessary for current expenses and sinking fund purposes together, and the levy of 15 mills.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

403.

SHERIFF'S RESIDENCE—COUNTY COMMISSIONERS MAY PROVIDE FOR SUCH IN JAIL BUT NOT ELSEWHERE.

Under the broad discretion given the county commissioners under section 2419, General Code, in the building and fitting out of a jail, they may provide a residence for the sheriff in said jail.

As there is no other provision of statute authorizing the commissioners to provide a residence for the sheriff, however, they may not pay the expense of maintaining a residence elsewhere for that official while the jail building is undergoing process of repair.

COLUMBUS, OHIO, September 30, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I am in receipt of your communication of September 13th, wherein you state as follows:

> "For many years in the past in this county, it has been the custom for the sheriff to have his residence at the jail, the building having

been constructed in such a manner as to provide for both under the same roof. Last spring the county commissioners determined to improve and repair the jail and sheriff's residence, both being under one roof as above stated. It therefore became necessary for the sheriff to transfer all of the county prisoners to the city jail while such improvements were being made, and also to seek his own residence elsewhere. Is it a proper expense for the county to pay house rent for the sheriff during the period that such jail and sheriff's residence were in process of repair?"

Section 2419 of the General Code provides:

"A court house, jail, offices for county officers, and an infirmary shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions, and expense, as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein."

Section 3157 of the General Code provides:

"The sheriff shall have charge of the jail of the county, and all persons confined there, keep them safely, attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas."

Section 2419, supra, grants a wide discretion to the county commissioners for the building of a jail, and in the exercise of such discretion the county commissioners of the various counties in so providing a jail for their county, included therein a residence for the sheriff, but there is no provision of law which permits such commissioners to provide a residence for the sheriff other than above stated.

By virtue of section 3157, supra, it is provided that the sheriff shall have charge of the jail of the county, but it does not require him, so having charge, to live in such jail.

As the placing of a sheriff's residence within the building containing the jail receives the sanction of the law solely because of the wide discretion left to the county commissioners to provide for such jail under section 3157, supra, and there being no provision of law that the county commissioners *shall* provide a residence for the sheriff separate and apart from the jail, I am, therefore, of the opinion that it is not a proper expense for the county to pay the house rent for the sheriff during the period that the jail of such county is in process of repair.

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

404.

FEES OF PROBATE JUDGE IN CRIMINAL CASES WHERE STATE FAILS —SALARY FEE FUND.

Under the amendment to section 1602, *General Code, the probate judge may receive from the county treasury, to be credited to his fee fund, his legal fees for services in criminal cases wherein the state fails to convict or the defendant proves insolvent, immediately after such services are rendered but only up to the amount of* $300 *in any one year.*

COLUMBUS, OHIO, October 2, 1911.

HON. JAMES F. BELL, *Prosecuting Attorney, Madison County, London, Ohio.*

DEAR SIR:—Your favor of September 29, 1911, is received, in which you ask an opinion of the following:

> "The last part of section 1602 of the General Code as amended May 31, 1911, Volume 102 Laws of Ohio, page 282, is as follows:
>
> " 'Upon the certificate of the probate judge and the warrant of the county auditor the probate judge shall receive from the county treasurer to be credited to his fee fund his legal fees for services in criminal cases wherein the state fails to convict or the defendant proves insolvent, but not more than three hundred dollars shall be allowed for services rendered in any one year of his term.'
>
> "Four months, or one-third of a year, have elapsed since this law was passed.
>
> "The probate judge makes his report October 1, 1911, and the per cent. on the fees collected in his office are not quite enough to pay his deputy.
>
> "I would like your opinion on the following question, and if possible, to have your reply by next Monday:
>
> "The question is: Can the probate judge legally transfer his proportionate amount of the $300.00, to-wit, $100.00, under the above section, to the fee fund at this time?"

Your inquiry calls for the construction of that part of section 1602, General Code, which you have quoted. The remainder of this section specifies the fees to be paid the probate judge in particular instances and does not apply to your question. The part of this section under consideration was added in Ohio Laws, 102, page 282.

A similar statute, section 2846, General Code, governing the payment of the fees of the sheriff in like cases was also amended by the same act.

Before the amendment section 2846, General Code, read as follows:

> "In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided for. Such allowance shall be paid from the county treasury."

As amended in 102 Ohio Laws, page 287, this section now reads:

> "Upon the certificate of the clerk and the allowance of the county

commissioners the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term."

Section 2902, General Code, governing the payment of the fees of the clerk of courts in like cases was amended in the same manner by the above act.

Before this amendment to section 2846, General Code, an allowance was made to the sheriff by the court of common pleas. Nothing is said about his legal fees. The amendment to sections 2846 provides that the sheriff shall receive his legal fees in the criminal cases enumerated, but not more than three hundred dollars for any one year of his term. The same provision is found in section 1602, under consideration, and also in section 2902, General Code.

It is evident that it was intended that the method of paying compensation for such services should be and was changed. Instead of making a lump allowance as formerly, it is now provided that such officers shall receive their legal fees in such cases, but not to exceed three hundred dollars in any one year of their term. If the fees for such services amount to less than three hundred dollars for the year, such officers will receive the full amount of their legal fees and no more. If they amount to more, the sum above three hundred dollars cannot be paid.

As it is the legal fees chargeable for such services that are to be paid from the county treasury, I am of the opinion that these fees can be paid into the fee fund after the fees are earned and upon the proper certificate. Payment can be made for such services until the limit of three hundred dollars is reached, when they must cease for that year. This might be compared to making an appropriation for a certain purpose. The appropriation is drawn upon as needed, until it is exhausted, when from necessity payment ceases.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

406

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—BOARD OF EDUCATION, POWER OF TO ISSUE BONDS WITH AND WITHOUT POPULAR ELECTION—"EMERGENCY LEVIES."

Under section 4, of the Smith law, levies for certain emergencies therein referred to, are excluded from all of the limitations of the Smith law. Repairs in a school building made necessary by the chief inspector of workshops and factories, however, are not included among such emergencies.

When the ordinary limitations of the Smith law make such improvements impossible, relief is extended through issue of bonds, under sections 5649-5a *and* 5649-5b *and under section* 7625, *General Code. Also under section* 7629, *General Code, the board of education for such purposes may issue bonds not exceeding the aggregate of a tax of two mills for the year next preceding the issue, without a vote of the electors.*

COLUMBUS, OHIO, October 3, 1911.

HON. N. CRAIG MCBRIDE, *Prosecuting Attorney of Highland County, Hillsboro, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of the inquiry made of me in your behalf by Mr. L. L. Ferris, Clerk of the Board of Education of Lynchburg, as follows:

> "Necessary repairs and improvements in a school building ordered by the chief inspector of workshops and factories involve the expenditure of a sum of money that cannot be raised within the limitation of the Smith one per cent. bill, so-called. Do the facts presented constitute an emergency within the meaning of the said law?"

Section 4659-3 of the act of June 2, 1911 (102 O. L., 269), excepts from the ten-mill limitation "emergencies" as provided in section 5649-4 of the General Code. Said section 5649-4 of the General Code is section 4 of the act of May 10, 1910 (101 O. L., 431), which provides as follows:

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

I have heretofore held that the effect of section 4, considered as a part of the act of which the entire act of 1911 is amendatory, is to take the emergency levies provided for out of every act of 1911, including the limitation measured by the 1910 taxes, the limitation of fifteen mills imposed by section 5649-5b, and the limitation of five mills (as to school districts) imposed by section 5649-3a, as well as the limitation of ten mills to which the language of section 5649-3 primarily applies.

Unfortunately, however, section 4 does not refer to any emergency which might exist in school districts. Section 4450 and 4451 of the General Code, referred to in said section, are emergencies arising by reason of an epidemic of contagious or infectious diseases in a municipal corporation or township. Section 5629 provides for an emergency arising by virtue of destruction by fire or other casualty of a county building. Section 7419 of the General Code refers, inter alia, to emergencies caused by destruction of public highways.

I am, therefore, unable to find any authority under the act of June 2, 1911, by virtue of which a board of education may lawfully levy a tax outside of the limitations of said act for the purpose of making necessary repairs and improvements to a building.

I might be permitted to suggest, however, though the question of Mr. Ferris does not ask my advice upon the point, that under sections 5649-5a and 5649-5b of the General Code as enacted 102 O. L., 272-31, and under section 7625 of the General Code, boards of education seem to have the power, with the assent of the electors of the district, to make the necessary improvements by issuing bonds, and under section 7629 of the General Code, boards of education for such purposes may issue bonds not exceeding the equal of the aggregate of the tax of two mills for the year next preceding such issue without the "vote of the electors." Some one of these sections may afford the desired relief.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

407

INITIATIVE AND REFERENDUM—SIGNATURE FOR PETITIONS—MEANING OF "FIFTEEN PER CENT. OF QUALIFIED ELECTORS"—"TOTAL VOTE FOR MAYOR"—FORMER OPINION OVERRULED.

The fifteen per cent. of qualified electors mentioned in the initiative and referendum act with reference to the number of signers of petitions, is to be computed upon the total vote cast for mayor at the preceding election and not upon the vote cast for the successful candidate for mayor at such election.

COLUMBUS, OHIO, October 3, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Under date of September 16, 1911, I rendered you an opinion construing the new initative and referendum act found in 102 Ohio Laws, 521, covering five questions submitted by you in reference thereto.

This opinion was prepared and submitted for my approval, and at that time the principal matter considered by me was the scope and effect of said act, and the time within which a petition could be filed. My attention was not called at that time particularly to the percentage of signers necessary to validate the petition under such act, and I did not consider such question, to wit: the third question submitted by you, as carefully as I did the others.

My attention has since been drawn to my opinion on such third question by the editorial which appeared in the issue of The Ohio Law Bulletin under date of September 25th, 1911, on page 325 thereof, and in view of what is there said I have again taken it up for more careful consideration, and beg leave to submit the following on such third question to be substituted in place of the answer thereto in the opinion which I have heretofore rendered you:

You inquire:

> "Thirdly: Is the fifteen per cent. in amount to be computed upon the vote cast for the successful candidate for mayor at the preceding election, or should the mayoralty vote be totaled?"

The language used in section 4227-2 supra is:

> "A petition * * * * signed by fifteen per cent. of the qualified electors of such municipality as determined by the highest number of votes cast for the office of mayor of such municipal election immediately preceding."

It will be noted that the primary requisite for the validity of the petition as shown from the language above quoted is that it be signed by fifteen per cent. of the qualified electors of such municipality. It is a well known fact that a person may be a qualified elector and yet fail for various reasons to exercise his privilege thereunder, and, consequently, if there were no basis for determining the number of qualified electors three would likewise be no basis for computing the fifteen per cent. thereof. The legislature, therefore, further provided in said act the basis upon which to compute the number of qualified electors in such municipality by stating that it was to be "determined by the highest number of votes cast for the office of mayor." The office of mayor is the highest office in a municipality, and is one for which all of the electors of such municipality are entitled to vote. Being the highest office, it was the

office chosen by the legislature as the office upon which to best determine as nearly as possible the total number of qualified electors of such municipality.

I am, therefore, of the opinion that the legislature in enacting such provision clearly intended to require that fifteen per cent. of all the inhabitants of the municipality, who were qualified electors, should sign a petition in order to cause the submission of ordinances to a vote, and, secondly, that in determining that the vote cast for mayor, being the highest office in such municipality, would more nearly approach the total number of qualified electors of such municipality, and I, therefore, construe the language "As determined by the highest number of votes so cast for the office of mayor" to mean the *total* number of votes so cast, and that the fifteen per cent. in amount required for the petition is to be computed upon the total vote cast for the office of mayor of such municipal election immediately preceding.

With this substitution for my answer to the third question in the opinion heretofore rendered you my opinion will remain as written.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 407

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—BOARD OF EDUCATION, POWER OF TO ISSUE BONDS WITH AND WITHOUT VOTE OF ELECTORS.

When it becomes necessary for a board of education to improve school buildings by reason of an order from the inspector of workshops and factories, and such improvements cannot be made within the ordinary limitations of the Smith tax law, and when, furthermore, the electors have repeatedly refused to authorize bond issues, under sections 7625 *and* 7628, *General Code, the board of education may have recourse to sections* 7629 *and* 7630, *General Code.*

By these sections, they may issue bonds for this purpose in a sum not to exceed the amount of a tax at the rate of two mills for the year next preceding the issue, and may extend the payment of such bonds over a period of forty years.

COLUMBUS, OHIO, October 3, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—In your letter of August 4th, and in other letters from different persons, the following question, which seems to be of frequent occurrence, is submitted:

> "For certain reasons in some cases in order to comply with the orders of the chief inspector of workshops and factories, and in others in order to render the buildings suitable for ordinary use, various boards of education find themselves confronted with the necessity of raising money to improve or reconstruct school building. The proposition to issue bonds and borrow money enough to complete the improvement, and to levy taxes to discharge such indebtedness, has been repeatedly submitted to the electors of the district, who have voted

in the negative. What, if any, statutory method is there of which the board may avail itself in order to raise money for this purpose, the ordinary levies authorized by law not being sufficient?"

In a previous opinion addressed to you I stated the following conclusions with respect to sections 7629 and 7630, General Code:

1. The board of education under favor of said sections may issue bonds and improve public school property without a vote of the people.

2. The bonds issued under said sections in any one year may not in amount exceed the amount of a tax at the rate of two mills for the year next preceding the issue.

3. Bonds may not be issued under said sections in an amount greater than an amount which can be provided for and paid within forty years after the issue, on the basis of the tax valuation at the time of the issue, by a tax levied within the limitations of the Smith one per cent. law.

These sections would seem to provide a remedy for the condition which you describe; the only question would seem to be as to whether or not this method of borrowing money can be adopted by a board of education which has previously and unsuccessfully sought to follow the other method prescribed by sections 7625 and 7628, General Code. On consideration of this question I am satisfied that the submission of the question of a bond issue to the electors under said last named sections and its rejection by them does not estop the board of education from proceeding under sections 7629 and 7630. These sections seem to provide an additional and cumulative power in favor of the board of education. As to the amount of money which in a given case may be raised by the method prescribed in sections 7629 and 7630 that, of course, is a matter which must be worked out in accordance with the circumstances existing in each particular district. I know of no other method available to the board of education under the circumstances mentioned by you.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

C 408.

COUNTY INFIRMARIES—POWER OF SUPERINTENDENT TO AFFORD RELIEF OUTSIDE OF INFIRMARY — POWER OF COMMISSIONERS TO CONTRACT FOR MEDICAL SERVICES—ADVERTISEMENT AND BIDS.

The superintendent of a county infirmary is authorized, under section 2545, General Code, to furnish relief to persons outside the infirmary. All instances of such relief, however, must be reported to the board of state charities.

The county commissioners may contract for medical services only after advertisement for bids as provided in section 2546, General Code. Payment of bills for medical relief furnished in any other manner is illegal.

October 4, 1911.

HON. W. V. WRIGHT, *Prosecuting Attorney, Tuscarawas County, New Philadelphia, Ohio.*

DEAR SIR:—Under favor of July 25, 1911, you ask an opinion of this department upon the following:

"Your opinion is respectfully requested as to the proper construction of section 2544, General Code, relative to outside relief furnished by the infirmary directors and fully covering the following statement of facts:

"(1) In many instances the infirmary directors of this county have furnished relief to persons and families where it was impracticable to receive them at the infirmary, and where the relief furnished cost less than would their maintenance at the infirmary.

"For instance, in some cases the directors have granted support to the extent of $10.00 per month and authorized some grocer to furnish supplies to that amount. In other instances outside relief has been furnished in cases of sickness, where the removal of such person to the infirmary was dangerous or impossible.

"In other instances outside relief in small amounts has been furnished families where the presence of small children rendered the removal of the parent to the infirmary impossible unless at the same time the children be placed in the children's home.

"(2) May infirmary directors authorize physicians to furnish medical relief and medicines to persons outside the infirmary and pay therefor the amount of the bill rendered for such services where no contract is entered into as provided for in section 2546, General Code?".

Section 2544, General Code, as amended in 102 Ohio Laws, page 436, provides:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, *they shall forthwith receive and provide for him in such institution, or otherwise*, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Section 2545, General Code, as amended in 102 Ohio Laws, page 436, provides:

"The superintendent of the infirmary shall report quarterly to the board of state charities, the names of *all persons to whom relief has been given outside of the infirmary, whether medical or otherwise*, together with their age, sex and nationality, whether married or single, and, if married, the number of persons in the family, and the ages of each; also the reasons for extending relief, the nature and amount of the relief given, and any other information prescribed by such board."

The only changes made in these sections was the substitution of "superintendent of the infirmary" for "infirmary directors."

A reading of these statutes leaves no doubt that outside relief may be provided by the superintendent of the infirmary. The superintendent must re-

port to the board of state charities all outside relief given. Section 2544 provides that he shall provide for such persons "in such institution, or otherwise." If he had no power to grant outside relief, section 2545 would be a nullity.

The superintendent of the infirmary has power to grant relief to persons outside the infirmary.

Your second inquiry is as to the authority of the infirmary directors to furnish medicines and medical attention when no contract has been entered into.

Section 2546, General Code, as amended in 102 Ohio Laws, page 436, provides:

> "County commissioners may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the county commissioners reserving the right to reject any or all bids. The physicians shall report quarterly to the county commissioners on blanks furnished by the commissioners, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the commissioners. The commissioners may discharge any such physician for proper cause."

Before amended this section granted the same authority to infirmary directors.

The infirmary directors nad only such powers as were granted them by statute, and they were required to act strictly within their jurisdiction.

Section 2546, General Code, provides the manner in which medical relief and medicines can be furnished. The enumeration of this method in the statutes excludes all other methods.

Medical relief and medicines can only be furnished in accordance with the provisions of this section, that is, upon contract with a competent physician. The payment of bills for medical relief furnished other than upon a contract as therein provided, is illegal.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

413.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATIONS—ROAD TAXES TO BE WORKED OUT BY TAXPAYER—EMERGENCIES—RATE FOR SPECIFIC PURPOSES—EFFECT OF SMITH LAW ON LEVY MADE BEFORE ITS PASSAGE BY INFIRMARY DIRECTORS—RETROACTIVE EFFECT—CONSTITUTIONAL LAW.

A levy for an emergency, under section 7914, *General Code, is expressly excluded from all limitations of the Smith one per cent. law and the fact that such levy is expressly excluded from the ten mill limitation, while no mention of such levy is made in dealing with the three mill limitation, is in this connection of no material significance.*

Levies made by the township trustees, under section 7488, *General Code, for road purposes which may be worked out by the taxpayers, are expressly excluded from the two mill limitation for township purposes, but there is no reason for holding that they are exclusive of any of the other limitations.*

Levies under section 7488 *are limited by section* 5649-3 *of the Smith law, to the amount which the rate named in such section as it stood prior to the enactment of the Smith law (i. e., one mill), would have raised if levied on the tax duplicate in* 1910.

It is the intention of the Smith law that the budget commission should have control of all levies made during the year 1911, *and therefore this control extends to a levy certified to the auditor by the infirmary directors on March* 1, 1911.

This effect of the Smith law in permitting the budget commission to decrease a levy which according to the law at the time it was made, was to be placed upon the duplicate and paid from a tax upon all properties, is not in contravention to Article II, section 28 *of the constitution providing that the "legislature shall have no power to pass retroactive laws."*

Said constitutional inhibition was intended as a protection to individual right and did not extend to mere officers or official boards when the rights of taxpayers or third parties were not affected.

COLUMBUS, OHIO, October 6, 1911.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 25th, submitting for my opinion thereon the following questions:

1. "Are the county commissioners authorized to make a levy under section 7419 in addition to the maximum county levy of three mills?

2. "Are levies for road purposes made by township trustees under section 7488 exclusive of the limitations of the ten mill law; if so, what is the maximum levy that may be made for road purposes and discharged in labor?

3. "Has the budget commission authority to change the levy made by the county infirmary directors under section 2529 for taxing year 1911, which levy was made on the first Monday in March, 1911?"

The following are the limitations of the act of June 2, 1911, popularly termed the "Smith one per cent. bill:"

Section 5644-2:

"Except as otherwise provided in sections 5649-4 and 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any * * * taxing district * * * including taxes levied under authority of section 5649-1 of the General Code (for interest and sinking fund purposes) * * * shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein * * * for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes * * * shall not in any one year exceed ten mills on each dollar of the tax valuation of the * * * taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

Section 5649-3:

"The maximum rate of taxation in any taxing district *for any purpose*, as now fixed, shall be and is hereby changed so that such maximum rate, as levied on the total valuation * * * in the district for the year 1911 and any year thereafter would produce no greater amount of taxes, than the present maximum rate for such purpose, if levied on the total valuation for all the taxable property therein for the year 1910, would produce. Any minimum rate required by law to be levied for any purpose, is hereby reduced in like proportion that the maximum rate is herein reduced. * * *; the intent and purpose of this act being to provide the total amount of taxes which may be levied in the year 1911 or in any year thereafter, for all purposes, shall not exceed * * * the total amount of taxes levied in the year 1910 * * * or such less amount as may be produced by the levy of a maximum rate of ten mills on each dollar * * * of the taxable property therein of any * * * taxing district, for that year * * * except to the amount of such levies as may be made for interest and sinking fund purposes as provided in section 5649-2 of the General Code as herein enacted, for emergencies *as provided in section* 5649-4 *of the General Code* and such additional levies as may be authorized by a vote of the people as provided in section 5649-5 * * *."

Section 5649-3*a*:

"* * * The aggregate of all taxes that may be levied by a county for county purposes on the taxable property in the county * * * shall not exceed in any one year three mills * * *. Such limits for county * * * levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, *levies for road taxes that may be worked out by the taxpayers*, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control. * * *"

Section 5649-4. (Enacted May 10, 1910, and not amended by the act of June 2, 1911):

"For the emergencies mentioned in sections 4450, 4451, 5629 and 7419 of the General Code the taxing authorities of any district may levy a tax sufficient to provide therefore *irrespective of any of the limitations of this act.*"

The sections above quoted embody all the provisions necessary for the purpose of answering your first question. The problem of construction presented thereby arises because of the following facts:

1. Section 5649-4 expressly provides that the levy under section 7419 shall be exclusive of "any of the limitations of this act."

2. It is expressly provided by section 5649-3 in defining "the intent and purpose of this act" that emergency levies as provided in section 5649-4 shall be exclusive of the ten mill limitation; it is not expressly stated in section 5649-3*a* that such emergency levies shall be exclusive of the three mill limitation, but certain other levies are expressly excluded from such three mill limitation.

The phrase "any of the limitations of this act" as used in section 4 of the act of May 10, 1910, therein designated as section 5649-4, General Code, may by fair inference be held to apply to all the limitations of the act of June 2, 1911. The act is in form merely an amendment of sections 2, 3 and 5 of the act of May 10, 1910; and inasmuch as section 4 was left unamended, the evident intention of the general assembly was to make its broad provisions applicable to all of the limitations of the amended law. Otherwise section 5649-4 would be of doubtful import, inasmuch as sections 2, 3 and 5 which impose the limitations created by the act of May 10, 1910, having been repealed, no meaning could be given to the phrase "this act" as retained in the unrepealed section 4. This inference is also strengthened by section 5649-5*b* not above quoted, which in effect provides an otherwise all inclusive limitation of fifteen mills upon the combined maximum rate for all taxes levied "under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code as herein enacted." It is very clear that this section and the fifteen mill limitation therein created are not intended to apply to emergency levies.

From all the foregoing then, the inference is very reasonable that emergency levies, including, of course, levies under section 7419, General Code, are in addition to all of the limitations of the act of June 2, 1911, including the three mill limitation upon the rate of taxation which may be levied for all county purposes. On the other hand, however, the general assembly has seen fit expressly to exclude emergency levies from one limitation of the act, viz., the ten mill limitation, and as above remarked, has not seen fit to repeat this express exclusion in connection with other express exclusions from the three mill limitation. From these facts alone the inference reasonably arises that it was the intention of the general assembly in enacting the act of June 2, 1911, to include emergency levies within the three mill limitation. Upon careful consideration of the somewhat difficult question thus presented, I am of the opinion that emergency levies, including levies under section 7419 are excluded from consideration in ascertaining the three mill limitation levies for county purposes.

In reaching this conclusion I have ignored, and I think properly, the express mention of emergency levies in section 5649-3 above quoted. The latter part of this section declares the "intent and purpose of this act." Primarily then, it is a constructive section to be looked to for the ascertainment of an intent imperfectly expressed in the positive provisions of other sections. Its declaratory provisions apply solely to the limitation upon the maximum levy

for all purposes and are not intended directly to affect the subsidiary limitation upon levies made for county, municipal, township and school purposes.

It follows from all these considerations that the force of the inference which might otherwise be drawn from the express mention of emergency levies in this section is greatly mitigated. That is to say, because the last clause of section 5649-3 is merely declaratory of the "intent and purpose of this act," it is not to be inferred that the express mention of the emergency levies therein creates a presumption that otherwise such levies would not have been excluded from consideration in ascertaining the ten mill limitation to which it relates, despite the unrepealed provisions of section 5649-4. Stated in another way, the express mention of the emergency levies in section 5649-3 is to be regarded as accidental rather than as essential, and therefore does not afford proper occasion for the application of the maxim that "the expression of one thing is the exclusion of all others" throughout the related sections, especially in the face of conditions like those above referred to, which give rise to an opposite inference.

It follows from the foregoing then that the failure of section 5649-3*a* expressly to exclude emergency levies from the three mill and co-ordinate limitations is not to be regarded as significant.

I am of the opinion, therefore, with regard to your first question, that by virtue of the provisions of section 5649-4, which must be applied as well to the act of June 2, 1911, as to that of May 10, 1910, emergency levies under section 7419, General Code, are not to be considered in computing the three mill limitation imposed by section 5649*3a* as enacted June 2, 1911.

From the sections above quoted I think it is apparent at the outset that levies made by township trustees under section 7488, General Code, are exclusive of the two mill limitation, but are to be included in the other limitation of the act of June 2, 1911. Said section 7488 authorizes the trustees at any time to

> "levy an amount not exceeding one mill upon each dollar of valuation of the * * * respective townships, for road purposes, which may be worked out at the rate other work is paid for of a similar nature. * * *"

Such levies that may be worked out by the taxpayers are expressly excluded from the three mill limitation of section 5649-3*a* but are not expressly excluded from any of the other limitations of the act. Upon careful consideration I am unable to apprehend any principle upon which, by application, such levies are to be excluded from the ten mill limitation of sections 5649-2 and 3, the limitation upon the aggregate of all taxes which is measured by the total amount levied in the taxing district for all purposes in the year 1910 or the outside limitation of fifteen mills imposed by section 5649-5*b*.

It is my opinion, therefore, as above stated, that the only limitation of the act of June 2, 1911, or of the unrepealed provisions of the act of May 10, 1910, from which road taxes to be worked out by the taxpayers are excluded, is the limitation of two mills for township purposes.

In your second question you present the further inquiry as to what is the maximum levy that may be made for road purposes and discharged in labor.

I presume that your question relates to section 7488 alone and shall consider it accordingly.

Section 5649-3, above quoted, provides for an automatic decrease of maximum rates for single purposes to such rate for any year as, multiplied by

the total tax valuation of the taxing district for the year 1911, or any year thereafter would produce a product no greater than the product produced by multiplying the total valuation in such district for the year 1910 by the maximum rate for such purpose as it existed prior to the passage of the act of June 2, 1911. That is to say, assuming that the taxable valuation in a township in the year 1910 is $100,000, the amount produced by a levy of one mill—the maximum rate under section 7488—would be, of course, $100.00. This $100.00 then becomes a limitation upon the tax which may be levied under section 7488 and worked out in the manner therein provided within that township. The limitation is no longer directly upon the rate; it is rather upon the *amount*.

It is, therefore, impossible to state the maximum rate which may be levied under section 7488 by township trustees under the Smith one per cent. bill. Such rate will *vary* in the several townships according to the relative amounts of the 1910 duplicate, and the duplicate for the year in which the levy is to be made, and in no case more than one mill.

The third question which you ask requires first, a consideration of the evident intent of the Smith law, and second, consideration of whether or not the intent as applied to the levies for the year 1911 violates the constitution.

That the general assembly intended to give the budget commission control over all the levies for the year 1911 is, I think, quite apparent from the language of the act itself. Thus sections 5649-2 and 3 expressly mention the year 1911 as the year in which the limitations therein imposed shall first become effective. That is to say, the first levies to which the limitations of the act are to apply, are "levies for the year 1911."

The machinery of the budget commission is evidently designed to carry into effect the limitation provisions of the act. I do not think it can be seriously disputed that the whole act must be read together, and the powers of the budget commission under the sections relating to it, defined by consideration of the sections relating to the various limitations imposed in the other sections of the act. So I think it is quite clear that inasmuch as the limitations are expressly made applicable to levies for the year 1911, the powers of the budget commission are intended to apply to all levies for the year 1911. The construction of the statute then is clear. Is the statute constitutional? Section 28 of Article II of the constitution provides that "The general assembly shall have no power to pass retroactive laws. * * *"

Section 2529 of the General Code provides:

> "On the first Monday of March in each year the board of infirmary directors shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year. * * * The county auditor shall place the amount so certified on the tax duplicate of the county and the infirmary directors shall have full control of the poor fund."

It is apparent then that prior to June 2, 1911, the date of the passage of the act in question, the infirmary directors might have, and doubtless had, lawfully certified to the county auditor the amount of tax necessary for the support of the infirmary. Under the then existing law it was the ministerial duty of the county auditor to place the rate so certified to him upon the duplicate of the county against all of the taxable property therein. This ministerial duty, however, cannot be performed until the duplicate against which the levy

was made, was made up; that is to say, until the original tax list and duplicate consisting or a "complete list or schedule of all the taxable property in the county, and the value thereof, as equalized" (section 2583, General Code), be prepared by the auditor. This in point of fact could not be until the month of October, 1911.

The constitutional question presented then is as to whether a law which by abolishing an unexecuted ministerial duty deprives a public authority of the right to have that duty executed, which right had attached and become perfect, save as to the time of its enforcement, prior to the passage of the law, is retroactive?

The first branch of the syllabus in Miller vs. Hixson, 64 O. S., 39, contains the following succinct defination:

> "A statute which imposes a new or additional burden, duty, obligation or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article two of the constitution which provides that 'The general assembly shall have no power to pass retroactive laws.'"

Constitutional provisions similar to section 28, Article II, are found in many of the states and in many verbal forms. All of them, however, have been construed to mean substantially the same thing, viz., that the legislative power shall be prohibited from affecting accrued rights in any manner which pertains to their substance, either by imposing additional obligations upon the obligor or by impairing the right of the obligee. In reason the latter is as repugnant to such provisions as the former. It is, of course, to be observed that a law is not retroactive or retrospective which affects merely the remedy or the means of enforcing an accrued right; it is essential to the nature of a retroactive law that its provisions fasten themselves upon the substance of things.

Now I think it is perfectly apparent that if the definition above stated, which embodies all the essential elements or definitions of the term "retroactive" or its equivalent "retrospective," as given in other authorities, be applied to the case at hand without further qualification, the act of June 2, 1911, in its apparent intended effect upon the consummated acts of the several boards of infirmary directors of the state, must be regarded as within such definition and as violative of section 28, of Article II of the constitution. That is to say, the valid and perfect act of the infirmary directors is sought to be rendered imperfect and of no ultimate legal effect. This is impairing the accrued right of the infirmary directors, or viewed from another standpoint, of the poor fund of the county.

True, no contractual right is impaired. It is clear, however, that the intent of the constitutional provision is to protect rights other than mere contractual rights. In the very section in which the above quoted language is found occurs the specific prohibition against impairing the obligation of contracts, and this of itself clearly indicates that there are retroactive laws other than those which tend to impair contractual obligations.

I have sought diligently for authorities upon the exact point, but have found none. Some of the cases in other jurisdictions are decided upon the enunciated principle that the constitutional provision does not apply to governmental subdivisions. Upon examination of these cases, however, the real ground for decision will be found to be otherwise. In this state also in the case of Commissioners vs. Rosche Bros., 50 O. S., 103, any such broad principle

as this is clearly repudiated. The first branch of the syllabus in that case is as follows:

> "The act entitled 'an act to provide for refunding taxes erroneously paid under section 2742, * * * * * * insofar as it imposes an obligation on the county of Hamilton, on account of past transactions, is retroactive and in conflict with section 28, of Article II, of the constitution of this state."

The act referred to in the syllabus authorized certain manufacturers in Hamilton county to sue to recover taxes erroneously paid by them under a mistake of law, and imposed upon the county direct liability in such action regardless of the defense which it otherwise would have had. In the opinion per Bradbury, J., page 113, occurs the following language:

> "To uphold a statute on this ground * * * the natural justice of the object sought to be accomplished should be indisputable. * * * The money that they (the defendants in error) now seek to recover from the county was voluntarily paid to the treasurer who was bound to receive it. Without notice of any claim to its repayment * * * he distributed to the city of Cincinnati and the state their respective proportions of the fund. Under these circumstances the natural justice of requiring the taxpayers of *Hamilton county* to refund the entire sum is a question upon which minds differ."

It is to be observed that the court does not decide whether or not a statute, which is in furtherance of natural justice though otherwise retrospective, is "retroactive" within the meaning of the constitution. Inasmuch, however, as no consideration, of *natural justice* are found in the question you present, this point would seem to be immaterial. The case last referred to, however, suggests a possible distinction. While the syllabus and some of the above quoted language from the opinion refer to the imposition of an additional *obligation upon the county* it is fairly apparent, I think, that the rights which the court deemed to be protected by the constitutional provision *were those of the taxpayers of the county.* The act held invalid did impose certain burdens upon the taxpayers and did deprive them of certain rights theretofore accrued. In the last analysis, therefore, the court did not hold section 28, of Article II applicable to laws affecting the validity of acts of officers representing political subdivisions *as such,* except in so far as such acts created in favor of the taxpayers of such political subdivision rights that were impaired by the law under consideration. Thus the personification of the county and the protection of its rights was merely for the purpose of conserving the rights of its taxpayers. Ultimately, therefore, the constitutional provision was invoked to protect *private rights.*

In my opinion section 28, of Article II of the constitution and similar constitutional provisions must be regarded as adopted for the purpose of protecting the rights of the individual from oppressive impairment. Its object, in other words, is to protect "vested rights" of the person. It is in the nature of a declaration of right and might properly be placed in the bill of rights. I do not think it was ever intended to prohibit the legislature from passing laws which would tend to invalidate the acts of public officers when no private rights have accrued in pursuance of such official acts. As I have already stated I have been unable to find any authority upon this point, but I am convinced that it is the law.

In the case under consideration the certification of the infirmary directors to the county auditor of the amount necessary, in their judgment, for infirmary purposes, during the fiscal year 1911-1912 created no rights in favor of any individual. The board of infirmary directors acquired a right, and the infirmary fund, personified, acquired what might be termed a right. Neither of these rights, however, in the absence of the intervention of private rights is protected by section 28, of Article II. Inasmuch as private rights could not in the nature of things have intervened, I am of the opinion that said section of the constitution does not prohibit the legislature from impairing the purely official rights to which I have referred. In other words, the act of June 2, 1911, in so far as it affects the action of the infirmary directors taken in March, 1911, and subjects such action to revision by the budget commission is not a "retroactive" law within the meaning of Article II, section 28 of the constitution.

It follows from all the foregoing that the levy made by the infirmary directors, as aforesaid, is subject to review and revision by the budget commission.

To summarize, my conclusions as to your third question are as follows:

1. Levies under section 7419 are exclusive of all the limitations of the one per cent. law, including the limitation of three mills on the amount which may be levied by a county for county purposes.

2. Levies for road purposes made by township trustees under section 7488 are exclusive of the two mill limitation for township purposes, but are included within all the other limitations of the law.

3. The budget commission has authority and control over the levy made by the county infirmary directors in March, 1911.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

414.

EXTRA COMPENSATION TO DEPUTY COUNTY AUDITOR FOR EXTRA WORK UPON REAPPRAISEMENT OF REAL PROPERTY—RESOLUTION OF COUNTY COMMISSIONERS PROPER BUT NOT NECESSARY—ESSENTIALS OF BILL PRESENTED.

Though it is proper for a county auditor before employing extra clerk hire when real property is reappraised, to first have the commissioners pass a resolution authorizing such expense, however, when additional work is performed in this connection, outside of office hours by a deputy auditor, and these facts appear upon the face of the bill presented by him, the commissioners should pay such bill even though the commissioners have not passed the resolution aforesaid.

COLUMBUS, OHIO, October 6, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 26th, in which you state that:

"At a regular meeting of the county commissioners of this county,

held July 3, 1911, a bill was presented to them for allowance by W. C. Downs, deputy auditor of the county, of which bill the following is a copy:

"'JACKSON, OHIO, June 28, 1911.

"'JACKSON COUNTY, OHIO.

"'To W. C. Downs, ...Dr.

"'For extra work in the auditor's office occasioned by the reappraisement of real estate and as per an opinion of the attorney general, rendered November 15, 1910, to the bureau of accounting, of which communication of same to D. H. Armstrong, prosecuting attorney, is hereto attached .....$300.00'

"Accompanying the bill was a resolution which the commissioners were asked to pass which reads:

"'In the matter of additional allowance to the county auditor for clerk hire in any year in which additional work devolved upon his office by reason of the appraisement. Resolved, that by reason of said additional work in the auditor's office during this year, 1911, that the county auditor be and is hereby allowed the sum of three hundred and no/100 dollars in addition to allowance heretofore made for the employment of clerks in his office during said year under the authority of section 2629, General Code.'

"The above bill was presented to me by the commissioners and my advice asked as to its allowance. I objected to the allowance upon several grounds. First, because the bill is not in a proper form, and does not show what the extra work was, nor when it was performed. Since the person asking its allowance is a regularly employed deputy, it seemed to me that the bill on its face should show that it was extra work, and should further show that such work was done at times other than the hours of his regular employment, since such time under his employment belonged to the county. I also objected upon the ground that the statute does not warrant an allowance in any other year than that in which the appraisement is actually made, although I am aware of decisions to the contrary, with which decisions, I am informed by Mr. McGhee, you are familiar. And if these decisions should be followed I feel that this bill should not be allowed for the reason that the resolution was not passed previous to the performance of the services."

and request my opinion upon the following questions:

"1. Can the allowance be made this year, and if so, must the resolution precede the performance?

"2. Can the extra pay be drawn by one of the regular office force, and if so, must he not show upon his bill that the services were outside of his usual and regular employment?"

Section 2629 of the General Code provides as follows:

"The county commissioners of the several counties shall make an additional allowance to the county auditor for clerk hire, not exceeding twent-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."

Section 2629, General Code, was formerly section 1076, Revised Statutes, and was construed by the circuit court of Lucas county in the case of State ex rel. vs. William M. Godfrey, reported in Volume 4, C. C. R. N. S., p. 465. It was held in that case that:

> "The provision in section 1076 for an additional allowance to the county auditor for clerk hire, during the period when the decennial appraisement is being made of real property, is not limited to the year during which the reappraisement is actually made, but includes so much of the year following as may be necessary for the boards of equalization to complete their work, subject to the limitation of the statute requiring that this work be done before the fourth Monday in January of the second year following the reappraisement."
>
> (3d Syllabus.)

Following that decision, it is my opinion, if the bill presented is legal in all other respects, it should be allowed. However, you question the legality of the bill because the county commissioners did not pass a resolution authorizing the expenditure of money for extra clerk hire previous to the performance of the services. I agree with you that the auditor should have requested of the commissioners an allowance for additional clerk hire, under authority of section 2629 of the General Code, prior to the employment of additional clerks, and if the commissioners found, upon such application, that the auditor needed additional clerks by reason of increased work, due to the reappraisement of lands in 1910, a resolution should have been passed authorizing the county auditor to employ additional clerks or authorizing him to spend whatever sum he might need, within the limitations of section 2629, General Code, for additional clerk hire. However, if, as a matter of fact, the county commissioners failed to pass such a resolution prior to the time the services were performed by the deputy auditor; and the deputy auditor did the work outside of his regular hours of employment, and there was necessity therefor, and the county received the benefit of labor and work done by the deputy auditor after the hours of his regular employment, I am not disposed to hold that any bill presented, for labor so done by him, should not be allowed.

You also state that the bill presented was for work performed by a person in the regular employment of the auditor as a deputy, and that you objected to the bill upon the further ground that it does not show on its face that the work was done by the deputy auditor at times other than the hours of his regular employment. I concur in your objection to the bill in that regard, and agree that it should appear affirmatively upon the face of the bill that the work was done by the deputy auditor at times other than the hours of his regular employment, as his time during the business hours of the day belong to the county.

In conclusion, it is my opinion that if the additional work, for which the bill was presented, was done by the deputy auditor at times outside of his regular hours of employment—and this should appear upon the face of the bill—and it was necessary for such additional work to be done, by reason of the reappraisement of land in Jackson county, even though the county commissioners did not pass a resolution prior to the work being done, the bill should be allowed.

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

415.

BOARD OF EDUCATION OF SMITH TOWNSHIP—LIABILITY FOR TUITION OF PUPILS ATTENDING "ACADEMY HIGH SCHOOL"—"REGULARLY ORGANIZED HIGH SCHOOL."

The "Academy high school" in Muskingum county has been taken over by the New Concord board of education, so as to have the control and management thereof and said high school has been recognized by the state commissioner of common schools.

The board of education of Smith township is, therefore, liable for tuition of its Boxwell pupils who attend said high school, since said board has entered into no agreement for the schooling of said pupils, in accordance with section 7750, General Code.

October 7, 1911.

HON. WILLIAM V. CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Under date of June 26th you submitted at the request of the Smith township board of education for my opinion the question as to whether or not said board of education would have to pay the tuition of pupils attending what is known as the "Academy high school" in Muskingum county, said Smith township board of education not having entered into an agreement for the schooling of its high school pupils as provided by section 7750, General Code.

Section 7663 of the General Code provides:

"A board of education may establish one or more high schools, whenever it deems the establishment of such school or schools proper or necessary for the convenience or progress of the pupils attending them, or for the conduct and welfare of the educational interests of the district."

Section 7747, General Code, provides:

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

Section 7750 of the General Code provides:

"A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agree-

ment is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date of attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Section 7752 of the General Code provides:

"No board of education shall be entitled to collect tuition under this chapter unless it is maintaining a regularly organized high school with a course of study extending over not less than two years and consisting mainly of branches higher than those in which the pupil is examined. The standing or grade of all public high schools in the state shall be determined by the state commissioner of common schools, and his finding in reference thereto shall be final."

From the letter which you enclosed from the Smith township board of education it would appear that the contention of said board is that the Academy high school is not under the control and management of the New Concord board of education, but is a private institution to which said New Concord board of education sends its Boxwell-Patterson graduates, and therefore is not such a high school as is contemplated in the statutes.

From data on file with the state commissioner of common schools I found a plan of organization from which it appears that the New Concord board of education accepted the control and organization of the Academy high school; that it rented the preparatory equipment for public high school by way of rooms, furnishings, laboratory, janitor and heating and that it elected certain teachers to conduct the work of the high school in accordance with the course of study and rules and regulations prescribed by the board of education and under the direction of the superintendent and principal and that it required that all such teachers should hold high school certificates.

The statement of facts as submitted by the Smith township board of education did not accord with the plan of organization by which the New Concord school district was to obtain control of what is known as the Academy high school, as found on file with the state commissioner of common schools and, therefore, I requested a report from said commissioner as to what control and management was exercised by the New Concord board of education over the said Academy high school. In answer thereto I have received the following communication:

COLUMBUS, OHIO, September 14, 1911.

"HON. TIMOTHY S. HOGAN, *Attorney General of Ohio, Columbus, Ohio.*

"MY DEAR SIR:—According to your request, I sent Mr. McCurdy, one of my high school inspectors, to investigate the conditions at New Concord. The following is his report:

"'I have examined the records of the Academy high school at New Concord and find that the board is elected in the proper manner. It rents building and equipment of the college at $50.00 per month. It employs its own teachers, requires them to be properly certified and pays them a stipulated price. Their certificates are on file with the clerk. The board adopts its own course of study and lays down the rules regulating the discipline and governing every feature relating to

the control and management of the school. All these facts I found in the minutes kept by the clerk of the board of education.'

"Very truly yours,

"FRANK W. MILLER,

"*State Commissioner of Common Schools.*"

Section 7663, *supra*, authorizes any board of education to establish a high school, and section 7752, *supra*, states that no board of education shall be entitled to collect tuition unless it is maintaining a regularly organized high school, with a course of study extending over not less than two years. As I construe the words "establish and maintain" they mean that such board shall have the management and control of such school and the power to employ and dismiss teachers, and prescribe rules and regulations to govern such schools.

As the New Concord school district has the management and control of the Academy high school, employs its teachers, and rents the rooms necessary for the conduct of such school, it is my opinion that such Academy high school would be considered as a legal high school under the law, and the board of education of Smith township would be required to pay the tuition of its Boxwell-Patterson graduates attending such school as provided in section 7747, *supra*.

Section 7752, *supra*, provides that the standing and grade of all public high schools in the state shall be determined by the state commissioner of common schools and that his finding in reference thereto shall be final. I find from examination in the office of the state commissioner of common schools that the Academy high school has been recognized by him as a high school under the provisions of the law.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

A 415.

BOARDS OF EDUCATION—JOINT SCHOOL DISTRICTS—CENTRALIZATION OF SCHOOLS IN TOWNSHIPS—ATTACHMENT AND DETACHMENT OF TERRITORY WITHIN JOINT DISTRICT AFTER CODIFICATION OF THE SCHOOL LAWS.

When a joint school district prior to the codification of the school laws, was composed of part of the two townships, P and S, the school house of said joint district being located within the lines of "P" township and the voters of "P" township, under section 4726, General Code, have voted for the centralization of schools, held:

That the territory of the entire joint subdistrict becomes a part of the centralized "P" township school district.

That the voters of the part of the joint district territory lying in "S" township are entitled to vote upon the question of a bond issue authorized by section 7625, General Code, and promoted by "P" township, provided that the "S" township school district has not centralized its schools and thereby acquired through section 4725, General Code, jurisdiction of that part of the former joint township school district which lies within "S" township.

Except by fulfillment of the conditions provided for in section 4725, General Code, there is no way that the territory in "S" township attached to the "P" township school district can be detached from the "P" township without the consent of residents and the school board of the "S" township.

COLUMBUS, OHIO, October 9, 1911.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Under date of June 14th you wrote me as follows:

"The township of Pickaway, in this county, voted for the centralization of schools under section 4726, General Code, which election carried. Prior to the codification of the school laws there was a joint school district. This was composed of part of Pickaway and Saltcreek townships, the school house being built near the township line, but in Pickaway township. This, as I take it under section 4723, became a part of the Pickaway township school district, and upon the vote for school centralization I advised the board of elections that the voters residing in Saltcreek township but in the Pickaway township school district under section 4714 had a right to vote at the centralization election of Pickaway township. It seems that all the voters living in Saltcreek township but in the Pickaway township district are opposed to the centralized schools, and my decision gave some dissatisfaction. The board of education will now have to submit to the electors of Pickaway township school district for a bond issue under section 7625. They do not want the voters living in the Saltcreek part of this district to vote on this question. Can they prevent it? Is there any way except under section 4725 that this territory may be detached, over the objection of the school board in one township, and the persons resident of the Saltcreek part of the school district—see section 4692-3? They want your opinion."

Section 4714, General Code, provides in part as follows:

"Electors residing in territory attached to a township school district for school purposes may vote for school officers and on all school questions at the proper voting place in the township in which such territory is attached."

Section 4723, General Code, provides:

"Joint subdistricts are abolished and the territory of such districts situated in the township in which the school house of the joint district is not located shall be attached for school purposes to the township school district in which such school house is located. Such territory shall constitute a part of such township school district, and the title of all school property located therein is vested in the board of education of the township to which the territory is attached."

Section 4725, General Code, provides:

"When such joint subdistrict is a part of townships, *both of which have centralized schools* and no school is maintained in such subdistrict, the boundaries of the civil township so situated shall form the boundaries of the township school districts, and each township shall have control of the territory of such joint subdistrict lying within its boundaries."

Section 4692, General Code, provides in part:

"Any school district or a part thereof may be transferred to an adjoining school district by the mutual consent of the boards of education having control of such districts."

Section 4693, General Code, provides in part:

"Territory may also be transferred from one school district to another as follows: A petition, signed by not less than one-half of the qualified male citizens who are electors, *residing in the territory sought to be transferred* and accompanied by a correct map of the territory, shall be filed with the clerks of the boards of education interested. If such boards of education fail or refuse to transfer such territory by mutual consent, as herein provided, within sixty days from the filing of the petition and map, the petitioner shall file a copy of the petition and map in the probate court of the county in which the territory is situated, or, if it be situated in two or more counties, in the probate court of the county containing the largest proportionate share of the territory to be transferred."

Section 7625 as amended 102 Ohio Laws, 419, provides in part:

"When the board of education of any school district determines that (for the purposes mentioned in said section) a bond issue is necessary, said board shall submit to *the electors of the district* the question of issuing such bonds for the amount so estimated."

I assume from the form of your inquiry that prior to the codification of the school laws a part of Pickaway township and a part of Saltcreek township composed a joint *subdistrict.*

By virtue of section 4723, supra, the Saltcreek part of the joint subdistrict upon the codification of the school laws became attached to the Pickaway township school district for school purposes.

You state that the board of education of the Pickaway school district will have to submit to the electors of the Pickaway township school district the question of a bond issue under section 7625, General Code, and that such board does not want the electors living in the Saltcreek part to vote on the question. As before stated, section 7625, General Code, provides that such question shall be submitted to the electors of the *district*, and as the persons residing in the Saltcreek part of such district are electors of such district under the provisions of section 4714, supra, and as such are entitled to vote on *all* school questions, I am of opinion that they are entitled to vote, providing the Saltcreek township school district has not centralized its schools, and thereby acquire, by virtue of section 4725, supra, jurisdiction of such part of Pickaway township school district as lies within Saltcreek township.

You further inquire whether there is any way, except under section 4725, supra, that the territory in Saltcreek township attached to the Pickaway township school district for school purposes may be detached over the objection of the school board in one township and the persons resident of the Saltcreek part of the school district, and you call my attention to sections 4692 and 4693, supra.

Section 4725, supra, provides for the transfer of such territory from one district to the other purely by operation of law upon the occurrence of condi-

tions stated in said section. Aside from that, sections 4692 and 4693, supra, are the only provisions of law of which I am cognizant, that provide for the transfer of territory from one school district to another.

Consequently, I am of opinion that as the conditions provided for in section 4725 do not exist in this instance, there is no way that the Saltcreek territory attached to the Pickaway township school district can be detached over the objection of the Saltcreek board, and the persons resident of the Saltcreek part of the school district.

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

A 416.

TOWNSHIP DITCH SUPERVISORS—COMPENSATION—EXTRA EXPENSES NOT AUTHORIZED.

As the only payments authorized by the statutes to be made to township ditch supervisors is the $2.00 per diem provided for in section 3388, General Code, these officials cannot be allowed for additional expenses incurred in the performance of duties outside their own township.

COLUMBUS, OHIO, October 10, 1911.

HON. CHARLES C. HALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I am in receipt of your communication of recent date in which you submit for opinion the following:

> "One of the ditch supervisors of this county requested me to get an opinion from the attorney general in regard to his expenses.
>
> "There is a joint cleanout between three counties, and the ditch supervisor from five townships were interested in the work.
>
> "The supervisor from Cynthian township was required to go on several occasions into other counties, and the expenses incurred thereby were larger than the fees coming for the services, and he desires an opinion from the attorney general as to whether he will be entitled to the actual expenses incurred, in addition to his per diem, when performing duties outside of his township."

and in reply to your inquiry will say that section 3386 of the General Code provides for the election, terms, etc., of ditch supervisors as follows:

> "In any township in which county or township ditches have been located and established, at the time and in the manner provided by law for the election of township officers, there may be elected a township ditch supervisor, who shall serve for a term of four years. The township trustees shall fill any vacancy which occurs in such office, by resignation or otherwise, by appointment, until the next proper election, when successor shall be chosen for the unexpired term."

Section 3388 of the General Code provides for the compensation of such supervisors as follows:

> "Such supervisor shall be allowed two dollars per diem, for the time actually engaged in performing the duties of his office, to be paid by the township trustees, from the township ditch fund, upon presentation of an itemized account, verified upon oath by the township ditch supervisor. When actually engaged in measuring a ditch or ditches, the supervisor shall be allowed one assistant, who shall receive one dollar and fifty cents per day for the time actually employed, and shall be paid by the trustees from the township ditch fund, upon the certificate of the ditch supervisors."

Section 3389 of the General Code provides for the general duties of such ditch supervisors as follows:

> "The township ditch supervisor shall have the supervision of all township and county ditches in his township. He shall clean them out and keep them in repair as provided by law and shall perform such other duties as are imposed upon him by law."

By the provisions of the above sections with respect to ditch supervisors in their respective townships, such supervisors have no duties to perform in their official capacity outside of the particular township in which they are elected and the only provision for their payment is the provision as the same is provided in section 3388, General Code, which is the per diem they shall receive for cleaning out and keeping in repair all the township and county ditches in their respective townships. The only provision for paying such ditch supervisors is their two dollars per diem as the same is provided for in section 3388 of the General Code, which I have cited above, and as there is no other provision for paying any other expenses which might be incurred by said ditch supervisors, I am of the opinion that such ditch supervisors are not entitled to any expenses incurred in addition to their per diem when the same are incurred in performing duties outside of their own respective townships. I believe that I have fully answered your inquiry, and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 422.

INTOXICATING LIQUORS—ROSE COUNTY LOCAL OPTION LAW—DOWAIKEN LAW — "SINGLE SALE," WHEN A VIOLATION — "GIVING AWAY."

Under section 6071, General Code, a single sale would not constitute a business or trafficking in intoxicating liquors, unless the circumstances showed that such sale was made in a place established for the purpose of conducting such a business.

Under the language of the Rose law, however, i. e., section 6112, General Code, a single sale will effect a violation. Whether or not, however, a single sale would constitute a violation of the provision of that section against keeping a place where intoxicating liquors are sold, given away or furnished for beverage purposes, is a question of fact depending upon all surrounding circumstances.

The giving away of liquor shall not constitute a violation of the Rose law, if such act is performed by a party in his private dwelling, unless such dwelling is a place of public resort.

COLUMBUS, OHIO, October 14, 1911.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I have your letter of October 13th, wherein you advise me as follows:

> "Some of the papers have reported that you rendered a decision recently in which you held that it takes a number of sales of liquor to constitute a violation of the local option laws and the tax laws.
>
> "I know that it is necessary to show a series of sales before you can hold a person liable for the Dow-Aiken tax, but understand that one sale is sufficient to convict under the Rose law. I wish you would let me know what your opinion was in regard to this matter at once."

Unfortunately many of the newspapers erroneously reported my opinion to Hon. S. E. Strode, state dairy and food commissioner, under date of September 12, 1911. The question put to this department by Mr. Strode was as follows:

> "Does a single sale of intoxicating liquor make the seller liable to payment of the Dow-Aiken tax levied upon the business of trafficking in intoxicating liquors?"

Inasmuch as there seems to be some confusion with reference to the application of what is known as the Aiken law and the Rose county local option law, I deem it advisable to call attention to the difference between the two laws, and cite some of the decisions showing the difference in the underlying principles of each.

First, however, permit me to requote from my opinion to Hon. S. E. Strode as follows: Therein it was stated

> "Section 6071, General Code, levies the tax in these terms:
>
> "*Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor* there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

You will notice that the tax is levied upon the *business of trafficking* in spirituous, vinous, malt or other intoxicating liquor. Now it does not require any decisions to come to the conclusion that if a man, whose home was in Detroit, happened to drop down to Jackson, Ohio, on a day's visit, and while there in fact sold, and sold only one drink of liquor to some one, would not be engaged in the *business of trafficking* in intoxicating liquors, yet that one sale would constitute a violation of the following section of the Rose county local option law, to-wit, section 6112 of the General Code, which provides as follows:

> "If a majority of the votes cast at such election are in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election it shall be unlawful for any person, personally or by agent, within the limits of such

county *to sell, furnish or give away intoxicating liquors* to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

A careful reading of said section 6112 will disclose that the single act of selling, furnishing or giving away intoxicating liquors to be used as a beverage constitutes a violation of the law. Whether or not a single sale will constitute a violation of that provision of section 6112 providing against keeping a place where such liquors are kept for sale, is a question of fact in each particular case. It is well to keep in mind this distinction in regard to the provision of the statute providing against selling, furnishing or giving away intoxicating liquor, a single sale constitutes not only a completion of the offense but it is complete evidence of the violation of the law in that respect, while with respect to keeping a place where liquors are sold contrary to law, the single sale may or may not be sufficient evidence to prove the crime. Where it appears that a single sale has been effected, for instance, by a man just coming to a community, and his evidence satisfies the court that he has only made that sale, having at the time no place of doing business, no equipment, and there being no circumstances to show more than a single sale, such evidence, in my judgment, would not satisfy the court that the defendant had kept a place. However, where a man keeps a room or a place, such as to leave a fair inference that it is used for the sale of liquor, and a single sale is made, all the circumstances put together may leave the conclusion, quite reasonably, that the party charged is engaged in keeping a place. In my judgment the court may be warranted under certain circumstances in finding the defendant guilty of keeping a place without proof of a single sale whatever, as for instance, if the place was one where no other business was engaged in, at least no legitimate business, where the entrances and looking arrangements are such as to call for, and are without proper explanation; where large quantities of whisky or other intoxicating liquors are kept without any apparent reason therefor other than that they are kept for sale, and where people are seen to frequent such a place with no apparent reason other than to procure liquor, the court has every right to assume that that place is kept for the sale of intoxicating liquors.

I have only attempted here to cite one instance of what would seem to be sufficient proof. One in giving an opinion upon a question like this can only give illustrations of what might constitute sufficient evidence. It is not intended to measure evidence to constitute a breach of law. At this point permit me to say that a single sale under the circumstances that I have related would be sufficient to fasten the Aiken tax lien upon the premises.

It was far from my intention to hold, and I did not hold in the former opinion, that a single sale would not constitute a violation of the Rose law. Therein I distinctly drew the difference between the Rose law and the Aiken law in that connection. Quoting from the opinion further I said:

> "A single sale would constitute the 'trafficking' in intoxicating liquors, but a single sale, with no other circumstances tending to show that a business was being conducted, would not constitute the 'business' of trafficking in intoxicating liquors. A single sale would be evidence that the seller was engaged in such business, but it would not be conclusive. Other facts must be shown to exist tending to prove that the seller was so engaged.
>
> "All the circumstances surrounding a sale of intoxicating liquor must be taken into consideration in determining whether or not the

seller is engaged in the 'business' of trafficking in intoxicating liquor. Each case must stand upon its own particular circumstances. The single sale alleged in the affidavit and admitted by the plea of guilty is not sufficient evidence to warrant the levying of the Dow-Aiken tax against the seller. How much more or what particular evidence would be required, need not be set forth herein. The evidence must be weighed in each case."

The foregoing I think will pretty clearly indicate the law as to what constitutes keeping a place, or as to what constitutes the *business* of trafficking in intoxicating liquors.

Coming now to the local option law and similar legislation it was held by the common pleas court of Franklin county in the case of Volk vs. the Village of Westerville, 3 Ohio Nisi Prius n. s. 241, as follows:

"Proof of a single sale is sufficient to establish the charge that the defendant did unlawfully keep a place where intoxicating liquors were sold."

The syllabus in that case is, of course, to be read in the light of the circumstances and the facts. Judge Evans speaking for the court at page 244, said:

"It is not manifest from the record that in the overruling of said motion Volk was embarrassed or injured in making his defense.

"It is also insisted that evidence did not show that said Volk did unlawfully keep a place where intoxicating liquors were sold at retail, and also, that if the evidence did not show that he did, that he could not, under the charges in the affidavit, be found guilty of more than a single offense.

"Volk vs. the Village of Westerville, an unreported case decided by the circuit court of this county about a year ago, is an authoritative decision which this court should follow. In that case it appears from the written opinion of the court delivered by Sullivan, J., that the court held that proof of a single sale was sufficient without proving a series of sales, to constitute the offense charged that the defendant did unlawfully keep a place where intoxicating liquors were sold at retail; that the case of Miller et al. vs. The State, 3 O. S., 477, has no application as an authority to the case at bar. With this decision to guide me, I cannot say that the record before me shows that the finding and judgment of the mayor's court is contrary to the law or the evidence."

The tenth syllabus in the case of Miller vs. State of Ohio, 3 O. S., 476, is as follows:

"To convict for a violation of the fourth section, it is necessary to aver in the information, and prove on the trial, that the place where the liquor was sold, was a place of public resort. And the proof must also show that it was a place where liquors were habitually sold in violation of the act. *A single sale does not make the place a nuisance, or the seller a 'keeper' within the meaning of the act. A series of sales is necessary.*"

You will note that it was held in the 3 Ohio State case that to convict for a violation of the fourth section it is necessary to aver in the information proof on the trial that the place where liquor was sold was a place of public resort. In addition to that the proof must also show that it was a place where liquors were habitually kept in violation of the act, and that a single sale does not make the place a nuisance or the seller a keeper within the meaning of the act. A series of sales is necessary.

Unquestionably that case was held not to apply because of the requirement that more than one sale was necessary. The other features unquestionably apply, that is, there must be a place to which the public resort. It is not necessary that the place should even be within a building. It might, so far as the purpose of the law is concerned, be a vehicle or a grove or any other place, but there must be a place, and if thereby such place proven, a single sale is entirely sufficient in connection with other circumstances to satisfy the court that such place is kept.

The principles of the Westerville case referred to, were approved by the circuit court, as found in the case of Lynch vs. State of Ohio, 12 O. C. C. n. s., 330. The syllibi, 1 and 2, are as follows:

> "1. An affidavit charging the keeping of a place where intoxicating liquors were sold, furnished or given away on a designated day, is sufficient to sustain a prosecution under the Rose county local option law.
>
> "2. Proof of one unlawful sale is sufficient to sustain a conviction under such charge; and the affidavit need go no further than to aver an unlawful sale, leaving it to be developed by the evidence in what respect the sale was unlawful."

You will observe that it is necessary for the affidavit to charge the keeping of a place, so that place is a necessary element, and the other essential feature to keep in mind is that when this place is proven to the satisfaction of the court proof of one unlawful sale is sufficient to sustain a conviction under the charge.

The case of Lynch vs. State was affirmed by the supreme court in the case of Lynch vs. State, 81 O. S., page 489.

1. To summarize, a single sale will not only constitute the crime of selling, furnishing or giving away intoxicating liquors contrary to law, provided it be in prohibited territory, but is ample evidence of the guilt of the person.

2. A single sale, with sufficient evidence under legal rules of the existence of the place, and the attendant surroundings are sufficient to warrant the court in finding that a place is kept where liquors are furnished, sold or given away contrary to law.

3. The essential ingredient to fasten liability under the Aiken tax is that the person against whom the Aiken tax is claimed is engaged in a business, and the business must be trafficking in intoxicating liquors.

Trafficking is defined in section 6065, General Code, as follows:

> "The phrase 'trafficking in intoxicating liquor' as used in this chapter and in the penal statutes of this state means the buying or procuring and selling of intoxicating liquor otherwise than upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes."

Therefore a single sale may constitute trafficking. The Aiken tax, section 6071, General Code, is upon the *business* of trafficking in spirituous, vinous, malt or other intoxicating liquors. It will, therefore, appear that it is not because of trafficking that the tax is imposed, but because of the *business* of trafficking. The word business is not defined in our General Code, therefore we must look to the dictionary. The Century dictionary defines business as "that which one does for a livelihood; occupation, employment: as, his business was that of a merchant; to carry on the business of agriculture. The occupation of conducting trade or monetary transactions of any kind."

Webster defines business as: "That which busies, or that which occupies the time, attention or labor of one, as his principal concern, whether for a longer or shorter time; employment; occupation."

It therefore appears to have the idea of continuance in it. While I think the decisions of the courts are clear upon all of the points involved, I yet deemed it necessary to discuss the principles which unquestionably underlie the decisions of the court, believing that this may clear up the confusion hereinbefore referred to.

Of course it will be kept in mind that the words "giving away" where they occur in the Rose county local option law shall not apply to the giving away of intoxicating liquors by a person in his private dwelling unless such private dwelling is a place of public resort.

I thank you for inquiring upon this important subject, because it gives me an opportunity to cover all of the points involved, and prevent a misleading of the public upon so important a subject.

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

426.

INTEREST OF PUBLIC OFFICIALS IN CONTRACTS OF A MUNICIPALITY —POWER OF UNION CEMETERY TRUSTEES TO WRITE INSURANCE ON MUNICIPAL BUILDINGS.

The trustees of a union cemetery are not so connected with a municipality as to be prohibited by the provisions of section 12910, *General Code, from writing fire insurance on public buildings of a municipality.*

COLUMBUS, OHIO, October 17, 1911.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your favor of August 16th is received. You inquire:

> "Can a trustee of a union cemetery elected by the joint vote of a municipality and a township, as an insurance agent, write insurance on public buildings of said municipality without violating section 12910 of the General Code?"

Section 12910 of the General Code provides as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of prop-

erty, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 4183 of the General Code provides for the establishment of union cemeteries and is as follows:

"The councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township or townships, when conveniently located for that purpose, may unite in the establishment and management of a cemetery by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided."

Section 4184, General Code, provides for the election of trustees for a union cemetery, and

Section 4186 et seq., provides for their control over cemetery grounds.

The trustees of a union cemetery are not municipal officers. They have no control over any of the buildings of a municipality, and are not connected with a municipality in the sense that they are municipal officers, although being elected in part by the voters of the municipality. The trustees of a union cemetery are not, therefore, precluded from writing fire insurance on the public buildings of a municipality under section 12910, General Code.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

428.

TOWNSHIP TRUSTEES—MAJORITY TO DO BUSINESS—NECESSITY FOR ALL TO BE PRESENT OR TO BE NOTIFIED OF MEETING.

The statutory provision providing that a majority of the township trustees should constitute a quorum to do business was repealed after the supreme court construed that provision to allow special meetings to be held at any time and place without previous notice to all trustees. At the present time, therefore, all trustees must be present to do business either actually or "constructively" (i. e., must be notified) and a majority may then conduct business.

COLUMBUS, OHIO, October 18, 1911.

HON. CARL W. LENTZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your letter of September 27, 1911, received. You inquire:

"Whether or not township trustees are all three required to be present at a meeting for the transaction of business, or if a majority constitutes a quorum and can legally act in the absence of the third member."

You call my attention to the latter part of section 14 of the act of March 14, 1853, found in Swan & Critchfield's Statutes, section 1568, which provides as follows:

"* * * and a majority shall be a quorum to do business at all meetings of the township trustees."

and to the fact that in the revision of 1880 that part of section 14 just quoted, relating to a quorum, was omitted and the remaining part of section 14 was incorporated in section 1457, Revised Statutes, and is now section 3271, General Code. You further state that there is no other provision of the General Code providing that a majority of the trustees elected shall constitute a quorum, and that by reason of the following language by Judge McIlvaine, construing said section 14 of the act of 1853, above quoted, in the case of State ex rel. vs. Wilksville Township Trustees, 20 O. S., 288, to-wit:

"By the rule of the common law, where power or authority is delegated to two or more persons to transact business of a private nature, all interest in the power must concur in its due execution. But in matters of public concern, though it is necessary for all to be present, yet the majority will conclude the minority. In this state, however, the rule of the common law has been abrogated in the case of township trustees. * * *"

you are of the opinion that in the absence of statute constituting a majority of trustees, a quorum, it may be necessary for all trustees to be present; or, to quote you more correctly, you state that "Judge McIlvaine in his opinion indicates that in the absence of such a statute it is necessary for all members to be present when any public business is to be transacted."

Mecchem on Public Officers, section 572, lays down the doctrine that:

"Where, however, a trust or agency is created by law or is public in its nature, and requires the exercise of deliberation, discretion or judgment, whether it be judicial or quasi-judicial in its character, the rule is otherwise, and while all the trustees, agents or officers, *except* where the law makes a less number a quorum, must be present to deliberate, or, *what is the same thing, must be duly notified and have an opportunity to be present* * * * where the law prescribes what shall constitute a quorum a majority of that quorum may act."

It was held in the case of Williams vs. School District, 21 Pick. (Mass.), page 75:

"Where a body or board of officers is constituted by law to perform a trust for the public or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all *have due notice of the time and place of meeting*, in the manner prescribed by law, if so prescribed, or by rules and regulations of the body itself, if there be any, otherwise, if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum."

In New York, under a similar statute, it is held generally that, "where power is vested in a board of assessors, composed of three members, all must be notified to meet and consult, though a majority must decide."

The Matter of Beckman, 1 Abb. Pr. 449.

The supreme court of Ohio, in construing section 7 of the act of March 29, 1856, in relation to the time of holding court, authorizing judges of a district to appoint special terms, for good cause, held that:

> "The discharge of the duty imposed by section 7 requires the presence, *actual or constructive*, of all the judges, and a concurrent action of the majority to make the appointment."

The supreme court of Ohio subscribes to the doctrine laid down in section 572 of Meecham on Public Officers, that all trustees, agents or officers performing a *public* duty must be present to deliberate, *except* where the law makes a less number a quorum, or, what is the same thing, must be duly notified and have an opportunity to be present. The supreme court of Ohio seems to hold that a notice and opportunity to be present is "constructive" presence.

Judge Sutliff, in handing down the opinion in the case of Merchant vs. North et al., 10 O. S., 252, says:

> "It is true that section 7 does not, like section 2, authorize a mere majority of the judges to appoint such special term of the district court. The character of the authority conferred by section 7 may have been regarded such as to have induced the legislature to commit the trust only to all the judges, instead of to a mere majority. The holding of a special term is, by the provisions of the section, made to depend upon the opinion of the judges as to the want of time, at a regular term, to dispose of the business, or whether, from other circumstances, there exists good cause for appointing such special term. The exercise of this authority and public trust the legislature has seen fit to devolve *upon all the judges, instead of a majority.* The judges ought, therefore, according to well-established principles of law recognized in analogous cases, to have all been present, or, at least, *constructively* so. *They should have all been duly notified of the time and place of the meeting at which the appointment of such special term was to have been determined upon; and then the action of a majority would have been legal.* And if the record in *this case showed us that the two judges, whose names* do not appear to have been signed to the order, were neither present nor *notified*, we could not regard the appointment of the special term as a legal term of the court."

Prior to the change in the statute, and under the statute where a majority of the trustees constituted a quorum to do business, it was held in State ex rel. Cline vs. Trustees, 20 O. S., 289, that:

> "Special meetings of boards of township trustees may be held at any time and place within the township and *without previous notice to all of the trustees.*"

After this decision was rendered by the supreme court the law was amended, dropping that part of section 14 of the act of March 14, 1853, authorizing a majority of trustees to transact business at all meetings of the trustees. This was perhaps done intentionally; so that all business transacted by trustees should be transacted when all are present, or, after notice, and all given an opportunity to be present.

Following the doctrine laid down in section 572 of Meecham on Public Officers, and the decision of the supreme court of Ohio in the case of Merchant vs. North, et al., 10 O. S., 252, I am of the opinion that two of the trustees can act in the absence of the third, provided the absent trustee has been notified and given an opportunity to be present; and that any action of two trustees, without notice to the third and an opportunity given him to be present, and without his presence, will be illegal and void.

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

A 431.

TAXES AND TAXATION—LEVY BY COUNTY COMMISSIONERS FOR AGRICULTURAL SOCIETIES, MANDATORY—"MAY" AND "SHALL"—SMITH ONE PER CENT. LAW LIMITATIONS.

The words "may" and "shall" in a statute are to be construed in their ordinary sense except where the statute shows reasons for substituting one for the other.

The statute providing for a levy of one-tenth of one mill by the county commissioners, makes it mandatory upon the county commissioners, subject, however, to their discretion as to amount, and guided by the limitations of the tax laws, to make a levy for agricultural purposes as defined in section 9894, General Code, when a request for such levy is made by the agricultural societies.

COLUMBUS, OHIO, October 19, 1911.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of October 9th wherein you state:

> "The legislature at its last session passed an act providing for a levy of one-tenth of one mill for the use of agricultural societies. I wish to inquire whether or not in your opinion it is mandatory upon the county commissioners to make such a levy on the request of the county agricultural society. Of course, the levy made is subject to the limitation therein provided that the amount produced therefrom shall not exceed in any one year the sum of $1,500.00."

Section 9894 of the General Code, as amended May 10, 1911, reads as follows:

> "When a county or a county agricultural society owns or holds under lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners *shall* on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in

the general fund not otherwise appropriated, in anticipation of such levy."

Section 9894, previous to the amendment of May 10, 1911, read as follows:

"When a county owns real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of the lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners *may* annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society; upon an order from the county auditor duly issued therefor. Prior to the levy of any such tax, if they determine it to be for the best interest of the county and society, such commissioners may pay out of the treasury any sum from money in the general fund not otherwise appropriated in anticipation of such levy."

Section 9887 of the General Code provides when the county commissioners *may* assist the agricultural societies, providing that they may do so "if they think it for the interests of the county and society."

Section 9895 provides when the county commissioners *may* purchase ground and that "the commissioners may levy a tax upon all the taxable property of the county, the amount of which they shall fix, * * *."

These kindred sections appertaining to the same subject are of assistance in determining your question. As stated in Lewis' Sutherland Statutory Construction, section 640, the words "may" and "shall" are to be taken in the ordinary and usual sense, unless the sense and intent of the statute require one to be substituted for the other. (Citing 184 Ill., 59). And again the same authority at page 1155 says:

"The word 'shall' in its ordinary sense is imperative."

And again:

"When the word 'shall' is used in a statute, and a right or benefit to any one depends upon giving it an imperative construction, then that word is to be regarded as peremptory." (Boyer vs. Onion, 108 Ill. App., 612.)

The amendment of section 9894 by the last legislature grants more liberal terms to county agricultural societies that come within the act. The old sections merely permitted aid to be given to such societies; they provided the commissioners *may* purchase or aid in purchasing ground. The amended act states that under certain circumstances the commissioners *shall* levy a tax.

The sole object and purpose of county assistance to agricultural societies is for the express purpose of encouraging agriculture. Heretofore it was optional for county commissioners to grant this assistance and the only purpose of the amendment of section 9894 was to extend the list of societies to whom assistance should be given, to limit the maximum amount of such assistance, and make it mandatory upon the commissioners to make the levy, providing the agricultural societies come within the purview of the statutes. Nor could it be that the legislature intended that the agricultural societies should fix the amount that was to be levied upon their request. Their only function in the

matter is to make the request and then it is within the authority of the commissioners to determine the amount of the levy that would be made to raise the fund required so long as it did not exceed the limitation the law provides. I take it that it is fairly inferable from the section that if the societies make such representations as would be deemed proper, showing the necessity for a certain amount of money, the commissioners then should determine how much, in their judgment, will be necessary, keeping within the limitation provided, and then it becomes the duty of the commissioners to raise the amount so determined. Of course this section must be read in the light of the amended tax laws, and now instead of a direct levy, it becomes the duty of the county commissioners to take care of the amount decided to be raised for the purpose in their annual budget, as provided by section 5649-3*a*. and the amount determined and certified by the commissioners is subject to reduction by the budget commission.

I am, therefore, of the opinion that the county commissioners, on request of the agricultural societies, determine the amount of money to be raised for the purpose expressed in section 9894 of the General Code, always keeping within the limitation of the law; that the agricultural societies have no right to determine the amount to be levied; that subject to their discretion in the matter of the amount to be named, it is mandatory on the county commissioners to provide the funds when a request for that purpose has been first made by the proper agricultural society.

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

434.

BOARD OF EDUCATION — TRANSPORTATION OF PUPILS AFTER CENTRALIZATION OF SCHOOLS.

When the schools of a township school district are centralized, the board of education must provide a conveyance for all pupils residing at a greater distance than a mile and a half from the school.

Transportation of pupils residing within the distance of a mile and a half is entirely optional with the school board.

COLUMBUS, OHIO, October 23, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I am in receipt of your communication of August 11th, and I desire to say that the delay in replying to your inquiry has been due entirely to the large number of requests for opinions which this department has received. In your inquiry you say:

> "At the request of the board of education for Townsend township school district, I submit the following for your inquiry:
>
> "Upon November 8, 1910, the question of centralization of the schools in that township was submitted to the electors and the question was carried as provided in sections 4726-4727 of the General Code. Prior to the time of this centralization, a high school had been maintained, and a high school building erected in the village of Collins, which is practically in the central part of this township, and subdis-

trict No. 1 which had been formed, and consisted of quite a large proportion of the whole township school district.

"Some parts of subdistrict No. 1 are at a distance greater than a mile and a half from this school building, and since the centralization all of the schools of the township are conducted at Collins, Ohio, at the place of this high school building.

"The question, or rather the questions, we desire your opinion upon are with reference to the transportation of pupils who, prior to the time of the centralization, resided within the limits of subdistrict No. 1, and who, if that subdistrict has not been eliminated by the centralization, are still within its limits.

"First, is the board of education for Townsend township school district required to convey and to provide for conveying any of the pupils living within the limits of this subdistrict? Second, if your opinion is in the affirmative, what distance must a pupil residing within the old subdistrict No. 1 live from the school building to compel the school board to provide him transportation and conveyance to the buildings at Collins, Ohio—in other words, when a township is centralized, what are the limits beyond which the board must provide a conveyance?"

In reply to your questions I beg to state that section 7730 of the General Code provides as follows:

"The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No subdistrict school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast therefor were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

Section 7731 of the General Code provides:

"No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Therefore, by virtue of the provisions of the above cited sections, the board of education of Townsend township is not required to provide transportation

for pupils living less than one and one-half miles by the most direct public highway from the school house, and whether or not the board of education shall furnish transportation to such pupils living less than one and one-half miles by the most direct public highway from the school house is entirely within the option of the board of education.

I am further of the opinion that all pupils of Townsend township living more than one and one-half miles from the school house by the most direct public highway can require the board of education to furnish transportation for them, and it follows, therefore, that if any of the pupils living in said subdivision No. 1, of which you speak in your inquiry, living more than one and one-half miles from the school house by the most direct public highway, then the board of education is legally required by statute, to-wit, section 7732 of the General Code, to furnish transportation for such pupils to the school house, for the reason that said section 7732 of the General Code provides that the *board must provide for the conveyance of pupils residing in such subdistrict or subdistricts to a public school in the township.* However, on the other hand, as stated above, in section 7731 of the General Code, it is clearly optional with the board of education as to whether or not it will provide transportation for pupils living within a mile and one-half of the school house by the most direct public highway.

I believe I have fully answered both of your inquiries, and beg to remain,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

436.

CORRUPT PRACTICES ACT — ELECTION — EXPENSE OF EMPLOYING VEHICLES FOR CONVEYANCE OF VOTERS TO POLLS PROHIBITED— INFIRM VOTERS.

As the expense of using vehicles for the purpose of hauling voters to the polls is not included in the corrupt practices act within the authorized list of lawful expenditures, such expense may not be incurred by political committees. This prohibition, however, does not extend to the conveyance of feeble or infirm voters when the object is purely to enable him to cast a free and unbiased vote.

COLUMBUS, OHIO, October 25, 1911.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of the 21st inst., wherein you state:

> "Have the political committee, city and county, any authority to hire carriages, wagons or other conveyance to transport the voters to the polls on election day? A strict construction of the statute, as I read it, absolutely prohibits and prescribes against it, as I read the law. This seems to be a little drastic. There arises many a time that a voter mentally vigorous, but physically infirm, wants to vote but can't reach the polls without aid, and yet if the committee furnished him transportation to the polls they would violate this statute, and incur its penalty."

While you are perfectly familiar with the provisions of the so-called cor-

rupt practice act enacted by the last legislature, found in 102 Ohio Laws, 321-332, attention is called to section 26 of that act, which reads as follows:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value:
>
> "Rents of halls and compensation of speakers, music and fireworks for public meetings, and expenses of advertising the same, together with the usual expenses incident thereto;
>
> "The preparation, printing and publication of posters, lithographs, banners, notices and literary material, the compensation of agents to supervise and prepare articles and advertisements in the newspapers, to examine questions of public interest bearing on the election, and the report on the same; the pay of newspapers for advertisements, pictures, reading matter and additional circulation, the preparation and circulation of letters, pamphlets and literature bearing on the election;
>
> "Rents of offices and club rooms, compensation of such clerks and agent as shall be required to manage the necessary and reasonable business of the election and of attorneys at law for actual legal services rendered in connection with the election; the preparation of lists of voters and payment of necessary personal expenses by a candidate; the rasonable traveling expenses of the committeemen, agents, clerks and speakers; postage, express, telegrams and telephones; the expenses of preparing, circulating and filing petitions for nomination. No party organization or candidate shall compensate or hire in any one election precinct more than one person to prepare lists of voters. Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, whose names shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisors of elections, at least two (2) days before such registration or election day, and who may be paid for their services by such committee or candidate not in excess of five ($5.00) dollars per day each.
>
> "Any payment, contribution or expenditure or agreement or offer to pay, contribute or expend any money or thing of value for any purpose whatsoever except as herein provided is hereby declared to be corrupt practice and invalidates the election of any person guilty thereof."

Now the object of this act is to bring into the limelight and before the public eye the amount and character of campaign contributions and expenses; to prevent by such publicity the use of campaign funds for improper purposes; to enumerate the matters and things constituting proper items of election expense, and in case of improper expenditure to render easy the conviction of the offender.

Keeping in mind the object of the statute it should receive the fair construction to which it is entitled. The object of the law should not be defeated by either fine technical distinction, or a loose liberal interpretation, nor yet, if possible, should the statute be so construed as to unreasonably hamper and embarrass the proper conduct of political campaigns.

It must be admitted, and I think all fair-minded citizens must sorrowfully concede, that in this later day political corruption has run rampant in our political system. It did not need the "muck-rake" exaggeration to call to mind the fact that the body politic had become debauched. In the various commonwealths instances of flagrant fraud cropped out at each election. Awakening to this undermining of the freedom and liberty of the people the legislatures of the different states were compelled to enact laws to protect their citizenship, and to mete out just punishment to those who, imbued with criminal selfishness, had polluted the very fountain head of civic liberty, to-wit: the electorate. And, mayhap, in the endeavor to immediately work a betterment, and also because so callous had become the public conscience, many things had become a matter of course in political campaigns, the laws adopted by the various legislatures may seem drastic and harsh, and in individual instances occasionally may work a hardship. The recompense will come in the prevention of fraud and the greater benefit to the common good.

To my mind the general assembly intended in section 26 of the corrupt practice act to enumerate all the *matters and services* in connection with or in respect to an election for which compensation could be made or promised. The list is exhaustive and exclusive.

If the item is not found in that section, either expressed or fairly implied, then in the langauge of the section: "Any payment, contribution or expenditure or agreement or offer to pay, contribute or expend any money or thing of value for any purpose whatsoever except as herein provided is hereby declared to be corrupt practice and invalidates the election of any person guilty thereof."

A careful examination of section 26 does not disclose any authorization to hire conveyances to transport a voter to the polls on election day. I know that such has been a time-honored custom, and so general was the practice that no inference attached that it was done to influence the voter, yet certainly if the practice was within the knowledge of anybody it must have been known to the members of the legislature, and they did not see fit to include that as an item of charge in the permitted matters and services set forth in section 26 of the law.

As you state it frequently arises that a voter mentally vigorous but physically infirm must be aided or transported to the polls. I think that no worthy citizen possessing mental vigor need be deprived of the right to vote by reason of lack of transportation. Under the corrupt practices act it seems to me that there is no objection to any man taking a voter of this kind to the polls either upon request of such man or upon the voluntary act of the party affording the transportation. It should appear, however, in fact, and not in form, that such voter is being assisted to the polls without any motive other than to enable him to enjoy his privileges as a citizen. If the transportation is afforded by any one because of a desire to procure a vote for either party or for any question as distinguished from any other party or any other question, the affording of the transportation would amount to a contribution. A vigorous upholding of the principles of the corrupt practices act will leave easy the solution of the question of taking to the polls worthy citizens whose desire to go and vote are pure and patriotic.

In short, the question whether one in that respect violates the law is one of fact. The presumption is against one who hauls another to the party polls under circumstances indicating improper motive.

I am decidedly of the opinion that it is contrary to the law for committees, either directly or indirectly, to use vehicles for the purpose of hauling voters to the polls, and that no one may make any payment, contribution or expendi-

ture, or make an agreement or offer to pay or contribute or expend any money or thing of value for any purpose whatever except as expressly provided in section 26 of the corrupt practices act, and that this law should be vigorously enforced, and that its enforcement will be one of the greatest blessings of modern legislation. And further that a rigid adherence to it in every county in this state will result in such purification of public life as to make easy the interpretation of statutes in relation to elections.

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

B 438.

EXPENSES OF PROSECUTING ATTORNEY—HIRING OF DETECTIVE FOR SINGLE CASE.

If, in the discretion of the prosecuting attorney, the hiring of a detective for services in a particular case would be a need for "furtherance of justice," such expense may be incurred by him and paid from the allowance permitted for his expenses in section 3004, General Code.

COLUMBUS, OHIO, October 26, 1911.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—In your letter of October 20, 1911, you ask whether the expense of hiring a detective for a temporary period in a single case is considered as a legitimate expense of the prosecuting attorney in the performance of his official duties and in the furtherance of justice; and can be paid under the allowance made to the prosecuting attorney by virtue of section 3004 of the General Code.

Section 3004 of the General Code was amended by an act passed April 11, 1911 (102 O. L., 74), and is as follows:

> "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.
>
> "Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.
>
> "The prosecuting attorney shall annually before the first Monday

of January, file with the county auditor an itemized statement duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

This fund, as will be seen from the wording of the act, is to be used to pay "for expenses which may be incurred by him (the prosecuting attorney) in the performance of his official duties and in the furtherance of justice not otherwise provided for." There is no test provided by this section by which to determine what may or what may not be an expenditure in the furtherance of justice. The act puts the fund entirely under the control of the prosecuting attorney and, therefore, in my opinion, its expenditure is discretionary with him, provided always that such discretion is exercised in good faith; and if, in the judgment of the prosecuting attorney, the hiring of a detective for a temporary period in a single case would be in the furtherance of justice, then it is my opinion that the compensation of such detective could be paid out of this fund.

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

B 440.

CORRUPT PRACTICES ACT—DELEGATE TO CONSTITUTIONAL CONVENTION—COMMITTEES—EXPENSE OF CONVEYING VOTERS TO POLLS—ELECTIONS.

A delegate to the constitutional convention is included within the restrictions of the corrupt practices act.

A candidate for that office may have one representative in each precinct on election day.

The powers and limitations of committees promoting such a candidacy are the same as those of committees of political parties.

Such candidate may not hire conveyances to transport voters to the polls.

The money contributed by such candidate to a committee, must be added to what he gives for other purposes and the total amount so expended governed by the limitations of the corrupt practices act.

COLUMBUS, OHIO, October 30, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Answering your inquiry of Saturday, over the telephone, first, in reference to the following question:

"Does the corrupt practices act refer to a delegate to the constitutional convention?"

will say that it does. You will note in section 1 of the act the following:

"The term 'committee' or 'organization' as hereinafter used shall include every committee or combination of two or more persons co-

operating to aid or promote the success or defeat of a political party or principle, or of any proposition submitted to vote at any election, or to aid or take part in the election or defeat of any candidate for public office; * * *"

Note also the following from section 2 of the act:

"Every candidate who is voted for at any election or primary election held within this state, and every person, committee or association of persons incorporated or unincorporated, who may have contributed, promised, received or expended directly or indirectly, any money or thing of value in connection with such election, shall within ten days after such election file, as hereinafter provided, an itemized statement showing in detail all the moneys or things of value, etc."

Perhaps you have in mind the exception in section 1:

"But nothing herein contained shall apply to or in respect of any committee or organization for the discussion or advancement of political or economic questions."

Without taking time to discuss this, it in no way refers to delegates to the constitutional convention.

"2. How many workers may he have in a precinct?"

Answer—One representative in each precinct upon election day. (See section 26 of the corrupt practices act.)

"3. How much money may he order the committees to spend?"

As to the privileges of committees referred to in section 8 of the act creating the constitutional convention, the powers and limitations of the committees are the same as committees of political parties.

"4. Can a delegate to the constitutional convention hire conveyances to convey voters to the polls?"

Answer—No.

"5. Should the money spent by a candidate and that spent by the committees be added to make the limit?"

This question does not permit of a direct answer. The total amount to be expended by a candidate is to be measured by what he gives to the committees in connection with what he gives to others. If he spends the full amount provided by statute in the way of contributions to a candidate that is the end of his expenditures.

Your sixth question, "Can any man unknown to the candidate?" is one which you can see I have not received. Please, therefore, renew this question in writing, and I will take pleasure in answering you by return mail.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 447

COMPENSATION TO MEMBER OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS FOR SERVICES IN CONDUCTING A PRIMARY —ALLOWANCE FOR PART PERFORMANCE TO MEMBER WHO RESIGNS.

Section 4990, General Code, provides for additional compensation to members of the board of deputy state supervisors of elections for services in conducting a primary and where a member has performed services in this connection and resigned before their completion, the compensation authorized for such services should be apportioned between the party resigning and his successor.

COLUMBUS, OHIO, November 2, 1911.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your letter of recent date received. You state:

> "A member of the board of deputy state supervisors of elections of Wayne county, who was a candidate at the primary election held the third Tuesday of May, 1910, resigned April 25, 1910, and was succeeded by a person who was appointed April 28th of the same year, and which successor drew the compensation of $100 for his services in conducting the primary, shortly after the primary, there being fifty precincts in this county. The person who was a candidate and who had resigned April 25th insists that he is entitled to a part of such compensation,"

and inquire whether such member of your board of elections, who resigned April 25, 1910, under the foregoing state of facts, is entitled to a part of the compensation provided for by section 4990, General Code.

Section 4990, General Code, provides for the compensation of election officers in conducting primaries, and is as follows:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

You do not state sufficient facts for me to determine whether the member who resigned April 25, 1910, is entitled to a part of the compensation provided for in said section 4990. If he, as a matter of fact, before resigning, and before becoming a candidate at the primary, performed some services in connection with the primary, he would, as a matter of law, be entitled to a portion of the compensation provided for such services in said section 4990, General Code.

The compensation of the members of the board of deputy state supervisors of elections, prior to the enactment of the primary law, was provided for in section 2966-4, Revised Statutes, which was codified under section 4822, General Code. The enactment of the primary law added to their duties and in addition

to the regular salary provided for in said section of the Revised Statutes they were allowed for *their services in conducting a primary* two dollars for each election precinct in their respective counties. So that if one member of the board of deputy state supervisors of elections performs part of the work in conducting a primary and resigns, his successor completing the work, they should, as a matter of justice and law, equitably divide the compensation.

Not knowing whether the member who resigned actually performed any services in connection with the primary, I am unable to say whether he is entitled to a part of the compensation provided for such services; but you will have no trouble in determining the question in accordance with the principles laid down above, after you have determined the facts.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

450

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATIONS APPLIED TO BOND ISSUES FOR PIKE ROAD IMPROVEMENTS BY TOWNSHIP TRUSTEES—PREMIUM AND ACCRUED INTEREST ON BONDS—TRANSFER TO SINKING FUND BY CONSENT OF COURT.

There is no statutory direction as to whether the township trustees can take the premium and accrued interest from the sale of bonds for the purpose of piking of the roads and place the same to the credit of the sinking fund for the redemption of the bonds and interest, or whether such premium and accrued interest should be credited to the funds for the purpose for which the bonds were sold.

It is recommended, therefore, to proceed under sections 2296-2302, *General Code, to obtain authority of the court to transfer to the sinking fund.*

Though bonds levied for the purpose aforesaid are within the limitations of the Smith law, the holders of these bonds may compel the making of such levies as are pledged for their retirement, and therefore the budget commissioners must make the necessary reductions upon the amounts to be levied for other township, county, municipal or educational purposes.

COLUMBUS, OHIO, November 3, 1911.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 25th requesting my opinion upon the following questions:

> "First. Can township trustees take the premium and accrued interest received from the sale of bonds for the piking of roads under sections 6976 to 7019, G. C., and place the same to the credit of the sinking fund for the redemption of the bonds and interest?
>
> "Second. The second question that I wish to ask is this: The township trustees of Plymouth, Richland county, Ohio, have practically sold $16,000 of pike or road improvement bonds, and the question is as to the legality of the issuance, and under the particular questions which you will find below.
>
> "These $16,000 bonds are divided into thirty-two bonds of $500 each—the first bond being due September 1, 1913, the second, Septem-

ber 1, 1915; then a bond for $500 for each year thereafter up until September 1, 1938, when there are four bonds due, and on September 1, 1939, there are five bonds due. The premium upon these bonds amounts in round numbers to $1,600. If the premium is allowed to go to the sinking fund, then there will be sufficient revenue (and also to keep within the limitations of the Smith law) to pay the interest for 1912; and at the present apportionment of the entire township levy by the township trustees, there will not be sufficient revenue to pay the bond and interest for 1913.

'The question is, would the fact that in order to meet the bond and interest for 1913, and for the subsequent years, and to keep within the requirements of the Smith act, the trustees have to change the amount they have been levying for repairs to roads, ditches, etc., and add the same to sinking fund, affect the legality of the bonds? In other words, would the fact that the trustees would be required to scale down the other funds and add the amount of reduction of those funds to the sinking fund to pay off the bonds and interest, would that in any way affect the legality of the issuance of the bonds?

"Also, the would-be purchaser asks what, if any, remedy would there be to the bondholder on refusal or failure to scale down the other needs of the township sufficient to care for the maturing bonds and interest?

"What, if any, limit is there to the extent to which such scaling down may be practiced?"

Section 7005, General Code, provides simply that,

"Such bonds shall not be sold for less than their par value, and accrued interest."

There is no provision, as you point out, such as that in section 3932, which requires a transfer by a municipality to its sinking fund of premiums and accrued interest from the sale of its bonds

I know of no reason, however, why this may not be done by the township trustees under the sections to which you refer, especially if the principal sum of the amount borrowed is sufficient for all purposes for which it was borrowed. Possibly, however, it would be best to insure regularity by proceeding under sections 2296 to 2302, General Code, inclusive, to obtain authority of court to make such transfers. These sections provide in general for a special action on the part of township trustees as well as other officers to obtain authority to transfer funds under their supervision.

In this connection permit me to point out as to boards of county commissioners and boards of education the premiums and accrued interest derived from the sale of bonds for any purpose belong to the fund on account of which the bonds are issued and sold. This is by virtue of section 3295, General Code, and is, of course, the reverse of the rule with respect to municipal corporations. Seemingly, then, county commissioners and boards of education are *commanded* by the statute to treat the premiums and accrued interest in one way, municipal corporations are *required* to treat such moneys in the opposite, and township trustees are not guided by any statute as to how they shall treat such funds. The case is then apparently one for advice of the court under the sections above referred to.

Answering your second question I beg to state that in my opinion you are correct in your conclusion that the Smith law limitations include levies for the

purpose of paying the interest and retiring the principal of bonds issued under section 7005, General Code. However, I know of no reason why this ought to affect the legality of the bonds in the first instance. Instead sinking fund levies are preferred levies, and it is well settled by an unvarying line of authorities that the holders of bonds may compel the making of such levies as are pledged for the retirement of such bonds and the payment of interest thereon so long as the making of such levies will not of itself cause limitations on levies which may be made by the taxing authorities in a given district to be exceeded.

In the case you submit it is, of course, clear that the making of this interest and sinking fund levy, though within the limitations of the Smith law, will not of itself cause those limitations to be exceeded. The budget commission must merely reduce, as you yourself suggest, the amounts to be levied for other township, county, municipal or educational purposes. There is no limit to the extent to which the budget commission may reduce the amounts asked for by the township trustees or other officers levying within a given taxing district for the purpose for which they are required to levy taxes.

The supreme court has held in the case of State ex rel. v. Sanzenbacher, recently decided, that the action of the budget commission must be with due regard to the amounts asked for and the needs of the respective subdivisions. The supreme court thus admonishes the budget commission to be impartial in the exercise of its powers, but it does not thereby indicate that the budget commission may not reduce ordinary levies to the very minimum, if necessary, in order to discharge indebtedness. This the commission may be compelled to do, as I have already stated, by the purchaser of bonds who is entitled to have the levy necessary to discharge the obligation of his contract made each year in preference to all other levies, though within a common limitation. The remedy would properly be to compel the township trustees to ask for, and the budget commission to grant a levy sufficient in amount to provide for the interest and sinking fund purposes of the township for the current year.

In this connection I beg to call attention also to the provisions of law which authorize a re-funding of bonded indebtedness which from its limits of taxation a county or township is unable to pay at maturity. See sections 5656, 5657, etc., General Code. These sections may enable the township so to distribute its indebtedness as to escape embarrassment by reason of the operation of the Smith law.

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

453

COMPENSATION OF TOWNSHIP TREASURER FOR DISTRIBUTION OF FUNDS RAISED FOR ROAD IMPROVEMENTS.

For the distribution of all moneys, raised by virtue of the provisions of sections 6976-7018, *General Code, providing for taxation and bond issues for road improvements, whether it be of the moneys received by the sale of the bonds and distributed to the contractor, or whether it be funds raised by taxation and distributed to bond holders, the treasurer is entitled to the payment provided for by section* 7015, *General Code, and no other compensation for such service can be allowed him.*

COLUMBUS, OHIO, November 4, 1911.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney of Richland County, Mansfield, Ohio.*

DEAR SIR:—Your favor of July 15, 1911, is received, in which you ask an opinion of this department upon the following:

> "Request has been made of me for an opinion by the trustees, clerk and treasurer of Sharon township, this county, whether the township treasurer is entitled to a per cent. on money raised by taxation for the purpose of paying interest and redeeming bonds issued in previous years for road improvement under the provisions of General Code, sections 6976 to 7018, inclusive.
>
> "The treasurer in office at the time the proceeds of the particular bond issue were received took his commission of one-half of one per cent. (½ of 1%), etc., as provided by section 7015."

Section 3318, General Code, provides for the compensation of a township treasurer as follows:

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

Section 7004, General Code, provides for the issuing of bonds to pay the expenses of improving certain township roads, as follows:

> "For the purpose of providing the money necessary to meet the expenses of improving such roads and streets the trustees of a township, if advisable in their opinion, may issue the bonds of the township, payable at such times as they determine, not exceeding thirty years, in the sum of five hundred dollars each, bearing interest at a rate not to exceed five per cent. per annum, payable semi-annually."

Section 7006, General Code, provides for the levy of a tax to meet such bonds when issued:

> "When the trustees of such township have determined to improve a road, as herein provided, in order to provide for the payment of such improvement and to provide a fund for the redemption of bonds issued by them under the provisions of the next two preceding sections, with interest thereon, in addition to the other road taxes authorized by law, they shall levy annually upon each dollar of valuation of all taxable property of such township an amount not exceeding six mills upon each dollar of such valuation, and shall continue such levy from year to year until the roads and streets, by said commissioners designated for improvement, have been improved, as herein provided, and the bonds issued for that purpose, with interest thereon, have been paid."

Section 7015, General Code, prescribes the duties of a township treasurer in reference to the money raised under this subdivision, and his compensation for such services, as follows:

"The treasurer of such township shall receive and disburse all money arising from the provisions of this subdivision of this chapter. *He shall receive as compensation therefor one-half of one per cent. of the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall not receive other compensation for services rendered under such subdivision.*"

In the case in question it appears that money was raised by the sale of bonds to meet the expense of the improvements of the roads. A fund is being provided by taxation to meet and pay these bonds. The money raised by the sale of the bonds was distributed in the first instance to the contractors or persons engaged in making the improvements.

The money raised by taxation from year to year to pay off the bonds as they mature with interest thereon, is distributed to the bondholders when due them.

Section 7015, General Code, makes it the duty of the township treasurer to receive and disburse all moneys arising from the provisions of this subdivision, whether secured by the issue of bonds or by taxation. The money raised on the sale of bonds and distributed to the contractors, as well as the money raised by taxation and distributed to the bondholders is money received and distributed by virtue of that subdivision.

The compensation of the treasurer is based upon the amount distributed by him. It might occur that the same treasurer would receive and distribute the money secured upon the sale of bonds and also the money raised by taxation to redeem the bonds.

The bonds, however, may run as long as thirty years and different treasurers be required to handle the money. If compensation were allowed upon the money raised by the sale of the bonds and not upon the money secured by taxation to meet such bonds, the first treasurer would receive compensation for work which was to be partly performed by his successor, or successors.

The compensation of the treasurer of the township is based upon the amount distributed by him. The moneys raised upon the bonds and the money secured by taxation are each distributed, there are two separate distributions.

Section 7015, General Code, provides that the treasurer shall receive no other compensation for such services than therein provided. This provision of the statute prevents him from drawing the compensation provided in section 3318, General Code.

It is my conclusion that the township treasurer is entitled to compensation upon all moneys raised by virtue of the provisions of sections 6976 to 7018, inclusive, of the General Code, and distributed by such township treasurer, whether said money is raised by the sale of bonds or by taxation. His rate of compensation for such services is fixed by section 7015, General Code, and is based upon the amount actually distributed by him. Money placed in a bank or depository and money paid to a successor in office would not be money distributed by him.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

455

PUBLICATION OF REPORT OF EXAMINERS OF COUNTY TREASURER—NEWSPAPERS—GERMAN NEWSPAPER.

As section 2703, General Code, providing for the publication of the report of the examiners of the county treasury is a special statute, its provisions must be allowed to control.

Such reports must, therefore, be published in two English newspapers of general circulation in the county and of opposite politics.

Section 6253, General Code, providing for publication of advertisements of general interest to taxpayers in a German newspaper being a general statute, has no application.

COLUMBUS, OHIO, November 4, 1911.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney of Defiance County, Defiance, Ohio.*

DEAR SIR:—Your favor of October 2, 1911, is received, in which you ask an opinion of this department upon the following:

> "Should the report of the examination of the county treasury, provided for by section 2703 of the General Code, be published in a German newspaper having the qualifications provided for in sections 6252 and 6253 of the General Code?"

Section 2703, General Code, provides as follows:

> "The accountants shall certify in writing, in triplicate, the exact amount of money in the treasury, the amount belonging to each fund, and all property, bonds, securities, vouchers, assets and effects, one copy of which shall be recorded in the books of the treasury and filed by the treasurer in his office, one shall be recorded and filed by the auditor of the county, and one shall be delivered to the probate court and entered on record therein. *The probate court shall furnish a copy of such record for publication one week in two newspapers of opposite politics of general circulation in the county.*"

Section 6252, General Code, authorizes the publication of certain notices and matters of general interest to taxpayers, as follows:

> "A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and *such other advertisements of general interest to the taxpayers* as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

Section 6253, General Code, provides for the publication of such notices and matters of general interest in a German newspaper as follows:

"In addition to the publication provided in the next preceding section, the county officers therein named shall publish such notices and advertisements in a newspaper printed in the German language, if such newspaper be printed and of general circulation among the inhabitants speaking that language in the county within which such advertisements are intended to be made."

The publication of the report of the county treasury is not specifically authorized by sections 6252 and 6253, General Code, and the question arises, Is such report included in the clause providing for the publication of advertisements of general interest to the taxpayers?

Section 2703, General Code, authorizes the publication of the examination of the county treasury in two newspapers of opposite politics of general circulation in the county. Nothing is said about publication in a German newspaper.

That this provision means newspapers printed in the English language is decided in case of Cincinnati v. Bickett, 26 O. S., 49, the third syllabus of which decision reads:

"Where a statute of the state requires a publication to be made in a 'newspaper,' in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language is not a compliance with the statute."

As there is a special statute governing the publication of the report of the examination of the county treasury, such publication is governed solely by such special statute and the general statute cannot apply.

This proposition is decided in case of Schloenbach v. State, 53 O. S., 345, the third syllabus of which is as follows:

"The law does not authorize county commissioners to publish the annual report required to be made to the court of common pleas in a German newspaper."

On page 346, the court says:

"* * * * The duty of the commissioners in regard to the publishing of their report is governed wholly by section 917 of the Revised Statutes, and that section does not afford authority for either ordering such report published in a German newspaper, or paying for the same. See Cincinnati v. Bickett, 26 Ohio St., 49."

In order to determine just what is decided by the above case it is necessary to ascertain the provisions of the statutes as they existed in 1892, the year in which the question arose that was therein passed upon.

In 1892, section 917, Revised Statutes (section 2511, General Code), provided as follows in reference to the publication of the report of the commissioners:

"* * * * And it shall be the duty of said commissioners, immediately thereafter, to cause said statement, together with said report of said examiners, to be published in a compact form for one week in two weekly newspapers of different political parties, printed in the

county, if there are two such papers there published, if not, then a publication in one paper only shall be required." (73 Ohio Laws, 141-142.)

At that time this section did not contain any provision for German publication.

In 1892, sections 6252 and 6253, General Code, were substantially as they now are. See 73 Ohio Laws, page 75.

The principle decided and applied in 53 Ohio State, 345, supra, is that when there is a special statute providing for the publication of reports or notices such publications are to be governed wholly by the provisions of such special statute and the general statute cannot apply.

Section 2703, General Code, is a special statute providing for the publication of the report of the examiners of the county treasury in two newspapers of opposite politics. Such publication is to be made in two English newspapers. There is no provision in this section for the publication of such notice in a German newspaper and publication in such a newspaper is unauthorized.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

457

INTOXICATING LIQUORS—MUNICIPAL AND COUNTY "WET" AND "DRY" ELECTION—BEAL AND ROSE LAWS CONSTRUED—COUNTY "WET" ELECTION HAS NO EFFECT ON "DRY" MUNICIPALITY.

When a municipality has voted "dry" under the Beal law, it remains dry until a resubmission of the question under the same law results in a "wet" majority.

The fact that such municipality subsequently casts a majority "wet" vote in a county local option election which results in a "wet" majority does not result in the permission of the sale of intoxicating liquors in said municipality.

COLUMBUS, OHIO, November 8, 1911.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 27th, containing the folowing inquiry:

"Six years ago a municipal corporation of the county at an election held under the provision of the Beal law voted to prohibit the sale of intoxicating liquors. In October, 1908, a county local option election was held in the county in which this municipality is located, and in this election it was voted to prohibit the sale of intoxicating liquors within the county, the said municipality giving a dry majority.

"Query: If in 1911, after the expiration of the three years' time specified in the Rose law, this same county at an election under the Rose law gives a majority permitting the sale of intoxicating liquor—said municipality giving a wet majority—will it be lawful to sell intoxicating liquor in the said municipality regardless of the result of the election under the Beal law six years ago, or will it be necessary after the county local option election is held to call another election in this municipality under the Beal law?"

Section 6131, General Code, provides:

> "If a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election, no person, personally or by agent, within the limits of such municipal corporation shall sell, furnish or give away any intoxicating liquors to be used as a beverage, or keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

So it appears that when an election has resulted in a majority of the votes cast being in favor of the prohibition of the sale of intoxicating liquors the above section obtains until an election is held under the provisions of section 6136, which permits a resubmission of the question after two years, resulting in a majority of the votes cast being against the prohibition of the sale of intoxicating liquors, or until the statute is repealed.

Sections 6108 to 6118, General Code, provide for local option elections in counties and are the codification of the so-called Rose law. Section 6112 provides that:

> "If a majority of the votes cast at such election are in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election it shall be unlawful for any person, personally or by agent, within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

It follows, therefore, that since an election was held in your county in October, 1908, resulting in a majority of the votes cast being in favor of the prohibition of the sale of intoxicating liquors that condition would remain until your county should resubmit the question, as provided in section 6115, and vote against the prohibition of such sale.

Section 6116 provides:

> "The foregoing sections of this subdivision of this chapter shall not affect, amend, repeal or alter in any way any other law or ordinance which prohibits throughout a municipality, township or residence district the selling, furnishing or giving away of intoxicating liquor as a beverage or the keeping of a place where intoxicating liquor is sold, furnished or given away as a beverage."

In consequence of this last quoted section, if any municipality, township or residence district of your county had, as popularly termed, "voted dry," that condition would not be changed by the county voting "wet." If you will recall, there were two bills introduced at the last session of the legislature to effect the very thing which you are claiming under the law, to wit: to provide that when there was a vote in a county under the provisions of the Rose law, a separate canvas of the vote cast in each city in such county should be made, and if a majority of the votes cast at such election in the county, including the votes in the city, had been cast in favor of the prohibition of the sale of intoxicating liquor, and a majority of the votes cast in any city had been against such prohibition, in that event, it should not be unlawful within the limits of

said city, under the provisions of sections 6110 to 6112, General Code, to sell, etc., intoxicating liquors, to be used as a beverage, etc. I refer to Mr. Fulton's House bill No. 494 and Mr. Dean's Senate bill No. 204; these bills failed to be enacted into law.

I am therefore of the opinion that even though your county should vote "wet" under the Rose law, since the municipality is "dry" under the Beal law, it would require another Beal law election at which a majority of the votes should be cast against the prohibition of the sale for the municipality to become "wet."

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

A 457

ROAD DISTRICTS—TERMINATION ONLY BY LEGISLATIVE ACT—TERM OF OFFICE AND MANNER OF APPOINTMENT OF ROAD COMMISSIONERS.

The legislature has not provided a means by which a road district, when once established, may be dissolved or terminated, and neither the failure to reappoint road commissioners nor the non-user of powers granted to the commissioners will cause a termination of such district.

The statute provides but one means of appointing the road commissioners and that is to be exercised by the commissioners only after nomination of appointees by the township trustees. The trustees may be compelled to make such nomination by mandamus, but their discretion as to choice cannot be controlled thereby.

The road commissioners hold until their successors are appointed and qualified unless removed by the county commissioners for incompetency or neglect of duty or unless impeached or disfranchised under proper proceedings therefor.

COLUMBUS, OHIO, November 9, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney of Coshocton County, Coshocton, Ohio.*

DEAR SIR:—Under favor of October 3, 1911, you ask an opinion of this department upon the following:

> "In 1907 four of the townships in our county organized a road district under section 7095 et seq., or chapter five of the G. C.
>
> "The terms of said road commissioners are about to expire and I wish to know whether there is any way by means of which such organization can be terminated. Section 7098 of the G. C. says that the commissioners shall hold office for the full term for which they are appointed and until their successors are appointed and qualified.
>
> "I will submit certain questions which will probably assist you in telling what I want.
>
> "First. Is there any way in which such road commission can be terminated?
>
> "Second. Can the commissioners appoint any one other than those nominated by the township trustees?

"Third, If the township trustees refuse to nominate, may the county commisioners appoint, or must they appoint?

"Fourth. If the county is unable to levy any money for the purposes of said road commission, will that terminate the commission?

"Fifth. Is there any way in which the appointment of the road commissioners terminates, other than by the removal of the commissioners by reason of failure to do their duty as provided for in section 7097?

"As a final question, I will submit it in this way: A great many of the taxpayers of the road district are anxious that the good road commission cease to operate and that the townships be the same as they were before they were organized into a good road district."

The law governing the establishment and the organization of a good road district and prescribing the duties of the road commissioners is found in sections 7095 to 7136, inclusive, of the General Code.

It appears that four townships in Coshocton county have established a road district by virtue of these sections and some of the taxpayers desire to discontinue said road district.

The law in question is not self-operative. A road district must be petitioned for, and submitted to the vote of the electors of the townships which are to compose the road district.

Section 7100, General Code, provides:

"No road commissioners shall be appointed until the construction of such road district is petitioned for, to the county commissioners, by at least fifty or more of the resident taxpayers of each of said townships asking for the improvement of the public roads of such townships and the establishment of such road districts."

Section 7103, General Code, provides:

"Within ten days after the road commission is organized, it shall notify the deputy state supervisors of elections of the county of its organization. Thereupon the deputy state supervisors of elections, at a general or special election, shall submit the question of the improvement of the public roads of such road district by general taxation levied upon the property therein, to the qualified electors thereof, including a village or city therein."

Section 7108, General Code, provides:

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

It is evident that the voters of the townships decided to form a road dis-

trict. They thereby put into operation the act of the legislature authorizing and establishing road districts.

The legislature has not provided a means by which a road district once established can be dissolved, or terminated.

The power of the legislature to abolish an office created by it is set forth in Bulger v. Merrill, 45 Cali., 553, as follows:

> "The legislature can abolish or change an office created by it, and it may extend or abridge the terms of its incumbents at pleasure."

The failure to elect or appoint officers does not terminate the municipality or the corporation.

In case of People v. Wren, 5 Ill., 269, the fourth syllabus reads:

> "A public corporation, such as a county or city, does not become dissolved by the neglect of the inhabitants or corporators to elect officers."

In the case of People vs. Niebruegger, 244 Ill., 82, the third and fifth syllabi read:

> "A drainage district, while it is not strictly a municipal corporation, is a public corporation, which can cease to exist only by legislative consent, or pursuant to legislative provision, and mere non-user of its corporate powers for a period of years does not work a dissolution of the district.
>
> "Drainage commissioners duly chosen hold office until their successors are chosen and qualified, and if there is a failure for several years to choose commissioners the county court may, under section 62 of the Levee act, appoint upon petition of land owners of the district."

Neither the failure to appoint road commissioners for a road district once established, nor the non-user of the powers granted to road commissioners, through lack of funds, or from any other cause, will terminate or discontinue an established road district.

While the law creating the road district is put in operation by the act of the voters of such proposed road district, yet the road district is established by act of the legislature, and nothing short of an act of the General Assembly, or an act in pursuance of a power granted by the legislature, can terminate a road district once such road district is established. The abolishing of a road district is a matter of legislative control. As the legislature has not provided a means of dissolving a road district, such road district will remain in existence, although it may not exercise its powers, until the legislature acts.

Your second and third questions are, Can the commissioners appoint any one other than those who are nominated by the township trustees? and, If the township trustees refuse to nominate, may the county commissioners appoint, or must they appoint?

Section 7096, General Code, provides for the appointment of road commissioners, as follows:

> *"The road commissioners shall be appointed by the county commissioners, but shall be nominated by the respective township trustees.* They shall hold their offices during a term of four years and until their successors respectively are appointed and qualified, unless sooner re-

moved for incompetency or neglect of duty by the county commissioners."

Section 7097, General Code, provides for the filling of vacancies and the apointment of successors, as follows:

> "*The county commissioners, in like manner, shall make appointments to fill all vacancies in* the road commission caused by death, removal, resignation or otherwise, of any of its members. The person so appointed shall hold his office for the unexpired term of the member in whose stead he was appointed and until his successor is appointed and qualified, unless sooner removed, for incompetency or neglect of duty, by the county commissioners. *Not less than ten days prior to the expiration of the term of office of a road commissioner, the county commissioners shall appoint a successor in like manner as provided in the next preceding section.*"

The statute provides that the road commissioners shall be appointed by the county commissioners, but shall be nominated by the township trustees. Both the county commissioners and the township trustees must concur in the appointment as prescribed by the statute before such appointment becomes effective or is valid.

The second syllabus in case of People v. Bissell, 49 Cali., 407, is as follows:

> "A person does not become the successor of another in an office filled by the appointment of the governor which requires the confirmation of the senate under section 368 of the Political Code, until his appointment has been thus confirmed."

The rule is laid down in 29 Cyc., page 1372, as follows:

> "Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken."

The first and second syllabi in case of State v. Lea, 20 Ohio Dec., 569, are as follows:

> "Act 99 O. L., 565, known as the Paine law, so far as sections 157 to 165, General Code 4478 to 4488, are concerned, was founded upon a well defined popular belief that the civil service in municipalities throughout the state would become more efficient by competitive examinations open to all, and became operative January 2, 1910.
>
> "Any appointment of directors or officers therein named, made in a way other than that prescribed, is void, and mandamus will lie to compel strict compliance with the provisions of the act."

Appointments to office, to be valid, must be made in the way prescribed by the statute. Where two bodies are required to act in making an appointment to office, both must concur in the manner prescribed.

The county commissioners cannot appoint any persons other than those nominated by the township trustees. This does not mean that they must appoint the one first nominated, or any of those nominated. They have a discretion in their appointment and they may reject all nominees and request others.

The refusal of the township trustees to nominate would constitute a nonperformance of a duty of their office. The performance of this duty could be enforced by mandamus.

In Taylor v. Kolb, 100 Ala., 603, the third syllabus reads:

> "The duties to be performed by the judge of probate, sheriff and clerk, under Code 1886, section 352, requiring them to appoint three inspectors of election, 'two of whom shall be members of opposing political parties, if practicable,' are not purely ministerial, but require judicial judgment and discretion, and consideration of evidence, and therefore mandamus, while it lies to compel them to act, does not lie to control their action."

In case of Ross v. City Council, 136 Iowa, 125, the syllabus reads:

> "Mandamus cannot be resorted to for the purpose of compelling an appointing board to give the statutory preference to a war veteran over other applicants, it can only be invoked to compel the board to exercise its discretion in determining the qualifications of applicants, not for the purpose of controlling that discretion."

In case of State v. Robeson, 15 Ohio Dec., 471, the syllabus is as follows:

> "The act of April 8, 1904 (97 O. L., 86), authorizing the sheriff of any county to appoint not more than three jail matrons, no appointment to be made except upon the approval of the probate judge, confers on such probate judge a discretion which cannot, at least in the absence of gross abuse, be controlled or directed by writ of mandamus."

The township trustees are required to make nominations for road commissioners, and they may be compelled by mandamus to exercise the power of nomination, but their discretion as to the person to be nominated cannot be controlled by mandamus.

Your fourth inquiry is substantially answered in the first part of this opinion. The failure to levy any tax for the purposes of the road commission would not terminate the road district, although such district might not be able to exercise the powers granted it.

Your fifth inquiry is as to the termination of the office of a road commissioner.

Sections 7096 and 7097, General Code, supra, both provide that such road commissioners shall serve until their successors are appointed and qualified, "or unless sooner removed, for incompetency or neglect of duty, by the county commissioners."

These statutes authorize the county commissioners to remove the road commissioners for neglect of duty or incompetency. There is no other provision in the act establishing a road district by which a road commissioner can be removed. A road commissioner may, however, be removed by impeachment or disfranchisement in the same manner as other officers of a like character are impeached or disfranchised.

In the light of the decision of the court in the following cases: State v. Brennon, 49 O. S., 33, State v. Halliday, 61 O. S., 171, and State v. Thrall, 59 O. S., 369, there is some well-founded doubt as to the validity of the sections of the statute creating the road commission because the commissioners may be township officers, and as such require election. However, it is not the duty of the attorney general or the prosecuting attorney to proceed upon the theory that any statute is unconstitutional unless it is manifestly so. Therefore, for the purpose of this opinion the validity of the sections you cite are not assumed to be unconstitutional.

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

461

ROADS, COUNTY AND TOWNSHIP—CONTROL OF TOWNSHIP TRUSTEES AND COUNTY COMMISSIONERS—ROADS ESTABLISHED UPON PETITION OF NEIGHBORING RESIDENTS.

Sections 6956-18 *and* 6956-19, *General Code, place county roads under the supervision and control of the county commissioners and township roads under the control and supervision of the township trustees.*

For the purposes of these sections, roads established by petition to the county commissioners, under sections 6860-6886, *General Code, are county roads, and although the township trustees are required to open the roads under these provisions, they do so only upon the order of the county commissioners.*

COLUMBUS, OHIO, November 11, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson County, Jackson, Ohio.*

DEAR SIR:—Your favor of September 20, 1911, is received, in which you ask an opinion upon the following:

> "I wish you would give me your opinion upon the jurisdiction of county commissioners and township trustees, as to the repair of public ways, since the passage of sections 6956-18 and 6956-19, G. C. of Ohio. (Ohio Laws 101, pages 292-293.)
>
> "It is thought by some officials here that one class of roads which the statutes provide for has not been included in section 6956-18. It is a road which is built by a petition to the county commissioners, and by them allowed, and the townships trustees ordered to open. (Sections 6861-6881.) This opinion is formed by reason of the fact that because this county has a system of turnpikes, the county commissioners have not had any authority to levy a tax for general road purposes, but such duty has been given to the trustees. (Sec. 7455-7456.) The trustees, therefore, because of their duty to keep up the unimproved roads, have, whenever an order was issued to them, as stated above, not only proceeded to open the road by removing the obstructions along the course thereof, but have gone further and built the road. Because of this it is claimed that the county commissioners did not have supervision, and that therefore this road is not among those mentioned in section 6956-18."

The act of which you inquire, found in 101 Ohio Laws, 292, and known as sections 6956-18 and 6956-19 of the General Code, provides:

> "*That the supervision and control of all roads and turnpikes which are known as county roads and were built under supervision of county commissioners either by petition* or under existing laws at time same were built, or roads that were built by turnpike companies and afterward acquired by any county, or any road built under a special act *shall be under the control of the county commissioners, who shall have the power to make levies for repair and maintenance of same;* provided that this section shall not be so construed as to authorize the commissioners to refuse to make a levy for road funds, under the provisions of sections 5635, 5636, 7419, 7420.
>
> "Section 2. The supervision of all roads known as township roads which were built under the direction of township trustees by petition or under existing laws at time same were built shall be under direct control of the township trustees who shall have power to levy for improvement and repair of same.
>
> "Section 3. The officers named in the foregoing section shall exercise their jurisdiction under existing laws over those roads as they now stand. The board of county commissioners and the township trustees may enter into an agreement between said boards whereby they may jointly supervise, repair or maintain any state, county or township road in their respective jurisdictions."

This act places county roads and turnpikes under the supervision and control of the county commissioners, and township roads under the supervision and control of the township trustees. Whether a road is a county road or a township road must be determined from the particular circumstances of each road.

Your inquiry is whether a road established by virtue of section 6860 to 6886, inclusive, of the General Code, is included in the provisions of section 6956-18, supra, placing jurisdiction thereof in the county commissioners.

The title of the chapter in which these statutes are found is "County Roads," and the sub-heading is "Ordinary County Roads."

Section 6861, General Code, provides:

> "*Applications for laying out*, altering, changing the width of, or vacating *a county road shall be by petition to the county commissioners*, signed by at least twelve freeholders of the county residing in the vicinity of the road to be laid out, viewed or reviewed, altered or vacated. One or more of the signers to such petition shall enter into bond with sufficient surety, payable to the state for the use of the county, condition that the persons making such application shall pay into the treasury of the county the amount of all costs and expenses accruing thereon in case the application fails."

Section 6881, General Code, provides:

> "Thenceforth such road shall be a public highway, and *the county commissioners shall issue their order to the trustees of the proper township or townships directing it to be opened.* If the report of the viewers is against such proposed road, or alteration, or if, *in the opinion of the commissioners, it is unnecessary, no further proceedings*

shall be had thereon, and the obligers, in the bond securing the expenses, shall be liable for the full amount of costs and expenses."

The roads established by virtue of these provisions of the statutes are called county roads. They are established by petition to the county commissioners. The county commissioners also have the power to determine whether such road is necessary before ordering its construction. Although the township trustees are required to open the road, they do this upon the order of the county commissioners. Your objection as to the right of the commissioners to levy taxes for general road purposes has no bearing as the act under consideration authorizes the commissioners to levy for repairs.

A road built by virtue of sections 6860 to 6886, inclusive, of the General Code, is a county road, and comes within the provisions of section 6956-18, General Code, conferring supervision and control of such roads upon the county commissioners.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

462

TOWNSHIP TREASURER—LIABILITY FOR LOSS OF TOWNSHIP FUNDS DEPOSITED CONTRARY TO LAW UPON ADVICE OF INSPECTOR FROM STATE ACCOUNTING DEPARTMENT.

When a township treasurer deposits township funds in a manner contrary to the law governing such deposits, he will be liable for any loss ensuing even though he made his deposit in accordance with the direction of an inspector from the state accounting department.

COLUMBUS, OHIO, November 11, 1911.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your favor of November 5th stating that the township treasurer of a certain township, as such treasurer, had money deposited in a certain bank; that a few months ago the bank, which was a private institution, failed; that the money was not deposited with said bank under the depository law. Your further state:

"Since the failure of the bank the township treasurer refuses to honor the orders of the board of trustees and the township is really without any funds by reason of the action of the township treasurer, who was under bond. His defense is that the inspector from the state accounting department ordered him to put the money in the bank shortly before it failed.

"The township trustees would like to have your opinion as to their rights and remedies in the matter. I will be glad to have an early suggestion from your department."

Section 3326 of the General Code is as follows:

"When such depository is provided and the funds are deposited therein as herein directed, the treasurer of the township and his

bondsmen shall be relieved of any liability occasioned by the failure of the bank or banks of deposit or by the failure of the guaranty company acting as surety for such bank or banks, or by the failure of either of them except as herein provided in cases of excessive deposits."

By its terms, when the laws of Ohio relating to township deposits are complied with, the treasurer is relieved from responsibility in case of the failure of a bank or banks in which funds are so deposited. But you state in your letter, definitely, that the deposit in this instance was not made in accordance with the laws of Ohio governing the deposit of township funds, viz: section 3320 et seq., of the General Code. Therefore, section 3317 of the General Code covers this case. This section is as follows:

"The failure or inability on the part of an individual or corporation, with whom the funds of a township are deposited, to refund the money deposited, shall not, in any way or manner release the treasurer from responsibility, but he shall be held and firmly bound for the money belonging to such township, except as otherwise provided by law."

By the express terms of the above section the failure of the bank would not relieve the treasurer from his responsibility for the funds deposited with it, and if, as he claims, an inspector from the state accounting department had ordered him to put the money in said bank, unless said deposit was made as provided by the depository law, he would still be responsible, and the order made by said inspector, if such order was in fact made, would not protect him.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

464

DEED WRITTEN IN FOREIGN LANGUAGE— DUTY OF COUNTY RECORDER TO RECORD—ENGLISH TRANSLATION, INDICES AND AFFIDAVIT.

By virtue of section 8516, General Code, a deed executed in a foreign country in the language of that country, if valid by the laws of that place, is valid in this state and must by provision of section 2757, General Code, be recorded by a county recorder when presented to him for that purpose. The deed being indexed in English, according to names, parties and parcel of property, will afford ample notice of the fact of its record to the English-speaking public.

It is suggested that the deed be recorded in the language in which it was written together with a copy thereof of an English translation, accompanied by an affidavit of the translator, to the effect that the translation is a true one of the original copy.

COLUMBUS, OHIO, November 13, 1911.

HON. F. N. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

MY DEAR SIR:—Under date of September 20th you desired my opinion as to whether or not the county recorder is required to accept for record an instrument in language other than the English.

I have been unable to find any decision of court bearing directly on the

question submitted by you, nor have I been able to find any case wherein such a question has been raised.

The question presented by you is one of unusual interest about which numerous lawyers have expressed their views to me. It is urged by some that,

> "While there is no provision in the constitution of the United States or the state of Ohio officially determining that English is the official language of the United States or the state of Ohio, yet it is the recognized language thereof, as is clearly shown by various decisions of the courts. It has been repeatedly held that the courts of this country will not take judicial cognizance of the meaning of words unknown to the English language. It may be assumed, therefore, although not specifically stated, that English is the official language of the country.
>
> "All the laws, official writings, public records and court pleadings are in English throughout the United States, and each person within the United States is in contemplation of law presumed to know the English language, and his failure so to do will not relieve him from any duty of obeying the laws thereof, nor permit him to require that such laws be translated into a language with which he is familiar in order to charge him with knowledge of the same. On the other hand, any person knowing the English language is entitled to require that all such laws shall be in English in order to bind him."

And they say further:

> "Therefore, it may be stated as a general rule that it is a presumption of law that English is the only language a person is required to know in order to transact any ordinary business in this country."

Those taking that view further urge that the object of recording a deed is to give notice to a third party, and they insist that the only language by our laws as a vehicle of notice to a third party is the English language.

It will, of course, be conceded that the English language is the language of our courts, as well as the language in which instruments are ordinarily recorded, but I cannot accede to the doctrine that the English language is the only one through whose instrumentality business is transacted. A contract written in German in Ohio would doubtless be good as against the statute of frauds. It is a common thing for wills to be offered for probate and be probated although written in foreign tongues. Testimony of witnesses who do not understand English is taken through interpreters in all courts, state and federal. So, that, it is not safe to conclude that because English is the language of the state and the nation, therefore instruments written in other languages are not to be recognized by judicial or administrative officers, or not to be honored by county recorders.

To determine whether or not an instrument written in a foreign country, as a deed, is entitled to record, it is well enough to consider what is a deed. Rather, I should say, we should consider its requisites. Blackstone discusses this in Book II, page 297, and it is only necessary to refer here to the third requisite, to wit:

> "The deed must be *written*, or I presume *printed*, for it may be in

any character or any language, but it must be upon paper or parchment."

There is no definition of deed that I am aware of in our statutes; so that the requisites given for a deed, as found in Blackstone, would apply in Ohio as in England in the time of that illustrious law-writer.

I might say at this point that it seems to be generally admitted by those who take the opposite view from the writer's in reference to the recording of deeds written in foreign language, that they admit that a deed written in a foreign language is good in Ohio as between the parties because any deed conforming to the definition given by Blackstone will convey land in Ohio. The moment that it be admitted that a deed may be written in a foreign language that moment it is easy to come to a conclusion to the question you ask.

Section 8516 of the General Code of Ohio provides as follows:

"All deeds, mortgages, powers of attorney, and other instruments of writing for the conveyance of incumbrance of lands, tenements or hereditaments situate within this state, executed and acknowledged, or proved, in any other state, territory or country, in conformity with the laws of such state, territory or country, or in conformity with the laws of this state, shall be as valid as if executed within this state in conformity with the foregoing provisions of this chapter."

You do not say in your question whether the deed was executed in another country according to the laws of that country, or whether it was executed in this state, but written in a foreign language. I will assume, for the purpose of this opinion, that the deed to which you refer was executed, acknowledged and proven according to the laws of that country for the execution, acknowledgment and proof of deeds.

From what has been said, the deed in question is one recognized as valid by virtue of section 8516 of the General Code. Now, apply section 2757 of the General Code, which is as follows:

"*The recorder shall keep four separate sets of records, namely: First, a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments;* * * * *. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

To my mind, the last named section settles the controversy. The recorder is required to record *all* deeds. There is no exception; and those who argue the inconvenience of recording a deed, for instance, in German, or Japanese or Chinese, make an argument that might be addressed to the legislature, but is one not properly to be addressed to a county recorder. He is required to record *all* deeds.

Section 2758 of the General Code provides as follows:

"Upon the presentation of a deed or other instrument of writing for record, the county auditor shall indorse thereon the date and the precise time of day of its presentation, and a file number. * * * *."

Section 2759 of the General Code provides as follows:

> "The county recorder shall record in the proper record in a fair and legible handwriting, typewriting or printing, *all* deeds, mortgages, or other instruments of writing required by law to be recorded, presented to him for that purpose. * * * *."

It is argued by some that one who understands English only would receive no notice on account of recording deeds in foreign tongues. To my mind there is no force to this argument. Under our recordation practice deeds are traced either through a system of indices whereby the chief guide consists in the name of the grantor and the grantee. The recorder can easily write the names in both English and German. Or the key to the recording is found through assigning a specific tract of land to a certain page or pages in the index, for instance, Section 34, Township 9, Range 18, Jackson County, Ohio, is assigned a certain page of the index to start with and all recordations of land in that section are kept by themselves. Under the section heading and the instrument appearing in writing under that heading would certainly be a notice that a grantee would observe, and get a translation of before purchasing the property. Now, whether the system be one wherein the key or information is found through the instrumentality of the name or through the instrumentality of a specific tract of land, no difficulty would arise in receiving notice just as well as if the instrument had been recorded in our own language.

While in my judgment the statutes clearly settle the question and leave nothing further for argument, yet every argument is in favor of recording instruments written in foreign languages. Even though notice to third parties be weak, it is better than no notice at all, which would certainly follow if advocates of the other side of the question were right in their views.

Since writing the foregoing I have found an Ohio case, the reasoning of which sustains the view hereinbefore taken. It is that of The Lessee of De Segond and Warden v. Culver and Burk, 10 Ohio Reports, 188. Quoting from the statement of the case:

> "This is a motion for a new trial in an action of ejectment from the county of Knox.
>
> "The plaintiff offered, as a part of his title, *a copy of the records of deeds of the county*, which contains a document, purporting to be a deed, by General De Segond, executed in the presence of two witnesses, and bearing the following acknowledgment: * * * *."
>
> (The acknowledgment is here given.)
>
> "This record was objected to, but admitted, and a verdict having been rendered for the plaintiff, this motion is made for a new trial."

Chief Justice Lane, in deciding the case, said:

> "If I should indulge my conjecture as to this paper, I should take it that the acknowledgment was written in French, and was translated for the record. If this be so, the record is not a true copy of the deed, and should be rejected."

The foregoing recognizes the proposition that the rejection was because it appeared that the deed was not recorded in the original language in which it was written. This case discloses that there was no objection to the copy of the record provided the original record was a true transcript of the original

deed, so that, if the record, when true, would be admitted in evidence it is a recognition of the right to record a deed in a foreign language.

I think a careful study of this last case discloses it to be clearly confirmatory of the view heretofore expressed in favor of recording such instruments, and I would suggest, with reference to your specific case, that you advise the recorder to record the deed, or cause it to be recorded, in the language in which it is written, have a copy made in English and have an affidavit of the translator attached to the copy, setting forth that it is a true copy of the original, and have this likewise recorded. Also have the deed indexed in English.

In conclusion, therefore, I beg to advise that if the deed to which you refer was executed in another country according to the laws of that country, *it is the duty of your county recorder to file and record it.*

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

465

COUNTY AUDITOR—NO POWER TO EMPLOY ASSISTANTS TO KEEP UP TAX MAPS OF COUNTY—DUTY OF COUNTY COMMISSIONERS TO EMPLOY COUNTY SURVEYOR AND ASSISTANTS.

It is not the statutory duty of the county auditor to keep up the tax maps after they are filed in his office. On the contrary, express provision is made by section 5551, General Code, for the appointment of a county surveyor and fixing of the salary and number of his assistants by the county commissioners for the purpose of keeping up the county maps.

The county auditor is, therefore, without authority to employ assistants for the purpose of doing this work.

COLUMBUS, OHIO, November 15, 1911.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your letter of October 16th, 1911, in which you state:

> "Some years since the county commissioners, pursuant to sections 5551-5552 of the General Code, appointed the county surveyor to make the maps provided for in these sections. These maps are now, according to the best information we can get about them, almost in a completed condition. The commissioners have already ordered them removed to the county auditor's office, where, under section 5551, it is plain they are to be kept.
>
> "The question now arises as to whether or not, with these books in the auditor's office, the auditor has authority to employ an assistant to keep them up to date.
>
> "In connection with this I would call your attention to section 2563, which provides in part that the county auditor may appoint one or more deputies to aid him in the performance of his duties. Section 2981 further provides: 'such officers (the county auditor among others) may appoint and employ necessary deputies, assistants, clerks, bookkeepers, or other employes for their respective offices.'"

Section 2563 of the General Code, and which you cite in your letter, provides as follows:

> "The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it."

Section 2981 of the General Code, and which you also cite in your letter, provides as follows:

> "Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each officer the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

It is my opinion that sections 2563 and 2981 of the General Code, as above quoted, only authorize the county auditor to employ deputies and assistants in the performance of his various duties, and it does not seem to be the statutory duty of the county auditor to make, correct and keep up to date a complete set of tax maps for the reason that such duty is clearly vested in the county commissioners to employ county surveyors to perform such work, by virtue of the language used in section 5551 of the General Code, which said statute provides as to the making, correcting, etc., of tax maps, and reads as follows:

> "The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision, or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

Section 5552 of the General Code further provides that the county commissioners shall fix the number of assistant draftsmen, not to exceed four, and shall likewise fix the salaries of such assistants, not to exceed two thousand dollars per annum, as follows:

"The board of county commissioners shall fix the salary of the draftsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draftsmen and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

I am of the opinion, therefore, that the county auditor is without authority to employ an assistant, or assistants, to keep up to date the tax maps as provided for in sections 5551 and 5552 of the General Code.

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

466

CORRUPT PRACTICES ACT—CANDIDATE FOR DELEGATE TO CONSTITUTIONAL CONVENTION—REPORT TO BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—HIRING OF MANAGER.

Reports of expenditures of a candidate for the office of delegate to the constitutional convention must be filed in the office of the board of deputy state supervisors of elections in the respective counties.

A committee may engage the services of an agent or manager to devote most of his time to the interests of the candidate and pay him $200 for his services if that amount represents the actual bona fide value of said services, provided that such services were performed within the limitations of said law.

COLUMBUS, OHIO, November 15, 1911.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I have your letter of November 10, wherein you make inquiries regarding various phases of the corrupt practices act, particularly applying to delegates to the constitutional convention. You ask: (a) With whom must these reports be filed? (b) To what extent must money received and paid out by the committee be itemized? (c) Can such committee engage the services of an agent or manager to devote most of his time to the interests of the candidate and pay him $200.00 for such services?

(a) Section 6 of the so-called corrupt practices act (102 O. L., 323) provides in part:

"Statements required to be filed by this section, if they relate to the election of candidates for offices to be filled by, or propositions submitted to, the electors of the entire state * * * * *shall be filed in the office of the secretary of state; in all other elections such statements shall be filed in the office of the board of deputy state supervisors of elections for the county in which such election is held.*"

Inasmuch as the candidates for the constitutional convention delegates were elected for their respective counties, the report must be filed in the office of the board of state deputy supervisors of elections in their respective counties.

(b) Section 2 of the act spoken of provides for a statement of expenditures

by the candidates and committee and requires them within ten days after such election to file an itemized statement "showing in detail all the moneys or things of value, so contributed," etc.

Section 3 of the act provides what further this statement shall contain, requiring, among other things, "the specific nature of such items, the purpose for which, the place where and the date when it was contributed, * * * * expended," etc. From this section it appears that the committees are required to itemize a statement in detail all contributions and expenditures even to the most trivial item so long as there was a specific contribution or expenditure therefor. These sections are certainly so self-explanatory that I feel no mistake can be made in the character of the itemization.

(c) Section 26 of the act provides in part:

> "That any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays * * * * or offers or promises to pay * * * * any money * * * * for any other purpose than the matters and services, at their reasonable, bona fide and customary value:
>
> "Rents of halls, * * * * of offices and club rooms, compensation of such clerks and agents as shall be required to manage the necessary and reasonable business of the election * * * *."

Now, if the sum of $200.00, which you mentioned, was the *reasonable, bona fide and customary value* of the services rendered by the agent or manager, then it is permitted under the act. Of course, you understand that the agent would be limited in the performance of such services as are permissible under the election laws, and it would remain a question of fact whether the amount paid for such services was reasonable, bona fide and of customary value.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 466

CORRUPT PRACTICE ACT—SOCIETIES AND ORGANIZATIONS—MERE PROPAGANDA AND CAMPAIGNING FOR CANDIDATES—ADVOCATE OF "PRINCIPLES" AND OF "PERSONS"—EXCEPTION TO THE ACT.

Committees, societies or organizations which confine their efforts wholly to mere propaganda and their disbursements to the end of advancing, discussing and promulgating pure questions as opposed to persons or candidates for office, are within the exceptions of the corrupt practice act and are not required to file the statements, or perform the other requirements of the act.

COLUMBUS, OHIO, November 15, 1911.

HON. HENRY T. HUNT, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Your communication of the 16th ult. was duly received. Owing to the peculiarities found in the act about which you inquire, the whole being a jumbled patchwork, parts thereof being taken from the New York, Massachusetts and other statutes, with original suggestions interjected at intervals (too frequently at places ineffectual to determine the statute writer's real intention):

also because of the importance of giving every possible aid and assistance to the intendment of the legislature to purify as much as possible *all* elections; we have given such time to a due consideration of the question as to incur a slight delay.

This office has not passed upon the exact question you submit, although since the receipt of your letter a great number of similar inquiries have come to hand. You state:

> "My opinion has been asked as to the scope and effect of the act found at page 321 of Vol. 102, Ohio Laws, popularly known as the 'corrupt practices act.' From the press I learn that your office has already passed upon some questions arising as a result of this law, and it may be that you have been asked for a ruling upon the question which I herewith submit.
>
> "The question turns upon the meaning of the last three lines of section 1 of said act, which read as follows:
>
> "'And nothing herein contained shall apply to or in any respect of any committee or organization for the discussion or advancement of political or economic questions.'
>
> "The question upon which I ask your ruling is as follows: Does the last clause of section 1, which excepts committees for the discussion or advancement of political or economic questions from the operation of the act, apply to propaganda-making bodies who seek to have certain principles placed in the new constitution, notwithstanding the fact that these bodies, associations, or societies seek to bring about the above purposes by furthering the candidacy of such prospective delegates to the convention as seem most likely to be in favor of the said principles? For instance, the progressive leagues or referendum leagues are interested in placing the referendum in the constitution; the Personal Liberty League is interested in striking the no-license clause from the constitution; the Anti-Saloon League may be interested in inserting a prohibition clause in the constitution; the State Board of Commerce and the Ohio Tax League are interested in having the new constitution provide for further classification, by the legislature, of subjects for taxation; the United Constitution Committees of Cincinnati, Cleveland and other cities are interested in having home-rule provisions inserted in the constitution. In advocating candidates who stand for any of these principles, and working for the election of such candidates, are the committees furthering these principles subject to the provisions of the corrupt practices act aforesaid, or are they exempt by reason of the exception in section 1?
>
> "If your office has already passed upon this question, I should be very grateful if you will send me a copy of the opinion, covering this matter. Likewise, I should be most grateful, in the event the matter has not already been brought to your attention, if you will be good enough to let me know what your ruling will be."

The first section of the Kimble corrupt practices act defines a committee or organization as including every committee or combination of two or more persons co-operating to aid or promote the success or defeat of a political party or principle, or of any proposition submitted to a vote at any election, or to aid or take part in the election or defeat of any candidate for public office. The committee or organization, as herein defined, will embrace the committee, organization or society, soliciting money, assessments or other things of value, or in any

way participating in a local option election, and advocating, as such committee, the prohibition of the sale of liquor, or the contrary.

The exception to section 1 is as follows:

> "Nothing herein contained shall apply to or in any respect of any committee or organization for the discussion or advancement of political or economic questions."

This exception means practically the same as the exception in the New York corrupt practices act, which is as follows:

> "That nothing in this article contained shall apply to any committee or organization for the discussion or advancement of political questions or principles without connection with any election."

"Without connection with any election" makes the matter clear; but in a legal aspect is mere surplusage. Committees or organizations advocating high license or opposing high license, or advocating temperance or opposing temperance, come within the exception. Any committee or organization is within the exception so long as it is advancing or discussing political or economic questions, as distinct from standing behind men as candidates and advocating their election. For instance, it may be known that a man ran as a candidate at the last election for delegate to the constitutional convention as a "dry" man; yet, in the theory of the law, if such man were elected he goes to the constitutional convention for all purposes; he is to participate in all questions that may arise. He may advocate labor measures or the contrary; he may advocate tax reform or the contrary; he may advocate the recall of judges or the contrary; he may advocate the initiative and referendum or the contrary; so that a committee that is participating or aiding in the election of a *man* is not within the exception, while if they are standing for the advancement of a political or economic question, and that only, the candidate may incidentally be the beneficiary; yet, the committee or organization does not come within the scope of section 1 of the Kimble corrupt practices act.

Section 2 provides that every candidate who is voted for at any election or primary election held within this state, and every person, committee or organization of persons, incorporated or unincorporated, who may have contributed, promised, received, or expended, directly or indirectly, any money or thing of value in connection *with such election*, shall, within ten days after such election, file, as hereinafter provided, an itemized statement showing in detail all the moneys or things of value so contributed, promised, received or expended, etc.

This is the only section of the act defining who shall file a statement in the manner and form provided. "Every candidate who is voted for at any election," and "every person, committee, etc., who may have contributed, promised, received or expended any money or thing of value in connection *with such election*"—these are the two classes compelled to file itemized statements. By virtue of the well known rule, "*Expressio unius exclusio alterius est*," all others are relieved of the necessity of filing the itemized statement required under the act.

The New York corrupt practices act (N. Y. Cons. Laws, Vol. 2, paragraphs 540-545), as well as the Massachusetts act (Mass. Rev. Laws, 1902, paragraphs 205-306, with amendments as found in Massachusetts Acts and Resolves, 1907, 742-746), and the Oregon act (Oregon Laws, 1909, pages 15-38), confines its provisions to candidates and political parties. As stated before, our corrupt practices act is in a great measure a compilation of the above named statutes. In

the various states which have adopted corrupt practices acts, as well as in the arguments and statements of those public-spirited citizens who have urged and advocated the necessity of further provisions looking to the purification of the ballot, there seems to have been no intendment to include propagandists who, not actuated by motives of selfish political advancement, but, acting from pure moral or altruistic impulses, give of their time and substance to propagate and further great political and economic questions.

And with the act under discussion, while section 1 manifests an intent to include those concerned in all elections, whether for candidates, measures, propositions or principles, yet, when the legislature came to the enactment of section 2, wherein they make provision for the parties required under the act to file the itemized statement, a manifest limitation occurs, the meaning of which is too plain to be explained away

It will be observed, moreover, that in paragraph 9 of the act it is made "unlawful and a violation of this act for a *political* committee * * * * to collect, receive or disburse money" unless a treasurer be appointed; and, further, it is provided that all *political* committees shall disburse their funds through a treasurer.

It is a significant fact, also, that in section 29 the limitation on the amount allowed to be expended is confined to candidates.

To summarize, then, it is my opinion that so long as committees, societies or organizations confine their labors to mere propaganda and their expenditures to the proper and necessary things "pertaining to the discussion and advancement of the questions they advocate" they are included in the exception found in section 1 of the corrupt practices act; that as soon as they endorse, aid or assist in the nomination or election, or both, of a candidate for office, they bring themselves within the purview of the statute and are included in the provision requiring the filing of an itemized statement, as well as the other provisions of the act; that it is only candidates voted for at any election, and persons, committees, societies and organizations contributing and expending things of value at any election where a candidate is voted for who are compelled to file statements under section 2; that persons, organizations, etc., contributing and expending things of value at local option elections, bond issues, or at any election where other propositions or measures are voted upon are not required under section 2, which is the only section providing for the same, to file an itemized statement of such contributions and expenditures.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

C 468.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATION TO AMOUNT RAISED IN 1910 APPLIES TO PROPERTY IN ALL SUBDIVISIONS—EFFECT OF MAKING NO LEVY IN MUNICIPALITY IN 1910.

The limitation of the Smith law with respect to the amount raised for all purposes in the year 1910 *refers to the amount which may be levied by the state, county, school district, township and municipality altogether, and therefore, the only effect of the fact that a municipality had made no levy whatever during the year* 1910 *would be in allowing the needs of said municipality for* 1911, *to reduce the amounts allowed to other subdivisions from taxation on the property of said municipality.*

COLUMBUS, OHIO, November 17, 1911.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Your letter of October 25th states that the village of Magnolia, Carroll county, made no levy at all for municipal purposes in the year 1910 because of the existence of a surplus in its various funds sufficient to operate its government during the year 1911, and you request my opinion upon the question as to whether or not under the Smith one per cent. law any levy may be made for this village for the year 1911.

I have prepared other opinions relating to this question, but your question so squarely raises the issue that I will answer you directly without referring you to the other opinions.

Section 5649-2 of the General Code, enacted June 2, 1911 (102 O. L., 269), provides as follows:

> "Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the *aggregate* amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, for the year 1911 and any year thereafter, *including* taxes levied for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910. * * *"

Again in section 5649-3 it is provided as follows:

> "If in any year the taxing authorities of any taxing district shall desire to raise a less amount of taxes for a particular purpose than was levied for such purpose in the year 1910, the amount of taxes that may be levied for another or other purposes may be correspondingly increased; the intent and purpose of this act being to provide the *total* amount of taxes which may be levied in the year 1911 or in any year thereafter, for *all* purposes, not to exceed in the aggregate, the total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912, nine per cent. for the year 1913 and twelve per cent. thereof for any years thereafter * * *."

It may be that a misconception has existed as to the meaning of this second section. It seems to me that it is quite clear that the limitation measured by the amount of the tax levy in the year 1910 is not upon the amount of taxes that may be levied by or for a municipal corporation, or township or school district, but is upon that amount of taxation which may be levied by the state, the county, the school district, the township and the municipality *all together,* within the limits of the smallest taxing district or part of a taxing district within which the aggregate levy is made. This limitation is like the one per cent. limitation—it is upon *all* taxes, and not upon taxes for the city nor the township.

Therefore, if it is a fact that the township or village made no levy at all for the year 1910, it is immaterial except as it affects the amount which the township, county and school district may have in the year 1911. That is to say, the $3,000.00 for which the council of the village of Magnolia has asked, if found by the budget commission to represent its actual needs, must be counted in with the amount to be levied by the township, county and state within the

corporate limits of the village, and the sum of all these amounts must not exceed the sum ascertained by multiplying the tax duplicate of the village for 1910 by the total tax rate for all purposes applicable therein in that year. The effect of this will, of course, be to reduce the amount of taxes which the township, the school district and the county together may get from that particular territory under the coming levy as compared with what these three subdivisions received therefrom in the year 1910. This, while a seeming hardship, is essential under the purposes of the law.

Nothing will be found in the decision of the supreme court in the case of State ex rel. vs. Sanzenbacher inconsistent with the foregoing.

My opinion is that the village of Magnolia may have a levy for the year 1911 for corporation purposes subject to the qualifications above stated.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

469.

CONVEYANCE OF PROPERTY PASSED BY DESCENT — AFFIDAVIT OF GRANTOR, HEIRS AND CONVERSANT PARTIES.

Section 2768, General Code, is to be construed to the effect that when real estate, the title to which has passed by descent, is transferred, the conveyance shall not be recorded by the recorder until there has been filed with him an affidavit signed either by all the heirs who take part in the conveyance or else by affidavits of two persons who have knowledge of the facts and who are not themselves heirs at law.

COLUMBUS, OHIO, November 19, 1911.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 26th, requesting my opinion on the following questions:

> "If the affidavit of one or more heirs at law fewer in number than the whole number of heirs at law, be presented to the auditor in case of a conveyance made by any heir at law of property standing in the name of the ancestor on the duplicate and on the records, should it be accepted by him under section 2768, General Code, as amended 102 O. L., 99?"

Said section 2768 as amended provides in part as follows:

> " * * before any real estate, the title to which shall have passed under the laws of descent shall be transferred * * * from the name of the ancestor to the heir at law * * * or to any grantee of such heir at law * * *; and before any deed or conveyance of real estate made by such heir at law or next of kin shall be presented or filed for record by the recorder * * * such heir at law shall present to such auditor the affidavit of *such heir or heirs at law or next of kin, or of two persons resident of the state of Ohio, each of whom has personal knowledge of the facts*, which affidavit shall set forth the date of such ancestor's death * * * the fact that he or she died intestate, the names, ages and addresses * * * of each such ancestor's heirs at law or next of kin who by his death inherited such real

estate, and the relationship of each to such ancestor and the part or portion of such real estate inherited by each * * *. Such affidavit shall be filed with the recorder and shall be by him recorded and indexed * * * in his office. * * *"

It is apparent, I think, that from the expression "such heir or heirs" refers to a grantor or maker, because the statute provides:

" * * * before any real estate, the title to which shall have passed under the laws of descent shall be transferred * * * from the name of the ancestor to the heir at law * * * or to any grantee of such heir at law * * * and before any deed or conveyance of real estate made by such heir at law or next of kin shall be presented to or filed for record by the recorder, * * * such heir at law * * * shall present to such auditor the affidavit of *such heir or heirs at law, or next of* kin, etc."

The word "such" in this case does not seem to me to have any relation or connection with an heir that is not connected with the transaction.

Quoting more of the statute we find the following:

"The names, ages and addresses so far as the ages and addresses are known and can be ascertained of each of such ancestor's heirs at law and next of kin, who by his death inherited such real estate and the relationship of each to such ancestor, etc."

If it was intended that all of the heirs should sign the affidavit, whether they be makers or not, no meaning could be given to the expression "so far as the ages and addresses are known and can be ascertained of each of such ancestor's heirs at law and next of kin, etc."

This very language presupposes that there may be heirs whose addresses are unknown. It follows, therefore, that such heirs are not makers of the instrument.

My holding, therefore, is that if it be one heir the affidavit of that one is sufficient. If there be more than one heir it is only necessary for the heirs who are makers of the instrument to make the affidavit. If, for instance, there are four heirs making the instrument all four should make the affidavit. All of the heirs that are joined in the conveyance as grantors and having an interest should join in the affidavit regardless of the number of heirs, but as to heirs or next of kin that are not grantors in the instrument there is no necessity for their executing an affidavit.

Further, I am of the opinion that such conveying heirs who make affidavits are not to be considered as "persons resident of the state of Ohio having personal knowledge of the facts" for the reason that it is the intention of the general assembly that all conveying heirs at law shall make affidavit and that if affidavits are presented other than the affidavit of all the conveying heirs at law they should be those of persons not themselves heirs at law.

It is, therefore, my opinion that the affidavit required under section 2768 must be either those of all of the conveying heirs at law, or else those of two persons not themselves heirs at law having knowledge of the facts.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

471.

COUNTY MEMORIAL AND MONUMENTAL BUILDING—FAYETTE COUNTY —DUTIES OF TRUSTEES AND COUNTY COMMISSIONERS—ACCOUNTING OF TRUSTEES TO COURT.

The law under which was raised a fund for the purpose of constructing a memorial building in Fayette county was repealed. Under a subsequent law, however, the funds remaining in trust were devoted to the purpose after appointment of new trustees, and under procedure of the act of 1871.

Under section 10 *of the act of* 1902, *as amended March* 9, 1909, *it was provided that upon the completion of the building, it was to be turned over to the county commissioners, who were to equip, decorate and furnish the same.*

Held: That as it was prescribed by the act of 1871 *that the trustees should install certain memorial tablets whereon were inscribed the names of soldiers, from the county, who had been killed during the war of the rebellion, said building could not be turned over to the commissioner under the act of* 1909 *aforesaid, until such tablets had been installed.*

The trustees of the memorial building are officers of the court who may be compelled by the county commissioners at any time, to account for funds in their possession.

The trustees have no authority to collect rents for said building, though the county commissioners have such power even though the building has not yet been turned over to them, and when the trustees have collected such rents, they should account for the same to the commissioners in addition to their duty to account to the court.

The trustees may inscribe on the tablets installed by them, only the names of all "persons who entered the Union army from the county, during the rebellion and lost their lives therein."

The inscription of any further names must be left to the commissioners in their work of decorating the building.

COLUMBUS, OHIO, November 21, 1911.

HON. POPE GREGG, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 14th, requesting my opinion upon the following question:

> "The board having in charge the construction of the memorial building of this county, located in this city, has long since completed the construction of the building itself, but has failed to offer the structure as a complete structure to the county commissioners or to any other authority. The board claims the right to continue to act because certain marble tablets have not yet been placed in the building, for which a contract has been let.
>
> "The county commissioners wish to be advised as to their powers and duties in the premises."

When I undertook the examination of the question of law presented by your inquiry I encountered some difficulty, growing out of the fact that what is familiarly called a "memorial building" might have been constructed in Fayette county under any one of three separate and distinct laws, namely:

1. Sections 3059 to 3069, inclusive, General Code, most of which constitute the act found in 95 O. L., 42, as codified.

2. The act of May 2, 1871, 68 O. L., 122, with its various amendments be-

coming sections 3107-12 to 3107-18, Bates' Revised Statutes, and not being included in the General Code.

3. The act of April 27, 1896, 92 O. L., 700, which is a special act, applicable to Fayette county.

The last act above referred to provides in general that the commissioners of Fayette county are required to issue bonds of the county for the purpose of constructing what is therein termed as a "Soldiers' Memorial Library and Armory Building," and to transfer to the fund for the construction of said building a fund collected under authority of an act of February 12, 1892, evidently another special act applicable to Fayette county; both upon condition that the electors vote favorably upon the proposition to issue the bonds in question.

Obviously, if proceedings were had under this act, and the decision of the electors was favorable to the project, the powers of the board having in charge the construction of a memorial building in Fayette county would have to be determined by the provisions of that act. I felt called upon, under the circumstances, to investigate the facts and find, upon such investigation, that this proposition, required by the act of 1896 to be submitted to the electors, was duly submitted and failed to carry. It is quite apparent, therefore, that nothing in the special act is applicable to the subject under consideration.

The special act applicable to Fayette county being thus eliminated, I was still at a loss to determine in my mind under which of the two general acts the proceedings in question were had. I inquired, first, as to the date when the building at Washington C. H. was constructed, and found that this was in the year 1906; it was, therefore, apparent that such construction might have been under the act of 1902, or that of 1871. I am informed, however, by your subsequent letter of November 20th, that the board in question was originally a board of seven trustees, appointed by the court of common pleas, and that no other election was ever held than the one which I have already referred to. These facts seem to indicate that the act of 1902 was not the controlling law, for that act provides for a board of five trustees, to be appointed by the governor (section 3059, G. C.), who shall submit the question of the issue of bonds for a memorial building to the electors of the county (section 3061, G. C.).

Upon careful investigation, entailing some expenditure of time on the part of members of this department—which, I may add, would have been unnecessary had you submitted a complete statement of facts with your letter—I find that the building to which you refer was undoubtedly constructed under the act of 1871. I find that under the act of February 12, 1892, which was repealed by section 7 of the special act of 1896, above mentioned, a considerable sum of money was raised for the purpose of constructing a soldiers' monument, and held by the county commissioners of Fayette county, without any authority to expend the same by reason of such repeal; that subsequently, in the year 1905, proceedings were had under section 1 of the act of 1876 (section 3107-12, Bates' Revised Statutes) whereby said court appointed seven trustees to take charge of the fund so accumulated; that the said trustees elected, in the exercise of the discretion in them vested, by section 4 of said act, to erect a monumental building instead of a soldiers' monument; and that all the proceedings of said trustees have been referable to said act of 1871.

The following are the essential provisions of said act of 1871:

(Bates' Revised Statutes.)

"Section 3107-12. When any moneys, property, or assets of any kind, are held in trust, by any person or persons for the purpose of building

soldiers' monuments, it shall be the duty of the court of common pleas of the county in which said trustee or trustees, or a majority thereof, shall at the time reside, upon the application of said trustee or trustees, or a majority thereof, or of any citizen of such county, after ten days' prior notice to such trustee or trustees, or a majority of them, to order all of such moneys, property or assets so held in trust, as aforesaid, to be brought into court and placed in charge of such persons and invested in such manner, as shall, in the opinion of the court, be most judicious and prudent for the preservation and increase thereof; * * *

"Section 3107-13. The number of trustees appointed by the court of common pleas, under the provisions of the foregoing section, shall be seven (7), all of whom shall be resident free-holders of the county in which such soldiers' monument is to be built.

"Section 3107-14. The court of common pleas may enforce a full and complete settlement and delivery over by the original trustees to those appointed by the court and qualified as herein provided, by attachment as for contempt of court, reserving to said original trustee or trustees the same right of exception and review, on error, as in other similar cases.

"Section 3107-15. That whenever the original trust provides for building a soldiers' monument, it shall be within exclusive discretion of the trustees so appointed by the court of common pleas, as heretofore provided, or a majority thereof, to determine whether to use said trust moneys, property and assets, in the erection of a soldiers' monument, or of a monumental building, and in either case to determine exclusively the cost, mode, style, place, and manner of its erection, and in case of a monumental building, the uses and purposes to which the same shall be put in the future, except as provided in the next section of this act, and having arrived at such determination, they shall be, and are hereby authorized and required to proceed at once to erect such monument or monumental building, and to expend the trust funds and its increase for that purpose, with any other moneys or property that may be donated to them for that purpose, or received by them from any other party or parties, by virtue of any arrangements to build conjointly or otherwise, which they, in their judgment, may think best to make, and to select the site or location therefor, and to purchase from the said funds, if necessary, the requisite grounds, and take title thereto, in the name of said trustees and their successors, forever. (As amended in 1901, 94 O. L., 339.)

"Section 3107-16. In case of the erection of a monumental building, as heretofore provided, there shall be therein placed a permanent tablet, or tablets, on which shall be inscribed the names of all persons who entered the union army from such county, during the war of the late rebellion, and lost their lives therein, and their services may be perpetuated in any other manner which the said trustees, or the majority thereof, may, in their discretion, deem expedient;

"and there shall be a suitable hall provided in said building by said trustees in which the said tablet or tablets shall be placed, and which shall be used as a place for holding meetings by posts of the grand army of the republic, and their auxiliary relief corps or organizations, located in the same municipal corporation in which the said building is situated, and said posts and auxiliary (corps and) organzations shall have the right to use the same as long as they maintain themselves as organized bodies, pursuant to the rules and regulations

of the associations to which they may belong; and this provision shall be applicable to said building whether it shall have been built before the passage of this act, or shall be built after its passage. (As amended in 1901.)

"Section 3107-17. The trustees shall report to the court appointing them, as often as the court may require, and all vacancies that may, from time to time, occur in said board, by removal for cause, removal from the county, resignation, or death of any member or members, shall be filled by appointment of the court of common pleas in the same manner in which original appointments are made, and said court may, for good cause, remove any or all of said trustees, and appoint others in their stead.

"Section 3107-18. All funds raised and set apart for the purpose of building monuments and monumental buildings, when erected, shall be forever exempt from taxation for any purpose whatever."

On March 28, 1906, the general assembly passed an act, which became effective on April 11th of that year, amending what was originally section 10 of the act of 1902, so as to read as follows:

"Upon the completion of the memorial building authorized, or on completion of any monumental building under act passed May 2, 1871, as amended April 16, 1900, entitled 'An act to provide for the appointment of trustees and disposition of moneys, property and assets, held in trust for building soldiers' monuments, the board of trustees shall turn over the same to the county commissioners, who shall provide for the maintenance of said building as a memorial for the purpose aforesaid in the same manner as they are authorized to maintain other property of the county. * * *' "

On March 9, 1909, the general assembly passed an act to amend said section 10 of the act of 1902, so as to read as follows:

"Upon completion of the memorial building authorized, or on completion of any monumental building under act passed May 2nd, 1871, as amended April 16th, 1900, 'An act to provide for the appointment of trustees and disposition of moneys, and assets held in trust for building soldiers' monuments,' the board of trustees shall turn the same over to the county commissioners who shall provide for the *equipment, decoration and furnishing* of said building not to exceed the sum of fifteen thousand dollars ($15,000), as a memorial for the purposes aforesaid, in the same manner as they are authorized to care for and maintain other property of the county, * * *"

The effect of this amendment was to vest in the county commissioners the power and duty of providing for the equipment, decoration and furnishing of a building not previously equipped, decorated or furnished, which power and duty had formerly, in all probability, been vested in the trustees.

This section is codified as section 3068, General Code, having been amended, in the meantime, in immaterial particulars. But, as is apparent from the form in which it was originally enacted, it is intended to be applicable both to buildings constructed under the act of 1871, and to those constructed under the act of 1902.

Now, by section 5 of the act of 1871, section 3107-16, Revised Statutes,

above quoted, it is made the mandatory duty of the board of trustees to install the memorial tablets therein provided for. Such tablets are, therefore, in my opinion, a part of the original construction of the building, and are not mere articles of decoration or equipment, as might otherwise be the case. Despite the act of 1906, above quoted, therefore, it is my opinion that it is not the duty of the board of trustees of a monumental building, acting under the act of 1871, to turn over the building to the county commissioners until such tablets have been installed.

This conclusion fully answers your question, but I may add for the sake of completeness that the trustees, under the act of 1871, are officers of the court and not of the county; that their duty is to account from time to time to the court; and upon the final completion of their trust, their final account should be filed with the court and they should be discharged by order of the court. Only in this way can the trustees release the bond which they have given under the first section of the act of 1871.

The effect of the act of 1906, is, in my opinion, to give to the county a clear right—which in this case it probably had, at all events, by virtue of the fact that the moneys which formed the nucleus of the fund expended by the trustees were county moneys—to compel an accounting by appropriate proceedings in the common pleas court. This right may be exercised by the county commissioners, representing the county. That is to say, if at any time the county commissioners desire to question the proceedings of the trustees, the proper way in which to do this would be for the commissioners to file a motion for an order requiring the trustees to make a report to the common pleas court.

Since writing the above opinion, upon the question originally submitted by you, I have received your letter of November 20th, which, in part, is as follows:

> "In addition to the inquiries made in the original letter I would like to ask your opinion whether or not said trustees, so appointed as aforesaid, would have the right to continue in charge of said building and assume the management and control of same after the completion of the building except the placing of the tablets, collect the rents, and pay all the bills, or whether under the statutes that duty devolves upon the county commissioners, to take charge of said building, manage and control the same and collect the rents.
>
> "Also, what names can, under the law, be legally engraved on the tablets that the trustees propose to place in said building?
>
> "My opinion as to the above inquiries is: First, that under the circumstances above stated the duty to manage the building and collect the rents would devolve upon the county commissioners, and that only the names of soldiers that were *killed* in the civil war, or war of the rebellion, could be legally engraved upon said tablets."

I am at a loss to understand under what authority the trustees of the building have been collecting any rents. The building is to be a "monumental building;" that is, a building which is in itself, primarily, a *monument;* in the building, certain rooms are to be provided for the use of patriotic organizations (see section 5 above quoted); but, clearly, the use of such rooms by such organizations is to be rent free. On the other hand, however, there is no direct prohibition against the construction of a building containing rooms to be rented for other purposes; and there is direct authority in the county commissioners, under the last sentence of amended section 10 of the act of 1906, above quoted, to "permit the occupancy and use of the memorial building or any part thereof

upon such terms and conditions as they may deem proper." Strictly speaking, then, the trustees of a monumental building, constructed under the act of 1871, have no authority to rent any portion of such building, or to collect moneys thus derived; but since 1906 the county commissioners have had the right to rent portions of such buildings when turned over to them.

It seems, from your question, that in the case in which you are interested, the trustees have exceeded their powers by permitting the use and occupancy of portions of the building by persons and organizations other than those mentioned in section 5 of the act of 1871. I assume, also, that in this matter they have received moneys, and perhaps have expended them. Being trustees, they must account for the profits accruing to the trust fund, from any source, whether in the performance of the express trust or not. This is upon the familiar principles of equity jurisprudence. Therefore, in my opinion, the trustees, though they have violated the letter of the law, and have acted in excess of their authority in permitting the use and occupancy of rooms in the building by private individuals and associations, for gain, must nevertheless render to the court an accounting of their transactions of this nature as well as of the expenditure of the original fund intrusted to them. Indeed, there is express language in section 4 of the act tending to support this conclusion, in addition to the general principles applicable to all trust estates, above referred to. It is therein provided that the trustees shall "expend the trust funds and its increase for that purpose (the erection of a monumental building) with any other moneys or property that may be donated to them for that purpose, or received by them from any other party or parties, by virtue of any other arrangements to build conjointly or otherwise * * *." It is quite apparent, I think, therefore, that though the trustees had no authority to rent any portion of the building they must account for the rents received by them in the same manner that they must account for other funds coming into their possession.

I am further of the opinion that if the building is so far completed as to permit its use and occupancy by other parties than by the organizations mentioned in section 5 of the act of 1871, the power to permit such use and occupancy resides in the county commissioners, whether the building as a whole has been turned over to them or not. That is to say, while the trustees may continue in the exercise of their trust for the purpose of installing the tablets mentioned in section 5, yet, if the building is fit for use, the commissioners are and have been, since 1906, the only duly constituted authority to permit such use, and to arrange the terms upon which it shall be permitted. In the future, therefore, I would advise that the commissioners take over the management and control of such portions of the building as are ready for occupancy and are not needed for the purposes of the Grand Army of the Republic and the Women's Relief Corps, irrespective of the termination of the trust imposed in the trustees under the act of 1871.

I am further of the opinion that inasmuch as the trustees have exercised a power which rightfully belonged to the commissioners they should account to the commissioners independent of their accounting to the court, as aforesaid, for all rents and profits derived by them from the use and occupancy of the building by persons and organizations other than those mentioned in section 5. In so permitting the use and occupancy of the building, as aforesaid, the trustees have charged themselves, in my opinion, with an implied or constructive trust, the beneficiaries of which are the county commissioners; and their duty to account to the commissioners is not inconsistent with their duty to account to the court. This follows from the fact that when the trustees have accounted to the court and have paid in any balance or balances in their pos-

session, arising out of the rents aforesaid, the court would be obliged to turn over such funds to the commissioners.

In reality it would seem that a report made in duplicate, as to the rents, one copy of which might be filed with the court, and the other with the commissioners, would be sufficient. It must be noted, however, that the trustees are not accountable to the commissioners for the expenditure of the money used by them in the actual construction of the building, or the installation of the tablets.

The second question suggested in your letter of the 20th finds a clear answer in section 5 of the act of 1871. It is only the names of "all persons who entered the union army from the county, during the * * * rebellion, and lost their lives therein" which must be inscribed upon the memorial tablets. Tablets containing the names of any other persons, such as soldiers who left the county during the war of the rebellion but did not lose their lives therein, would not be memorial tablets within the meaning of the section; it would be beyond the scope of the power of the trustees for them to install such tablets. If such tablets are to be installed at all it must be by the commissioners, who have the power under the act of 1906, above quoted, to provide for the decoration of the building.

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

472.

OFFICES INCOMPATIBLE—TOWNSHIP TREASURER AND MUNICIPAL TREASURER.

There is no statutory inhibition against an individual holding both the offices of township treasurer and municipal treasurer, and as the offices are not incompatible in their nature, there are no legal objections thereto.

COLUMBUS, OHIO, November 21, 1911.

HON. C. W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I am in receipt of your communication of November 15th, in which you state that in your county you have a case wherein an elector of a township, who is also an elector of a municipal corporation located in said township, was elected to the office of municipal treasurer, also, to the office of township treasurer, at the recent November election; and request my opinion as to whether or not the same party can qualify as treasurer for the municipality and as treasurer for the township in which the said municipal corporation is located, and hold said respective offices at the same time.

I have carefully looked into the constitutional and statutory provisions of our state, and do not find any against one and the same person holding, at the same time, the offices of township and municipal treasurer. Under the ruling heretofore made by this department, in the absence of such a prohibition, the same person may hold the two offices at the same time, provided they are not incompatible.

The rule of incompatibility is laid down in the case of State, ex rel., v. Gebert, 12 C. C. R., N. S. 274, by Judge Dustin, at page 275, of the opinion, as follows:

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

In order to determine whether or not the offices of municipal and township treasurer are incompatible it is necessary to look to the statutory duties of each.

Section 4297, General Code, et seq., provide what the duties of the treasurer of a municipality shall be, which, in substance, are: To keep an accurate account of all moneys by him received, showing the amount thereof, the time when, from whom, and on what account received, and of all disbursements made by him, showing the amount thereof, the time when, to whom, and on what account paid, etc.; and that he shall receive and disburse all funds of the corporation, including the school funds and such other funds *as arise in or belong to any department or part of the corporation government.*

Section 3316, General Code, et seq., define the duties of the township treasurer.

Section 2602, General Code, provides that:

> "The auditor shall open an account with each township, city, village, and special school district in the county, in which immediately after his semi-annual settlement with the treasurer in February and August of each year, he shall credit each with the net amount so collected for its use.
>
> "On application of the township, city, village, or school treasurer, the auditor shall give him a warrant on the county treasurer, for the amount then due to such treasurer, and charge him with the amount of the warrant, but the person so applying for such warrant shall deposit with the auditor a certificate from the clerk of the township, city, village, or district, stating that he is treasurer thereof, was duly elected or appointed, and that he has given bond according to law."

This last above quoted section provides for the manner in which both a township and a city or village treasurer may obtain the funds due to the township, city or village, from the county treasurer.

There is nothing in the statutes which provides that either the township or the city treasurer shall maintain an office at any place within the respective territories, and which would thereby make the holding of both of said offices, at the same time, by the same person, incompatible.

In view of the further fact that the duties incumbent upon the city treasurer and the duties incumbent upon the township treasurer have nothing to do with each other, and are not in any way a check upon each other, being separate and distinct, and neither office being subordinate to the other, under the rule laid down in the above cited case, I cannot see wherein the duties imposed upon the respective treasurers, above referred to, could be incompatible.

Therefore, there being no statutory prohibition, and the said offices not being incompatible, under the rule above referred to, I am of the opinion that the same person, elected to the two respective offices, namely: treasurer of the municipality, and treasurer of the township wherein said municipality is located, may legally hold both at the same time.

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

474.

COUNTY AUDITOR—POWER TO INCUR EXPENSE OF EMPLOYING LEGAL COUNSEL FOR DEFENSE AGAINST ACTIONS BROUGHT FOR "PERFORMANCE OF LEGAL DUTY" AND "FOR REFRAINING FROM ILLEGAL ACT."

A county auditor is authorized, by section 4700, General Code, to employ legal counsel to defend him when an action is brought against him for "performing or attempting to perform a duty authorized or directed by statute for the collection of revenue" and have such legal counsel reimbursed from the county treasury.

When, however, an action is brought against an auditor by the prosecuting attorney and the attorney general for not placing certain property on the duplicate, and the action terminates in favor of the auditor, such action can only be deemed one against that official for "refraining from doing an illegal act." Unfortunately, no statute authorizes employment of counsel in such a situation, and such expense cannot be allowed.

COLUMBUS, OHIO, November 22, 1911.

HON. WALTER W. BOULGER, *Prosecuting Attorney, Chillicothe, Ohio.*

MY DEAR SIR:—I desire to acknowledge receipt of your communication of the 14th inst., wherein you inquire as follows:

> "Some time ago (in the year 1910) actions were brought by the prosecuting attorney and the attorney general against Mr. Robert D. Alexander, county auditor of this county, to compel him to place upon the duplicate certain taxes which the taxpayers claim they had paid. All of these actions in which the court arrived at a conclusion were decided against the prosecuting attorney and one is still pending—a demurrer having been filed thereto.
>
> "Mr. James I. Boulger was employed by the county auditor to represent him in this litigation, and the question now arises whether or not under section 5700 of the General Code, the money may be paid out of the county treasury by Mr. Alexander to his attorney as compensation for his services. Mr. Alexander submitted the question to the auditor of state, who, in turn, wrote him to take the matter up with the prosecuting attorney, and have the latter write you as to your view regarding this.
>
> "Neither Mr. Boulger nor Mr. Alexander have any desire to have the money paid out of the county treasury if there is any question in your mind about it. You will observe that it was necessary that the county auditor have some one to represent him, as the interest of the prosecuting attorney was adverse."

In reply thereto, section 5700 of the General Code, and to which you refer in your letter, provides as follows:

> "When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasurer reasonable fees of counsel

and other expenses for defending the action. The amount of damages and costs adjudged against him, with fees, expenses, damages and costs shall be apportioned ratably by the county auditor among all parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

One's first impression might be that said section 5700 would warrant allowing counsel fees. However, upon close inspection of a statute you will observe that the allowance is for "performing or attempting to perform a duty *authorized or directed by statute for the collection of the public revenues.*"

I am unable to find any statute authorizing the refraining from an illegal act. The thing the auditor did in your county was to refrain from placing certain property upon the tax duplicate that, under the holding of the court, would not have gone on, so that Mr. Alexander was doing his duty in refusing to do an act and not in "performing or attempting to perform" something specifically authorized or directed by statute. And in addition to that the authorization and direction by statute must be *"for the collection of a public revenue."* This latter consideration is important when you study the following:

"* * * The amount of damages and costs adjudged against him, with the fees, expenses, damages and costs shall be ratably apportioned by the county auditor among all the parties entitled to share the revenue so collected and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

It appears manifestly from the foregoing that the distribution of these items is made upon the basis of an amount which the auditor is to put on the tax duplicate, and not upon his refusal to put on the duplicate undetermined amounts.

I appreciate that it is hard upon an auditor to have to expend his own money in resisting a suit of this kind, because it is in the performance of his duties. In fact, an auditor who declines to place property upon the tax duplicate when the law sustains him is to be commended for his courage. His act is one just as deserving as is the act of another who places property upon the duplicate against the will of the owner who has left it off.

I regret exceedingly to have to hold that under the law the commissioners are without authority to make any allowance to Mr. Alexander. If there is any statute upon the question which I have overlooked, be free to call my attention to it. I will withhold this opinion from the files until after I hear from you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

482.

CORRUPT PRACTICES ACT—BOARD OF ELECTIONS—CANDIDATES.

Candidate for justice of peace who distributes eighty-five cents' worth of cigars in his campaign, is not guilty of such a violation of the corrupt practices act as to justify the bringing of charges under section 15 of the act.

It is not within the power of the board of elections to determine judicially whether or not the provisions of the corrupt practices act have been violated by a candidate.

The corrupt practices act should be construed with a view to its aims, but in the light of the maximum, "De minimus non curat lex."

COLUMBUS, OHIO, December 5, 1911.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 25th, in which you state:

> "A candidate, elected to the office of justice of the peace, files his statement of expenses, and in it makes a sworn statement that he contributed 85 cents worth of cigars. Is he entitled to the certificate of election and his commission, or is he guilty of corrupt practice?
>
> "It is my opinion that he is guilty of corrupt practice and that no candidate has a right to give away cigars. I do not think that it is my duty to decide this matter, for I think the law plainly states that the prosecuting attorney, attorney general or any five citizens may prefer charges. However, the question has been put up to me, and they are pressing me for an answer. Will you give me your opinion promptly if that is possible?"

Such candidate is entitled to a certificate of election. Section 8 of the corrupt practices act only provides that the certificate of election shall not issue until the statement is filed. As I understand you the candidate did file his statement; and it is not for the board of deputy state supervisors of elections, with whom the certificate is filed, to determine judicially whether the statement discloses either that the candidate did or did not violate the corrupt practices act, in the character or amount of his expenses. Upon the filing of a statement in apparent compliance with the statute it is incumbent upon the board to issue the certificate, if the issuance thereof is authorized by law.

You further ask, is he guilty of corrupt practice? Inasmuch as in the itemization of section 6 of the corrupt practices act there is no provision for the expenditure of money for cigars, to be given to voters, and if, as a matter of fact, the candidate contributed eighty-five cents worth of cigars to influence voters for himself for the office for which he was running at the election, he probably would be technically guilty of a violation of the corrupt practices act.

But this is a new law. While it should receive proper construction, aimed to cure the prevalent abuses that seem to have crept into our system of elections, yet, in giving it its first trial there should be some liberality, and trivial matters should not be given too much importance. *De minimis non curat lex*, while not a maxim of the criminal law, in trivial matters, like the one suggested, in my view, should receive some application.

Again, if the contribution of eighty-five cents worth of cigars was without improper motives; that is, if the candidate as a matter of good fellowship and

hospitality gave away the cigars; or if it had been his former practice to distribute to his friends an occasional cigar, and there was no intention of seeking to influence the voter in the exercise of his franchise, it might be that the item should have properly been under the head of "personal expense;" and in that event, of course, it would not be a violation of the act.

In any event, if the only charge that could be brought against a candidate was the contribution of eighty-five cents worth of cigars, and nothing further, if I were prosecutor I would not give it the slightest attention.

Section 15 of the act provides:

> "The petition provided for in the foregoing section may be filed by the attorney general of the state, the prosecuting attorney of the county, a candidate voted for at the election, in respect to which the allegations in such petition may relate, or by any five resident and qualified voters, who voted at such election."

This does not refer to the matter of preferring charges for violations of the act. The petition referred to in section 14 is one alleging that some person or persons, within the county, have become subject to the requirements of the act in regard to the filing of statements or accounts of election expenses, and have *failed* to do so, or have filed *false* or *incomplete* statements or accounts. The order which the court would issue, under section 17, would be a direction to show cause why such person or persons did not file a statement of election expenses, or amend the statement already filed, etc.

If a person were guilty of a corrupt practice act he would be in the same position as if he were guilty of any other crime, and it would be the duty of the proper authorities to file a proper affidavit against him.

In conclusion I would say that I would not advise that the violation of any law be disregarded; yet, owing to the character of the corrupt practices act, the uncertainty of some of its provisions, and the newness of the law, slight and technical violations thereof should not receive too much attention.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

484-2.

TAXES AND TAXATION—SMITH ONE PER CENT TAX LAW—ELECTIONS —ADDITIONAL LEVIES AFTER DUPLICATE HAS BEEN MADE UP— DUTIES OF BUDGET COMMISSION, COUNTY AUDITOR AND TREASURER.

Where, under sections 5649-5 *and* 5649-5*a of the Smith one per cent. tax law, the electors of several respective taxing districts in November vote in favor of a specified additional levy after the tax list and duplicate have been made up in October by the county auditor in accordance with the allowance of the budget commission and delivered to the treasurer, by the auditor, and any taxpayers have already paid up in acordance with the duplicate; Held, "That the additional levies cannot be placed upon the* 1911 *duplicate but may be placed upon that of the year* 1912 *if the taxing authorities of such districts wish, at the time of making up the budgets for* 1912, *to avail themselves of the authority thus acquired by them."*

COLUMBUS, OHIO, December 5, 1911.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 27th, enclosing correspondence which has passed between the tax commission of Ohio and the commissioner of common schools, and between the auditor of your county and yourself. The correspondence and your letter, together, present the following question:

> "At the recent November election the authorities of two or three taxing districts in Columbiana county submitted to the electors of their respective districts the proposition of additional taxes, as provided in sections 5649-5 and 5649-5*a* of the so-called Smith one per cent. tax law. In each instance the electors voted in favor of levying a certain specified amount or rate above the maximum rate fixed by law.
>
> "Several days prior to the holding of this election the county auditor computed the rates of taxation so as to produce the amounts allowed for the year 1911, by the budget commission, to the several taxing districts and made up the tax list and duplicate, and had delivered the latter to the treasurer. The county treasurer had written his receipts and footed each individual receipt; the tax rates have long been made up and posted in the various election precincts and many individuals have actually paid taxes, among them persons owning property in the taxing districts affected by the votes taken. Of course, in order that these steps should have been taken the budget commission has completed its work and certified the result of its labors to the county auditor.
>
> "The proposition submitted in each of the taxing districts involved did not designate the year or years for which the additional levy should be made.
>
> "What are the respective duties of the county auditor and the county treasurer in the premises?"

The Smith tax act of 1911 provides in part as follows:

> "Section 5649-5. The county commissioners of any county, the council of any municipal corporation, the trustees of any township, or any board of education may, at any time, by a majority vote of all the members elected or appointed thereto, declare by resolution that the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code as herein enacted within its taxing district, will be insufficient and that it is expedient to levy taxes at a rate, in excess of such rate and cause a copy of such resolution to be certified to the deputy state supervisors of the proper county. Such resolution shall specify the amount of such proposed increase of rate above the maximum rate of taxation and the *number* of years not exceeding five during which such increased rate may be continued to be levied.
>
> "Section 5649-5*a*. Such proposition shall be submitted to the electors of such taxing district at the November election that occurs more than twenty days after the adoption of such resolution. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question to the electors of such taxing district, and the election shall be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular

elections in such taxing district for the election of officers thereof. Twenty days' notice of the election shall be given in one or more newspapers printed in the taxing district once a week for four consecutive weeks prior thereto, stating the amount of the additional rate to be levied, the purpose for which it is to be levied, and the number of years during which such increased rate may be continued to be levied, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in a newspaper of general circulation in such taxing district.

"The form of the ballots cast at such election shall be:

"For an additional levy of taxes for the purpose of ..... not exceeding ..... mills, for not to exceed ..... years. Yes.

"For an additional levy of taxes for the purpose of ..... not exceeding ..... mills, for not to exceed ..... years, No.

"Section 5649-5*b*. If a majority of the electors voting thereon at such election vote in favor thereof it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

In connection with these sections, section 2595, General Code, must be read. Said section is as follows:

"On or before the first day of October of each year, the county auditor shall deliver to the county treasurer a true copy or duplicate of the books containing the tax list required to be made by him for the year."

Also, certain sections of the Smith law of 1911, other than those above quoted, as follows:

"Section 5649-3*a*. On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. * * *

"Section 5649-3*c*. The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3*a* of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total

amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any items therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law."

Upon examining all these related sections I have reached the following conclusion:

1. The date fixed in section 2595, General Code, is directory, merely; the delivery of the duplicate after the first day of October would not vitiate the process of taxation in any respect.

2. "All levies" made by local taxing authorities under the Smith one per cent. law, so-called, are to be made subject to the action of the budget commission; and that is not a "levy" (excepting only emergency levies as provided in section 5649-4, 101 O. L., 431), which is not made by the county auditor upon certificate of the budget commission.

This statement is true even as to levies made upon the authority of the electors, as provided in section 5649-5 et seq., above quoted, for the obvious reason that even after such additional taxes have been authorized the aggregate levy in a taxing district must not exceed fifteen mills, while the enforcement of this limitation is made a part of the duties of the budget commission by section 5649-3c. That is to say, even after an additional levy has been voted the budget commission must nevertheless review such a levy for the purpose of ascertaining whether or not it, together with other levies applicable within the same taxing district, produces an aggregate levy therein exceeding fifteen mills, and if this result does follow it is then the duty of the budget commission to reduce some levy or levies within such fifteen mill limitation.

It follows, therefore, that the mere vote of the people is not itself authority for the auditor to place any levy upon the tax duplicate.

Furthermore, this conclusion is supported by the fact that section 5649-5*b* does not provide that "if a majority of the electors * * * vote in favor thereof, a levy at the increased rate for and during the period provided for in the election shall be made;" on the contrary, it provides that if the electors vote in favor of the proposition "it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate, for and during the period provided for in such resolution, but in no case shall the combined rate for all taxes levied in any year * * * exceed fifteen mills." Evidently, the result of the vote is not to levy the aditional tax, but to authorize an additional tax. It confers a power which must be exercised by the levying authorities before it is executed. Before, then, the county auditor is bound to take any notice of the favorable action of the electors under section 5649-5*a*, the taxing authorities of

the district affected thereby must determine how they will use their newly acquired authority, and must submit their requisitions anew to the budget commission, as provided particularly in paragraph 8 of section 5649-3*a*, above cited, but not quoted, which provides that the budget must contain "the amount of such additional taxes as may have been authorized as provided in section 5649-5, General Code."

The only consideration which points to a different conclusion from that above expressed is the form of the ballots, as set forth in section 5649-5*a*, above quoted. Those ballots are required to specify the purpose for which the additional levy is to be made, while section 5649-5, in prescribing the contents of the resolution to be passed by the taxing authorities does not require the purpose of the levy to be set forth. In order to reconcile these two sections, and the language of section 5649-5*a*, prescribing the form of the ballot to be used at the election, must be construed, not as relating to any specific purpose, but as relating to the general purpose for which levy is to be made, such as "schools," "support of municipal corporations," etc.

The various provisions of the Smith law are not exactly clear with respect to the question submitted, but upon careful examination of them I have concluded that the effect which I have described must be given to the vote taken under section 5649-5*a*.

3. While the date prescribed in section 2595, General Code, is, as above suggested, directory, yet, I find no authority, statutory or otherwise, for the return by the treasurer to the auditor of the duplicate delivered to him, for the purpose of adding any levy or levies thereto. If the levy is not made at the time the auditor delivers the duplicate to the treasurer, I know of no way in which it can be made thereafter.

It would seem, therefore, that the general assembly, in providing that the vote of the electors upon the proposition to have increased taxes, should be taken at a November election, could not have intended that the result of that vote should affect a duplicate made up and to be delivered in October, even though the date of delivery be regarded as directory.

For all the foregoing reasons I am of the opinion that the additional levies, authorized in the taxing districts of Columbiana county referred to, cannot be placed upon the 1911 duplicate, but may be placed upon that of the year 1912, if the taxing authorities of such districts wish, at the time of making up the budgets for the year 1912, to avail themselves of the authority thus acquired by them.

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

485.

SOLDIERS' BURIAL COMMITTEE—POWER OF COUNTY COMMISSIONERS WITH REFERENCE THERETO.

Expenses of burying an old soldier incurred by authorization of section 2950, *General Code, may not be limited by the county commissioners to less than* $75.00.

COLUMBUS, OHIO, December 9, 1911.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 21st, requesting my opinion upon the following:

"May the county commissioners limit the amount for which a township or ward soldiers' burial committee may contract to a sum less than $75.00 *in each case?*"

The following sections of the General Code must be considered in connection with your question:

"Section 2950. The county commissioners of each county shall appoint two suitable persons in each township and ward in the county * * * who shall contract, at a cost not to exceed seventy-five dollars * * * and cause to be interred * * * the body of any honorably discharged soldier * * * or the mother, wife or widow of any such soldier * * * or any army nurse * * * who dies, not having means to defray the necessary funeral expenses. * * *

"Section 2951. Such committee shall hold their appointment so long as they serve to the satisfaction of the county commissioners. * * *

"Section 2952. * * * The persons so appointed * * * shall cause to be buried such person, and make a report thereof to the county commissioners * * * setting forth * * * an accurate itemized statement of the expenses incurred by reason of such burial."

I am clearly of the opinion that the county commissioners have no power to limit the amount for which the township or ward committees may contract under the provisions of the above sections otherwise than such amount is limited by the sections themselves.

I am further of the opinion that it was probably the legislative intent that the price should be seventy-five dollars except that in certain communities in the state and under certain conditions all parties concerned might not care to expend that much, or that there may be reasons at times and places for a less expenditure on account of the lack of revenues. The statute certainly is one to be construed liberally in favor of the soldiers. It is the last tribute in the way of anything of financial value that the people of a grateful Republic can pay to its heroic defenders, and, too, when the legislature fixed the maximum at seventy-five dollars prices were much lower than they are now, and this sum seems to be not only within the field of economy, but pretty well toward the center of boundary of stinginess.

With great esteem, believe me to remain,

Sincerely yours,
TIMOTHY S. HOGAN,
Attorney General.

487-1.

BOARD OF REVIEW—POWERS OF "DE FACTO BOARDS"—CHIEF CLERK AN EMPLOYE—COMPENSATION—DISMISSAL AND APPOINTMENT.

When the members of a board of review are dismissed upon charges, and a new board installed and the old board again reinstated in place of the second, the chief clerk hired by either board is a mere employe and any of the boards whilst in office being at least de facto officers, may employ and dismiss a chief clerk at will.

The chief clerk should be compensated for services actually rendered at the injunction of any one board, but where litigation is pending it is recommended to have such employe furnish bond to release the city from all liability.

COLUMBUS, OHIO, December 11, 1911.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 17th, relative to the conflicting claims of John B. Tehan, former clerk of the board of review of the city of Dayton, and Daniel M. Heeter, present clerk of said board of review. You state:

"You are familiar with the removal of the old board, consisting of Lindemuth, Winch and Berst, on the 24th of March, 1911; the appointment in their places of Messrs. Gwinner, Madden and Smith, and the subsequent reinstatement of Messrs. Lindemuth and Winch, by order of the supreme court. Also that upon a hearing of formal charges against Lindemuth and Winch they were removed about the first of this month by the board of assessors and appraisers, and Messrs. Madden and Smith appointed in their places. In order that you may understand what has been done relating to the employment of clerks, I give you the following data taken from the records of the board of review:

"June 6, 1910, the board composed of Lindemuth, Winch and Berst, organized for the session of 1910 and passed a resolution fixing the salaries of clerks and messengers by the month, and reserving the right 'to remove any clerk or messenger at any time for incompetency, neglect of duty, or whenever their services are deemed unnecessary.' June 7, 1910, John B. Tehan was employed as chief clerk of the board, beginning June 6, 1910, and the salary of the chief clerk was fixed at the rate of $166.66 per month.

"March 27, 1911, the board composed of Gwinner, Madden and Smith, organized and on motion John B. Tehan, chief clerk, Clyde Eggleson, clerk, and Daniel H. Corson, messenger, were removed from their respective positions and Daniel M. Heeter employed as chief clerk. June 5, 1911, the board, composed of Gwinner, Madden and Smith, organized for the session of 1911, passed a resolution in the precise words of the resolution of June 6, 1910, fixing the salaries of clerks and messengers by the month, and reserving the right 'to remove any clerk or messenger at any time for incompetency, neglect of duty, or whenever their services are deemed unnecessary,' fixing the salary of the chief clerk at $166.66 per month, and employed Daniel M. Heeter as chief clerk. October 2, 1911, the board, composed of Gwinner, Lindemuth and Winch, organized in the absence of Gwinner. The minutes show that John B. Tehan, clerk, 'appeared and reported for duty.' November 1, 1911, resolution passed fixing the salary of the chief clerk at $166.66 per month, and on motion John B. Tehan was appointed chief clerk, 'said appointment to date from October 1, 1911.' The record thereupon shows that the appointment was accepted by Tehan, 'with the distinct understanding that I do not waive any legal right which I claim has existed under the appointment of June 7, 1910.'

"Heeter performed the services as chief clerk during the month of September, but before the month ended, on September 28, 1911, the supreme court handed down its decision reinstating Lindemuth and Winch. The auditor held up Heeter's salary for September, and before it was paid to him Tehan filed with the auditor a written protest against the payment of this September salary to Heeter. Tehan performed all the services of chief clerk during the month of October, 1911, and there has been no objection made to his receiving the salary for that month, al-

> though his appointment by the board was not made until November 1st, and making the appointment relate back to October 1st. Since the removal of Lindemuth and Winch, November 1st, and the appointment of Madden and Smith in their places, the board as composed of Gwinner, Madden and Smith, passed a resolution removing Tehan and the other clerks upon the ground that their services were unnecessary, and employed Heeter as chief clerk. Since this action Tehan has filed another protest with the auditor against paying to Heeter any of the salary for services claimed to be rendered as chief clerk since September 1, 1911, or for services that may be performed in the future either by Heeter or some one else."

I did not understand that you had formally advised your auditor in this matter. I concur with you that the safest procedure would be to have, either a judgment of some court having jurisdiction, or full and proper indemnity to the county from the parties receiving payment. Inasmuch, however, as you have asked my advice in the matter, I am pleased to give you my views. If I correctly understand the situation, there are two questions to be answered:

1. Should the auditor issue a warrant to Daniel M. Heeter for his services during the month of September, 1911, notwithstanding the written protest filed by said John B. Tehan?

2. Should the auditor issue a warrant to said Daniel M. Heeter in compensation for his services as chief clerk of the board of review for the time commencing when Lindemuth and Winch were removed, November 1st, and Madden and Smith appointed in their places, at which time they dismissed Tehan and employed Heeter, as chief clerk?

At the outset it must be conceded that the board composed of Gwinner, Madden and Smith, which employed Daniel M. Heeter as its clerk, as shown by the minutes of its organization at the session of 1911, under date of June 5, 1911, was at least a de facto board.

> "To constitute an officer de facto, it is enough that the office is one provided for by law, and that the person has the color of appointment; assumes to be and acts as such officer, and that he is accepted and acknowledged by the public as such to be, exclusive of all others."
>
> Smith vs. Lynch, 29 O. S., 261.
> Ex parte Strong, 21 O. S., 610.

The last named board, as I understand, were performing the duties of a board of review for the city of Dayton during the month of September, 1911, and said Daniel M. Heeter performed the duties devolving upon the position of chief clerk of said board, under his employment of the previous June. The public recognized the acting board as the acting board of review of said city, and no one else, at that time, sought to perform the duties of said board.

The law is well settled that the acts of officers *de facto* are as valid and effectual, where they concern the rights of third persons, as those of officers *de jure*. School Directors vs. Tinglen, 73 Ill. App., 471.

> "The acts of an officer *de facto*, performed before an ouster, are, as to the public, as valid as the acts of an officer *de jure*."
>
> Parker vs. State, 13 Ind., 178.
>
> "Nor can the official acts of a *de facto* officer be collaterally attacked."
>
> Cleveland vs. McKenna, 41 L. R. A., 670.

So it must be conceded that the board organized June 5, 1911, composed of Gwinner, Madden and Smith, was a *de facto* board, fully empowered, as far as the public and third persons were concerned, to do all of the things that a *de jure* board could do.

Section 5622, General Code, provides as follows:

> "The board of review may employ a chief clerk, and appoint such other clerks, not exceeding six, and such messengers, not exceeding six, as it may deem necessary, and fix their compensation, which shall be paid out of the county treasury upon the order of said board, and the warrant of the county auditor. Such incidental expenses as the board deems necessary shall be paid out of the county treasury in like manner."

It will be noted that the language of the statute is "may *employ*" a chief clerk.

Bouvier defines a "clerk" to be:

> "A person employed in an office, public or private, for keeping records or accounts.
>
> "His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs."

The word "chief" signifies no duties, and the very title "clerk" is properly that of an employe. I cannot see how it can be contended that the position of chief clerk of a board of review is an office.

> "An officer is distinguished from an employe in the greater importance, dignity and independence of his position, in the requirement of an official oath, and perhaps a bond in the liability for misfeasance or nonfeasance, and usually in the duties of the position. A mere clerk is not an officer, but an employe. A chief clerk in the office of the assessor of the city of Detroit is not an officer."
>
> Thorp vs. Langdon, 40 Mich., 373.

Inasmuch as it appears from the foregoing that the chief clerk of the board of review is a mere employe, hired to perform certain duties under the instructions and orders of the board; and since, to my mind, there is no question but that the board of review of the city of Dayton, composed of Gwinner, Madden and Smith, was the *de facto* board of review of said city at the time of their organization, to-wit: June 5, 1911, during the month of September, 1911, and up until the time of their ouster on the 28th day of that month, it cannot but follow that they were authorized to make the contract of employment with Mr. Heeter, and that he would be entitled to receive the compensation agreed upon, for the services he rendered.

There is no question, however, but that the best and safest course for your county to pursue would be to do as you advise—require Mr. Heeter to properly and satisfactorily indemnify the county for the salary for the month of September, to guard against Mr. Tehan's involving the county in any litigation in the matter.

You further ask as to the right of the auditor to issue a warrant for the compensation of the chief clerk of the board of review for the time since November 1st, when, as I understand, the old board was removed for cause, and thereupon Messrs. Madden and Smith were appointed as members of the Dayton board of review, and now, with Gwinner, constitute the *de jure* board. Since

they are, under the law, empowered to employ a chief clerk, and since they have done so, I see no reason why the auditor should refuse to honor their voucher, in payment for the services of such an employe.

Any contention on the part of Mr. Tehan that he is entitled to compensation, although the services of chief clerk were performed by Mr. Heeter, or some other person, could only rest either upon the claim that the position of chief clerk is an office, to which he still holds some title, or that the appointment of Messrs. Madden and Smith, after the removal for cause of Messrs. Winch and Lindemuth, was illegal and void.

I am of the opinion that the removal of Messrs. Lindemuth and Winch was in strict compliance with the law, and that the appointment of Messrs. Madden and Smith was in all respects legal; further, that since November, 1911, there can be no question but that the *de jure* board of review of the city of Dayton was composed of Messrs. Gwinner, Madden and Smith.

I am further of the opinion that the position of chief clerk to said board is a mere employment; that the employment is only during the pleasure of the board making the appointment; that at any time, when the board sees fit, it may discharge its chief clerk, in the same manner as it could any of its other employes; that in the absence of any employment of Mr. Tehan, by the board, the duties of the employment being performed by Mr. Heeter, or some other person, the board could not be called upon to pay or compensate Mr. Tehan, or any person other than the one employed to do the particular work. As you are aware, the greater weight of authority holds (Cronan vs. Eshelby, 2 C. C., 480), that even payment to officers *de facto* would relieve the county or other political division from again making payment to officers *de jure*.

That payments to *de facto* officers relieves the people from payment to *de jure* officers, see:

88 N. Y., 217.
30 Pac., 265.
20 Kansas, 298.
50 N. J. L., 12.
19 L. R. A., 689.

So, while it is not necessary to pass upon the matter in this opinion, even if Mr. Tehan were to successfully contend that he was an officer, the county, in my opinion, would not be liable to him for salary, if it had paid the *de facto* officers who had performed the duties of the office.

In conclusion then it is my opinion that as far as the matter of the payment of the salary to Mr. Heeter for September, the safer course would be to require Mr. Heeter, before payment to him, to satisfactorily indemnify the county against any loss or liability that might be incurred by such payment; that as to the salary or compensation of the chief clerk since the reappointment of Madden and Smith and the organization of said board with Mr. Gwinner, that the auditor upon the authority of the board's voucher, should issue his warrant to the acting chief clerk, Mr. Heeter.

I might add that the chief clerk being a mere employe, subject to discharge at the pleasure of the board, there was no necessity for a formal resolution dispensing with his services; the mere hiring of another in his place, who did the work of the position to the exclusion of Mr. Tehan, was ample notice of his discharge.

Trusting that this will assist you to finally determine the matter, I am,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

489.

SALARY OF DEPUTY SEALER OF WEIGHTS AND MEASURES—EXPENSES —POWERS OF COUNTY COMMISSIONERS.

The salary of deputy county sealer of weights and measures as fixed by the county commissioners includes his expenses. After fixing his salary, the commissioners cannot allow a further amount for expenses.

The commissioners may in their discretion, however, rescind the resolution, and by another resolution increase the salary.

COLUMBUS, OHIO, December 12, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

MY DEAR SIR:— Your letter of August 29th received. You set forth therein a copy of the resolutions of your county commissioners fixing the salary of the deputy county sealer of weights and measures, which resolution is as follows:

> "WHEREAS, The general assembly of the state of Ohio, on the 17th day of May, 1911, amended an act known as Senate Bill No. 237, passed on the 10th day of May, 1910 (101 O. L., page 234), and,
>
> "WHEREAS, Said amendment provides that the salary of said deputy county sealer of weights and measures shall be fixed by the board of county commissioners of the respective counties,
>
> "Now, therefore, on this 5th day of July, A. D. 1911, the above matter came on to be heard before the board of county commissioners of Crawford county, Ohio, at their office, with all members present in due session convened, and after due consideration the salary of the deputy sealer of weights and measures is fixed at eighty-five ($85.00) dollars per month, to be paid by the county, which amount shall be in full of all compensation and expenses of said deputy sealer of weights and measures."
>
> (Signed and attested.)

You also state that the deputy county sealer of weights and measures, whose salary was fixed by the above resolution, is dissatisfied with the amount and the county commissioners wish to know whether under the law they could legally allow his expenses and livery hire in addition to the amount named in the resolution, and you request my opinion upon this point.

The deputy sealer of weights and measures is under the law appointed by the county auditor and his salary is fixed by the county commissioners. Your deputy sealer of weights and measures having been appointed by the county auditor and the commissioners having fixed his salary at $85.00 per month, which is to include his expenses, I am of the opinion that the commissioners could not legally allow his expenses and livery hire in addition to the amount named in the said resolution, for the resolution *expressly* states that the amount named *shall include his expenses.*

However, if the county commissioners are of the opinion that the amount fixed by the said resolution is inadequate to pay his expenses and reasonable salary, they can rescind their former action and increase the amount to such a sum as they deem advisable.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

490

BOARD OF EDUCATION — SPECIAL SCHOOL DISTRICT — MEMBER OF TOWNSHIP BOARD OF EDUCATION RESIDENT IN SCHOOL DISTRICT — DISQUALIFICATION THEREOF.

A man who is elected, qualified and acting as a member of township board of education is ineligible to continue as such officer after the establishment of a special school district of which latter district said officer is a resident and a taxpayer.

COLUMBUS, OHIO, December 13, 1911.

HON. JOHN F. MAHAR, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Under date of November 27th, 1911, you submitted the following question for my opinion:

> "Is a man who was elected, qualified and acting as a member of the township board of education eligible to continue as such official after the establishment of a special school district, he being a resident and taxpayer in the special school district."

Section 4745 of the General Code provides that a vacancy in any board of education may be caused by non-residence and also by removal from the district.

It is, therefore, clear that the intention of the legislature is that a member of a board of education in order to serve as such member must be a resident of the school district of which he is a member of the board of education. The newly established special school district which was carved out of the township school district is a separate taxing district and ceases to be a part of the township school district from which it is carved. Therefore, although the man was at the time of his election and qualification as a member of the township board of education a resident of the township school district, yet when the new special school district was established, which special school district covered the territory in which such man resides, he thereby ceased to be a resident of such township school district and became a resident of the special school district.

I am, therefore, of the opinion that a vacancy was created under the provisions of section 4745, General Code, for the reason that he now is a non-resident of the township school district.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

493

SEALER OF WEIGHTS AND MEASURES, COUNTY—POWER TO APPOINT AND REMOVE A DEPUTY SEALER—TERM OF OFFICE OF A DEPUTY SEALER.

A term of office of a county sealer of weights and measures rests with the discretion of the county sealer who appoints him, and the term of said deputy cannot extend beyond that of the county sealer who made the appointment.

COLUMBUS, OHIO, December 18, 1911.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—In your communication of October 20th, you submit to me for opinion thereon the following question:

> "Has the county sealer of weights and measures the right to appoint a deputy under section 2622, General Code, when his predecessor in office, on August 7, 1911, appointed a deputy to serve for a term of one year?"

I desire to thank you for the memorada and opinion submitted by you with your request. It has been of valuable assistance to me.

Section 2622, General Code, as amended May 31, 1911, 102 O. L., 426, provides as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

Section 9 of the General Code provides that,

> "A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. * * * *"

Since the deputy county sealer of weights and measures is no different from any other deputy provided for by law, the provision of section 9, supra, applies.

> "Deputies, clerks, assistants, bookkeepers and other employes are not officers under the constitution."
>
> Theobald v. State, 10 C. C. (n. s.) 175.
> Affirmed, no opinion, 78 O. S., 426.

> "Where an office is filled by appointment, and a definite term of

office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."

Throup on Public Officers, Section 304.

"A deputation expires with the office on which it depends, and if the principal is reappointed the deputy must be reappointed also."

Throup on Public Officers, Section 304.

"A deputy's commission, in the absence of any statutory provision to the contrary, runs only while the principal's term lasts."

Grennwald v. State, 17 Ark., 332.

It has even been held that a deputy county clerk who was appointed during the county clerk's first term of office, and who continued to act without a reappointment during the same person's second term is not an officer *de facto*. (Smith v. Causter, 83 Ky., 367.)

Whatever duty the deputy county sealer performs *colore officii* is done by the county sealer of weights and measures. The deputy does nothing in his own name. As you state, the case of Brady v. French, 6 N. P., 122, has a special reference to the provisions of section 9, Revised Statutes, now section 9, General Code. In the latter case the court says:

"An officer can have no legal or official pleasure after his term has expired, because with the expiration of his term of office he is functus officio and a private citizen. His appointments expire necessarily with the power which gave them life. Any other construction of the statute might find the office of county treasurer so embarrassed by numerous contracts of employment of collectors, for whose acts an incoming treasurer would be responsible, and from whom he would not have the right even to demand a bond, that no conservative or responsible man could be induced to accept the office. The only candidates would be the reckless and irresponsible. Any other construction, therefore, should be avoided as against a wise and prudent public policy."

From all the foregoing, I have no hesitation in concurring with your opinion, and I hold that the term of a deputy county sealer of weights and measures cannot extend beyond the term of the county sealer of weights and measures, who makes the appointment.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

500

INMATES OF CHILDREN'S HOME—ATTENDANCE AT VILLAGE SCHOOL OUTSIDE OF HOME DISTRICT—BOARD OF EDUCATION OF TOWNSHIP AND OF VILLAGE—PAYMENT OF TUITION OF INMATES OF CHILDRENS' HOME.

Inmates of a children's home are classed equally with other youth under the meaning of section 7681, General Code, and such inmates may attend a village school not within their own district, if there is no school within their own district within one and one-half miles of the home or at closer proximity than the village school. The board of education of said village cannot charge tuition for said inmates until they have notified the board of education of the district in which the pupils reside.

The duty of providing for the education of such inmates devolves upon the board of education of the township in which they reside and not upon the trustees of the home.

COLUMBUS, OHIO, December 22, 1911.

HON. T. E. MCELHINEY, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—Under date of November 7th you have requested my opinion as follows:

"The Morgan county children's home is situated in Malta township, in this county; about 1886, under the provisions of the law a separate school was established there for the benefit of the inmates and the same was continued until a few years ago; since that time the pupils have been sent to the Malta village schools and the trustees of the home paid tuition for a few years; the trustees of said children's home then refused to pay any further tuition, but the children have continued to go to the Malta village school.

"The children's home is situated about three-quarters of a mile from said village school and more than a mile and a half from any school maintained in Malta township, other than said village school; the Malta township school board has discontinued the school in the district in which said home is located and conveys the pupils to said village school; no notice has been served upon said township board until the beginning of the present school year that the pupils were in attendance at said village school

"I desire your opinion as to whether the Malta village school board can hold either the township board or the trustees of the children's home for the payment of the tuition for such years as it has not been paid, prior to the serving of notice, by the village board upon the township board, that said pupils were in attendance at said village school."

Section 7676, General Code, provides:

"The board of any district in which a children's home * * * * is established by law, * * * * when requested by the board of trustees of such children's home, * * * * shall establish a separate school * * * * so as to afford to the children thereon, as far as practicable, the advantages and privileges of a common school education. * * * * If the distributive share of school funds to which the

school at such a home * * * * is entitled by the enumeration of children in the institution is not sufficient to continue the schools for that length of time, the deficiency shall be paid out of the funds of the institution."

Section 7678, General Code, provides that the board of education shall incur no expense in the support of such schools.

Section 7681, General Code, provides 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 * * * * of actual residents of the district, including children of proper age who are inmates of a county or district children's home located in such a school district, at the discretion of its board of education * * * *."

Section 7735, General Code, provides as follows:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

As you state that the separate school district which has been established for the benefit of the inmates of the Morgan county children's home, situate in Malta township, Morgan county, has been discontinued, the provisions of section 7676 of the General Code are no longer applicable, but the inmates of such children's home would come within the provisions of section 7681 of the General Code, as such children of proper age are included among the pupils of the particular district in which the home is located, and such inmates are to be considered in the same light as any other youth between the age of six and twenty-one, who are children of actual residents of the district. It is true that the statute says at the discretion of its board of education, but, as I construe such language that refers to the entire youth of such district. I, therefore, agree with my distinguished predecessor, Hon. U. G. Denman, wherein he construes the discretion given to the board by this section as "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 opinion was rendered to Hon. John W. Zellers, state commissioner of common schools, October 14th, 1909, in reference to the same children's home.

Holding, as I do, that the inmates of the children's home are entitled under the provisions of section 7681, General Code, to be treated the same as all other youth between the age of six and twenty-one, children of actual residents of the district, providing no separate school is maintained in accordance with the provisions of section 7676, General Code, supra, the provisions of sections 7735, General Code, supra, are in full force in respect to the inmates of such children's home. Said section authorizes pupils who live more than one and one-half miles

from the school to which they are assigned in the district where they reside to attend a nearer school in the same district, or if there be none nearer, then the nearest school in another district in all grades below the high school. In your letter you state that the Malta township school board has discontinued the school in the district in which the children's home is located, that there is none nearer in such district, and that the village school is the nearest in another school district. Such being the case, I am of opinion that the inmates of such children's home may attend such village school and that the board of education of the Malta township school must pay the tuition of such pupils, provided the provisions of section 7735, General Code, have been fully carried out. Such section states that a board of education (in this instance the village board of education), shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside (in this instance the Malta township school district), and as no notice has been served upon said township board until the beginning of the present school year that the pupils (the inmates of the county children's home) were in attendance at such village school, I am of the opinion that the Malta village board of education cannot hold the Malta township board of education for the payment of the tuition for such years as the pupils have been in attendance at such village school prior to the serving of the notice by the village board of education on the township board of education.

I am further of the opinion that as the inmates of the county children's home are included among the youth that are entitled to free education in the district in which such home is located, there being no separate school established at such home, the trustees of such home are not liable in any instance for the payment of the tuition of such inmates attending the village school, the duty of providing for their education being devolved upon the board of education of the township in which such children's home is located.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

501

CORRUPT PRACTICES ACT—LOCAL OPTION ELECTIONS—INDIVIDUALS AND ORGANIZATIONS—EMPLOYMENT OF MEN AROUND POLLS—HIRING OF CONVEYANCES TO AND FROM POLLS.

It is the view of the attorney general that the corrupt practices act does not require individuals and organizations to file an account of receipts and expenditures in a local option election; but in Given et al. vs. Moore et al., the common pleas court of Shelby county, Ohio, holds contrary and should be followed pending decisions of higher courts. The same applies with regard to employment of men and hiring conveyances about polls in a local option election.

COLUMBUS, OHIO, December 22, 1911.

HON. SHOLTO M. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 13th, in which you ask the following questions:

"In local option elections:

"1. Does an account of receipts and expenditures have to be filed by the various individuals and organizations covering moneys received and expended to promote their respective causes?

"2 Is it a violation of the corrupt practices act to employ an unlimited number of men to work around the polls on election day?

"3. Is it a violation of the corrupt practices act to hire conveyances and to convey voters to and from the polls."

On November 15th last I rendered an opinion to Hon. Henry T. Hunt, prosecuting attorney of Hamilton county, wherein I held that under section 2 of the corrupt practices act,

"* * * so long as committees, etc., confine their labors to mere propaganda, and their expenditures to the proper and necessary things 'pertaining to the discussion and advancement of the questions they advocate' they are included in the exception found in section 1 of the corrupt practices act; that as soon as they endorse, aid or assist in the nomination or election, or both, of a candidate for office they bring themselves within the purview of the statute * * * that it is only 'candidates' voted for at any election, and persons, committees, societies and organizations contributing and expending things of value at any election where a candidate is voted for who are compelled to file statements under section 2: that persons, organizations, etc., contributing and expending things of value at local option elections, * * * are not required under section 2, which is the only section providing for the same, to file an itemized statement of such contributions and expenditures."

It was my view that the corrupt practices act did not require individuals and organizations to file an account of receipts and expenditures in a local option election. However, on last Friday, Judge Klinger, in the case of Charles Given et al. v. E. V. Moore et al., in the court of common pleas of Shelby county, Ohio, decided to the contrary and expressly said:

"We hold that the corrupt practices act of Ohio does include committees and individuals who participated in a local option, county or municipal election."

In view of the above decision, while, with all deference and respect to the honorable court, I see no reason to change my former opinion, the safer position of any one falling within the matters and things of the corrupt practices act would be to comply with the provisions thereof.

The answer to your second question is totally dependent upon whether or not the opinion of Judge Klinger obtains. If, as he holds, the corrupt practices act applies to local option contests, then, since there is no provision whatsoever in the itemization of section 26 of the act for the employment of any number of men to work around the polls on election day, by others than a "candidate" or a "political party," and since it is further provided that any expenditure, etc., for any "purpose whatsoever, except as herein provided, is hereby declared to be corrupt practices," it is readily seen that the payment to parties employed to work around the polls would be a violation of the act.

This is a very significant and, to me, pertinent reason for believing that the legislature did not intend to have the act apply to other elections than those at which candidates were voted for, and which were in charge of political com-

mittees. However, as before stated, since Judge Klinger has taken a contrary view, so long as his decision stands, I am constrained to hold that the only safe way is to comply with the law as interpreted by him.

Answering your third question, would say, in an opinion rendered some time ago to Hon. Harry M. Black, prosecuting attorney of Seneca county, I held the rule to be that it would be a violation of the corrupt practices act to hire conveyances, and to convey voters to and from the polls at a general election. You, no doubt, have a copy of this opinion and have noted the exceptions to the general rule. Any answer to this query would also be controlled by the opinion of Judge Klinger, since the hiring of the conveyance would imply the payment or recompensing of some one for the use of the conveyance, and if the corrupt practices act applies to local option elections, as held by Judge Klinger, since there is no provision in section 26 for the expenditure of money for such purpose as hiring conveyances, it would be prohibited.

I am enclosing you copies of the opinion to Hon. Henry T. Hunt and to Hon. Harry M. Black. I regret that I am unable at this time to send you a copy of Judge Klinger's opinion, which holds contrary to my views as expressed in the Hunt opinion.

I am very sorry that I cannot answer your inquiries in any other manner than as herein stated, but while I understand the Shelby county case will at once be carried up, I cannot anticipate the holding of the upper court, and must be governed, so long as it stands, by the decision of Judge Klinger.

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

503

EXHAUSTED FUNDS—WARRANT OF COUNTY AUDITOR—DUTY OF TREASURER.

A county auditor may draw a warrant upon a fund which he knows to be exhausted, if said warrant is issued, in compliance with section 7570, General Code.

County treasurer shall endorse upon said warrant "not paid for want of funds" with date of its presentation and sign his name thereto so that said warrant may carry interest from that date.

COLUMBUS, OHIO, December 22, 1911.

HON. SHOLTO M. DOUGLASS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I herewith beg to acknowledge receipt of your communication of November 8th, 1911, wherein you inquire as follows:

> "Will you please advise me at your earliest convenience whether or not in your opinion an auditor is permitted by law to draw an order on a fund which he knows to be exhausted?
>
> "I have no authority on the question one way or the other except the section of the General Code providing that when such an order is presented to the treasurer he shall indorse it not paid so that it may draw interest."

In reply thereto I desire to say that section 2676, General Code, provides as follows:

"When a warrant is presented to the county treasurer for payment, and is not paid, for want of money belonging to the particular fund on which it is drawn, the treasurer shall indorse the warrant, 'Not paid for want of funds,' with the date of its presentation, and sign his name thereto. Such warrant shall thereafter bear interest at the rate of six per cent. per annum. A memorandum of all such warrants shall be kept by the treasurer in a book for that purpose."

Section 2570, General Code, provides as follows:

"Except moneys due the state which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from such treasury upon presentation of the proper order or voucher therefor, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose and on what fund. He shall not issue a warrant for the payment of any claims against the county, unless allowed by the county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal authorized by law so to do."

I am of opinion that the county auditor is permitted by law to draw a warrant on a fund which he knows to be exhausted if said warant is issued by the auditor in compliance with the authority vested in him by section 2570, General Code, supra, and when the county auditor so issues such warrant then it becomes the duty of the county treasurer to indorse upon such warant the following, "Not paid for want of funds," together with the date of its presentation, and sign his name thereto so that said warrant may carry with it interest from said date.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

504

BOARDS OF EDUCATION—MEMBERS OF—DURATION OF TERM—OFFICERS ELECTED AND APPOINTED.

A member of the board of education whether elected for a full term or appointed to fill a vacancy, holds such office until his successor is elected and qualified.

Where four members are holding an office under equal rights and an elector is chosen at a regular election to succeed any one of them to membership of the board, all four are interlopers and the court has no other alternative but to dismiss all four. The best expedient would be an agreement among themselves in accordance with which one of them should resign to make room for their successor.

COLUMBUS, OHIO, December 23, 1911.

HON. THEODORE H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Under favor of December 16, 1911, you ask an opinion of this department upon the following:

"In one of the special school districts of this county the term of office of at least four members of the board of education would have expired on January 1, 1912, if their sucessors had been properly elected and qualified under the last November election.

"Two of the members, whose terms of office would thus have expired on January 1, 1912, have been duly elected by the people and the remaining two have been appointed under section 4748 of the General Code, to fill the unexpired terms of members who had resigned.

"Owing to the irregularity in the nomination papers of three of the electors who sought to have their names placed on the ballot as members of the board of education, it so happened that at the regular election only one name appeared on the ballot for member of the board of education.

"The question now arises:

"First. Do the members who were appointed to fill the vacancy for the unexpired term hold over until their successors are duly elected and qualified?

"Second. Whose place on the present board of education will be taken by the man who was duly elected at the last November election?"

You then state your views upon the questions and cite authorities therefor, which I find of assistance to me.

Section 4740, General Code, provides:

"The board of education thus elected shall organize on the second Monday after the election, and the terms of members shall be, as hereinbefore provided, from the first Monday in January after the last preceding annual election of members of boards of education *and until their successors are elected and qualified.*"

Section 4745, General Code, provides:

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

Section 8, General Code, provides:

"A person holding an office or public trust shall continue therein *until his successor is elected or appointed and qualified,* unless otherwise provided in the constitution or laws."

Section 10 of the General Code provides:

"*When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified.* Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term,

or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

The rule is that an officer, whether elected for a full term, or appointed to fill a vacancy, holds such office until his successor is elected and qualified.

In State v. Metcalfe, 80 O. S., 244, the fourth syllabus is as follows:

> *"The capacity conferred upon an elective officer by said article to serve until a successor is elected and qualified attaches to and may be enjoyed by one appointed to succeed where the elected officer has resigned.* And 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, by force of the constitution, clothed with the power to hold the office until a successor is elected and qualified."

The person who is appointed to fill a vacancy in an office has the same right, as an elective officer, to hold over until his successor is elected and qualified. The members of the board of education who were appointed to fill a vacancy caused by resignation succeed to the rights of their predecessors and hold over until their successor is elected and qualified. Each of the four members of the board of education whose terms expire the first Monday in January have a right to hold over. In this respect they have equal rights.

The term of four members expire the first Monday in January and only one person has been elected to take office on said first Monday in January. As against this elected member, each of the four is, or will be, a usurper of the office. His right to office is superior to either of the four. As against each other, each of the four have equal right to hold over, and each of them has an equal duty to retire from office and permit the last elected member to succeed him. There are but three places to be filled by the four who hold over. In other words, four persons have equal rights to three positions. The statutes do not provide a means of determining who shall step aside in such a case, nor have I found any decision upon the proposition.

This situation is similar to a tie vote at an election. In case of a tie vote two have equal rights to the office, but neither has the actual right to the office. In the present situation four persons have the actual right to the office and to hold over, but there are only three places to fill and one must retire. Each of the four have an equal duty to relinquish his office.

The question is who shall retire, and not who shall be elected, as in the case of a tie vote for election.

In case of a tie vote the statute provides a means of breaking the tie vote by lot. In the absence of a statutory provision, however, a tie vote is considered no election.

In State v. Adams, 2 Ala., 231, the third syllabus reads:

> "Where two candidates for sheriff obtain an equality of votes no election is effected."

In case of Hammock v. Barnes, 67 Ky., 390, the syllabi read:

> "A tie vote for two candidates for the office of town marshal of the

town of Princeton, having been received at an election for town officers, under the special statute, which neither required nor authorized the examiners to do more than examine the polls and report the legal number of votes cast for each candidate, said board of examiners had no right to decide by casting lots. Such a decision would be illegal and void, and cannot be compelled by mandamus.

"The general law regulating the examining board in state, district and county elections, and requiring them to cast lots in cases of tie votes, does not embrace town elections under special statutes for town officers. The circuit court properly refused a mandamus against the board of examiners to compel them to decide by casting lots between two candidates having an equal number of votes for the office of town marshal of the town of Princeton."

In the case in question there is no provision of statute to determine who shall retire. As against the newly elected member all are interlopers, and if quo warranto proceedings were instituted, the court could not legally select any particular one of the four to be ousted as against the other three. The only alternative for the court would be to oust the four.

You have a situation that is not covered by strict legal rules, and it is a situation where common sense rules should apply. The four members whose terms expire should agree upon some method of determining who shall relinquish office, either by lot or otherwise. Then let the member who is to retire resign. If this is not done I see no alternative but to oust all four, as the court in such a situation would have no legal authority to favor one over the others.

Very truly,

TIMOTHY S. HOGAN,

Attorney General.

506

TOWNSHIP TRUSTEES—APPROVAL OF BONDS BY JUSTICE OF THE PEACE OF TOWNSHIP.

Bonds of township trustees elect must be approved by justice of the peace of the township.

Where there is no justice of the peace in the township, there is no provision for the approval of the trustees' bonds.

COLUMBUS, OHIO, December 26, 1911.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—From the statement made to me over the telephone a few days ago it appears that Franklin township, Jackson county, Ohio, has no justice of the peace. Three township trustees were elected at the last election, and inasmuch as the law provides that the trustees' bonds must be approved by a justice of the peace of the township before the trustees assume their office, you desire an opinion as to the proper course to pursue in this matter.

In reply to your inquiry I beg leave to cite section 3269 of the General Code which reads as follows:

"Before entering upon the discharge of his duty, each township trustee shall give bond to the state for the use of the township, with at

least two sureties, who shall be residents of the same township, with the trustee, in the sum of five hundred dollars, conditioned for the faithful performance of his duty as trustee. Such bond shall be approved by a justice of the peace of the township in which the bond is given."

You will note that this section requires the bonds of the trustees to be approved by a justice of the peace of the township, and since there is no justice of the peace in such township the question arises as to where the legal authority to approve said bonds is lodged.

I must confess my inability to find either statute or decision bearing directly upon this question. The powers and duties of justices of the peace are set forth in section 10223, etc., of the General Code of Ohio. Section 10224, which it is not necessary to quote at length, gives a list of the matters and causes in which justices of the peace have jurisdiction beyond the townships for which they were elected, that is co-extensive with the county, and the power to approve bonds of trustees of a township having no justice of the peace is not included therein.

It has been decided by the supreme court of Ohio in the case of Curdy v. Baughman, 43 O. S., 79, and other cases, that justices of the peace have jurisdiction only as conferred by statute. No authority can be found in our statutes giving to a justice of the peace the power to approve bonds generally, and as section 3269, *supra*, provides that the bonds of township trustees must be approved by a justice of the peace of the township "*in which they are given*," I am constrained to hold that a justice of the peace of an adjoining township may not legally approve the bonds of trustees of a township having no justice of the peace. To hold otherwise would be to read into the statute a meaning contrary to its plain intent and purpose. The legislature has not provided for this condition, and in the absence of such provisions I can arrive at no other conclusion than as above indicated.

To obviate the difficulty I would suggest that the present trustees of Franklin township appoint a suitable person justice of the peace. The person so appointed can then approve the bonds of the newly elected trustees and if he does not desire to hold said office thereafter he may resign. Surely Franklin township is not without a citizen sufficiently patriotic to accept this appointment as a public duty to the end that the township trustees may qualify to assume the office for which they were duly elected, for until they are qualified as provided by law the trustees cannot enter upon their duties or receive compensation.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the City Solicitors)

15.

NEWSPAPERS—RESOLUTION OF COUNCIL DESIGNATING NEWSPAPERS WITHOUT AUTHORIZING CONTRACT—RIGHT OF PUBLIC SERVICE DIRECTOR TO IMPOSE TERMS OF CONTRACT AND TO REFUSE.

The mere designation of two newspapers by resolution of council for publication of ordinances, without directing or authorizing any officers to contract therefor, would not be a compliance with the rule of law that liability for such publication must rest upon express contract.

The director of public service after being authorized by ordinance to enter into such a contract, may refuse to enter into the same when the newspapers decline certain terms other than those prescribed by section 6251 *General Code.*

COLUMBUS, OHIO, January 13, 1911.

MR. W. J. TOSSELL, *City Solicitor, Norwalk, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this office the following query:

> "(1) Would action by our city council a year ago merely designating two newspapers named as the official organs for publication of ordinances, etc., but not directing any officer to contract therefor, pursuant to which the clerk of council merely handed ordinances to representatives of such papers, constitute a contract upon which municipal liability for publication might be based?"

In reply thereto, it is my opinion that the mere designation of the two newspapers by action of the city council as the official organ for publication of ordinances, etc., but not directing or authorizing any officers to contract therefor, would not be sufficient to constitute a contract upon which municipal liability for publication might be based.

In the case of McCormick vs. the City of Niles, 81st Ohio State, page 246, it was held that:

> "The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on *express* contract and not upon a mere account for the rendition of such services."

In that case the ordinances and resolutions were handed by the auditor and clerk of council to the publisher of the *Independent*, a newspaper of general circulation in the city of Niles, Ohio. It was held by the court that that was not sufficient and they must go further and prove an express contract for the publication of the ordinances before they could recover.

I would advise that the council authorize the clerk or director of public service to enter into an express contract with the newspapers named, or some other newspapers for the publication of ordinances, etc., in your city.

2nd: You also inquired:

> "Has the director of public service, under a resolution directing

him to enter into a contract, any discretion to refuse to contract with such newspapers upon their declination of any terms other than the rate prescribed by General Code 6251?"

I am of the opinion that the director of public service under a resolution directing him to enter into a contract for publication *can refuse* to contract with such newspapers upon their declination of any terms other than the rate prescribed by section 6251 General Code; to hold otherwise you would practically take away the right of the city to contract with newspapers under section 6251 of the General Code, and the decision of the supreme court in the McCormick case above cited would be of no importance.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

34.

ANNEXATION PROCEEDINGS—LOSS OF AFFIDAVITS USED IN HEARING BY COMMISSIONERS DOES NOT INVALIDATE.

In proceedings by a municipality to annex territory, affidavits considered by the commissioners in their hearing upon the petitions, are not required to be brought before the council in their deliberations upon the application and when such affidavits are lost after having served in the hearing by the commissioners and prior to the proceedings of the council, the validity of the proceedings will not be thereby affected.

As such affidavits furthermore, do not constitute "orders" or "proceedings," they are not required to be set forth in full on the journal of the commissioners.

COLUMBUS, OHIO, January 18, 1911.

HON. E. F. MCKEE, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 30th, submitting for my opinion thereon the following question:

"Under proceedings by a municipality to annex territory, sections 3549, 3550 and 3551, of the General Code provide the proper steps after the prayer of the petition has been granted by the county commissioners, as per section 3522. In this city all steps were regular up to and including the transcript of the commissioners, and the accompanying map and petition which was deposited with the clerk of council instead of the auditor. With the transcript were the affidavits offered for and against the annexation. The original petition and plat are still in the possession of the clerk of council, but the transcript and accompanying affidavits are lost. Council accepted the same as provided in section 3550, by having the county commissioners' books brought before them and read instead of their original transcript. Query: Would it be complying with the laws on this subject to have another transcript made from the commissioners' books, which would be minus the affidavits above referred to, but which transcript makes reference to such affidavits, and file copies of the same with the petitions, maps and plats as required in section 3551? Would such action complete the annexation, and make it legal or will the entire proceedings have to be had from the start?"

The following provisions of the General Code, some of which you cite in your letter, are applicable to the question you presented.

Section 3548:

"The inhabitants residing in territory adjacent to a municipality may * * * cause such territory to be annexed thereto, in the manner hereinafter provided. Application shall be by petition, addressed to the commissioners of the county * * and shall contain * * a full description of the territory, and be accompanied by an accurate map or plat thereof."

Section 3549:

"A petition shall be presented to the board of commissioners at a regular session thereof, and when so presented, the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division. *The final transcript of the commissioners and the accompanying map or plat and petition,* shall be deposited with the auditor * * of the municipality."

The reference in this section is to section 3520 et seq. General Code which provide the machinery for the incorporation of a village. The following provisions of these related sections are in point:

Section 3520:

"The petition shall be presented to the board of commissioners at a regular session thereof and when so presented the board shall cause it to be filed in the office of the county auditor * *. The commissioners shall then fix * * * the time and place for hearing the petition * * *."

Section 3521:

"The hearing shall be public, and may be adjourned from time to time * * *. Any person interested may appear * * * and contest the granting of the prayer of the petition, and *affidavits presented in support of, or against the prayer of the petition shall be considered by the commissioners* * * *."

Section 3522:

"Upon such hearing if the commissioners find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described * * *, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given * * *, that there is the requisite population, * * * and if it seems to the commissioners right that the prayer of the petition be granted, they shall

cause an order to be entered on their journal to the effect that the corporation may be organized"

Section 3523:

> "The commissioners shall cause to be entered on their journal all their orders and proceedings in relation to such incorporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map and *all other papers on file relating to the matter*, to the recorder of the county, at the earliest time practicable."

Section 3550 of the General Code continues the scheme of annexation as follows:

> "At the next regular session of the council of the municipality * * * the auditor or clerk shall lay the transcript *and the accompanying map or plat and petition* before council. Thereupon the council by a resolution or ordinance shall accept or reject the application for annexation."

Section 3552 relating to the further proceedings in completion of the annexation is worthy of consideration in this connection; it provides in part as follows:

> "If the resolution or ordinance is an acceptance, the auditor or clerk of the municipality shall make two copies, containing the petition, map or plat accompanying it, transcript of the proceedings of the commissioners, and resolutions and ordinances in relation to the annexation, * * *."

It will be observed by comparison of sections 3549 and 3523 that whereas the latter requires that, "all other papers on file" relating to the matter of incorporation to be filed in the recorder's office, together with the transcript of the proceedings of the commissioners, the petition and the map of the territory to be incorporated, section 3549 makes no mention of any "papers on file." It merely provides that the transcript, the map and the petition shall be filed with the auditor of the municipality. In like manner mention of "other papers" is omitted from sections 3550 and 3552 above quoted. I am therefore of the opinion that while affidavits may be offered in support of the petition filed with the commissioners, and while the commissioners are obliged to consider such affidavits in reaching their conclusion in the matter of annexation, yet such affidavits are not required to be transmitted to the auditor of the municipality and council is not required to have before it such affidavits in accepting or rejecting the application.

From all the foregoing, it follows that the loss of the affidavits, as described by you, after the commissioners have acted and before council has acted, would not invalidate the proceedings for the annexation of the territory, in the event that council should accept the application.

You state that the transcript of the commissioners' proceedings refers to the affidavits; I do not believe that such reference incorporates the affidavits in the proceedings of the commissioners and makes them a part of such proceedings. While I do not, of course, know the precise manner in which the transcript refers to the affidavits, I presume that it includes an order of the commissioners admitting the affidavits and placing them on file. Clearly, however, the affida-

vits themselves do not constitute either "orders" or "proceedings" and are not required to be set forth at large on the journal of the commissioners.

Clearly, also, the transcript which is repuired to be made out and certified to the commissioners is a transcript of such orders and proceedings only as are spread upon the journal of the commissioners under section 3523 General Code.

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

39.

OFFICES INCOMPATIBLE—COUNCILMAN AND MEMBER OF BOARD OF EDUCATION—ELECTION TO PRESIDENCY OF COUNCIL VOID.

When a member of a village council qualifies as member of the board of education, he forfeits ipso facto his position as councilman.

When, therefore, after his qualification as member of the school board, he is elected president of the council, such election is void and when a vacancy occurs in the office of mayor, he cannot succeed to that position.

COLUMBUS, OHIO, January 19, 1911.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, Ohio.*

DEAR SIR:—In your letter of January 17th you state that at the November election of 1909 William Fitzgerald was elected as a member of a village council and also as a member of the board of education of the school district of said village; that he qualified both as a member of council and as a member of the board of education; that he was elected president pro tem. of such council; that upon the resignation of the mayor of such village he assumed the office of mayor and that thereupon the council elected a new president pro tem. of council. You state also that such new president pro tem. of council has taken the oath as mayor and filed his bond, and claims to be entitled to such office of mayor as against William Fitzgerald. You ask who is the lawful mayor of said village.

Section 4218 of the General Code provides as follows:

> "No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall fofreit his office."

In an opinion of this office under date of December 24, 1909, it was held that:

> "A person who is a member of the village council may not at the same time be a member of the village board of education,"

under section 120 of the Municipal Code, of which section 4218 of the General Code is a codification.

When, therefore, William Fitzgerald qualified as a member of the board of education of such village he was holding another "public office" under the provisions of section 4218, and by reason of holding such other public office he thereupon ceased "to possess * * * the qualifications herein required." Under

such circumstances the language of section 4218 is explicit that he "shall forfeit his office."

I am, therefore, of the opinion that by reason of his holding the position of member of the board of education William Fitzgerald forfeited his office as member of the village council, and is, therefore, disqualified from holding the position of mayor of such village.

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

54.

SALARY OF DIRECTOR OF PUBLIC SERVICE—CANNOT BE INCREASED DURING TERM—OPINION LATER OVERRULED.

January 23, 1911.

MR. GEORGE W. BETCHER, *City Solicitor, Canal Dover, Ohio.*

DEAR SIR:—Your letter of January 20, 1911, received. You inquire whether the city council has a right to increase the salary of the director of public service during his term of office for which he was appointed. Your letter indicates that the director of public service was appointed for a given term by the mayor of your city, and his salary was fixed by the council at the time or prior to his appointment. Under section 4213 of the General Code the salary of any officer, clerk or employe of a municipal corporation, shall not be increased or diminished during the term for which he was elected or appointed.

I am, therefore, of opinion that under authority of section 4213 of the General Code they cannot increase his salary during the term for which he was appointed.

Respectfully yours,
TIMOTHY S HOGAN,
Attorney General.

56.

REFUNDING BONDS FOR PURPOSE OF TAKING UP OUTSTANDING WATERWORKS BONDS NOT WITHIN LIMITATIONS OF LONGWORTH ACT.

Refunding bonds, issued for the purpose of retiring outstanding waterworks bonds, which call for a higher rate of interest than do the refunding bonds, do not create a new indebtedness nor are they issued for any of the purposes set forth in section 3939, General Code, known as the Longworth law.

Such refunding bonds are therefore, not within the four per cent. limitations of section 3942, General Code.

COLUMBUS, OHIO, January 23, 1911.

HON. W. O. WALLACE, *City Solicitor, Columbiana, Ohio.*

DEAR SIR:—I have your letter of January 17th and I herewith quote the portion of the same which states the facts upon which you request my opinion:

> "I desire to know if refunding bonds issued in 1905 for the purpose of taking up waterworks bonds issued in 1894 and not yet due, but taken

up on account of being able to seli same at a lower rate of interest, should be counted in or exempt under section 3946.

"The village is about to issue bonds in the sum of about $4,000.00 to pay the village portion of street improvement.

"The village now has the following bonded indebtedness; $10,500.00 village portion of street improvements issued since 1902, $2,300.00 engine and generator bonds, which are being taken care of by waterworks, waterworks refunding bonds $13,500.00 issued 1904, originals were issued in 1894, and $2,000.00 waterworks issued 1894.

"The appraised value of property being as follows: real estate $405,740, personal property $291,859. Under the new appraisement the real estate is $885,986.

"With this statement the council have requested that I ask you if it would be legal to proceed and issue the bonds above mentioned and make the improvements. The preliminary proceedings for these improvements were gone through with last year but on account of the contractors' bids being above the estimate the contract was not let."

From what you state, if the waterworks refunding bonds, amounting to $13.500.00, are included in the net indebtedness of the corporation under section 3942, then your city has already exhausted the limit prescibed by said section and the proposed issue of 4,000.00 additional bonds for street improvements would be invalid. On the other hand, if said $13,500 of waterworks refunding bonds are not held to be included as part of the net indebtedness prescribed by said section, you are well within the limit and the proposed issue would be valid. Therefore, the sole question to be answered is whether refunding bonds issued in 1904 for the purpose of refunding and reducing the rate of interest on bonds of the same amount issued in 1894 are to be included in ascertaining the net indebtedness of a corporation under section 3942 of the General Code.

These bonds having been issued in 1905 msut have been issued under the authority of the old section 2709 Bates Revised Statutes, 95 O. L. 507 or 96 O. L. 52, section 97 of the Municipal Code, now section 3925 of the General Code. Therefore, these bonds were not issued for any of the purposes prescribed in section 3939 of the General Code (the Longworth law). As this section, to-wit, 3939 is quite lengthy and includes twenty-seven different specific purposes for which bonds may be issued, I do not copy it here, but refer you to the same.

Section 3942 of the General Code reads as follows:

"The net indebtedness incurred by a municipal corporation *for such purpose* shall never exceed four per cent. of the total value of all property in such corporation, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the corporation in the manner hereafter provided."

Therefore, it seems clear that this section 3942 prohibits any municipal corporation from incurring a net indebtedness exceeding four per cent of the total value of all the property in such corporation for any of the purposes set out in section 3939 of the General Code.

The bonds you refer to being refunding bonds issued by the municipality for the purpose of decreasing the rate of interest on bonds which had been issued in 1894 can in no sense be considered as creating a new debt for the corporation; the debt was already in existence and even if it had been incurred for one of

the purposes prescribed by section 3939, was not subject to the inhibition of section 3942 as it had been incurred prior to April 29, 1902, and was therefore excluded by section 3946 of the General Code. It was to the advantage of the municipality to issue these refunding bonds and obtain a better rate of interest, and it would be contrary to the public interest as well as to the spirit of the law to hold that by issuing these refunding bonds, for the benefit of the corporation and without creating any new or increased debt, the corporation thereby lost rights given to it by the statutes.

My opinion, therefore, is that these refunding bonds were not issued under any of the provisions of section 3939 and, therefore, are not to be included in estimating the net indebtedness incurred by the municipal corporation for the purposes set forth in said act under section 3942; and further that they do not create any new debt of the corporation and should be held as simply taking the place of the old bonds which were retired by their issue; and that it would be legal to issue the bonds referred to in your letter.

I further call your attention to the case of Platt v. City of Toledo, et al., 12 circuit court N. S., page 279. This case has been affirmed by the supreme court but without report, and I wish to call your attention to the language of the court on pages 283 and 284:

> "It seems to us that there is no escape from the conclusion that in determining the one per cent. of the tax valuation of property in the city, or rather in determining the amount of bonds which may be issued under the limitation, all bonds issued prior to the amendment of section 2855, on April 29, 1902, should be excluded, whether they be original bonds to provide payment for the construction of waterworks, or bonds to refund indebtedness created by such original issues."

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

60.

ASSESSMENTS FOR STREET IMPROVEMENTS—INTEREST ON CASH PAYMENTS.

A property holder who proffers a cash payment for paving assessments eight months after the expiration of the thirty days allowed for payment of assessments in cash, must now pay the amount of his assessment plus the amount of interest due thereon at the same rate as the bonds issued in anticipation of the collection of assessments, as provided for in the resolution.

If he fails so to do, the deficiency may be placed by the auditor for collection on the tax duplicate under section 3817, *General Code.*

January 25, 1911.

MR. H. M. WHITCRAFT, *Solicitor, Logan, Ohio.*

DEAR SIR:—Your communication of January 3, 1911, received. You state:

> "The following question is respectfully submitted to your department for an opinion:
>
> "In the month of August, 1909, the village council of Logan, Ohio,

upon a petition of more than three-fourths of the abutting property owners on Market St., in said village, duly passed a resolution to improve said street by paving, and approved the plans and specifications therefor, said resolution being authorized under section 51 M. C. It was provided in said resolution that the cost of said improvement less the one-fiftieth and cost of intersections would be assessed by the foot frontage on the abutting property owners. It was also provided therein that the interest on bonds in anticipation of the collection of assessments, under authority of section 2254 R. S., should be a part of the cost of construction. It was provided in said resolution that the cost was payable in cash or in ten equal annual installments (at the option of the property owner) thirty days from the date of the final passage of the assessing ordinance, being given for cash payments.

"Four per cent. coupon bonds were issued in anticipation of the collection of installments of assessments, and the interest thereon was included in the cost of construction, and the proper proportion assessed upon the property owners.

"The assessing ordinance, after completion of the street was passed, assessing upon the property owners, by the front foot, the proper proportion of the cost (including interest on bonds) of said improvement.

"More than eight months have elapsed since the expiration of the thirty days for the payment of said assessment in cash, and the passage of the assessing ordinance.

"An abutting property owner now seeks to pay his assessments, but refuses to pay any part of the interest on bonds issued in anticipation of the collection of said assessment.

"He tenders the amount in full of said assessment, less all interest on said bonds, to the village treasurer."

and inquire:

"Must he not also tender the interest?"

Section 51 of the Municipal Code, now section 3817 of the General Code, is as follows:

"When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

You state that the council of the village of Logan in August, 1909, upon a petition of more than three-fourths of the abutting property owners on Market Street in said village duly passed a resolution to improve Market Street by paving, and approved the plans and specifications therefor; that it was provided in said resolution that the cost of said improvement less the charges payable by the village would be assessed by the foot frontage on the abutting property owners. It is also provided by proper resolution that the interest on the bonds in anticipation of the collection of assessments should be a part of the cost of construction. It is provided also that the cost was payable in cash or in ten

equal annual installments at the option of the property owner, cash being accepted in thirty days from the date of the final passage of the assessing ordinances. You also state that four per cent. bonds were issued in compliance with said resolution, and the proper proportion was assessed against the property owners. That eight months have elapsed since the expiration of the thirty days for the payment of the assessments in cash, and the passage of the assessing ordinance, and that an abutting property owner now desires to pay his assessment, but refuses to pay any part of the interest on the bonds issued, etc.,

Section 3817 above quoted states:

> "If such assessment or any installment thereof is not paid when due, *it shall bear interest until the payment thereof*, at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

It is my opinion under authority of the section last named that the abutting property owner having permitted thirty days to pass in which time he was permitted to pay cash, and escape paying interest, that he now must pay the amount of his assessment plus the amount of interest due thereon at the same rate as the bonds issued in anticipation of the collection of assessments as provided for in said resolution, and if he fails so to do it can be certified to the county auditor for collection and placed on the tax duplicate as provided in section 3817.

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

63.

BOND ISSUES—LIMITATIONS UPON AGGREGATE ISSUE— BASED UPON LAST PRECEDING DUPLICATE.

The aggregate amount of bonds which may be issued by a municipality, under section 3942 General Code as amended 101 O. L. 432, under the two and one-half per cent. limitation is to be computed upon the last duplicate made up. Postponement of action under said law is recommended, however, until its amendment.

January 25, 1911.

C. W. JUNIPER, ESQ., *City Solicitor, Nelsonville, O.*

DEAR SIR:—Your communication of January 21, 1911, received. You inquire:

> "In computing the aggregate amount of bonds which may be issued by a municipality under the provisions of section 3942 as amended 101 Ohio Laws 432, without submitting the question to a vote of electors, under the limitation of two and one-half per cent., must the municipality compute the same on the duplicate of 1910? Or, would it be legal for the city to compute such aggregate amount of bonds upon the basis of the new appraisment which is to go on the duplicate of 1911?"

Section 3942, as amended, of the General Code, provides as follows:

"The net indebtedness incurred by any township or municipal corporation for the purposes mentioned in sections thirty-two hundred and ninety-five and thirty-nine hundred and thirty-nine of the General Code shall never exceed two and one-half per cent. of the total value of all the property in such corporation or township, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the township or corporation in the manner hereinafter provided."

It expressly says:

That the net indebtedness incurred by any municipality for purposes mentioned in sections thirty-two hundred and ninety-five and thirty-nine hundred and thirty-nine of the General Code shall not exceed two and one-half per cent of the total value of all the property as listed and assessed for taxation.

The council of the city know the amount of the 1910 duplicate as *listed* and *assessed* for taxation; the 1911 duplicate is not yet complete; the real estate is subject to additions and deductions, etc.: the personal property has not been listed for taxation, and will not be for several months, consequently it will be impossible at this time to determine what the tax duplicate for the year 1911 will be.

I am, therefore, of the opinion that you must base your bond issue as provided in section 3942 upon the 1910 duplicate as it is "listed" and "assessed."

I would advise however, that if it were possible that you wait until the law found in Ohio Laws 101, page 430, applicable to your case is amended. This law has been found deficient in many respects; is not clear as to procedure; and indefinite as to its meaning; so much so that the city solicitors of this state in convention assembled unanimously agreed to postpone any action thereunder by their respective municipalities until it was amended. A bill has already been introduced to change this law and will be passed no doubt at a very early date.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

66.

SEMI-ANNUAL APPROPRIATION ORDINANCES—PUBLICATION—NEWSPAPERS.

The semi- annual appropriation ordinance is not an ordinance of general nature requiring publication in two newspapers of opposite politics of general circulation in the municipality.

January 25, 1911.

MR. H. R. SCHULER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—Your favor of January 24, 1911, received. You inquire:

"Is the semi-annual appropriation ordinance an ordinance of a general nature which requires publication in two newspapers of opposite politics of general circulation in the municipality?"

I am aware it has been the ruling of this department heretofore that the semi-annual appropriation ordinance was an ordinance of a general nature which required publication in two newspapers of opposite politics of general circulation in the municipality. However, this identical question was decided by the circuit court of Jackson County, Ohio, in the past year, holding that the semi-annual appropriation ordinance was not an ordinance of general nature which required publication in two newspapers of opposite politics of general circulation in the municipality. The style of the case was The Transcript Printing Co. vs. The City of Wellston, Ohio, decided in May, 1910. The case was not taken to the supreme court. I do not think there is any other decision in Ohio upon this question.

I will, therefore, hold that the semi-annual appropriation ordinance is not an ordinance of general nature requiring publication in two newspapers of opposite politics of general circulation in the municipality.

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

67.

EXTRA COMPENSATION OF ENGINEER AND ASSISTANTS IN PUMPING STATION—POWERS OF COUNCIL.

Under the inhibition of section 4213 General Code, council may not pay extra compensation for working overtime, to a chief engineer and two assistants employed by council to take charge of an engine at the pumping station.

January 25, 1911.

MR. T. F. THOMPSON, *City Solicitor, Zanesville, O.*

DEAR SIR:—Your communication of January 24th received. You state:

> "In our city water works department we employ a chief engineer, and two assistants, to take charge of the engine at the pumping station, which, of course, is operated day and night, either by the chief, or one of his assistants in charge. They are each paid by a fixed salary, per annum, which amount was fixed by council.
>
> "Should they be called upon to do over-time work after their day's labor is ended, in your opinion could the city legally pay them extra compensation for such services, or would they of a necessity be compelled to rely upon their compensation per annum, as fixed by council? They each being an officer, and salary certain per year, could the city contract with them for the extra service for extra compensation?"

Section 4213 of the General Code is as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

I take it from your letter that the city council has created the office of chief engineer and the office of assistant engineers, and has fixed the annual salary

for each officer. Under section 4213 of the General Code just quoted the salary fixed by the city council for the officers named cannot be increased or diminished during the term for which they are appointed.

Consequently, the city could not contract with them for extra service, nor allow them extra compensation. If, however, the engineer and assistants are not able to do the work there would be no legal objection to the employment of other assistants to aid them.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

84.

NEWSPAPERS—"OF GENERAL CIRCULATION"—PUBLICATION OF ORDINANCES—CONTRACT OF CLERK UNDER DIRECTION OF COUNCIL—OPINION MODIFIED BY LATER OPINION—"PUBLISHED" IN MUNICIPALITY.

Under section 124 Municipal Code, requiring ordinances to be published in two newspapers of opposite politics and general circulation in a municipality, such publication can only be made in papers "printed" and circulated in the municipality.

Any newspaper which may be circulated generally in the whole of a municipality is a newspaper of general circulation.

When the statute provides for the number of publications and the number of newspapers, publications at more frequent times and in more newspapers than prescribed would be illegal.

Liability to pay for such publications must rest upon express contract and where the statute has not prescribed the person who shall enter into the contract, council may authorize the clerk to execute such contract under its direction.

COLUMBUS, OHIO, January 31, 1911.

HON. LEWIS STOUT, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—I am in receipt of your communication of January 23rd in which you submit to this department for an opinion thereon the following questions:

> "1. Under the statute requiring ordinances to be published in two newspapers of opposite politics, and of general circulation in a municipality, would a paper printed at Findlay, Ohio, but mailed from the post office at St. Marys, Ohio, be published in St. Marys?
>
> "2. Under said section what would constitute a newspaper? I herewith submit three papers of circulation in St. Marys, Ohio, and request that you give your opinion as to which of same are newspapers, or whether all three are newspapers?
>
> "3. What would constitute a general circulation in a city with a population of 5,732?
>
> "4. Where there are three newspapers can the ordinance be published in all three papers?
>
> "5. Can council direct a rotation of publication, two at a time?"

In reply to your first inquiry I desire to call your attention to the language of the statute relative to that matter, which reads as follows:

"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," etc.

Section 124 Municipal Code.

It is my opinion that said section must be construed to mean that the newspaper must not only be of general circulation in such municipality, but it must be published in such municipality. There seems to be no legal definition for the word "published," but the Century Dictionary says "to publish is to cause to be printed and offered for sale; issued from the press; put in circulation," which definition meets my approval, and, in my opinion, is the definition which should be taken to construe the word "publish" in order to determine the intention of the legislature, which must of necessity have meant, from the wording of the statute that the greatest publicity should be given to ordinances and resolutions by causing them to be printed in a newspaper or newspapers as provided therein, evidently meaning newspapers printed and circulated within said municipality; and hence the fact that a paper was mailed from the postoffice at St. Marys, Ohio, would not mean, as I construe the statute, published in said municipality.

In reply to your second question I desire to say that there are a great many definition of what constitutes a newspaper, and the following one, to-wit, "a newspaper is a paper or publication conveying news or intelligence; a printed publication issued in numbers at stated intervals conveying intelligence of passing events," is the best one that would express my opinion of what constitutes a newspaper under the statute. In other words, it is hard to lay down an arbitrary rule as to what might or might not constitute a newspaper, and as the three newspapers you submit to this department cannot, in my opinion, test any matter or question beneficial to you at this time, on account of the fact that the St. Marys Socialist is not published in your municipality I do not desire to give any ruling or opinion as to whether or not the last named paper is or is not a newspaper.

As to your third question I beg to say that inasmuch as the legislature has not defined what would constitute a general circulation only in the case of German newspapers, that that question must of necessity be left to the particular community as a question of fact as, what might be deemed a newspaper of general circulation in one community would not be considered so in another. However, it is my opinion that any newspaper which may be circulated generally in the whole of a municipality would be a newspaper of general circulation.

As to your fourth inquiry I desire to say that under the ruling made in the case of the Printing Company v. State, 68 O. S. 362, that where a statute provides for the number of publications, and also the number of newspapers to be published in, it is my opinion that to publish such ordinances in more than two papers would be an action unwarranted in law and unauthorized, and payment for said excess would be illegal.

In reply to your fifth inquiry will say that I can find no authority for a council to direct a rotation of legal publications, and desire to call your attention to the recent decision of our supreme court, in the case of McCormick v. City of Niles, 81 Ohio State, 246, in which case the court laid down two rules, namely:

"1. The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

"2. Where the statute has not prescribed the person who shall execute such a contract in behalf of a municipal corporation, it is consistent with section 1536-653, Revised Statutes, for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

In conclusion, I desire to say that in my opinion city and village councils should, in matters relating to the publication of all ordinances, resolutions and legal notices required by law to be published, be guided by the rules laid down by the supreme court in the case last above referred to.

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

85.

ELECTIONS—EXPENSES OF—LIABILITY OF COUNTY AND SUBDIVISIONS FOR RENT OF ROOMS.

Our present system of supervising elections is by county boards and the county is the unit.

Expenses of conducting elections are to be borne by the county except when a different intention of statute appears.

Under these principles, bills for rent for the November election 1910, *should be paid out of the county treasury, but the expenses of elections in odd numbered years is to be paid in the same manner, but deductions made for the various subdivisions, in accordance with section* 5053 *General Code.*

COLUMBUS, OHIO. January 31, 1911.

HON. A. E. JACOBS, *City Solicitor, Wellston, Ohio.*

DEAR SIR:—Your communication of January 23rd is received. You state and inquire:

Bills for rent have been presented to the city council of Wellston, by owners of rooms in the city in which the November election was held in the different wards and precincts of the city in which those rooms are found.

"I advised the council that these bills should be presented to and paid by the county under the provisions of section 5052 and 5053 of the General Code; the prosecuting attorney of Jackson county informs me that he has a ruling from the secretary of state, to the effect that these bills should be paid by the municipality. I am not advised that the secretary of state cites any authority in support of his ruling.

"I would be pleased to have your opinion as to who the law provides should pay these bills, and if your opinion should harmonize with my advice to council in that respect, whether council should obey the law or the ruling of the secretary of state."

Replying thereto permit me to say, first, that sections 5052 and 5053 of the General Code provide as follows:

"Section 5052. All expenses of printing and distributing ballots,

cards of explanation to officers of the election and voters, blanks and other property and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses.

"Section 5053. 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 funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors of the several political divisions and certified to the county auditor. In municipalities situated in two or more counties, the proportion of expense charged to each of such counties shall be ascertained and apportioned by the clerk or auditor of the municipality and certified by him to the several county auditors."

Section 3260 General Code provides in part,

"The trustees shall fix the place of holding elections within their township, or of any election precinct thereof. For such purposes they may purchase or lease a house and suitable grounds, or by permanent lease or otherwise acquire a site, and erect thereon a house."

Section 1536-982 Revised Statutes provides in part that:

"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 4844 of the General Code provides as follows:

"Elections shall be held for each township precinct at such place within the township as the trustees thereof shall determine to be the most convenient of access for the voters of the precinct. Elections shall be held for each municipal or ward precinct at such place as the council of the corporation shall designate. In registration cities, the deputy state supervisors shall designate the places of holding elections in each precinct."

Section 4874 of the General Code authorizes the board of elections to fix the place of registration and election in registration cities and directs such boards to provide suitable booths and ballot boxes or hire suitable rooms for such purpose, and for its office, at such rents as it deems just.

Section 4946 of the General Code provides that the cost of the rents, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors, and the holding of elections in such city shall be paid by such city from its general fund.

The above are all the statutes referring to the subject of expenses of general or special elections. They should b so construed as to establish a constitutional and uniform system of conducting elections throughout the state. Our present system of supervising elections is by county boards and not by city boards, and

the county is 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 exception noted above is in the act relative to registration in cities which act was passed prior to the general law.

Under the authority of section 3260 General Code and section 1536-982 Revised Statutes, which has been carried into the General Code, it is the duty of the trustees of the township and the council of municipalities, other than registration cities, to fix the place of holding elections; but the general act passed by the last general assembly, section 5052 and 5053 General Code, etc., provide that *all* 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 from funds due such township, city, village or political subdivision at the time of making the semi-annual distribution of taxes, etc.

I am, therefore, of the opinion that bills for rent for the November election 1910 should be paid out of the county treasury, and the expenses of the election in odd numbered years to be paid in the same manner, but deducted as provided in section 5053 General Code.

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

105.

CITY SOLICITORS—ORDINANCE PROVIDING EXTRA COMPENSATION FOR PROSECUTIONS IN MAYOR'S COURT UNDER ROSE COUNTY LOCAL OPTION LAW—CONSTITUTIONALITY.

The codifying commission, by omitting the part of section 137 of the Municipal Code which provided for extra compensation to solicitors for services in police court has recognized that council has the right, by virtue of section 4214 General Code, to provide by ordinance for compensation to city solicitors in addition to their salary for services rendered before the mayor in the prosecution of cases under the Rose County Local Option Law.

The allowance of such "compensation" does not effect a violation of article II, section 20 of the Constitution, providing that the general assembly may not effect a change in the "salary" of any officer during his existing term.

COLUMBUS, OHIO, February 9, 1911.

MR. A. E. JACOBS, *City Solicitor, Wellston, Ohio.*

DEAR SIR:—You submit the following ordinance for my consideration:

> "Be it ordained by the council of the City of Wellston, State of Ohio,
>
> "Section 1. That the city solicitor, in addition to his regular salary, shall receive, as compensation for his services as prosecuting attorney of the mayor's court, ten (10%) per cent. of all fines and costs collected and paid into the city treasury as a result of any and all cases prosecuted in said mayor's court under the Rose County Local Option Law and also in all criminal cases prosecuted by the solicitor in said mayor's court at the request of the mayor of the city.
>
> "Section 2. That the city auditor is hereby authorized and directed, at the end of each and every month of the term of service of the solicitor,

to issue to him an order on the treasurer of said city for the amount that may be due him, for that month, under the provisions of section one (1) of this ordinance, upon the presentation by the solicitor to the auditor of an itemized statement of the amount due him for the month, approved by the mayor of the city.

"Section 3. That this ordinance shall take effect and be in full force from and after the earliest period allowed by law."

You ask my opinion as to the legality of such ordinance.

Section 137 of the Municipal Code provides that,

"The solicitor shall be prosecuting attorney of the police court, and shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow, etc."

This section was amended by the act found in 99 O. L., page 458, the language of the amendment pertinent to your inquiry being as follows:

"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 shall allow; provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The duties of the solicitor as prosecuting attorney of the police court or mayor's court shall be such as are provided in section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the state and not inconsistent herewith."

This section expressly provides that council may prescribe compensation for the city solicitor for his services as prosecuting attorney of the police court and mayor's court, and therefore it is clear that such compensation was intended to be in addition to his salary or compensation as fixed under the general section 4214.

Section 4214 of the General Code is as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 137 of the Municipal Code, as found in 99 O. L., page 458, was not again amended; it stood as above quoted when the codifying commission codified the revised statutes. Their codification of this section is found in section 4303, 4305 and 4306, which is as follows:

"Section 4303. The solicitor shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the city.

"Section 4305. The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney.

"Section 4306. The solicitor shall also be prosecuting attorney of the police or mayor's court. Where council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court."

It will be noted that this codification, for some reason, leaves out the provision, "the solicitor shall receive for this service such compensation as council may prescribe."

It was not the intention of the codifying commission to omit, or repeal, substantive law unless the part omitted or repealed was covered by another law, thus making two provisions upon the same subject. Therefore, it is plain that the codifying commission, and consequently the legislature, considered that the authority given in said section 137 of the General Code, 99 O. L., 458, to council to provide for a compensation of the solicitor as prosecuting attorney in the police court and mayor's court was covered by the provisions of section 4214 quoted above.

This section gives council full authority to fix the respective salaries and *compensation* of officers and employes.

It is my opinion that the law, as it stood at the time of the codification, gave council the power to provide compensation for the solicitor for services as prosecuting attorney of the police court or mayor's court, and as it was not the intention of the codifying commission, in codifying an act, to omit any substantive law therein contained unless there was a like provision in some other statute, that the general section 4214 must be considered as giving council authority to provide for the compensation of the solicitor for his services when acting as prosecuting attorney of the police court or mayor's court in the same manner as provided in said section 137, 99 O. L., 458, before it was codified.

It may be said that section 4214 General Code does not apply to the office of city solicitor for the reason that the office of city solicitor is not one to be determined by council, but on the other hand, it is the creature of the state law. The answer to this is, that unless section 4214 in respect to salary and compensation embraces the city solicitor no statute whatever is to be found providing for payment for city solicitors' services. Section 126 of the Municipal Code which read as follows:

"(Salaries of municipal officers, clerks and employes). Council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act, etc."

was carried into section 4214 of the General Code. So that it follows, not only clearly and reasonably, but necessarily, that section 4214 provides for the payment to be received by the city solicitor for this service. Now, under what heads may this payment be made? The section expressly provides that the council shall, by ordinance or resolution, fix their respective *salaries* and *compensation*. What is understood by the term "salary?" This is defined in the

case of Thompson, relator, against John Phillips, 12 O. S., 617. By the court:

> "It is manifest, from the change of expression in the two clauses of the section, that the word 'salary was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the service rendered. Where the compensation, as in this case, is to be ascertained by a percentage on the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the constitution."

This doctrine is affirmed in the case of Gobrecht vs. Cincinnati, 51 O. S. R. page 68, the first and second syllabi of which are as follows:

> "1. Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20 of article 2, of the constitution, which provides that the general assembly in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.
>
> "2. An increase in the compensation of such officer during his term is not prohibited by the constitution."

Measured by the foregoing, I am constrained to hold that Ordinance 362 of the city of Wellston is valid. I am aware that my distinguished predecessor, in an opinion dated October 6, 1910, held, that the ordinance to which you refer is invalid, and I dislike to be constrained to reverse his opinion, but, after the most careful consideration of this ordinance I can come to no other conclusion. In addition to the reasoning in the case, I think practice and equity both sustain my conclusion. City solicitors in this state, generally in the past, have received salary and compensation. The office of city solicitor is one peculiarly requiring compensation, in addition to salary, because, it is impossible to tell the amount of extraordinary labors, the solicitor may be called upon to perform, and compensation is generally understood to be in payment of those extraordinary labors. Besides, it is just. If the solicitor is called upon to prosecute cases under the Rose law, and render his services in that behalf, thereby bringing into the city treasury, large returns, equity would suggest payment therefor.

My conclusion is therefore, that council has a right to provide by ordinance, for compensation to city solicitors for services rendered before the mayor in the prosecution of cases under the Rose county local option law.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

129.

DIRECTOR OF PUBLIC SERVICE—CONTRACTS—AUTHORIZATION OF COUNCIL AND ADVERTISEMENT FOR BIDS—WORK DONE BY DIRECTOR WITHOUT FORMAL REQUIREMENTS—ALLOWANCE OF BILLS IN EXCESS OF $500.

A director of public service has been authorized by the city council to advertise for bids and enter into a contract for the construction of a sewer, the estimated cost of which was $640.10, *and instead of entering into the contract in the formal manner, proceeded to construct the sewer himself by means of laborers in his department. Before completion it was discovered that the aggregate cost of the work would exceed the aforesaid estimate.*

Held: If the director had undertaken the work in good faith in the hope of saving money for the city bills accruing after the total cost had exceeded $500.00 *could be paid, but if as in this case, the facts seem to testify the work was undertaken with the express purpose of evading formal requirements, any expenses over* $500 *could not be paid by the city.*

COLUMBUS, OHIO, February 23, 1911.

HON. GEO. C. STEINEMANN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—I am in receipt of your favor of February 7th, in which you state that,

> "Upon estimates furnished by the director of public service and the chief engineer, the city council sometime ago, by proper and legal proceedings, authorized and directed the director of public service to advertise for bids and enter into a contract for the construction of a sewer, the estimated cost of which was $640.10. The service director instead of entering into a contract upon advertisement with the lowest bidder, proceeded to construct the sewer by day labor employes in his department and purchasing in the name of the city the necessary supplies therefor.
>
> "From an investigation I have made I am reasonably assured that the service director proceeded to do the work for the reason that he supposed it would result in a saving to the city and at a cost of less than $500.00. Before completing the work, however, he discovered that the cost of the sewer would exceed not only $500.00, but the amount of the engineer's estimate. Out of the sewer fund appropriated by council, some of the bills incurred have been paid, but there is a balance owing to laborers and material men which the city refuses to pay on the ground that the director of public service illegally incurred the indebtedness and that the city is not liable for the payment of the same."

and request my opinion as to whether or not the city can legally avoid payment of the unpaid bills upon said work.

Section 4328 of the General Code provides as follows:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision

> of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The section just quoted authorized the director of public service to make any contract or purchase supplies or material, or provide labor for any work under the supervision of his department, not involving more than $500.00, but when the expenditure within his department exceeds $500.00, such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed, the director of public service is requested to make a written contract with the lowest and best bidder, after advertisement for not less than two, nor more than four consecutive weeks, in a newspaper of general circulation within the city.

The provisions of section 4328, formerly section 143 Municipal Code, in regard to the manner of entering into a contract in excess of $500.00 have been held to be mandatory, and that unless such contract is authorized by council, and a contract entered into in writing, after advertisement for the required time, the same will be absolutely void. Welker vs. Potter, 18 O. S., 85; Gas & Water Company vs. Elyria, 57 O. S. 374; Lancaster vs. Miller, 58 O. S. 558; Buchanan Bridge Company vs. Campbell, 60 O. S. 406.

In the city of Sandusky, estimates were furnished by the director of public service and chief engineer, that the contemplated improvement in that city would cost more than $500, to-wit: $640.10; the council, acting upon this estimate, by proper and legal proceedings, authorized and directed the director of public service to advertise for bids, and enter into a contract for the construction of the public sewer; the council, in this instance, is not at fault. They complied with the letter and spirit of the law. The director of public service, notwithstanding he had an estimate of the cost, exceeding $500.00, and notwithstanding he was ordered by council to advertise for bids and let the contract as required by law, believing possibly he could do the work for less than $500.00, proceeded to construct the sewer by day labor and to purchase supplies; before completing the work, however, he found that the cost of improvement would exceed not only $500.00, but would exceed the engineer's estimate. Some of the bills have already been paid by council, and the balance owing to laborers and material men is not paid, the city refusing to pay because it claims the same is illegal. You inquire: Under the circumstances set forth, can the city legally avoid payment of these unpaid bills?

There would be no question about the illegality of a contract if the city had let the contract to some party to construct the sewer mentioned at an agreed price exceeding $500.00, and no recovery could be had thereon, even if the sewer had been completed in good faith, if the director of public service had not advertised for bids prior to the making of such a contract as required by section 4328 General Code. Lancaster vs. Miller, 58 O. S. 558.

In the case just mentioned, the court, construing section 2303 R. S., now section 4328 General Code, held that the advertisement for bids for which said section prescribed is indispensable to the validity of the contract. The court stated that,

"The evils against which these restrictive statutes are directed are municipal extravagance and the negligence and indifference of municipal officers. They were designed for the protection of municipal taxpayers generally, as well as to guard against excessive special assessments against property to pay for local improvement. The mischief arising from municipal prodigality and the growth of municipal debts that attended thereon, called loudly for an efficient remedy. These restrictive statutes are the answer to that call. They embody that principle of sound public policy which seeks to enforce economy in the administration of public affairs. The judicial tribunals of the state should administer these laws so as to advance the purpose thus sought to be accomplished. Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which these statutes impose.

"The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of them. It would be idle to enact those statutes, and afterward permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effect should be given to such acts of municipal officers it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice; it is possible that municipal bodies may secure benefits under a contract thus declared void and refuse to make satisfaction,. In the nature of things, however, these instances will be rare. Those who deal with public agencies entrusted with the management of municipal affairs usually experience liberal treatment. Such agencies are not stimulated to acts of injustice by cupidity. Self-interest, that great motive to overreaching, is absent. If, however, cases of hardship occur, they should be attributed to the folly of him who entered into the invalid contract. The gateways of municipal prodigality should not be left wide open, because an attempt to narrow them may cause an occasional instance of seeming hardship."

The facts in the Miller case, just quoted, and the one we are considering, are similar in a great many respects; except that one step further was taken in the Miller case, and the contract was let without going through the formalities required by statute, and it was held that Miller could not recover, although he completed the work and it was conceded that the contract was entered into in good faith by all the parties. Are the material men concerned in the work at Sandusky in any better position than Miller in the case of the city of Lancaster vs. Miller, from which I have just quoted? The court in the Miller case said:

"While a municipality in this state should not be allowed to divide an improvement, which is in fact single and entire, into separate parts so as to make the cost of each part less than $500, and contract separately for the construction of each part, thereby evading the provisions of section 2303, revised statutes, as to advertising for bids; nevertheless, if in view of the circumstances under which the city was acting at the time this contract was made, it in good faith had elected to regard the construction of each section as a matter distinct and independent of the other, and had proceeded to contract separately for each

section, neither would have originally involved an expenditure of $500, and therefore, it might not have fallen within the provisions of section 2303 as to advertising for bids. This was not done, however, but instead, the two sections were treated as one and their construction was provided for by a single contract, which involved an expenditure exceeding $500."

If the director of public service in the city of Sandusky was acting in good faith, and believed that he could save the city some money by performing the labor with employes of the department of public service, I am inclined to believe that the courts, because of a mistake made under such circumstances, would hold that the laborers and material men should be paid out of the funds of the city; but can the director of public service under the facts set forth in your letter claim that he acted in good faith? He had an estimate, made by the engineer, showing that the improvement would cost more than $500; he was ordered and directed by council to advertise for bids; and in the face of these facts he commenced the improvement and expended an amount far in excess of $500. To permit the requirements of section 4328 General Code to be set aside under such circumstances would practically nullify the law; as the court says in the Miller case, "it would be idle to enact those statutes and afterwards permit their practical abrogation by neglect or other misconduct of the officers of the municipality." Section 4328 General Code authorizes the director of public service *to purchase supplies or material or provide labor for any work under the supervision of his department not involving more than* $500; *but when the expenditure exceeds* $500 *it directs what steps must be taken before any money may be legally paid out of the city treasury.* The improvement in the city of Sandusky cost more than $500; an estimate was furnished to council that the cost of the same would exceed $500; the council took the necessary steps, and by proper and legal proceedings authorized the director of public service to advertise for the bids and enter into the contract as required by law; this was not done.

I am therefore of the opinion that these bills are illegal and may not be paid by the city. It may be a hardship, but it should be attributed to the officer who illegally contracted the work.

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

A 150.

CITY ENGINEER—GENERAL DUTIES—EXTRA COMPENSATION FOR WORK ON CITY SEWERAGE CONSTRUCTION NOT PERMITTED.

Ordinances of council may not be unreasonable nor arbitrary, and therefore, an ordinance totally prohibiting the moving of houses on or over public streets and avenues, is invalid. . .

As it is the duty of a city engineer, appointed by the director of public service, under section 4327, General Code, to take care of all engineering which comes under the supervision of the director of public service, said engineer cannot be allowed additional wages for work connected with the construction of a city sewerage system.

COLUMBUS, OHIO, March 6, 1911.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—In your favor of February 18th, you have submitted to me three questions, which I shall take up in the order submitted.

"*First.* I have been ordered by the city council of our city, which is Bellefontaine, Ohio, to prepare an ordinance prohibiting the moving of dwelling houses or any kind of buildings on our streets and avenues. For instance, the ordinance is intended to prohibit a man from moving a house from one lot to another over a street.

"Would such an ordinance stand, or would it be impossible to bring suit under such an ordinance without being defeated for want of power under the law?"

It is well settled that ordinances in order to be valid and binding must be reasonable; that if they are arbitrary and oppressive they will be declared void. The ordinance in question, to-wit: To prohibit the moving of dwelling houses or any kind of buildings from one lot to another over a street, would not be a reasonable one, as it does not tend to regulate, but to prohibit the use of the street in the case mentioned.

It is my opinion, therefore, that said ordinance would not stand for the reasons above given.

"*Second.* Our city is building a sewerage system. May our city engineer receive additional wages by the day while he works on this sewerage work?"

Section 4325 of the General Code provides:

"The director of public service shall supervise the improvement and repair of * * * sewers * * *"

Section 4327 of the General Code provides:

"The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons necessary for the execution of the work and the performance of the duties of this department."

I assume from your question that the city engineer of your city has been appointed by the director of public service as provided for in the above section 4327, and that as such engineer he has been appointed to take care of all engineering work which falls under the supervision of the director of public service. Section 4325 above given makes it the duty of the director of public service to supervise the improvement and repair of sewers.

It is my opinion, therefore, that as it is already the duty of your city engineer to supervise the building of the sewerage system, he cannot receive additional wages while at work on this sewerage work.

"*Third.* A majority of the owners on a street, that is, a majority of the front foot owners, petitioned council to improve the streets with macadam. Council ignored the petition, but several months later passed a resolution declaring it necessary to improve the same street with brick. May this improvement be made by council without regard to the aforesaid petition?"

Section 3814 of the General Code provides:

"When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication."

Section 3835 of the General Code provides:

"No public improvement, the cost or part of cost of which is to be specifically assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event, the council, a majority of the members elected thereto concurring, may proceed with the improvement in the manner therein provided."

A majority of the owners of the foot frontage having petitioned council to improve the street with macadam, and council having ignored the petition, it is the same as if the petition had not been filed. The above section (3814) permits council to make the public improvement with the concurrence of three-fourths of the members elected to council.

It is my opinion that council may make this improvement without referring to petition of owners of the front footage, providing the resolution that was passed received the concurrence of three-fourths of the members elected to council.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

157.

PAVING OF MACADAMIZED ROAD IS A REPAVING UNDER SECTION 3822 GENERAL CODE—ASSESSMENTS.

COLUMBUS, OHIO, March 7, 1911.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—Replying to your letter of February 2nd, requesting the opinion of this department as to whether or not the property abutting upon a street which has been improved by macadamizing, and which the property owners desire to have paved, will be assessable for more than one-half of the cost of paving, that is, will the paving of such a street be a repaving as contemplated in section 3822, General Code, I beg to state that in my opinion such paving would be a repaving as contemplated by the statute.

This is the holding of the circuit court in the case of Van Deman, et al., vs. The City of Delaware, copy of which opinion, in compliance with the request of your letter, I am enclosing herewith.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

161.

BOARD OF EDUCATION—NO POWER TO EMPLOY PROCEEDS OF BOND ISSUE TO PURPOSES OTHER THAN SPECIFIED IN NOTICE AND RESOLUTION.

The language of the statutes will not permit of a construction allowing a board of education to erect an eight-room building in place of a four-room building mentioned in the resolution and notice in the bond issue proceedings for said purpose.

Neither has the board power to construct an addition to a school building in another part of the city not mentioned in said notice and resolution.

COLUMBUS, OHIO, March 7, 1911.

HON. T. Y. MCCRAY, *City Solicitor, Mansfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 16th in which you ask the following questions:

> "1. Has the board of education of the city school district of the city of Mansfield, under its authority to issue bonds, as bestowed by a vote in conformity with notice and resolution, the power to build a four-room school building, in place of the eight-room building mentioned in said notice and resolution?
>
> "2. Has the board, under said authority to issue bonds, the power to construct an addition to a school building in another part of the city not mentioned in said notice and resolution, and under said authority to issue valid bonds therefor?
>
> "3. If the second question is answered in the affirmative, how can the board construct additions to buildings not mentioned in the resolution and issue valid bonds therefor under authority of its proceedings so far had, and without holding another election in the matter?"

In answer to your first inquiry I would say that the board of education has not the power to build a four-room building in place of the eight-room building as mentioned in said notice and resolution, for the reason that it would not be in compliance with what the people voted for, as described in the notice to the electors for holding said election on the proposed bond issue. In other words, it would not be in accordance with the proposition for which the electors of the Mansfield city school district voted for as set forth in said notice.

Section 7625 of the General Code requires the board of education to make an estimate of the probable amount of money required for such purpose or purposes. It is apparent that an estimate for a four-room building would not be an "estimate for an eight-room school building." In other words, the estimate would be a false estimate, and therefore, the electors voted upon a false estimate, and the reasoning of the statute requires that the electors shall vote upon a fairly accurate estimate when submitted to them for their approval or rejection, as provided in said section of the General Code.

I am of the opinion that statutes which authorize or empower bodies to issue bonds are to be strictly construed and to be strictly followed.

In answer to your second question would say, section 7625 provides:

> "When the board of education of any school district determines that

for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to do any of such things, etc."

So that the board has not the power to construct an addition to a school building in another part of the city not mentioned in said notice and resolution, for to do so the board would be expending money raised by an unauthorized and legally unwarranted bond issue, because the proposition of issuing the bonds for repairing or furnishing a school house was never submitted to the electors of the said city school district.

I think my answer to the first and second questions answers your third inquiry in this, that the board must hold another election in order to construct additions to buildings by an issue of bonds for the reason that the proposed issue of bonds for that purpose has not as yet been submitted to the electors of the district as required by the above mentioned section of the General Code.

Trusting that this answers your inquiries satisfactorily, I am,

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

191.

COUNCIL AND DIRECTOR OF PUBLIC SERVICE—POWER TO INSTITUTE PROCEEDINGS ON BOND ISSUES AND CONTRACTS, WHICH MUST BE COMPLETED DURING TERMS OF SUCCESSORS.

One council may sell bonds and another council act upon the contract connected therewith, and there is no requirement that all legislation and all proceedings be completed in a single term.

The principles apply to the action of a director of public service who may let contracts which must be completed by his successor.

COLUMBUS, OHIO, March 22, 1911.

HON. J. F. KUHNS, *City Solicitor, New Philadelphia, Ohio.*

MY DEAR SIR:—We have received your favor of the 12th inst. in which you state as follows:

"The council of our city is contemplating the construction of a sewage disposal works and a sanitary sewer. Plans have been prepared, and are about to be adopted by the council. A bond issue will have to be voted for the purpose.

"By the time the bond issue is voted, and the necessary legislation enacted, the greater part of the summer will be gone, and there will not be left sufficient time to let the necessary contract for the work to be completed within the year 1911, at the close of which year the term of the present councilmen expires.

"I have two questions upon which I earnestly solicit your opinion. The first is: Can the present council sell bonds (in 1911, at the close of which year the term of its members expires) for the construction of the sewer and sewage disposal works in 1912? The second question is: In

event our bonds are sold and the necessary legislation completed, can the director of public service let a contract for this work, which contract will not be completed within his term, that is, prior to January 1st, 1912?

"It appears to me that whatever is done by either the council or the director of public service in this matter should be done and completed within the year 1911."

In regard to your first question: "Can the present council sell bonds (in 1911, at the close of which year the term of its members expires) for the construction of the sewer and sewage disposal works in 1912," section 3939, of the General Code, which reads as follows, covers this question:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, *for such period of time*, at such rate of interest, not exceeding six per cent. and in the manner as provided by law, for any of the following specific purposes: * * *"

And subsection 3 of the same section:

"For sanitary purposes and for erecting a crematory, or providing other means for disposing of garbage and refuse matters."

Council sells the bonds, and it does not make any difference whether the members thereof are members when the works are completed, council being a continuous body.

Your second question is as follows: "In event bonds are sold, and the necessary legislation completed, can the director of public service let a contract for this work, which contract will not be completed within his term, that is, prior to January 1, 1912?" This question seems to be covered by the preceding one, and it does not make any difference who is the director of public service if he complies with the law in letting the contract, and after such contract is made the city is bound, and not the director of public service. For illustration, I might say that the bonds for the Columbus garbage plant were sold, and the contract let in 1902, and the plant was not completed until 1908; so you can readily see that there were several changes in officers between the selling of bonds and the completion of the plant.

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

210.

BRIDGES—RIGHT OF CITY TO MONEYS LEVIED BY COUNTY COMMISSIONERS UPON PROPERTY OF CITY—CONSTITUTIONAL LAW—SPECIAL LEGISLATION—VESTED RIGHTS.

Levies by the county commissioners were made for bridge funds under section 2824, Revised Statutes, which provides that cities having a population of 8,273 should be entitled to be paid from said funds all money collected upon the property of the city, and that said moneys shall be expended for bridge constructions within said city. Later, said statute was repealed by section 13767, General Code, along with certain other special legislation statutes, with the attendant provision that rights and liabilities theretofore incurred should not be affected by the repeal.

Held: That whether or not said act is contrary to constitutional provisions against special legislation, and whether or not the clause, "saving vested rights" is legal, the equity is with the city, and it should be entitled upon demand, to the share of moneys so levied upon its own properties.

COLUMBUS, OHIO, April 3, 1911.

HON. THOMAS J. SUMMERS, *City Solicitor, Marietta, Ohio.*

DEAR SIR:—Some days ago you inquired of this department verbally in reference to the right of the city of Marietta to demand and receive the whole of the proportion of the bridge fund collected upon the property within said city upon demand of the council of said city.

You inform me that the city of Marietta heretofore caused a bridge to be built, and to meet the expense thereof bonds in a large amount were issued; that the bridge was built by said city and the bonds issued thereunder on account of section 2824, Revised Statutes of Ohio, which provided *inter alia* as follows:

> "The commissioners, at their March or June sessions, annually, may levy on each dollar of valuation of taxable property within their county, for road and bridge purposes, as follows: In a county where the valuation of taxable property exceeds eighty millions and does not exceed one hundred and twenty million dollars, five-tenths of a mill; where the amount exceeds fifty and does not exceed eighty millions, seven-tenths of a mill; where the amount exceeds twenty millions and does not exceed fifty millions of dollars, one mill and one-tenth; where the amount exceeds ten millions and does not exceed twenty millions of dollars, one mill and five-tenths; where the amount exceeds five millions and does not exceed ten millions of dollars, three mills; and where the amount is less than five millions of dollars, five mills and five-tenths; and of the tax so levied, the commissioners shall set apart such portion, as they may deem proper, to be applied to the building and repair of bridges, which portion so set apart shall be called a bridge fund, and shall be entered on the duplicate in a separate column, and shall be collected in money, and expended, except as may be otherwise provided by law, under the directions of the commissioners in building bridges and culverts, or in repairing the same; * * *
>
> "(MARIETTA) and provided further, that in cities having at the last federal census a population of 8,273, the whole of the proportion of

> said bridge fund collected upon the property within said city shall upon demand of the council of said city, therefore, be paid into the treasury of said city, and shall be expended by said city for the purpose of building and maintaining bridges therein; * * *"

You further advise me that the city of Marietta is without funds to meet its obligations resulting from the issuance of said bonds unless the county commissioners shall order the whole of the proportion of said bridge fund collected upon the property within said city turned over to your city treasurer for the purpose of meeting the obligation on said bonds.

The situation which you describe is singular indeed, and presents many peculiar matters for consideration.

Section 2824 was repealed by section 13767, General Code, the heading of the latter section being as follows:

> "The following sections of the Revised Statutes and acts, and parts of acts, of the general assembly are hereby repealed."

Then follows the numbers of the sections repealed, amongst them being section 2824, of the Revised Statutes. However, these repeals are subject to conditions that then existed as shown by section 13766 of the General Code, which is as follows:

> "Nothing contained in section thirteen thousand seven hundred and sixty-seven, repealing a section of the Revised Statutes, or an act of the general assembly or part thereof, *shall be construed to affect a right or liability accrued or incurred thereunder*, or an action or proceeding for the enforcement of such right or liability; nor to relieve any person from punishment from an act committed in violation of such section, act or part thereof, nor to affect an indictment or prosecution therefor; and for such purposes, such sections, acts or parts thereof, shall continue in full force and effect notwithstanding such repeal."

It is my judgment that section 2824, R. S., is still in full force and effect insofar as the fulfillment of any obligations that were incurred in accordance with its terms, and in reliance upon it. It is true that statutes of that character have been held by our supreme court to be unconstitutional, coming under the head of "special legislation." See the following cases, and particularly, Platt, a Taxpayer, etc., v. Craig, Daly, James, Individually, etc., et al. Jones, Mayor of the City of Toledo, v. The State of Ohio, ex rel., Walbridge, 66 O. S., 75.

Also, State of Ohio, ex rel., Nicely, et al., v. Jones, et al., 66 O. S., 453.

Also State of Ohio, ex rel., Attorney General, v. Beacom, et al., 66 O. S., 491.

However, insofar as I am advised, no acts that were done in accordance with the provisions declared unconstitutional have been held as a nullity, nor do I know of any contracts or other obligations entered into by virtue of the "special legislation," to which I have referred in Ohio, that have been held invalid.

Judge Shauck, speaking for our supreme court in the Beacom case, to which I have referred, said on page 508, 66 O. S., as follows:

> "But this is a public action, instituted and conducted solely for the protection of the public against injuries to result from infractions of the constitution, and while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension

of its execution as will give to those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create; and this suspension will be until the 2nd of October, 1902."

It would thus appear that our supreme court did not intend that its decree should operate backwards, and that the infirmity of the legislation which was held unconstitutional, was an infirmity that must not longer continue than the second of October, 1902.

Our supreme court did not hold the legislation referred to as void, but only voidable because the officers referred to in the various decisions to which I have referred were permitted to continue until October 2nd, 1902, and, therefore, the statutes were not held unconstitutional absolutely, but only in the modified way that I have indicated.

From what I have said it will appear that neither by the decision of our supreme court nor by the act of the legislature was it intended that any condition which had theretofore been created, should be interfered with.

Section 2421 of the General Code provides:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, *except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein.* If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

This statute expressly recognizes the right of cities and villages to demand and receive part of the bridge fund levied upon property therein.

In case section 2824, Revised Statutes, be not in force as to Marietta, your city would not have the right by law to demand and receive part of the bridge fund levied upon property. In the latter event it is the duty of the commissioners to construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use.

Section 2421 of the General Code was orginally section 860, Revised Statutes. However, it had this in addition:

"Provided that in all cases except counties containing a city of the first grade of the first class, the granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the said board of commissioners."

The proviso to which I have referred as being in section 860, Revised Statutes, was omitted from section 2421, General Code, doubtless upon the theory that it was unconstitutional, referring only to Hamilton county, but the fact that this provision, to-wit: "except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein," was left in section 2421,

General Code, would seem to indicate the legislative intent still existing to the effect that certain cities still had the right to demand and receive this money on account of conditions that were created prior to the declaration of our supreme court that such statutes were invalid.

Whether or not section 2824 is still in force in reference to your city, the commissioners may act. If your city has not the right to demand and receive the bridge fund, then it is the duty of the commissioners to construct and keep in repair necessary bridges over streams, public canals, etc., and I cannot bring myself to believe that the city of Marietta is required, either in law or good morals to furnish a bridge for the county of Washington in the light of existing past legislation on this subject. By virtue of section 2421 the county may, and should do its part for the providing of bridges, and inasmuch as your city is under a bonded indebtedness growing out of the construction of the bridge referred to, it is my conclusion that by virtue of section 2421, your county commissioners have a perfect right to honor the demand of your city for its portion of the bridge tax as disclosed by section 2824 of the Revised Statutes.

In view of the fact that the city of Marietta issued bonds for the construction of this bridge, and that these bonds are a valid obligation against the city; that the credit and honor of the city are pledged to their payment, and that this step was taken by virtue of section 2824 of the Revised Statutes, I do not believe that either the legislature or the court intended by any act of repeal or decision to leave to the taxpayers of Marietta the unfair burden of paying the entire expense of the construction of the bridge. It seems to me that the right of the matter is altogether with the city, and that it is the duty of the county to pay over to the city of Marietta, the amount provided for under section 2824 of the Revised Statutes, and even if that statute is not in full force and effect now as to Marietta, the county will be within the pale of the law by virtue of section 2421, General Code. The equity of the question is so entirely one way that I trust no taxpayer in the county of Washington would put any obstruction in the way of the officers of your county in conforming to the ideas expressed in this opinion.

I am further advised by you that your proper county officers are entirely willing to turn over the funds in question to the city of Marietta if the law will permit. This fact is an additional matter for consideration as reflecting upon the justice of the claim of the city. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

213.

INTEREST OF CHIEF OF FIRE DEPARTMENT IN PLUMBING CONTRACT WITH PUBLIC SERVICE DIRECTOR, ILLEGAL—PUBLIC OFFICIALS.

As the chief of the fire department is an "officer" of a municipality, he is prohibited by the provisions of sections 3805 *and* 12912, *General Code, from entering into a contract with the director of public service for city plumbing work.*

COLUMBUS, OHIO, April 6, 1911.

HON. H. R. SCHULER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21st, which reads as follows:

"The following state of facts has been presented to me for an opin-

ion: The director of public service invited bids for the construction of connections between the water mains and sewer flush tanks in this city. The aggregate amount of the contract being less than $500.

"Bids were formally received and opened, and the bid of H. C. Sponhauer, the chief of our fire department, who is also in the plumbing business, was found to be the lowest, at 14 cents per lineal foot. At least three other bids were received, and ranged from 15 to 18 cents a lineal foot for the job.

"Can the contract under this state of facts be let to H. C. Sponhauer?

"Sponhauer claims that he has been doing work for the city right along, and that no examiner has ever found fault with the items paid to him.

"The sections of the General Code which I believe required interpretation are 3808 and 12912. Both of these sections prohibit 'officers of municipalities from becoming interested in the profits of a contract, etc., with a corporation,' and to my mind would prohibit a contract being made with H. C. Sponhauer.

"In view of the fact, however, that examiners have heretofore passed items of this kind, I thought it might be possible that one of your predecessors had held that a chief of the fire department was not an officer and therefore not included in the above sections.

"'Will you be kind enough to let me have your opinion as to whether or not a contract could be made with H. C. Sponhauer. There is no doubt but what it would be to the best interest of the city, but whether the Code will allow it is a question which I will kindly ask you to determine."

In answering your inquiry we must first determine, as you suggest in your letter, whether or not the chief of a fire department is an officer within the meaning of sections 3808 and 12912 of the General Code, which provide respectively as follows:

"No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer in the work undertaken or prosecuted by such corporation or township, during the term for which he was elected or appointed, or for one year thereafter, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

In the sections of the General Code, which provide for the appointment, authority, duties, etc., of chiefs of fire departments such chiefs of fire departments are referred to several times as officers; for instance: Section 4374, General Code, provides:

"The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court *officers*, etc."

Section 4375 provides:

"The director of public safety shall have the exclusive management and control of all other *officers*, surgeons, secretaries, etc."

Section 4376 provides:

"The chief of the fire department shall have exclusive control of the stationing and transferring of all firemen and other *officers* and employes in the department, * * * In case of riot or other like emergency the mayor may appoint additional firemen and *officers* for temporary service who need not be in the classified list of the department. * * *"

Section 4377 provides:

"The fire department of each city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other *officers*, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council."

Section 4379 provides:

"The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, *officers* or employes in his respective department, etc."

In the case of State, ex rel., Speller v. Painesville, decided in the seventh judicial district, at the October term, the circuit court held as follows:

"1st Syl. A duly appointed patrolman of the police department of a city is an officer within the meaning of the laws of Ohio."

It will be noted that the sections of the statute which I have already referred to above, are the sections which provide for the appointment, etc., of the officers and members of the police and fire departments, and that in said sections, members of the police, as well as members of the fire departments are referred to several times as above indicated, as officers. In its opinion the court in the case referred to says:

"Taking the two sections, 126 and 227, together, the first question suggested is whether a patrolman is an officer and whether he is included within the provisions of section 126. The terms of the statute are very inclusive, and it would seem that they were intended to include everybody employed in the city government; and that meaning would seem to be borne out very strongly by the terms of section 227, which provides that the council shall 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.

"If indeed, a patrolman be not an officer, then it would seem that he certainly would come within the meaning of the other term, an 'employe.'

"In our own statutes a policeman is repeatedly referred to as an officer. For instance, in General Code, 5276, it is provided that the commanding officer of any regiment, battalion, company or troop may authorize in writing any constable or police officer of the city, village or township to arrest any delinquent member of the regiment. Again, in General Code, 5276, it is provided that any person who engaged in disposing of spiritous or other intoxicating liquors near an encampment of soldiers may be put under guard by the commanding officer who may turn such person over to any police officer of the village or township. Again, General Code, 13478, provides that when a sheriff, constable, police officer or any agent for any duly incorporated society for the prevention of cruelty to animals has reason to believe, etc., he may cause a person to be arrested, and in General Code, 13474, it is provided that when a sheriff, constable, marshal or other police officer has reason to believe that any person is about to engage in a prize fight, he shall arrest such person."

In the case of State ex rel. vs. Jennings, 57 O. S., at page 424, of the opinion, the supreme court says:

"The chief of a fire department performs such duties as *make him an officer.*"

Thus, it would seem from the reading of the sections above quoted, and the reasoning of the above cited case, that a patrolman or policeman is generally recognized in our statutes as an officer, and as the two departments are similar in nature and character, it would likewise seem by parity of reasoning that the chief of the fire department unquestionably is an officer of the municipality. In view of the conclusion, therefore, that the chief of the fire department is an officer, I am firmly of the opinion that the said contract under the state of facts set forth in your inquiry cannot be awarded to H. C. Sponhauer, for the reason that the same comes within the restrictions of sections 3808 and 12912 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 213.

CHANGE OF SALARY DURING TERM OF EMPLOYMENT OF ENGINEERS AND FIREMEN IN POWER HOUSE OF WATER WORKS DEPARTMENT.

Engineers and firemen employed at the power house of the water works department are employes of the municipality within the meaning of section 4123, *General Code, and their salary, therefore, cannot be increased or decreased during their term of employment.*

COLUMBUS, OHIO, April 7, 1911.

HON. T. F. THOMPSON, *City Solicitor, Zanesville, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 25th in which you request my opinion upon the following:

"At the time council of our city made its semi-annual appropriation January 1, 1911, it made an appropriation for an allowance of a small increase of salary for the engineers and the firemen at the power house of the water works department, although it made no change at that time in the ordinance fixing their salary. Since that time council seems desirous of making a change in said engineer's and firemen's salary, by fixing their salary at a price per hour, instead of a yearly salary; in fact, some are paid by the hour now, but if such change in the salary is made it will be a slight raise in the salary for most of them; and said council has also included in the ordinance which they propose to pass, the janitor of the market house, making a slight raise in his salary also.

"It has been customary here to appoint these officials for a term of one year beginning the first of the year following the municipal election; so such firemen's and engineer's terms for the second year will expire the 1st day of January, 1912. Of course, said engineers and firemen are subject to removal at any time, by the director of service, unless they should be considered under civil service, but no action in that regard has been taken by our civil service commission towards placing them in civil service.

"Said engineers and firemen maintain that they do not come under the provisions of section 4213 of the General Code, providing against the increasing and diminishing of salary during term of office."

Section 4213 of the General Code, provides as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Within the meaning of said section, and as I construe it, a fireman is an employe of the municipality, and is, therefore, included within the restriction of said section 4213. Therefore, it is my conclusion that the council of the city of Zanesville has not authority to change either by decreasing or increasing, the salaries of its firemen during the term for which they were appointed; that is to say, the salaries of firemen and other officers or employes of the municipality should be fixed by ordinance of council before the commencement of the term for which he was appointed, and that the same cannot be changed during the term of such officer or employe of the municipality.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

G 222.

CONTRACTS OF MUNICIPALITY WITH REFERENCE TO MUNICIPAL LIGHTING PLANTS—POWERS OF DIRECTOR OF PUBLIC SERVICE AND OF COUNCIL—ORDINANCE AUTHORIZING CLERK TO ENTER INTO SUCH CONTRACT, ILLEGAL.

The matter of entering into contracts in reference to electric lighting plants, is conferred by the statutes upon the director of public service. A contract with an expert electrical engineer to investigate and report on the condition of a municipal electric lighting plant is within this category.

An ordinance therefor, authorizing the clerk to enter into such contract, is illegal.

COLUMBUS, OHIO, April 14, 1911.

HON. M. R. SMITH, *Solicitor, Conneaut, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 28th of March in which you inclose a copy of the following ordinance to-wit:

"ORDINANCE.

"No. .....

"Introduced by .....

"Ordinance to employ an expert electrical engineer, and to appropriate the money for the expense of the same.

"*Be it ordained by the council of the city of Conneaut, state of Ohio:*

"Section One. That an expert electrical engineer, selected by a committee of citizens composed of Myer Goebricher, F. L. Matson and Geo. T. Arthur, be employed to investigate and report on the condition of the municipal electric lighting plant, as hereinafter provided.

"Section Two. Said electrical engineer shall be engaged and required to make a full and complete investigation into the present condition, value and worth of the municipal electrical plant of Conneaut, Ohio, including the present physical condition, value and worth of all buildings, engines, boilers, dynamoes, machinery and of all lines, poles, meters and any and all fixtures or appurtenances belonging to said plant, and each and every one of the above mentioned shall be separately listed, and the present value thereof set out in a report of said engineer in such a manner as may be practical, and it shall show the value of each, and the length of time each has been in use. Said engineer shall further make a finding and report of the capacity for work of all boilers, dynamoes, regulators and lines. Said engineer shall find and report the amount of coal necessary to produce a kilowatt of electricity on the switchboard at the plant. He shall also find and report as to how much of the current produced at the plant is transmitted over the lines and actually used or consumed to make these findings. He shall use the grade of coal used at said plant during the year 1910, and shall make all tests as are necessary with the boilers, dynamos and lines now in use. Said engineer shall also make a full and complete report showing thereby the present condition of each and every boiler, engine and dynamo, and of all lines, and the work they will do as compared with an electrical lighting plant of like size which is conceded to be modern and well

equipped in every respect. Said engineer shall report and point out any and all defective or antiquated, or inefficient machinery of whatever nature now used in said plant, also the reason of the defect or inefficiency, and shall make such recommendation as he may deem necessary to place said plant in an improved and well equipped condition.

"Section Three. All reports made by him shall be in writing, and shall be submitted to the council. He shall appear before the council at any and such times it may request, and shall answer all questions of the council relating to the investigation of said plant.

"Section Four. Said engineer shall receive for his compensation a sum not exceeding one thousand dollars.

"Section Five. There shall be appropriated from the general fund of the city of Conneaut the sum of one thousand dollars to be used for defraying the expenses of said expert engineer, and the auditor of the city of Conneaut is hereby authorized to draw his vouchers for the payment of said bills of said expert engineer when approved by the finance committee of the city of Conneaut.

"Section Six. That the clerk of the council be and he hereby is authorized and instructed to enter into a contract on behalf of the city of Conneaut with the expert engineer selected by the committee heretofore appointed and composed of Myer Goebricher, F. L. Matson and George T. Arthur in accordance with this ordinance.

"Section Seven. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"Passed this ..... day of ..... 1910.

.....

"President of Council.

.....

"Clerk."

And respecting which ordinance you make the following inquiry:

"I enclose you herewith a copy of an ordinance prepared, which one of the councilmen has asked me to submit to you as to whether or not it would be legal.

"My advice to the council is that the appropriation of the money should be in one ordinance, and the ordinance to contract with a certificate from the auditor should be on the ordinance authorizing the clerk to enter into the contract, but some of the council are very anxious to have them all in one ordinance if it can be done legally, but as far as I am concerned I cannot see it any other way than to be done in two ordinances."

The power of council is but legislative only, as section 123, Municipal Code, provides, which is 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 139 of the Municipal Code provides as to the duties of director of public service, 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 powers and perform all duties conferred by law upon the directors of public service or the board of public service, except as otherwise provided by law."

Section 141, Municipal Code, provides as to management of municipal plants, as follows, to-wit:

"The director of public service shall manage all municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates; and he shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this act and he shall have the management of all other matters provided by the council in connection with the public service of the city."

Section 143 of the Municipal Code provides as to the making of contracts, to-wit:

"The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars ($500). When any expenditure within said department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council, 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. The bids shall be opened at 12 o'clock noon, on the last day for filing the same, by the clerk of such department of public service, and publicly read by him. Each bid shall contain the full name of every person or company interested in the same, and shall be accompanied by a sufficient bond or certified check on some solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material they shall be separately stated with the price thereof. The board may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. Where a bonus is offered for completion of contract prior to a specified date, the department may exact a prorated penalty in like sum for every day of delay beyond a specified date. Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein, shall be rejected."

By virtue of the above cited sections, I am of the opinion that the matter of making contracts in reference to electric lighting plants comes within the power conferred upon the director of public service, and that he is the proper party to enter into a contract, and not by the clerk as authorized in the ordinance of council. My authority for this conclusion is the case of Yaryen v. Toledo, 6 C. C. n. s. 1, which holds in substance as follows: The power conferred upon the director of public service is not simply to execute the contract, but to enter into it; the contract is merely authorized by council; it is made and entered into by the director of public service.

I believe that this sufficiently answers your inquiry.

I am, Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

J 222.

"NEWSPAPERS" — PUBLICATION BY CITY COUNCIL OF ORDINANCES, RESOLUTIONS, ETC.—TRADES PAPER.

As the Potter's Herald is a trades paper and does not publish general news, it is not a "newspaper" within the meaning of the statutes, and as furthermore that paper is non-political, a city has no authority to publish its ordinances, resolutions, statements, reports, notices, etc., therein.

COLUMBUS, OHIO, April 17, 1911.

HON. WILLIAM H. VODREY, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—Your communication of the 29th ult. received, in which you submit the following inquiry for our consideration:

> "The question has arisen in East Liverpool as to whether the city has authority to publish its ordinances, resolutions, statements, orders, proclamations, notices, reports, etc., in the newspaper known as the Potter's Herald. The total circulation of this paper amounts to about 5,650, of which circulation about 2,000 papers are delivered here in East Liverpool. The paper is a trades paper, and does not publish general news. It is non-political and is published weekly, and a copy is delivered to each member of the various trades and labor organizations in the pottery industry. Every member in good standing in his union is entitled to receive a free copy. The paid circulation amounts to about 75 copies. I would appreciate very much having an opinion from you as to whether the city of East Liverpool may publish its ordinances, resolutions and other legal publications in this paper, and if it may so legally publish them, may it legally pay for such publications?"

Section 4228 of the General Code provides:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation

within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4229 of the General Code provides:

"Except as otherwise provided in this title in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements 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."

From your description of the Potter's Herald I am of the opinion that the council of East Liverpool has not the authority to publish its ordinances, resolutions, statements, orders, proclamations, reports, etc., in that paper for the reason that the same does not meet the requirements of the statute in this, to-wit, that it is not a newspaper, that it is non-political and for that reason is not a newspaper of opposite politics.

This opinion is based on your statement that the paper is a trades paper and does not publish general news. You will find a definition of newspapers in the case of Bigalke et al. vs. Bigalke, 19 Ohio Circuit Court Report, page 331. Should the paper you inquire about come within the definition of a newspaper as described in that case, it would meet the requirements. I suggest to you a liberal interpretation of the statutes, especially where the paper has a wide circulation. I really think that our statutes should be amended so as to permit a paper of the kind you suggest to be one qualified to carry publications.

I regret to be compelled to the conclusion that I have come to in this opinion, to the effect that the paper to which you refer is not legally entitled to carry publications of the kind in question. The trouble, however, is with the law and not with those that are in duty bound to interpret it.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

230.

"NEWSPAPERS" — "PUBLISHED" WHERE — PUBLICATION OF ORDINANCES, NOTICES, ETC., OF COUNCIL—"ST MARYS SOCIALIST"—GENERAL POLICY OF PUBLISHING CURRENT NEWS.

A newspaper may be deemed to be "published" within the meaning of the statutes in a given place if its office is established there, if the business of the company is transacted there, and if it is entered at the postoffice therein for mailing. The mere fact therefore, that such a paper was printed at a different place would be immaterial as regards the question of publishing the ordinances, notices, etc., of a municipality wherein said paper is published.

Inasmuch as the St. Mary's Socialist does not publish general current items of "news" as its general policy, the same may not be employed by a council for the publications aforesaid.

April 25, 1911.

HON. LEWIS STOUT, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—Under date of January 23d you submitted several questions for my opinion, and under date of January 31st I rendered you an opinion on said questions. Since that time further facts have been submitted to me as bearing upon the first two questions which were submitted.

First: The first question of your inquiry of January 23d is as follows:

> "Under the statute requiring ordinances to be published in two newspapers of opposite politics, and of general circulation in a municipality, 'would a paper printed at Findlay, Ohio, but mailed from the postoffice at St. Marys, Ohio, be published at St. Marys?' "

I still adhere to my former opinion that a newspaper printed at Findlay, Ohio, but mailed from the postoffice at St. Marys is not published at St. Marys within the contemplation of the statute. I understood your question at that time to mean, however, that the situs of the paper was at Findlay and that merely the mailing was done at St. Marys. I am informed now, however, that this is not a fact.

Section 4228 of the General Code provides:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, *published* and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affdavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

The question to be determined with reference to the above section is the meaning of the word "published." It is my opinion that the word "published" as so used is referable to the situs of the publication; in other words, that the situs of a newspaper is the place where such newspaper in contemplation of law is published. The situs of a newspaper is to be determined by the facts.

As the subscriptions of a newspaper are solicited from a given place, as the office is located there, and the business of the company is transacted there,

and as the newspaper is entered in the postoffice as second class matter at such place, and is mailed from there, it is my opinion that such facts would establish that such newspaper would be considered as "published" in such place under the provisions of the above section.

As the statute under consideration does not require that the printing of a newspaper shall be within the municipality, the mere fact that such paper is printed at another place would not change the situs of such paper.

Answering your first inquiry, therefore, I am of opinion that if only the printing of the newspaper is done at Findlay and that the situs of the paper is at St. Marys, that in contemplation of the statute in question the paper would be considered as "published" at St. Marys.

Second: The second question which you submitted in your former inquiry is as follows:

> "Under said section what would constitute a newspaper? I herewith submit three papers of circulation in St. Marys, Ohio, and request that you give your opinion as to which of the same are newspapers, or whether all three are newspapers?"

In answer to this I would state that there is no statutory definition of a newspaper.

Bouvier defines a newspaper as follows:

> "Papers for conveying news printed and distributed periodically."

> "A newspaper, as ordinarily understood, is a publication which contains, among other things, what is called the general news, the current news, or the news of the day; not a publication which does not contain such news and is not intended for general circulation."

> 16 Am. & Eng. Enc. of Law, First Editions, 490.

> "A newspaper in the ordinary acceptation of the term is a publication in sheet form intended for general circulation published regularly at short intervals and containing intelligence of current events of general interest. It follows from the definition that if a publication contains the general current news of the day, it is none the less a newspaper because it is devoted primarily to special interests, such as legal, religious, political, mercantile or sporting."

> 29 Cyc., page 693.

> Definition of a newspaper.
> 19 C. C., 331.

> What constitutes a newspaper.
> 33 L. R. A., 779.
> 24 L. R. A., 793.
> 48 L. R. A., 409.

> "A newspaper in the ordinary acceptation of the term is a publication issued periodically, containing the general current news or news of the day designed to be read by the public generally."

In the case of Bigalke et al. vs. Bigalke, 19 O. C. C., 331, the court cites

with approval the definition from Wade on the Law of Notices, section 1066, which is as follows:

> "What is a newspaper? In order to fulfill the terms of the law, the notice must be directed, by the court or officer, to be inserted, for the statutory time, in some paper printed and circulated for the dissemination of *news;* but it is not essential that, to answer the description, the paper shall be devoted to the dissemination of news of a general character. It may, with equal propriety, be published in a paper devoted exclusively to the discussion of religious, legal, commercial or scientific topics, and the diffusion of knowledge touching special matters within its limited sphere, as in a public journal, the columns of which are open to news of a general character. It may be a religious newspaper, a commercial newspaper, a legal newspaper, or a scientific newspaper, or a political newspaper."

The court in that case then proceeded to apply such definition to the publication under discussion and used the following language:

> "To determine whether or not it complies with this definition, which is a fair one under the authorities which are cited, we have examined, in taking the issue that is made, a part of the bill of exceptions. We find there articles on religion; we find the political news of the day; we find notices of and comments upon conventions; we find marine news, and the news of fires, news pertaining to robberies, news pertaining to the progress of the war in the Phillipines, and, almost if not quite, a column of miscellaneous news, and notices of all sales and mortgages made and deeds recorded and all assignments made. And then there are a large number of advertisements of all kinds and classes of business. And then it contains the decisions of the supreme and other courts, both federal and state courts, and the assignments as made for trial in the different court rooms—given as the court proceedings, the opinions of the supreme court and other courts quite in full; and then there are contributions of a literary character, and contributions of poetry—which certainly ought to go far towards making it a newspaper. And it contains the time table notifying parties of the time of the arrival and departure of trains upon the different railroads in the city of Cleveland; and also contains a great many legal notices, and, perhaps quite as important, the notices of attorneys, of where their shingles are found, and the city news generally.
>
> "And the question is whether this is within the meaning I have read from Wade on the Law of Notice, a newspaper.
>
> "No one paper published in any county in the state, perhaps, contains all the news or makes any pretense of containing all the news. And if we take the different newspapers, we will find certain portions of news that are very important, that are entirely omitted from such papers. If a paper is a political paper, its readers generally are politicians of its faith—many of them; and the political news are selected with the intention and purpose of giving to that class of readers the news that will be pleasing to them—and the news of other political parties are almost entirely omitted.
>
> "So it will be seen at once that these papers differ in degree from the paper in which this notice was made, more than in character. *A paper may be devoted primarily to religion and to religious views, and yet may give general news of the day. That makes it a newspaper.*"

The Standard dictionary defines "news" as:

> "Fresh information concerning something that has recently taken place; anything new or strange."

I am of opinion that the word "news" as used in the definition given in Wade on the Law of Notice, supra, was so used by the author as meaning "the general news of the day," and was so considered by the court in the case of Bigalke vs. Bigalke, supra. The question as to whether a publication is or is not a newspaper is one of fact, and is to be determined by the general policy of the publication. A publication may in one issue answer the definition of a newspaper and in the next fall far short of such definition, but the question is as to the *general* policy of such paper. Again, a publisher may change the policy of such publication, so as to bring such publication within the definition of a newspaper as laid down. The general policy of the publication at the time it is sought to publish ordinances in such publication must determine the question as to whether it is a newspaper or not.

Coming now to apply the definition of a newspaper to the St. Marys Socialist, and upon examination of the issues thereof submitted to me, I am clearly of the opinion that the same is not a newspaper as at present published. Measuring the various issues in my possession by the standard as laid down in the case of Bigalke vs. Bigalke, supra, I find no article in any of them which could under the broadest interpretation be considered as giving the general or current news. In fact, in one of the issues there was no "news" as the word is generally understood in law.

I am, therefore, of the opinion that if the issues of the St. Marys Socialist submitted to me are a true criterion of the general make up of the publication, it is in no sense a newspaper, since in the language as laid down by Judge Caldwell, supra, it does not give the "general news of the day."

If, however, the policy of the St. Marys Socialist should be changed so as to include current or general news, and meet the standard of a newspaper as laid down in the case of Bigalke vs. Bigalke, supra, it would be a sufficient legal medium for the publication of ordinances.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

232.

ADVANCEMENT OF VILLAGE TO CITY—MACHINERY OF GOVERNMENT DURING PERIOD INTERVENING TIME OF ADVANCE TO CITY AND ESTABLISHMENT OF CITY GOVERNMENT—POWERS AND DUTIES OF MAYOR—PUBLICATIONS—ESTABLISHMENT OF DEPARTMENTS.

Upon the advancement of a village to a city, upon the expiration of thirty days after a federal census, the machinery of government remains the same until succeeded by the proper officers of the new corporation under section 3498, *General Code.*

After said thirty days, ordinances and resolutions should be published under the name of the city of Lakewood.

The mayor will retain his fees until the city regime is established, as provided for mayors of villages, and until that time, the mayor will not have the veto power.

The departments authorized in cities and not in villages shall not be established until the city machinery is established.

COLUMBUS, OHIO, April 26, 1911.

MR. ERWIN G. GUTHREY, *Solicitor, Lakewood, Ohio.*

DEAR SIR:—I have given most careful consideration to the various questions submitted by you to me in reference to the advancement of a village to a city by virtue of said municipality having reached a population of five thousand and over at the last federal census.

In your inquiry you call my attention to the following language of section 3498, General Code:

> "From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or a village, in accordance with the provisions of this title."

And also to section 3499 of the General Code, which reads as follows:

> "Officers of the village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation, shall continue in force until changed or repealed."

You then submit the following questions:

> "1st. After the expiration of the thirty days referred to in section 3498 must our official acts, ordinances, resolutions, etc., be under the name of the city of Lakewood, or, will we continue to use the village of Lakewood until the next municipal election?
>
> "2nd. Should the mayor of the municipality pay all fees collected in his court into the treasury thereof after said thirty days, pursuant to General Code, section 4213, or, will he retain his fees as now authorized by mayors of villages?
>
> "3rd. Will the mayor of the municipality after said thirty days be vested with the veto power, as per section 4234 of the General Code?

"4th. Section 3499 states that the officers of the village shall continue in office, but nothing is said regarding the establishment of departments authorized in cities and the appointment of heads thereof, which would not conflict with the continuance in office of present officers.

"Should we, therefore, establish a department of public service as per section 4323, et seq., and a department of public safety, as per section 4367, et seq., or a civil service commission, as per section 4477, et seq.?"

It is my opinion that the general assembly did not intend to change the officers, their powers, duties or emoluments in any manner from what they were under the village form of government until the election and qualification of the officers to be elected at the next municipal election succeeding the issuance of a proclamation after each federal census, and that although said municipality becomes by virtue of section 3498, supra, a city from and after thirty days after the issuance of the proclamation, yet the machinery of government of such city remains as it was under the village form of government and in the hands of the officers of such village until succeeded by the proper officers of the new corporation under section 3498, supra.

My conclusion is, therefore,

(1) That as section 3498 states that such municipality after thirty days after the issuance of the proclamation *shall be* a city the official acts, ordinances and resolutions should be under the name of the city of Lakewood.

(2) That the mayor of the municipality will retain his fees as now authorized by mayors of villages.

(3) That the mayor of the municipality will not be vested with the veto power.

(4) That as it is my opinion that the village form of government will obtain until the proper officers of the new corporation succeed them, the departments authorized in cities and not in villages, should not be established until the city passes under the city form of government by the induction into office of the proper officers elected at the last regular election.

This, I believe, from a careful examination of the subject to have been the clear intent of the general assembly.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

235.

BOARD OF EDUCATION— RIGHT TO DEDUCT PAYMENT OF SUBSTITUTE TEACHER FROM SALARY OF ABSENTEE.

When a board of education has adopted a provision that payments to teachers employed to substitute in the absence of a regular teacher shall be deducted from the salary of the latter, such resolution becomes a part of the contract made with teachers, and its provisions may be carried out, when a teacher is absent two months on account of sickness.

COLUMBUS, OHIO, May 1, 1911.

HON. H. R. HILL, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—Under recent date you state:

"The school board of this city make it a practice to pay teachers,

who are sick and unable to teach for the time they are off duty, and a substitute is hired and paid in their places. The board at present propose to pay one of their teachers about two (2) months' back salary, for which she has rendered no service whatsoever. Has the board a right to pay such bills?"

You further advise me that the rules and regulations of the board of education contain the following provision:

"Substitute teachers shall be paid by the board the same rate of salary as the regular teacher for whom they substitute, and the amount deducted from the salary of the regular teacher. Whether or not a substitute teacher is employed, an amount for the time missed shall be deducted from the salary of the regular teacher."

The above provision became a part of the contract of employment entered into by said teacher and the board. The salary of a teacher can be paid only when the teacher performs the service which would entitle such teacher to the said salary.

I am, therefore, of the opinion that the above provision is reasonable, and that the board has no right to pay the teacher who is sick and unable to teach for the time such teacher is off duty, when said board has hired and paid a substitute in such teacher's place.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

236.

CIVIL SERVICE—CLASSIFIED AND UNCLASSIFIED SERVICE—OFFICERS AND EMPLOYES OF BOARD OF HEALTH.

The employment of sanitary policemen being subject to confirmation of council, such employes of the board of health are clearly in the unclassified service and not subject to civil service regulations.

Inspectors of dairies and other inspectors, if in the judgment of the civil service commission these positions require technical or professional skill, are in the unclassified service. So also are ward or district physicians.

The health officer is the head of a department and therefore in the unclassified service.

Unskilled laborers are expressly placed in the unclassified service.

All other employes of the board of health are in the classified service.

COLUMBUS, OHIO, May 2, 1911.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 27th. I had prepared an answer thereto when I was apprised that certain of the statutes involved in your inquiry had been amended by the general assembly and have delayed answering the same until I could obtain a copy of the amended law.

You inquire as to whether or not employes of the board of health in a city are within the classified list in the civil service.

The board of health is specifically given the power to appoint a health officer, district physicians, sanitary policemen, inspectors of dairies, slaughter houses, shops, wagons, appliances, food and water supplies for animals, milk, meat, butter and cheese, and of course has general power to employ laborers, clerks and other persons necessary to the discharge of its functions. The sections amended by the act of 1911 are sections 4411, 4412 and 4484 of the General Code. These sections as amended are as follows:

Section 4411:

> "The board may also appoint * * * as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed."

Section 4412:

> "The board shall have exclusive control of its appointees, define their duties and fix their salaries, but no member of the board of health shall be appointed as health officer nor shall a member of the board of health not the health officer be appointed as one of the ward physicians. * * * The board may suspend, but not remove, any member of the sanitary police now serving or hereafter appointed for cause authorizing the dismissal of any person in the classified service, and shall certify such fact together with the cause of such suspension, to the civil service commission, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon and such judgment in the matter shall be final."

Section 4484:

> "Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law, and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

Section 4479 of the General Code provides that:

> "The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers * * * whose appointment is subject to confirmation by the council * * * persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission * * * the head or chief of any division or principal department relating to * * * health, * * * the superintendent of any * * * hospital * * * unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

From a consideration of these sections it is apparent that, whereas prior to the amendment of section 4411, sanitary policemen, being subject to confirma-

tion by the council, were in the unclassified list, since said amendment they have become members of the classified list and are subject to civil service. The other employes of the board of health apparently were unaffected by the amendment of 1911. The civil service commission has general power to determine whether or not a position in the department of health requires professional or technical skill. This follows because of the fact that the department of health is specifically referred to in section 4479. This section was later in point of original enactment than section 4412, and to the extent that the two may be inconsistent section 4479 controls. Therefore, the mere fact that section 4412, as still phrased, vests in the board "exclusive control of its appointees" does not operate to take out of the classified list all of the appointees of that board. If, therefore, an inspector of dairies or any other inspector mentioned in section 4458, General Code, occupies a position which in the judgment of the civil service commission does require professional or technical skill such an inspector would be within the unclassified list, otherwise, as is apparent from section 4479, the position belongs in the classified list. These positions apparently are in the class as to the status of which the determination of the civil service commission is controlling.

The health officer would seem to be the head of a department relating to health within the meaning of section 4479, and as such would not be within the civil service.

Ward and district physicians are undoubtedly "persons appointed to positions requiring professional skill," and while these positions are subject to classification by the civil service commission that commission could scarcely find otherwise than that they do require professional skill.

Unskilled laborers employed by the board of health are clearly exempted from classification by section 4479.

All other employes of the board of health, including clerks, are, under the sections as they now stand, within the classified list.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

239.

OFFICES COMPATIBLE—MEMBER OF CIVIL SERVICE COMMISSION AND MEMBER OF BOARD OF ELECTIONS—"POSITION IN PUBLIC SERVICE."

Section 4478, General Code, providing that civil service commissioners shall hold no other positions "in the public service" excepting in schools and libraries, should be construed to apply to positions in the municipal service only.

As there is no incompatibility, a member of said commission may, therefore, hold the position of member of the board of elections.

COLUMBUS, OHIO, May 3, 1911.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 11th, requesting my opinion upon the following question:

> "Can the same man hold and draw a salary as a member of the board of elections of the county, and a civil service commissioner, and draw a salary of this city?"

I understand your question to relate to the holding of two offices only, viz.: Member of the board of elections and civil service commissioner.

I find no provision of law directly prohibiting the holding of these two positions by the same person. I am unable to conceive of any reason in law for holding that the two positions are not compatible. The duties of the two positions in no way conflict, nor is it possible for the functions thereof to be exercised upon the same subject matter.

Section 4478, of the General Code, however, relating to the appointment and qualification of civil service commissioners, provides in part that,

> "They shall hold no other positions in the public service, excepting in schools and libraries."

The exact meaning of this provision is very doubtful. The phrase "public service" may be taken in two senses, viz.: 1. In the service of the public in any political subdivision; and, 2, in the service of the public in the municipality itself.

Under the somewhat similar provision of section 1717, Revised Statutes, which has since been supplanted by section 120, Municipal Code, now section 4207, General Code, that,

> "No member of council shall be eligible to any other office or to a position on any board provided for in this title or created by law or ordinance of council, except as provided in the seventh division of this title,"

it was repeatedly held that members of council were eligible to offices not municipal.

See State ex rel. v. Kearns, 47 O. S., 566.
State ex rel. v. Craig, 69 O. S., 236.
State ex rel. v. Brown, 60 O. S., 499.
State ex rel. v. Kinney, 20 C. C., 325.

The holding of the courts in these cases is to the general effect that the context showed that the words, "any other office," as used in the section should be limited and construed as if the word "municipal" was inserted.

Section 4478 is quite similar to old section 1717, and while the question is not free from doubt, I incline to the view that the broad language, "no other position in the public service excepting in schools and libraries," must be construed so as to mean "no other position in the municipal public service." It is true that the reference to schools might seem to indicate that the general assembly had in mind all offices. The first sentence of the section, however, provides for the appointment of the civil service commissioners by the president of the board of education of the city school district in which the city is located, and two other officers constituting an exofficio commission for that purpose, and it seems that the general assembly having once alluded to the city school district, might be presumed to have had offices of the district in mind as in a sense, though not in strict law, offices of the municipality.

As above suggested, the question is very doubtful, but in view of the attitude which the courts have taken respecting the construction of provisions like the last sentence of section 4476, and in view also of the absolute compatibility of the two positions, I incline to the opinion that they may be held by the same person.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

240.

CITY ENGINEER—APPOINTMENT AND FIXING OF SALARY—POWERS OF MAYOR, COUNCIL AND DIRECTOR OF PUBLIC SERVICE.

If the position of city engineer is created as the head of a subdepartment in the department of public service, the mayor has the power to make the appointments to that office. If such position is created otherwise than as the head of such department, the director of public service makes the appointment. In any event, the council fixes the salary.

COLUMBUS, OHIO, May 3, 1911.

HON. M. H. OSBORN, *City Solicitor, Van Wert, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21, which is as follows:

> "Will you kindly advise me who has the appointing power of the city engineer under the code? Also tell me how and by whom his compensation or salary is fixed."

The present Municipal Code as embodied in title 12, part 1, General Code, does not provide for the office of "city engineer." Whether or not this office exists in a given city depends on the determination of the authorities thereof.

Section 4214 of the General Code provides in part:

> "Except as otherwise provided in this title, council * * * shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * * *"

Section 4327 of the General Code provides:

> "The director of public service may establish such subdepartment as may be necessary and determine the number of engineers * * * necessary for the execution of the work and the performance of the duties of this department."

These two sections together, in my opinion, vest in the director of public service power to create the position of city engineer, and in council the power to fix the compensation attached to such office.

The power of appointment depends upon the manner of the creation of the office, that is to say, section 4246 provides:

> "Subject to the limitations prescribed in this subdivision such executive officers [the mayor and the directors] shall have the exclusive right to appoint all officers, clerks and employes in their respective departments or offices * * *"

Section 4250, which is to be read in connection with the foregoing section, provides in part that:

> * * * "He [the mayor] shall appoint and have the power

to remove * * * heads of the subdepartments of the department of public service and public safety * * *"

It follows, therefore, by virtue of these two sections that if the position of city engineer is created as head of a subdepartment within the department of public service, the engineer must be appointed by the mayor; but, if the position is not the head of a subdepartment, the director of public service would have the power to appoint the engineer. In so holding I have passed over the question as to the department in which the position of city engineer belongs. It seems to me, however, that it is quite obvious that it is a position within the department of public service, not only because of the use of the word "engineers" in section 4327, supra, but also because the work of engineering is work the supervision of which is given to the director of public service by sections 4324 and 4325 and 4326 of the General Code, quotation of which in this connection is unnecessary. (See also section 4347, pertaining to the duties of the director of public service as platting commissioner.)

Section 4366 of the General Code provides:

"In each municipal corporation having a fire engineer, civil engineer or superintendent of markets such officers shall each perform the duties prescribed in this title and such other duties not incompatible with the nature of his office as the council by ordinance requires, and shall receive for his services such compensation * * * as is provided by ordinance."

The exact effect of this section is problematical. It is probably obsolete as it is a re-enactment of section 1782, Revised Statutes, which was left unrepealed by the Municipal Code of 1902. It does not in terms authorize council to create any of the offices mentioned. If so construed, however, it would have to follow that the position of "city engineer" is thereby head of a subdepartment within the department of service, and that the appointment, therefore, would be made by the mayor. In short, this section serves only to emphasize that the question of power of appointment is dependent upon the manner in which the position is created.

In the same connection, I may say that for obvious reasons the position of city engineer is not within the classified service. Section 4479 defines the unclassified service, placing therein "head or chief of any division or principal department relating to engineering."

To summarize then, it is my opinion that if the position of city engineer is created by council or by the director of public service as head of a subdepartment in the department of public service, the mayor has the power to appoint the engineer. If the position is otherwise created, the director of public service has power to appoint. In any event, the compensation of the city engineer must be fixed by council.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

242.

PAYMENT FOR PAVING IMPROVEMENT OF STREET FORMING BOUNDARY BETWEEN CITY AND TOWNSHIP—ASSISTANCE TO COUNTY BY CITY—PUBLIC OFFICIALS—INTEREST OF SINKING FUND TRUSTEE IN MUNICIPAL CONTRACTS—OFFICES COMPATIBLE—SINKING FUND TRUSTEES AND SPECIAL COUNSEL IN SOLICITOR'S OFFICE.

When a street lies within a township and forms in part the boundary line of a city in said township, the city may pay a portion of the cost of improving said street when the work is undertaken by the county, under section 7357 General Code.

A member of the board of sinking fund trustees, though he can receive no compensation for such services, is prohibited by section 3808, General Code, from having any interest in any money drawn in an official capacity from the city treasury.

Such prohibition does not, however, extend to the holding of two compatible public offices. Such trustee, therefore, may be employed at a regular salary as special counsel in the office of the city solicitor. He would be prohibited however, by the terms of section 12916, General Code, from receiving compensation based on "contract" for services in said capacity as special counsel.

COLUMBUS, OHIO, May 4, 1911.

HON. J. R. SELOVER, *City Solicitor, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of two letters from you, one under date of March 8th and the other under date of March 15th, submitting for my opinion thereon the following questions:

> "1. A street is the boundary line of the city of Delaware, Ohio. One half of it is in the city and the other half is in the township. The territory may all be taken into the city or thrown into the township. *Query*: Is there any statute by which there may be a joint construction of this street as it now lays?
>
> "2. A is a member of the sinking fund trustees of this city. They receive no compensation for their services. Can A draw pay for special services as assistant counsel for the city. The former attorney general ruled that he could. Does section 45 of the Code apply where one serves in an office of this kind without compensation?"

Answering your first question, I beg to state that the two mile assessment pike law, section 7322, etc., General Code, authorizes the county commissioners to lay out and construct as well as to improve any free road by paving the same.

Section 7326 of that chapter provides for the location of such improvements within the territorial limits of an incorporated city.

Section 7357 authorizes a city to pay a part of the cost of the improvement in the case the same begins or terminates in such city. It would seem that these provisions might be available for the improvement of a street which is the boundary line of a city.

I know of no other statute which expressly authorizes the city, as such, to bear a portion of the expense of such improvement, and it would seem that this statute is the only one under favor of which a joint construction of such a street could be had. It is to be noted, however, that the construction itself

is not joint, and the city authorities would have no control over it. The improvement must be made by the county commissioners.

Answering your second question, I beg to state that section 45, M. C., now section 3808, General Code, provides that:

> "No member of the council, board, officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. * * *"

The section is penal in its nature, its remaining provisions defining the consequence of a violation of this provision. Accordingly it is subject in its application to individuals to a strict construction.

Section 4508, General Code, formerly section 103 M. C., provides that:

> "The trustees of the sinking fund shall serve without compensation * * *."

It is not accidental then that "A" in your question receives no compensation for his services as trustee of the sinking fund.

In spite of the strict construction to be given to section 3808, I am of the opinion that a person who holds an office in the city government to which the law does not permit any compensation to attach, is prohibited thereby from receiving money in an unofficial capacity from the city treasury.

While you do not invite my opinion upon the point, it seems clear to me that there is nothing incompatible in the two relations of member of the sinking fund trustees and special counsel in the department of the city solicitor. I question, however, whether in the case you suppose "A" can legally draw pay for special services as assistant counsel. Section 12912 of the General Code, formerly section 6975, Revised Statutes, provides in part that:

> "Whoever being an officer of a municipal corporation * * * is interested in the profits of a contract, job, work or services for such corporation or township * * * shall be fined."

Your statement of facts seems to indicate that "A's" relation to the city in the performance of his legal services were contractual and he was not in that capacity an officer of the city. The section last above quoted does not prohibit a person from holding two compatible municipal *offices*. but it does prohibit a person who holds one municipal office from undertaking work of an unofficial and contractual nature on behalf of the city and receiving the profits thereof.

Unless, therefore, "A," in the case supposed by you, was a regularly appointed member of the city solicitor's department he cannot lawfully, being a member of the sinking fund trustees, and hence undoubtedly an officer of the corporation, do work of a contractual nature for the corporation and receive pay therefor.

I trust you will pardon me for extending my answer beyond the limits of your inquiry, but it seemed to me that the merits of your question involved the application of sections other than section 45, M. C.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

D 251.

POWER OF COUNTY COMMISSIONERS TO ALLOW EXTRA COMPENSATION FOR "SERVICES IN POLICE COURT" TO CITY SOLICITORS AND ASSISTANTS.

Section 1813, Revised Statutes, was re-enacted in the General Code as section 4307, General Code. The extra compensation for services in police court by the county commissioners therein provided for, applied only to assistant city solicitors and not to the city solicitor himself.

Said section has since been amended, however, so as to permit the commissioners to allow such compensation to city solicitors who employ no assistants for work in police court.

May 12, 1911.

HON. WARREN J. MCLAUGHLIN, *City Solicitor, Lima, Ohio.*

DEAR SIR:—I am in receipt of your favor of recent date in which you state:

> "I have your favor of the 5th inst. with inclosure of copy of opinion rendered to the prosecuting attorney of Champaign county, relative to compensation by county commissioners to city solicitors for services in prosecution of state cases in mayor's court.
>
> "I note that you treat section 4306 of the General Code as a re-enactment of section 137 of the Municipal Code, and therefore find that in making the revision there was an omission of that clause of section 137 which provided for additional compensation by the county commissioners. I beg to call your attention to section 4307 of the General Code which also contains matter which was originally a part of section 137 of the Municipal Code, and wherein it is provided that 'the county commissioners may allow such further compensation as they deem proper, which shall be paid from the county treasury.'
>
> "Section 4307 prescribes the general duties of city solicitors and while there is some reference in it to the designating of assistants and their compensation, and there may be a question as to whether the language providing for compensation refers to such assistants alone, still it would seem that in view of the fact that it is a re-enactment of old legislation specifically provided for compensation to city solicitors, that the language of section 4307 providing for compensation by the county commissioners ought to be held to apply to city solicitors in municipalities where no assistants are provided.
>
> "In the city of Lima the city solicitor has no assistants. In view of this fact I would like your opinion as to whether under the provisions of section 4307 the city solicitor of Lima may receive compensation from the county commissioners for prosecution of state cases in the mayor's court."

Prior to the enactment of the General Code, section 137 of the Municipal Code provided in part as follows:

> "The city solicitor shall also be prosecuting attorney of the police or mayor's court, and shall receive for the service such compensation

as council may prescribe, and such additional compensation as the county commissioners shall allow."

Section 4306 of the General Code, which purports to be a re-enactment of said section 137 of the Municipal Code, reads as follows:

"The solicitor shall also be the prosecuting attorney of the police or mayor's court. Where council allows an assistant or assistants to the solicitor he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court."

Prior to the enactment of the General Code, section 1813, Revised Statutes (1536-844), provided as follows:

"The prosecuting attorney of the police court shall prosecute all cases brought before such court, and perform the same duties, as far as the same are applicable to the police court, as required of the prosecuting attorney of the county; and except in cities of the first grade of the first class, the prosecuting attorney may appoint not to exceed three assistants who shall be assistant prosecuting attorneys of the police court, and perform the same duties, so far as applicable to the police court, as performed by the prosecuting attorney of the police court. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper."

Section 4307, General Code, which purports to be a re-enactment of said section 1813, Revised Statutes, reads as follows:

"The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases, such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper, which shall be paid from the county treasury."

(Note: On the adoption of the General Code the above section 137 of the Municipal Code and section 1813, Revised Statutes, were repealed. See section 13767, General Code, subsections 42 and 44.)

The language found in section 4307, General Code, which, as stated, purports to be a re-enactment of section 1813 of the Revised Statutes, is identical with that found in said section 1813, Revised Statutes. I must beg to differ with you, therefore, in your statement that section 4307 of the General Code contains matter which was originally a part of section 137 of the Municipal Code.

The rule of law governing the construction to be given to codification of statutes is laid down by Okey, J., in Allen vs. Russell, 39 O. S., 337, as follows:

"But where all the general statutes of the state or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revision and consolidated form, although the language may have been changed. * * * *Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form.*"

Applying said rule to the case in question it is clear that the language found in section 1813, Revised Statutes, to-wit: "And the commissioners may allow such further compensation as they deem proper" would have been construed as applying solely to compensation to be allowed assistants to the solicitor, and not to the solicitor himself. That being so, the same construction is to be put upon section 4307, General Code.

Aside from the fact that section 4307 purports to be a codification *solely* of section 1813, Revised Statutes, and not of section 137, Municipal Code as well, I am unable to read into the last sentence of said section 4307 the meaning for which you contend that the words "The county commissioners may allow such further compensation as they deem proper" as used in said sentence, applies as well to the solicitor as to his assistants.

I am, therefore, of the opinion that prior to the amendments to said sections 4306 and 4307, General Code, passed May 5, 1911, that the language of section 4307 of the General Code providing for compensation by county commissioners does not apply to city solicitors, but solely to assistants to city solicitors.

The above construction is the same as that placed upon said section by the general assembly, and in order to correct this apparent flaw in the law, the present general assembly on May 5, 1911, amended said sections 4306 and 4307 so as to read as follows:

Section 4306:

"The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate the assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4307:

"The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor's court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

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

E 251.

CONTRACTS OF MUNICIPALITY WITH WATER AND GAS CO.—ADVERTISEMENT AND BIDS UNNECESSARY—DIRECTOR OF PUBLIC SERVICE MAY NOT ENTER INTO—POWER OF COUNCIL.

A contract by a municipality with a water and light company is, expressly authorized by statute, and there is no requirement that said contract should be let upon advertisements and bids, and as municipalities seldom or never have more than one such company, there is no reason for such requirement.

As section 4328, General Code, authorizes the director of public service to enter only into contracts for work "under the supervision of the department," the contract aforesaid is not included therein. Therefore, the contract may be entered into between the council and the company directly without advertising for bids.

COLUMBUS, OHIO, May 13, 1911.

HON. W. C. BALDWIN, *City Solicitor, Warren, Ohio.*

DEAR SIR:—You make an inquiry in re the validity of a contract made between the Warren Water and Light Company and the city of Warren for supplying water and gas to its inhabitants for a period of ten years.

Judge Fillius has furnished my office with a statement of facts. They are these:

> "There is in the city of Warren a corporation organized for the purpose of supplying water to the city, and is now and for more than twenty years last past has been in operation in the city. Recently, a previous contract between the company and the city having expired, the city and the company entered into a contract for supplying with water the streets, lands, lanes, squares and public places in the city for a period of ten years. This contract was entered into directly between the city and the company without advertising for bids and letting the contract to the lowest and best bidder.
>
> "Section 4328 of the General Code provides in substance, that a contract of the kind therein mentioned which involves the expenditure of more than $500.00 the director of public service shall make a written contract therefor with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks, etc."

You ask the following question: Is the contract which the city and the Warren Water and Light Company made without advertisements and competitive bidding valid? Judge Fillius submitted for my office a very excellent brief covering concisely and fully the law involved.

The same question was before my distinguished predecessor. On November 30, 1910, he held that contracts between municipal corporations and a private corporation in furnishing water and electricity for public uses for such municipal corporation cannot be entered into until competitive bids are solicited by advertising. He referred to contracts that would involve the expenditure of more than five hundred dollars.

Attorney General Denman further held that such contracts are within the department of public service, and must be executed in accordance with the provisions of section 4328, et seq., of the General Code.

He further held that while section 9324 of the General Code gives power to contract with water companies, it does not describe the manner that such contracts must be entered into, but that, in his judgment, it must be read in connection with section 4328 of the General Code. He further held that said section does not prescribe what shall be the municipal authority, and in this connection it must be read with section 4324 of the General Code.

Section 9324 of the General Code provides as follows:

> "The municipal authority of any city or village or the trustee of any township, in which *a gas or water company is organized*, may contract with *such* company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village or township."

Every statute should be construed in the light of the reason behind its enactment. This statute was evidently enacted to confer power upon a city or village whereby it might have the advantage of procuring gas or water for public uses. I assume that comparatively few cities or villages have more than one gas or water company, and from this consideration alone the idea of letting the contract after advertisement does not suggest itself as correct. The statute confers directly the power of making a contract with specific companies furnishing gas or water in the city.

Section 4328 of the General Code provides as follows:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. * * *"

At first glance one might interpret that section thus: The director may make any contract. However, that is not its true reading. If so, there would be no necessity for advertising for or purchasing supplies or material or provide labor, etc., because the expression, "any contract" would embody the purchasing of supplies or material or the providing of labor. In my judgment, the true interpretation of the first sentence of section 4328, G. C., is as follows: "The director of public service may make any contract for any work, or purchase supplies or material for any work, or provide labor for any work under the supervision of that department." In other words, contract for and purchase supplies and material, and provide labor connected with the work.

This, we think, is a reasonable interpretation because the director of public service is an administrative officer, but how about it in respect to section 9324? What reason is there why the director of public service should make a contract not in connection with any work, but a contract authorized expressly by the statutes? To my mind, there is no reason for requiring an advertisement under section 9324, while every reason suggests that such a contract may be entered into between council and the gas or water company directly.

Had I the time I would like to quote more fully from the brief of Judge Fillius, which, to my mind, is unanswerable and supports the conclusion to which I came before having the advantage of the brief. My conclusion, therefore, is, that the contract which the city of Warren and the Warren Water and Light Company made without advertisement and public bidding is valid as far as the question submitted by you is concerned. I am, of course, only passing upon the one question that it would not be necessary to advertise or submit to competitive bids.

I regret the necessity of reversing the opinion of my predecessor, but my judgment leads me to the belief that his conclusions were erroneous.

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

A 254.

ORDINANCES AUTHORIZING FULL PAY TO POLICEMEN AND FIREMEN ON VACATION—VALIDITY.

COLUMBUS, OHIO, May 19, 1911.

HON. FRANK A. BOLTON, *City Solicitor, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 13th, requesting my opinion as to the validity of an ordinance allowing policemen and firemen certain vacations on full pay.

I know of no reason why such an ordinance would not be valid. The cases which you cite relate to compensation of officers during suspension, the rule being, of course, that a suspended officer is not entitled to pay during such suspension whether or not the same was valid. Where, however, it is provided in advance by ordinance that an officer shall have a certain vacation on full pay these cases would not apply.

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

C 255.

TAXES AND TAXATION—BOND ISSUES—LIMITATIONS UNDER LONGWORTH ACT AND EXCEPTIONS.

Waterworks bonds which can be retired by the income from the waterworks, bonds to be paid by assessments specially levied upon abutting property, bonds issued prior to April 29, 1902, are excluded by virtue of section 3946, General Code, from the one, four and eight per cent. limitations of the Longworth act.

In addition to these enumerated exceptions, bonds issued upon the approval of the electors for the purposes referred to in section 3945, General Code, are excluded from the one and four per cent. limitations.

COLUMBUS, OHIO, May 20, 1911.

HON. W. W. WOODBURY, *City Solicitor, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 23d, requesting my opinion upon the following question:

> "The total existing bonded indebtedness of the village of Jefferson is $102,900, of which $40,000 are bonds issued for the purpose of constructing and improving the waterworks, the income from which is sufficient to cover the cost of all operating expenses, interest charges and to pass an amount to the sinking fund sufficient to retire such bonds; $35,000 of which are bonds to be paid for by assessments specially levied upon abutting property, and $1,500 of which are bonds issued prior to April 29, 1902.

"The grand duplicate of the taxable property both real and personal in said village for the year 1909 is $640,660. The estimated grand duplicate for the year 1910 is approximately $1,500,000.

"It is now desired to issue further bonds in the sum of $5,000 for the purpose of constructing a dam for the waterworks. May this additional issue be made, and if so, must the policy thereof be submitted to the electors?"

Section 3946, General Code, which is one of the limitation sections of the Longworth act, so-called, as embodied in the General Code, provides as follows:

"Bonds to be paid for by assessments specially levied upon abutting property, bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due, and bonds issued prior to April 29, 1902, shall not be considered in ascertaining such limitations."

Under favor of this section the bonds above specifically referred to, amounting in all to $76,500 of the total above mentioned, are not to be considered in ascertaining the limitations applicable to the village. This deduction leaves a total outstanding bonded indebtedness of $26,400.

You do not inform me as to whether the sewage disposal bonds amounting to $20,000 were issued upon a vote of the people. I assume, however, that this must have been the case inasmuch as the issue is in an amount much greater than one per cent. of what the grand duplicate of the village could have been in any past year. It would seem, therefore, that under sections 3940 and 3941, General Code, this issue, when made, must have been submitted to a vote of the people.

Section 3945, General Code, provides as follows:

"Such limitations of one per cent. and four per cent. hereinbefore prescribed shall not affect bonds lawfully issued for such purposes upon the approval of the electors of the corporation."

This section has recently been held by the supreme court, in an unreported decision affirming the circuit court of Cuyahoga county, to exempt from consideration, in ascertaining the limitations of the Longworth act, all bonds issued upon the approval of the electors. Therefore these bonds are to be considered in precisely the same manner as those above alluded to and eliminated from consideration. Accordingly the only outstanding indebtedness of the village which may be considered in ascertaining its limitations under the Longworth act is the issue of $6,500, being the village's portion of sewer bonds issued July 1, 1911.

The proposed issue of $5,000 is less than one per cent. either of the 1909 duplicate or that of 1910, and may lawfully be made at this time without a vote of the people so far as section 3940, General Code, is concerned. If made it will bring the total outstanding indebtedness of the village, which may be considered in ascertaining the limitations of the Longworth act, to $11,400. This amount is less than two per cent. of either the duplicates above referred to.

The question as to which duplicate shall be used for determining the application of the limitations of the statute is not even raised.

The foregoing comments relate entirely to the effect of the limitations of one per cent. and four per cent. imposed in the original Longworth act as codified. The further question might be raised as to whether or not the total outstanding bonded indebtedness which would exist after the issue of the $5,000 would exceed the total limitations imposed by said act.

Section 3954, General Code, provides that:

> "No municipal corporation shall create or incur a net indebtedness under the authority of this chapter in excess of eight per cent. of the total value of the property in such corporation as listed and assessed for taxation. * * * In ascertaining such limitations of such eight per cent. and of such four per cent. all such bonds shall be considered except those hereinbefore excluded."

This section in common with the others hereinbefore discussed was amended 101 O. L., 430-432, so as to read as follows:

> "No municipal corporation or township shall create or incur a net indebtedness under the authority of this chapter in excess of *five per cent.* of the total value of all the property in such township or corporation as listed and assessed for taxation. * * * In ascertaining the limitations of such five per cent. and such two and one-half per cent. all such bonds shall be considered except those specifically excluded by section 3946, General Code."

Section 3946, General Code, is above quoted. It has already been pointed out that under its favor all but $26,400 of the bonded indebtedness of the village is to be eliminated from consideration. Therefore, even under section 3954, as amended in 1910, the village would be authorized to have outstanding at a given time a bonded indebtedness based on the 1909 duplicate of $32,003. which would exceed the total bonded indebtedness subject to the limitations of the act as it would exist in the village of Jefferson under the issue of the $5,000 by about $600.

However, section 3954, as amended in 1910, was again amended at the present session of the general assembly. The amendment restores the eight per cent. limitation in place of the five per cent. adopted by the act of 1910, but otherwise retains the phraseology of section 3954 as amended in 1910.

Whether or not, therefore, the limitations now applicable to the village of Jefferson are to be ascertained by computation upon the 1909 or upon the 1910 duplicate, it would seem certain that the issue of the $5,000 sought to be made by the village at this time may lawfully be made without submitting such issue to a vote of the electors.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

262.

POWERS OF CODIFYING COMMISSION AND INTERPRETATION OF CODIFIED STATUTES—PROVISION ENABLING BOARD OF PUBLIC SERVICE TO ACT AS BOARD OF HEALTH REPEALED.

The legislature did not intend to give the codifying commission power to repeal any substantive parts of the existing law. After codification the statutes are to receive the same interpretation which they would have received before codification, unless it is clear from the language of a codified section as adopted by the legislature that a change in substance was intended.

That part of section 187, *Revised Statutes, providing for causing the board of public service to act as a board of health in a city, has been expressly repealed, and was, therefore, intentionally omitted when said statute was codified as section* 1404, *General Code.*

COLUMBUS, OHIO, June 1, 1911.

HON. W. A. O'GRADY, *City Solicitor, Wellsville, Ohio.*

DEAR SIR:—In your letter to me of February 28th, 1911, you refer to the fact that section 4404, of the General Code, which corresponds to section 187, of the Municipal Code (1536-723 Bates), omits the provision contained in said original section 187, that,

> "Whenever council of any city shall declare by ordinance, that it is for the best interests of said city that the board of public service act as a board of health for the 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 your question is, does the revision of the statutes by the code committee carry with it the power to amend any particular statute by dropping material parts, or was it the intention of the legislature that the committee codify the same without changing the substance of any particular section, or, in other words, does section 4404 repeal section 187 of the Municipal Code?

Answering your last question first would say, section 187 of the Municipal Code (1536-723, Bates), was expressly repealed by the enactment of section 13767 of the General Code. (See subdivision 43 of said section 13767.)

Answering your question further, it was not the intention of the codifying commission to repeal any substantive law, and it was not the intention of the legislature in creating the commission to give it the power to repeal active substantive laws, or to enact any new laws, but simply to codify all laws as they existed, and to repeal those that were unnecessary, and in cases of apparently conflicting statutes to reconcile the same if possible. The rule of law governing the codification of statutes is set forth in Allen v. Russell, 39 O. S., 337, in which opinion Judge Okey says:

> "Where all the general statutes of a state, or all on a particular subject are revised and consolidated, there is strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed. * *

> Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form."

Therefore, as the part of old section 187, to which you refer, was omitted by the condifying commission in the codification of said section, unless there is some section of the statutes which contains substantially the same provision, it must follow that the legislature by the enactment of the General Code, and the repeal of old section 187, purposely repealed that part of said section 187, which is not incorporated in sections 3393, 4404 and 4405 of the General Code.

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

A 266.

CLERK OF COUNCIL—FEES FOR SERVING NOTICES CANNOT BE ASSESSED AGAINST PROPERTY—FEES ALLOWED ASSISTANT CLERK MAY BE SO ASSESSED.

The clerk of council cannot be paid a fee for serving notices in street improvements, and the amount paid in such fees included in the assessment ordinance.

Council may, by motion, appoint an assistant clerk of council, provide for paying such assistant a fee for serving notices in street improvements, and the amount of said fees may be lawfully assessed against the property owners.

COLUMBUS, OHIO, June 7, 1911.

HON. H. M. RANKIN, *City Solicitor, Washington C. H., Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your esteemed favor of some days ago, in which you request my opinion upon the following:

> "1. We understand that it has heretofore been held that the clerk of council cannot be paid a fee for serving notices in street improvements and have the amount paid in such fees included in the assessment ordinance.
>
> "2. Can the council of a city by motion appoint an assistant clerk of council and provide for paying such assistant a fee for serving notices (say 25 cents for each notice) in street improvements?
>
> "3. Can the assistant clerk be lawfully paid a fee or must a salary be paid him?
>
> "4. If he can be paid a fee for serving such notices, can such fees be lawfully assessed against the property owners?"

Your understanding as to the first question is correct. A clerk of council cannot be paid a fee for serving notices for street improvements and have the amount of fees included in the assessment. The matter is practically decided in the case of Cincinnati vs. Longworth, 34 O. S., 101, wherein it is held that the cost of services of a salaried officer cannot be taxed in the cost of the improvement for which the assessment is made.

Answering your second inquiry, I am of the opinion that the council of a city is empowered to appoint, by motion, an assistant clerk of council, and to

provide for paying such assistant a fee for serving notices in street improvements. Section 4210 of the General Code provides that,

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. * * *"

As announced in the case of State vs. Green, 37 O. S., 227, the statute is silent as to the mode of voting in the organization of a council.

> "A vote is but the expression of the will of a voter; and whether the formula to give expression to such will, be a ballot or viva voce, the result is the same; either is a vote."

I am of the opinion that the appointment of the officer in question by motion is a legal appointment.

As to your third and fourth questions, while the practice of paying officers or employes fees, is to be deprecated, still under the law it is probably legal. Section 4214 of the General Code provides that,

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 3896 provides that,

> "The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

Since section 4214 empowers council to fix salaries and compensation, I am constrained to hold that a proper provision that the assistant clerk be paid a fee for serving each notice, as his compensation, is legal.

I am also of the opinion that, under that portion of section 3896, which reads:

> "The cost of any improvement contemplated in this chapter shall include * * * the expense * * * including notice of assessment, and serving notices on property owners * * *"

the amount of such fee may be lawfully assessed against the property.

Trusting that I have fully answered your questions I am,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 266.

ORDINANCE OF COUNCIL REQUIRING DIRECTOR OF PUBLIC SERVICE TO ENTER INTO CONTRACT WITH SELECTED CITY ENGINEER TO INVESTIGATE MUNICIPAL ELECTRIC LIGHT PLANT, VOID—USURPATION OF POWERS OF DISCRETIONARY SUPERVISION AND CONTROL OF DIRECTOR OF PUBLIC SERVICE.

An ordinance of council which, by its terms, requires the director of public service to enter into a fixed and determined contract with a city engineer selected by a committee of citizens for the purpose of investigating and valuing the municipal electric lighting plant and reporting to the council thereon, exceeds the powers of the council and infringes upon the discretion of the director of public service in his powers of supervision and management of said municipal plant.

COLUMBUS, OHIO, June 7, 1911.

HON. H. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 4th, in which you enclose copy of an ordinance which reads as follows, to-wit:

"Ordinance to employ an expert electrical engineer.

"Be it ordained by the council of the city of Conneaut, State of Ohio:

"Section 1. That an expert electrical engineer, selected by a committee of citizens composed of Mayor Goebricher, F. L. Matson and Geo. T. Arthur be employed to investigate and report on the condition of the municipal electric lighting plant, as hereinafter provided.

"Section 2. Said electrical engineer shall be engaged and required to make a full and complete investigation into the present condition, value and worth of the municipal electrical plant of Conneaut, Ohio, including the present physical condition, value and worth of all buildings, engines, boilers, dynamos, machinery, and all lines, poles, meters, and any and all fixtures or appurtenances belonging to said plant, and each and every one of the above mentioned shall be separately listed and the present value thereof set out in a report of said engineer in such a manner as may be practical, and it shall show the value of each, and the length of time each has been in use. Said engineer shall further make a finding and report of the capacity for work of all boilers, engines, dynamos, regulators and lines. Said engineer shall find and report the amount of coal necessary to produce a kilowat of electricity on the switch board at the plant. He shall also find and report as to how much of the current produced at the plant is transmitted over the lines and actually used or consumed to make these findings. He shall use the grade of coal used at said plant during the year 1910, and shall make all tests as are necessary with the boilers, dynamos and lines now in use. Said engineer shall also make a full and com-

plete report showing thereby the present condition of each and every boiler, engine and dynamo, and of all lines and the work they will do as compared with an electric lighting plant of like size which is conceded to be modern and well equipped in every respect. Said engineer shall report and point out any and all defective or antiquated, or inefficient machinery of whatever nature now used in said plant, also the reason of the defect or inefficiency and shall make such recommendation as he may deem necessary to place said plant in an improved and well equipped condition, also ascertain the average price the consumer pays for electrical current per kilowat, also the average cost including depreciation per kilowat, also the average cost including depreciation per kilowat of electric current consumed, also ascertain if any current is sold for less than five cents per kilowat, if so, how much and to whom sold.

"Section 3. All reports made by him shall be in writing and shall be submitted to the council. He shall appear before the council at any and such times as it may request, and shall answer all questions of the council relating to the investigation of said plant.

"Section 4. Said engineer shall receive, for his compensation, a sum not exceeding one thousand dollars.

"Section 5. That the director of public service be and he hereby is authorized and instructed to enter into a contract on behalf of the city of Conneaut with expert engineer selected by the committee heretofore appointed and composed of Mayor Goebricher, F. L. Matson and Geo. T. Arthur in accordance with this ordinance.

"Section 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"Passed this ..... day of ....., 1911."

You inquire concerning said ordinance as follows:

"Your letter of advice pertaining to said ordinance duly received, and herewith enclose you an ordinance which the council are desirous of having the director of public service enter into a contract in conformity with this ordinance, and desires your opinion as to the legality of this ordinance,"

The ordinance, about the legality of which you inquire, does not materially differ from the ordinance concerning the legality of which you requested our opinion on March 25, 1911, and in regard to which we rendered you our opinion on April 14, 1911. The only apparent difference between the two ordinances is that the last ordinance passed by your city council requires and compels the board of public service to enter into the particular contract without leaving any discretion to the said board of public service as to whether or not such contract should be entered into, and said ordinance substantially amounts to carrying out by the city council of your city of an administrative function and not a legislative function. The ordinance in substance provides that without any discretion on the part of the board of public service, said board shall employ such electrical engineer as a committee selected by the city council shall name, said engineer so named by said committee to make a full and complete investigation of the value and worth of the municipal electrical plant and report in detail as to the worth and value of all buildings, engines, boilers, dynamos, poles, lines, meters, etc. I am of opinion that the provisions of said ordinance are not in compliance with the statutes upon the subject for the

reason that section 139 of the Municipal Code, which I cited to you in my opinion of April 14, 1911, provides the director of public service shall manage and supervise all public works and undertakings of the city, and section 141 of the Municipal Code, which I also cited to you in my former opinion, provides that the director of public service shall manage all of the municipal water, lighting, heating, power, garbage and other plants and undertakings of the city; and section 143 of the Municipal Code provides that the director of public service may make any contracts or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred ($500.00) dollars; and when any expenditure exceeds five hundred ($500.00) dollars such expenditure shall first be authorized and directed by ordinance of council, and when so directed the director of public service shall make a written contract to the lowest and best bidder after advertisement, etc.

Section 145 of the Municipal Code further provides that the director of public service may establish such subdepartments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, etc., and other persons as may be necessary for the execution of the work and performance of the duties of this department.

By the terms of the ordinance, a copy of which you have enclosed, a committee named by your council is to name some engineer whom the director of public service is bound and required to employ for the performance of certain work. I am of opinion that this is not in conformity with the provisions of the sections of the Municipal Code, which I have cited above, and that said ordinance amounts to an abuse of power on the part of the city council of your city in this that it takes from the director of public service the management and supervision of the said municipal plant which is, as I view it, in direct conflict with section 141 of the Municipal Code which I have cited above, and that therefore said ordinance, in view of the foregoing reasons, is not legal.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 272.

BASEBALL—COUNCIL HAS POWER TO REGULATE BY LICENSE ON SUNDAY AFTERNOONS.

By virtue of section 3657, General Code, council is given power to regulate athletic games by license or otherwise and such authorization extends to baseball playing on Sunday afternoons, within municipal limits.

COLUMBUS, OHIO, June 19, 1911.

HON. MARK A. CRAWFORD, *Solicitor, New Boston, Ohio, Portsmouth, Ohio.*

DEAR SIR:—I am in receipt of your communication of May 27th, and I wish to state that the accumulation of work has been so great in this office that we could not get to your matter sooner.

You submit for an opinion thereon the question of the authority of councils of municipal corporations to license Sunday baseball within the limits of the municipality.

In reply I desire to call your attention to section 13049, General Code, as amended by the recent general assembly, the pertinent provisions whereof are as follows:

"Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden or other place, a theatrical or dramatic performance of an equestrian or circus performance of jugglers, acrobats, rope dancing or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, baseball playing in the forenoon * * * shall be fined not more than one hundred dollars or imprisoned in jail not more than six months or both."

Section 3657 of the General Code, also amended by the recent legislature, reads as follows:

"To regulate, by license or otherwise, restrain or prohibit theatrical exhibitions, public shows and athletic games of whatever name or nature, for which money or other reward is demanded or received; to regulate by license or otherwise, the business of trafficking in theatrical tickets, or other tickets of licensed amusements, by parties not acting as agents of those issuing them, but public school entertainments, lecture courses and lectures on historic, literary or scientific subjects, shall not come within the provisions of this section."

By the provisions of the last quoted section councils are given, among other powers, authority to license *athletic games*, and although baseball is not specifically mentioned, it is undoubtedly an athletic game, and therefore comes within the provisions of said section. The power conferred therein is not limited as to the time athletic games may be licensed, and, therefore, I am of the opinion that councils may regulate or license baseball playing on Sunday afternoons within municipal limits.

I enclose herewith copies of house bills Nos. 110 and 224, and the one per cent. tax bill in compliance with your request.

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

B 290.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW APPLIES TO ALL LEVIES FOR THE YEAR 1911.

The general provisions of the Smith law apply to all levies for taxes made for municipal purposes for the year 1911.

COLUMBUS, OHIO, July 8, 1911.

HON. E. F. MCKEE, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 1st, in which you inquire whether the limitations of the Smith one per cent. bill, so-called, apply to and govern the levies for the year 1911, some of which are required by law to be made prior to the passage of the act and some of which are required by law to be made after that date.

I beg to apologize for the delay in answering your letter; it was occasioned partly by the unusual pressure of business in this office, and partly by the fact that a case was recently filed in the supreme court for the purpose of con-

struing the law in question. The question which you present was not expressly decided by the supreme court, but it was involved in its decision.

The case in question was an action in mandamus, brought originally in the supreme court on the relation of the city of Toledo against the county auditor of Lucas county to compel him to make certain levies certified by the budget commission, on behalf of the city of Toledo. If the city levies for the year 1911 were not within the jurisdiction of the budget commission, that fact alone would have determined the case. The supreme court, however, did not decide the case upon this ground, but assumed in its decision that the levies for 1911 were all subject to revision by the budget commission under the Smith bill.

In this connection it may be proper to remark that, while it is true that a levy of taxes becomes a lien as of the day preceding the second Monday in April of the year in which it is made, a law passed between that date and the date of the levy undoubtedly applies to and governs the taxing authorities in the making of the levy.

Because of the decision of the supreme court above referred to and because further of the principle last above defined I am of the opinion that the machinery and the limitations of the act of June 2, 1911, apply to and govern the city authorities and the budget commission with respect to the levy of taxes for municipal purposes for the year 1911.

I herewith enclose copy of the journal entry in the case referred to.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

C 296.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—REPEAL OF OLD APPROPRIATION LAW AND SUBSTITUTION OF SMITH LAW PROVISIONS—POWERS OF COUNCIL.

The appropriation and expenditure of taxes levied during the summer of 1910 *for which settlement is made August* 5, 1911, *will be governed by the provisions of section* 3797, *General Code, and other related sections of the old law.*

Taxes collected in December, 1911, *however, were levied under the Smith law and appropriations from these collections, must be made in accordance with section* 5649-3*d, General Code.*

COLUMBUS, OHIO, July 15, 1911.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 3d, in which you call my attention to section 5649-3d as enacted in the recent act of the general assembly popularly referred to as the Smith one per cent. law, and requesting my opinion as to the repealing effect of this section upon section 3797 of the General Code, formerly part of section 43, Municipal Code.

In connection with this question you call my attention to the fact that if section 5649-3d be given its literal meaning it will make it impossible for the semi-annual appropriation ordinance to be passed by the council of the city of Youngstown until after settlement by the county treasurer with the county auditor and by the county officers with those of the city, by virtue of which the proceeds of municipal levies for taxes will reach the city treasury, for the reason that at the present time there is virtually no money in the treasury of the city of Youngstown.

Said section 5649-3d provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 3797, General Code, provides as follows:

> "At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

Section 5649-3a, referred to in section 5649-3d, specifically mentions the council of a municipal corporation and designates it in general terms as a "board." It is perfectly clear, I think, from a joint consideration of sections 5649-3a and 56493d, that the latter section is intended to apply to the council of a municipal corporation.

It is also apparent, I think, that section 5649-3d, relates to the same subject matter as that covered by section 3797, namely: The making of appropriations and expenditures therefrom. Not only is this true, but section 5649-3a covers all the ground covered by section 3797. There is here then a clear repeal by implication, and in my opinion, section 5649-3d does repeal section 3797 by implication.

However, the repealing clause of the act of June 2, 1911, together with all the provisions of the act as a whole, fails to disclose an intention to effect an immediate repeal of section 3797. Said repealing clause provides in part that "all acts and parts of acts inconsistent with the purposes of this act" are repealed.

Without citing or quoting from the various provisions of the Smith bill, so-called, suffice it to say that the act relates primarily to the levy of taxes and imposes certain limitations thereon. The provision of section 5649-3d is in a sense subsidiary to the principal purpose of the act. That is to say, the controlling intent is to regulate the *future* levy of the taxes and the expenditure of the proceeds of such future levies.

It is my opinion, therefore, that section 5649-3d is to be regarded as defining the powers and duties of legislative boards, including city councils, in the expenditure of taxes levied after the passage of the act of June 2, 1911.

Inasmuch as the taxes now in process of collection and for which settlement will be made on August 5, 1911, were levied during the summer of 1910, I am of the opinion that as to their expenditure council is governed by the provisions of section 3797. The taxes to be collected in December, however, being levied under the provisions of the tax limitation law must be appropriated and

expended in pursuance of section 5649-3d, and as to them, section 3797 will not be effective. In other words, as a matter of practice, section 3797 will continue in force until the passage of the first semi-annual appropriation ordinance of the year 1912, at which time it will be repealed by implication, and the provisions of section 5649-3d will govern.

I do not know of course as to the possibility of adjusting the fiscal affairs of the city of Youngstown within the next six months so as to obviate the practical difficulty suggested in your letter. The existence of this hardship, however, does not alter the plain meaning of the statute.

I wish to acknowledge my indebtedness to Hon. Edw. L. Weinland, city solicitor of Columbus, whose opinion on this same question has been of much service to me in answering your letter.

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

C 303.

RESOLUTION OF COUNCIL VETOED BY MAYOR—FIRST RECONSIDERATION OF COUNCIL FINAL—SINGLE RESOLUTIONS CANNOT BE CONSIDERED COLLECTIVELY.

When a resolution of council has been disapproved by the mayor and returned without his signature, and council, upon reconsideration of the measure, votes against the same, said reconsideration shall be final.

A further reconsideration of the resolution at a subsequent meeting which results in a favorable vote would be void.

Single resolutions cannot be acted upon collectively.

COLUMBUS, OHIO, July 25, 1911.

HON. H. R. SCHULER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—Your communication dated June 22d is received in which you state the following facts:

> "The council of Galion unanimously passed three separate and distinct resolutions by authority of section 3854 of the General Code, declaring that certain specific sidewalks should be constructed and repaired. These resolutions were submitted to the mayor and returned by him at the next regular meeting of the council without his signature with a letter of disapproval in which he gave his reasons for not signing said resolutions. No further action on the resolutions was taken by the council at that meeting, but at the meeting following, which was two weeks after said resolutions had been returned by the mayor to the council, a motion was made that said resolutions be reconsidered and carried; a further motion was thereupon made that said resolutions be passed over the disapproval of the mayor. The yeas and nays upon this motion were taken and resulted in four affirmative votes and three negatives votes. The council of Galion consisting of seven elected members, the president of council thereupon declared the motion lost. At the succeeding meeting of the council, which was approximately two weeks after the first reconsideration was had, a motion was again made to reconsider the vote by which said resolutions

were defeated, and declared carried by the president, and thereupon a new motion was made to pass said resolutions over the disapproval of the mayor. The yeas and nays were taken and resulted in five affirmative votes and two negative votes. The president thereupon declared the resolutions passed. The resolutions disapproved by the mayor contained an instruction to the clerk to proceed to serve notices upon the property owners designated in the resolutions, according to law, and the clerk is now refusing to issue the notices to property owners on the ground that said resolutions were illegally passed."

You request my opinion as to the legality of said resolutions.

In reply I desire to say that it is my legal opinion that the first reconsideration of said resolutions, after the disapproval of the mayor and the vote thereon was final, and that there could be no further reconsideration of such resolutions.

The section of the Code relating to the powers of council as to legislation disapproved by the mayor reads as follows:

"When the mayor disapproves an ordinance or resolution or any part thereof, and returns it to the council with his objections, council may, after ten days, reconsider the same, and if such ordinance, resolution or item, upon reconsideration, is approved by the votes of two-thirds of all of the members elected to council, it shall then take effect as if signed by the mayor."

This section specifically provides the procedure and the time when it must be taken, and in the case cited by you council availed itself of its legal authority when it took the first vote on the reconsideration of said resolutions after the disapproval of the mayor of Galion. The vote was legally taken and lost and so declared by the president of the council, which in my opinion was final.

I am of the opinion that we need not go further into the question in the interpretation of the statute, which specifically provides for but one action on the subject, but in addition to that if it would be a matter of parliamentary rule and we would look to the rules of our own legislature which provides that "a motion to reconsider, after being once decided, shall not again be entertained unless the question has been changed in form by amendment," which in the case cited by you was not.

I am further of the legal opinion that there being three resolutions, separate and distinct, it would be necessary for the council to have considered and voted upon them separately and not collectively, and for that reason said resolutions would be illegal, and the making of said improvements might be enjoined by any taxpayer affected thereby.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

D 303.

BOARD OF HEALTH AND COUNTY COMMISSIONERS—POWERS AND DUTIES WITH REFERENCE TO POLLUTED STREAM IN A CITY.

County commissioners cannot be compelled by the board of health to deepen and widen a polluted stream. The commissioners have authority to make such improvement, however, upon petition of abutting property holders as in other ditch matters.

The board of health of a city may abate the emptying of sewers into such stream as nuisances.

COLUMBUS, OHIO, July 24, 1911.

HON. E. G. STALEY, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—Your letter of May 29 is received in which you state:

> "In the southern part of the city there is a natural stream of water known as Gibson Run, and emptying into the river. This stream during the dry weather becomes almost dry, and the water naturally becomes stagnant and very obnoxious; that refuse matter collects in this stream more or less, and drift and branches of trees become lodged near the mouth and act as dams to hold this polluted water, and that certain sewers empty into this stream."

You request my opinion upon the following questions:

"1. Can the board of health compel the commissioners to deepen and widen this stream?

"2. Can the commissioners deepen and widen this stream, and how would they proceed?

"3. Just what action should the board of health take?"

In reply thereto I beg to state that as to the first question I am of the opinion that the county commissioners cannot be compelled by the board of health of your city to deepen and widen this stream. The only provision of the code providing for the straightening, deepening and widening of a stream or the cleaning out of a creek or water course is section 2428, General Code, which provides for the doing of the same for the protection of any bridge or road within their control, and the sections following provide the procedure for so doing. The only other procedure designated under the code whereby the commissioners have authority to change, deepen, widen or remove drift from a creek or stream is upon petition by abutting land owners who would be benefited by said improvement.

Your second question is answered in the answer to the first question, but in addition I desire to say that I think the commissioners of your county could deepen and widen said stream upon a petition being filed as in other ditch matters.

In answer to your third inquiry I would say that it is my legal opinion that the remedy or action which should be taken by the board of health of your city is the abatement of the emptying of sewers into said stream by parties as a nuisance, as provided by section 4420 of the General Code.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

309.

CONSTITUTIONALITY OF ACT PROVIDING FOR BOND ISSUE BY MUNICIPALITY FOR PURCHASE OF REAL ESTATE FOR ERECTION OF ARMORY—OPINION WITHHELD—CONSIDERATIONS RECOMMENDED.

COLUMBUS, OHIO, July 31, 1911.

HON. H. B. MORROW, *City Solicitor, Hillsboro, Ohio.*

DEAR SIR:—I have your letter of the 24th, which is as follows:

> "The writer is solicitor of the village of Hillsboro, Ohio. A move has started here for the purpose of securing an armory for the local company of the state militia, and my attention has been called to the amendment of subsection 1, of the Longworth bond act. The amendment is contained in Senate Bill No. 131, passed May 15, 1911, providing that a municipality may issue bonds for the purpose of procuring real estate to be donated by the state of Ohio by deed in fee simple as the site for the erection of an armory.
>
> "I have made some examination of the question, and I am doubtful about the constitutionality of the provision, and would like your opinion of the same and would refer you to the following cases: Wasson et al. vs. Commissioners, 49 O. S., 622; Hubbard as Treasurer of Cuyahoga County vs. Fitzsimmons, 57 O. S., 436.
>
> "There are a number of decisions by the lower courts which I have examined and all of them follow the principle laid down in the 49th O. S.
>
> "I would appreciate it very much if you can give me an early reply."

It is not in the province of this department to pronounce acts passed by the legislature as constitutional or unconstitutional—this is a matter entirely for the courts, and I am governed by the rule that unless the constitutionality of the act plainly appears, it is my duty to regard the same as constitutional until the court holds otherwise.

In reference to the particular act about which you write, I have examined the cases to which you refer and other cases and without expressing an opinion, I wish to call your attention to the fact that the present act differs essentially from the acts considered in those cases, and the armory laws have been changed since the decisions referred to. I also wish to call your attention to sections 5256 and 5262 of the General Code. It seems to me moreover that as the municipality is simply authorized to purchase the site and the state erects and maintains the building, there can be no doubt whatever but that an armory erected as provided by law would be a benefit to any municipality in which it might be erected.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 317.

MUNICIPAL CORPORATIONS—CERTIFICATES OF INDEBTEDNESS—DUTY OF CITY AUDITOR TO HONOR—POWER TO ISSUE REFUNDING BONDS —LONGWORTH ACT.

The city auditor is legally obliged to issue warrants upon the city treasurer in payment of certificates of indebtedness issued under section 3913, General Code, in anticipation of taxes and revenues at the next semi-annual settlement, for the respective funds.

Council may, however, issue refunding bonds, under section 3916, General Code, if it deems such procedure necessary for the best interests of the corporation. These refunding bonds would not be within the limitations of the Longworth act.

COLUMBUS, OHIO, August 8, 1911.

HON. J. R. SELOVER, *City Solicitor, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 15th, submitting for my opinion thereon the following questions:

"The outstanding certificates of indebtedness in the various city funds at this time are as follows:

General fund	$300 00
General and Safety funds	2,500 00
Service fund	500 00
	750 00
	600 00
Health fund	700 00

"These certificates of indebtedness were issued with the understanding that they would be taken up from funds received by the city from our tax settlements with the county. As it will be impossible to so take them up and still leave moneys in the various funds for payment of fixed charges, including salaries, etc., I wish your opinion as to the following:

"1st. Is it legally incumbent upon the city auditor to issue warrants in payment of such certificates of indebtedness, giving to such claims a preference over fixed charges and other legitimate and honest claims before moneys be paid out of these various funds for other purposes?

"2d. Is it in your opinion possible to proceed at this time as has been done in the past, to-wit: liquidate this indebtedness by issuing a series of refunding bonds?"

Section 3913 of the General Code provides in part as follows:

"In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. * * *"

Section 3916 of the General Code provides as follows:

"For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917 provides in part as follows:

"No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. * * *"

In my opinion it would be, in the absence of the issuance of refunding bonds, legally incumbent upon the city auditor to issue warrants in payment of the certificates of indebtedness to which you refer. This follows by reason of that provision of section 3913 above quoted, which stipulates as follows:

"The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity."

If, however, council deems it for the best interests of the corporation, I believe that council may lawfully issue refunding bonds under section 3916, following the procedure outlined in section 3917 as above quoted. I find that this has been the ruling of this department as promulgated by my predecessor, and I concur therein. The effect of such issuance of bonds, in my opinion, would be to render again available for current municipal expenditures, the amount produced by the anticipated tax levy.

I may add also that in my opinion bonds issued for refunding purposes, as aforesaid, are not within any of the limitations of the Longworth bond act, so-called, as recently amended. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 319.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LIMITATIONS—BONDED INDEBTEDNESS CREATED AFTER SMITH LAW ENACTMENT, WITHOUT VOTE OF ELECTORS NOT EXCEPTED—BONDS CREATED FOR ROAD IMPROVEMENTS.

Levies to retire bonds issued after June 2, 1912, without a vote of the people are not excepted from any of the limitations of the Smith law.

Levies to "retire bonds" issued for road improvement purposes are not within the exception provided for levies for road taxes that may be worked out by the taxpayer.

COLUMBUS, OHIO, August 9, 1911.

HON. CLIFFORD L. BELT, *City Solicitor, Bellaire, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 19th, submitting for my opinion thereon the following question:

> "Under the existing law can the township trustees issue bonds of the township for the purpose of improving by paving the township roads; and to provide a sinking fund for the payment of interest and bonds at maturity can the trustees make a valid levy over and above the maximum provided for by the act of the last general assembly limiting the tax rate at one per cent.?"

and of your letter of July 24th, kindly advising me as to your views thereon.

It will not be necessary to quote the voluminous provisions of the Smith one per cent. bill insofar as its application to your question is concerned. Its attempted purpose has been succinctly set forth in the journal entry made by the supreme court in the case of the State ex rel. vs. Sanzenbacher. The sixth paragraph thereof is as follows:

> "The five mills, which, subject to the qualifications hereinbefore defined, may be levied by a municipal corporation for corporation purposes, are exclusive of such levies for interest and sinking fund purposes as are or may be necessary to provide for any municipal indebtedness incurred *prior to the passage of the act of June* 2, 1911, *and any indebtedness thereafter incurred by a vote of the people.*"

The principles announced in the foregoing are also applicable to township levies.

So also, the second paragraph of the same journal entry states that:

> "In addition thereto (that is, to the ten mills which may be levied for all purposes in a single taxing district) levies may be made for sinking fund and interest purposes necessary to provide for any indebtedness incurred *before the passage of said act by a vote of the people.*"

It will be observed, therefore, that one class of bonded indebtedness is not exempt, so to speak, from the limitations of the Smith law. That class is bonded indebtedness created after June 2, 1911, without a vote of the people.

As I understand your question the bonded indebtedness proposed to be created is such bonded indebtedness. Therefore, your question should be answered generally in the negative. I may add that by virtue of section 5649-3*a*, which I forbear to quote on account of its length, levies for road taxes to be worked out by the taxpayers are exempt from the two mill township limitation therein provided for. I have heretofore held that levies for road purposes made by township trustees may be worked out by the taxpayers, and are therefore outside of the two mill limitation. In the case you mention, however, the levies of which you speak would not be levies for road purposes but levies for sinking fund purposes, although the bonds to be retired thereby would be bonds issued for road improvement purposes.

On the whole, then, I am of the opinion that levies to pay the interest and to retire the principal of bonds issued at the present time for the purpose of paving township roads are within all the limitations of the Smith bill.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

325

JUDGMENTS AGAINST CORPORATION—PAYMENT OUT OF SINKING FUND—CASES TO APPROPRIATE PROPERTY EXCEPTED.

All judgments final against a corporation must be paid out of the sinking fund except in cases brought to condemn property which are "cases to appropriate property" and are governed by Chapter 1, Division 3, Title 12, Part 1 of the General Code.

COLUMBUS, OHIO, August 18, 1911.

HON. NICHOLAS M. GREENBERGER, *City Solicitor;* MESSRS. J. E. PETERSON, H. B. HAMLEN, W. T. TOBIN, *Trustees of Sinking Fund, Akron, Ohio.*

GENTLEMEN:—I am in receipt of a separate request from the city solicitor and the board of trustees of the sinking fund of Akron, as to whether judgments rendered in actions brought by the city to assess damages by reason of a change of the grade by improvements of streets, should or should not be paid out of the sinking fund; also in receipt of a transcript of the cases of the City of Akron, plaintiff, vs. The Brewster Coal Company et al., defendants; The City of Akron, plaintiff, vs. Ella N. Dodge, defendant, and The City of Akron, plaintiff, vs. Margaret J. Ream et al., defendants; each of these actions being to assess damages against property owners who claimed they would be damaged by the proposed improvements.

It is claimed on the one hand that under section 4517 of the General Code that judgments in these cases should be paid out of the sinking fund; and on the other hand it is claimed that these judgments should be classed as final judgments in condemnation cases, which section 4517 expressly directs shall not be paid out of the sinking fund. It seems to me that this matter is settled by the General Code itself. An action to condemn property is authorized by Chapter 1, Division 3, Title 12, Part 1 of the General Code; and actions to assess damages is authorized by Chapter 5, Division 3, Title 12, Part 1 of the General Code, and section 3827 of the General Code simply directs that in an application to assess damages to be caused by improvement, a jury shall be summoned in the same manner as is provided for the appropriation of the property. Therefore, it seems clear from the provisions of the Code itself that they are two separate and distinct actions—one is to appropriate property by municipalities, and the other is simply to assess damages to property. They may be, and are, somewhat analogous, but it seems to me that section 4517 of the General Code, which is as follows:

> "The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

definitely settles the matter—that all judgments final against the corporation

except in cases brought to condemn property which are, of course, cases to appropriate property and provided for by the chapter above referred to, must be paid out of the sinking fund.

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

339.

MUNICIPAL CORPORATION—POWER OF COUNCIL TO COMPEL STREET AND INTERURBAN RAILROADS TO PAVE BETWEEN THE TRACKS.

Council of a municipality is empowered by section 3776, General Code, to compel a street or interurban railroad company to pave between the rails regardless of the fact that the franchise is silent on the matter.

COLUMBUS, OHIO, September 5, 1911.

HON. D. S. LINDSEY, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—Your communication dated July 7, 1911, in which you request my opinion upon the following question:

> "Has the municipality under section 3776 of the General Code the authority to compel street car and interurban lines to pave between their rails *where the franchise heretofore granted is silent as to this matter?*"

was duly received, and in reply I desire to say that said section 3776 of the General Code provides as follows:

> "The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders or wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits paving between the rails with stone, boulders, wooden or asphaltic pavement shall not be required."

It is apparent from an examination of the statute itself that it was the intent of the legislature to vest the council of a municipality with the authority to require street and interurban railroad companies to pave between the rails within the municipal corporation.

If the original franchise ordinance granting the rights to said company to use the streets is silent upon the matter of paving between the rails, I am of the opinion that the council is not barred from compelling the company to so pave the streets between the rails.

If the railroad company accepted a franchise silent upon the subject above referred to, I am of the opinion that the company accepts the franchise subject to the council in the future requiring it to so pave the streets between the rails of the said company.

I cannot see wherein there is any contractual relations existing between the municipality and the company, such that would be implied, when the franchise accepted by the company was silent on certain matters which the statutes authorize the council to compel the company to meet in the future as well as at the time the franchise is granted.

I am, therefore, of the opinion that the council of any municipality may compel any street car or interurban company to pave between its rails within the municipality as provided by section 3776 of the General Code, where the franchise ordinance was or is silent on said matter. Very truly,

TIMOTHY S. HOGAN,
Attorney General.

A 346

ASSESSMENT—CORNER LOT—"FOOT FRONTAGE" AND "FOOT FRONT."

The rule of Haviland v. Columbus, 50 O. S., 471, which was changed in Village v. Stoecklein, 81 O. S., 332, has been restored by the act of April 25, 1910 (101 O. L., 134), which replaced in section 3812 of the G. C. the phrase "foot front." A corner lot under the present law therefore can only be assessed according to the number of feet in that boundary thereof which constitutes its "front" if the assessment is made according to the third method described in said section.

COLUMBUS, OHIO, September 7, 1911.

HON. T. F. THOMPSON, *City Solicitor, Zanesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 26th requesting my opinion as to the present rule of levying assessments for street improvements according to the foot front against corner lots, when the improvement is made on the street which abuts on the side of such lot.

In Haviland v. Columbus, 50 O. S., 471, the supreme court construed the original Taylor law, so called, which was the first act of the general assembly providing three alternative schemes for making assessments for street improvements. This law was known as section 2264, R. S., and provided that the council might assess any part of such improvement "(3) by the foot front of the property bounding and abutting upon the improvement." The court held that the phrase "foot front" meant according to the number of feet in the *front* of the lot, and not necessarily according to the number of feet in that boundary of the lot which abutted upon the improvement.

When the municipal code of 1902 was adopted, the phrase "the foot front" was changed to the "foot frontage." In Village v. Stoecklein, 81 O. S., 332, the supreme court held that the word "frontage" was not synonymous with the word "front," but that the former meant and referred to that boundary of the lot which abuts upon the improvement.

The sole ground for this decision was the change of the word "front" to the word "frontage." Soon after the rendition of this decision the General Assembly amended section 3812, General Code, in which the original provision of the municipal code was found, so as to again change the phrase "foot frontage" to "foot front."

In view of the reasoning of the court in the two cases above cited there can be no question but that the rule of Haviland v. Columbus, supra, applies to the section in its present form.

It is, therefore, my opinion that under section 3812, approved April 25, 1910, 101 O. L., 134, a corner lot can only be assessed according to the number of feet in that boundary thereof, which constitutes its front if the assessment is made according to the third method described in said section.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

B 352.

TAXES AND TAXATION—ASSESSMENTS AGAINST SCHOOL BOARD FOR STREET IMPROVEMENT, ILLEGAL—MEMBERS OF BOARD CANNOT SIGN PETITION OF ABUTTING PROPERTY HOLDERS—COST OF SCHOOL PROPERTY'S PORTION ASSESSED AGAINST ALL PROPERTY OF MUNICIPAL CORPORATION.

Members of a school board cannot sign a petition for a street improvement, and such petition must therefore be signed by a majority of the abutting property holders exclusive of the school board signatures.

The school property may not be assessed for such street improvement. The apportioned cost of the portion of the improvement upon which said school property abuts may be assessed against the municipal corporation.

COLUMBUS, OHIO, September 11, 1911.

HON. W. P. VAUGHAN, *City Solicitor, Cardington, Ohio.*

DEAR SIR:—Your favor of August 2d received. You submit the following statement of facts, to-wit:

> "A petition asking for the improvement of a certain street in this village by paving the same, was presented to the council, signed by a majority of front feet abutting on said improvement. Abutting on this improvement are the Union school grounds; the entire school board signed the petition. Without the signature of the school board the petition would not have a majority in front feet. The school board is desirous of having the improvement made and will gladly pay their portion of the assessment, if permitted to do so."

and inquire whether the school board has a legal right to sign the petition for the proposed street improvement, and whether the assessment for the proposed street improvement can be enforced against the school property.

The identical question presented by you was decided in the supreme court of Ohio, in the case of The City of Toledo vs. Board of Education of Toledo, 48 O. S., 83. In this case the city council of Toledo attempted to assess against certain school property in Toledo an assessment for street improvements, under an ordinance, duly passed, assessing the costs and expenses of said improvement in proportion to the front foot upon the lots and lands in Toledo bounding and abutting upon said improvement. The school property involved in this case abutted on the proposed improvement. It was held that:

> "School property is not liable to assessment for a street improvement; nor can a judgment be rendered against the board of education for the payment of the assessment out of its contingent fund."

and that the amount must be paid out of the general fund of the city.

Section 3837 of the General Code provides in part as follows:

> "When the whole or any portion of an improvement authorized by this title passes by or through a * * * school building * * * the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by

the auditor or clerk of the corporation to the county auditor, and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as other taxes."

Under authority of section 3837 the city is authorized to pay the costs and expenses connected with street improvements passing by school buildings and school property.

I therefore hold that the school board has not the legal right to sign the petition for the proposed improvement in your city; and that assessment for the same cannot be enforced against the school property; also, that the petition for the proposed improvement must have a majority of the front footage to be assessed, exclusive of the property owned by the board of education.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

E 352

COUNCIL—PROCEEDINGS FOR STREET IMPROVEMENT—PLANS MAY NOT BE CHANGED, UPON PETITION OF PROPERTY HOLDERS, AFTER ALL STEPS COMPLETED.

After council has taken all necessary steps with reference to a street improvement, including resolutions, notices, advertisements, and letting of contract, a change may not be made in the proposed plans without the consent of all property holders, or unless the proceedings are started anew.

COLUMBUS, OHIO, September 11, 1911

HON. H. M. RANKIN, *City Solicitor, Washington C. H., Ohio.*

DEAR SIR:—Your letter of August 2d received. You state:

"In a street improvement council has passed the resolution of necessity, notices have been served on the abutting property owners that the improvement will be constructed according to the plans and specifications, which were filed before the resolution of necessity was passed; council then passes the ordinance determining to proceed with the improvement according to the plans and specifications, and direct the public service director to enter into a contract for the improvement; service director advertised for bids, the contract is let for the improvement according to the plans and specifications. A majority of the property owners then petition council to change the plans and specifications by constructing the sidewalk curb and gutter together instead of at the property line. This will necessitate moving the sidewalk about nine feet from where the plans call for,"

and inquire under the above state of facts:

"Can this change be made without invalidating the assessments levied on the property of those not petitioning for the change?"

Section 3812 of the General Code provides that,

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. * * *"

Section 3814 provides for the first step in making a street improvement, namely: Council must first pass a resolution of necessity by a vote of three-fourths of the members elected thereto.

Section 3815 provides that,

"Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to ten installments at such time as council prescribes."

Section 3816 provides that,

"At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested."

Section 3818 provides that,

"A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be prima facie evidence of the service of the notice as herein required."

The various steps in the passage of an ordinance for street improvement and assessment for the improvement on the abutting property owners are set forth in the above provisions of the General Code. Section 3815 provides what the resolution of necessity shall contain, that it shall, among other things fix the grade or elevation of curbs and approve the plans and specifications, estimates and profiles, for the proposed improvement.

Under your statement of facts, after all the necessary resolutions and ordinances were passed, the contract let and assessments levied for the proposed street improvement in your city, a majority of the property owners petitioned

council to make a change in the plans and specifications, by constructing the sidewalk, curb and gutter together instead of at the property line. This, you say, will necessitate moving the sidewalk about nine feet from where the plans call for; and you inquire whether this change can be made without invalidating the assessments levied upon the property owners not petitioning for the change.

You do not state in your communication that the change proposed would add anything to the cost or that the change proposed is a material alteration in the plans and specifications approved by council. In any event, to make the change after all the ordinances and resolutions were passed and assessments made is, to say the least, irregular. The owners of the property assessed who did not petition for the change in the plans and specifications were assessed in accordance with the original plans and specifications contained in the original resolutions of council; all the proceedings were had, assessments made and levied on all property *in reference thereto;* and in my opinion, council has not the power to act on the petition for the change in the plans and specifications after all the steps have been taken which authorized the proposed improvement and after the assessments were levied on the property in accordance therewith. If any change were made in the plans and specifications, estimates and profiles for the proposed street improvement, in my opinion the subsequent proceedings would be invalid; and the only safe course for your council to pursue, if they desire the change, is either to secure the consent of all the property owners involved, or to commence anew the proceedings.

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

C 353.

COUNCIL—DAMAGES—PROCEDURE FOR ASSESSMENT OF, AFTER COMPLETION OF AN IMPROVEMENT—PETITION TO COURT OF COMMON PLEAS.

COLUMBUS, OHIO, September 12, 1911.

HON. NICHOLAS M. GREENBERGER, *City Solicitor, Akron, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 5th, in which you request my opinion upon the following question:

> "Section 3827 of the General Code provides the procedure of judicially inquiring into claims for damages properly filed before commencing an improvement; but this section fails to prescribe the procedure when council, under favor of section 3824, General Code, determines that such claims for damages shall not be judicially inquired into until after the completion of the proposed improvement. What procedure should be followed in such case?"

Replying thereto I beg to state that you have overlooked section 3829 of the General Code, which provides as follows:

> "When the council determines to assess the damages *after the completion* of an improvement * * * the mayor or solicitor shall, *within ten days after the completion of such improvement* make written application to the court of common pleas * * * or to the probate

court * * * to summon a jury in the manner provided in this division for the appropriation of property, to assess the amount of damage in each particular case, and such court or judge shall fix the time and place of inquiry, and the assessment of damages, in the manner hereinbefore provided."

The phrase "in the manner hereinbefore provided" evidently refers to the procedure outlined in sections 3827 and 3828 of the General Code.

It would seem, therefore, that section 3829 read in connection with section 3828 of the General Code prescribes clearly the procedure of assessing damages in case council determines that damages shall not be assessed until after an improvement is completed.

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

A 402.

ASSESSORS—MEMBER TO BE ELECTED IN TOWNSHIP INCLUDING A CORPORATION—EFFECT OF DIVISION INTO PRECINCTS—POWERS AND DUTIES OF COUNTY COMMISSIONERS AND BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS.

In a township including a municipal corporation, wherein the corporation and the territory outside thereof comprise separate precincts, the board of elections could have ordered an assessor to be elected in each precinct when created. Since however this order was not made, under section 3351, *General Code, there can only be one assessor for the entire township until the county commissioners by an order entered on thir journal, constitute the outside territory a separate assessing district.*

COLUMBUS, OHIO, September 30, 1911.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 20th, in which you inquire as follows:

"Section 3351 of the General Code provides as follows:

"'In municipal corporations divided into wards, an assessor shall be elected in each ward. In a township composed in part of a municipal corporation, the county commissioners, by order entered on their journal, may constitute the territory outside such municipal corporation one or more assessor districts. In each ward and assessor district an assessor shall be elected, biennially, in accordance with law, and shall take the same oath, give the same bond and perform the same duties as township assessors. Nothing herein shall interfere with the duties devolving upon deputy state supervisors of elections.'

"In Richland township, this county, there is an incorporated village, viz: Senecaville. Heretofore one assessor for personal property has been elected to assess both township and corporation. The county commissioners have never taken any action designating the territory outside of said corporation, an assessor district. My opinion is that until this is done there shall be but one assessor for the corporation

and the territory outside of such corporation. Now, I would like to have your opinion as to whether or not there shall be but one assessor for both the corporation and territory outside of the corporation until the commissioners make an entry on their journal constituting the territory outside such municipal corporation one or more assessor districts."

Replying to your inquiry I desire to say that the following sections of the General Code govern as to the election of assessors:

"Section 3349. One assessor of personal property for the township shall be elected, biennially, in each township, who shall hold his office for a term of two years commencing on the first day of January next following his election. If the township is divided into two or more election precincts, one such assessor shall be so elected for each precinct in which such election is held."

As I view the said section 3349, it applies only to townships "not composed in part of a municipal corporation."

"Section 4850. Nothing in the preceding sections shall affect the powers or duties of boards of deputy state supervisors in reference to the division of election precincts within registration cities. The division of any election precinct into two or more subdivisions, as hereinbefore provided, shall not require the election of an assessor in each such subdivision, but in all such election precinct subdivisions there shall be elected one assessor for each original precinct unless such supervisors at the time of the division shall order that an assessor be elected in each precinct."

Assuming that Richland township, outside of Senecaville, and the corporation of Senecaville are separate precincts, the board of deputy state supervisors of elections at the time such division was made could have ordered that an assessor be elected in each precinct so created. However, inasmuch as this is not the case, I am of the opinion that section 3351 of the General Code, supra, applies. I agree with the construction you have placed upon said section 3351, and I am of the opinion that there can be only one assessor for both the corporation of Senecaville and Richland township outside of such corporation, until such time as the county commissioners, by an order entered on their journal, constitute the territory outside of such corporation a separate assessing district.

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

A 408.

INITIATIVE AND REFERENDUM ACT—PUBLICATION OF ORDINANCES NOT TO GO INTO EFFECT BEFORE SIXTY DAYS.

All ordinances requiring publication should be published as required prior to the initiative and referendum act, but when an ordinance is within the initiative and referendum act, it shall not go into effect in less than sixty days after its passage.

COLUMBUS, OHIO, October 4, 1911.

HON. ELMER T. BOYD, *City Solicitor, Marion, Ohio.*

DEAR SIR:—Under date of August 29th you ask for my written opinion upon the following:

> "By the terms of the new 'Crosser' law 'no resolution or ordinance shall become effective in less than sixty days after its passage' and for the reason the law makes no mention as to when resolutions and ordinances are to be published, I am writing you for an opinion as to when publication should be made.
>
> "Section 4227-2 of the General Code, 102 O. L., 522, is, in part, as follows:
>
> " 'No resolution, ordinance or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways or other public or quasi-public utility shall become effective in less than sixty days after its passage.'
>
> "It is to be noted as above stated that the new law makes no mention as to when resolutions or ordinances are to be published, while under section 4227 of the General Code they were published immediately and every resolution and ordinance became effective ten days after the first publication of such notice."

Section 4227 of the General Code provides in part as follows:

> "No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Section 4227-2 of the General Code is set out in your inquiry.

Section 4227 simply provides that the ordinance shall not take effect until ten days after the first publication, but it does not provide that it shall take effect immediately at the expiration of such ten days.

Section 4227-2 states that no ordinance in reference to certain subjects shall become effective in less than sixty days.

As the purpose of the publication of an ordinance is to give notice of the passage thereof, I am of opinion that such ordinance should be published as heretofore in order to advise electors of the passage of the same, but that such ordinances will not go into effect in less than sixty days after its passage.

It is to be noted that it is only certain ordinances against which the sixty days' limitation is placed. I am, therefore, of the opinion that the ordinances

passed by the city council requiring publication should be published as heretofore, but that wherever it is expressed in the initiative and referendum act that the ordinance is not to go into effect in less than sixty days after its passage, such provision shall take precedence over the provisions of section 4227.

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

D 408

EXTRA COMPENSATION TO HEALTH OFFICER FOR SERVICES AS PHYSICIAN AND TO SANITARY POLICEMEN FOR UNOFFICIAL DUTIES PERFORMED IN QUARANTINE CASES.

When a health officer is employed to perform physician's services in the case of quarantine, all services performed in the capacity of health officer are covered by his regular salary, but for all services performed in the capacity of physician he may receive appropriate extra compensation.

So also, a sanitary police officer may receive extra compensation for duties performed in cases of quarantine which are outside the obligations of his official position.

COLUMBUS, OHIO, October 4, 1911.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—Under favor of July 28, 1911, you ask an opinion of this department upon the following:

> "The health officer, who is a practicing physician in the city of Conneaut, and the sanitary police are paid on a regular salary of $20 per month. A short time ago we had a case of smallpox, the health officer attended the smallpox patient and brings in a bill for medical service, and the sanitary police brings in a bill of various items for work done pertaining to this case.
>
> "Question: Can either or both of these officers under regular salary be legally paid in compensation?"

Section 4431 provides for the employ of quarantine guards as follows:

> "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 4436, General Code, provides for medical attendance and the maintenance of persons quarantined, as follows:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

From the amount of the salary paid the health officer and the sanitary police, it is apparent that they are not expected to devote their entire time in the performance of the duties of such offices. They are, no doubt, permitted to perform such other work as will not conflict nor interfere with their official duties.

As Conneaut is a city it must have a board of health as provided for in section 4404, General Code. The health officer and sanitary police are employed by this board. By virtue of section 4436, General Code, the board of health is authorized to provide medical attendance to persons confined in a house that is under quarantine on account of a contagious disease. They can employ whomever they choose. The fact that the physician whom they so employ is also the health officer would not prevent such physician from receiving his reasonable pay for such medical attendance, in the same manner as any other physician that might have been employed. There is no incompatibility between the two capacities. Such physician cannot draw pay twice for the same service. That is, he cannot draw compensation for services he should perform as a health officer, and then present a bill for the same service as a physician. All the work done by him in connection with the case of smallpox he was called upon to perform in his capacity as health officer must be compensated for by his monthly salary. All services as a physician not falling within his official duty as health officer can be paid by virtue of section 4136, General Code.

You do not state the nature of the work performed by the sanitary police for which a bill has been rendered. The same principles will apply in this case. If the extra work comes within his duty as sanitary police, he cannot draw any extra compensation therefor. If it was work not within his official duty as a sanitary police, he can draw his pay therefor, provided of course that the work was legally authorized.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

410.

CITY AUDITOR—PAYMENT OF ASSISTANTS' SALARIES CANNOT BE MADE TO CITY ENGINEER—ASSIGNMENT OF VOUCHERS LEGAL, HOWEVER.

When council has fixed specific separate salaries for a city engineer and for his assistants, the city engineer may not present in his own name, a bill for salaries due assistants after paying the latter out of his own pocket.

Vouchers made in the name of assistants may be assigned by the latter however, to the city engineer and the auditor would not be violating his duties by honoring the same.

COLUMBUS, OHIO, October 4, 1911.

HON. E. C. STALEY, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—Under favor of July 31, 1911, you ask an opinion of this department upon the following:

> "Council of the City of Tiffin, passed an ordinance fixing the salary of the city engineer, in the following words: 'The salary of the city engineer shall be sixty cents per hour and sixty cents per hour for assistants when doing the work of an engineer.'
>
> "The engineer presents a bill in his own name for services rendered by him and assistants, and requests auditor to pay him. Auditor submitted the proposition to me, and I ruled that it would be necessary for assistants to present their bills in their own name. Am I right in my contention?
>
> "It seems as though the engineer has already paid these assistants out of his own pocket. Can the engineer receive the vouchers and receipts for same?
>
> "He has presented a bill in his own name, setting out the number of days and hours, charging the city some days thirty hours and has simply written in the word assistants after items of services rendered by assistants. Would this bill be legal?

Section 4366, General Code, provides the manner in which the salary of a city engineer may be fixed:

> "In each municipal corporation having a fire engineer, civil engineer or superintendent of markets such officers shall each perform the duties prescribed by this title and such other duties not incompatible with the nature of his office as the council by ordinance requires, and shall receive for his services such compensation by fees, salary or both as is provided by ordinance."

Section 4276, General Code, provides:

> "The auditor shall keep the books of the city, exhibit *accurate statements of all moneys received and expended*, and of all property owned by the city and the income derived therefrom, and of all taxes and assessments."

Section 4285, General Code, provides:

> "The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

From these sections it is seen that the auditor is required to give and keep accurate statements and accounts of all moneys received and expended. He is required to ascertain the correctness of any and all bills presented for payment. He cannot perform these duties unless bills are properly made out in the name of the person to whom payment should be made by the city. Such bills should contain a detailed statement of the items thereof.

Under the ordinance in question the salary of the engineer and assistant was fixed at so much per hour. The work done by the assistant was performed by him as an employe of the city and not as an employe of the engineer. The pay therefor should go direct to the assistant and the bill should be presented in his name, properly itemized, showing the hours and dates.

It is against public policy to permit a head of a department to buy or pay the claims of his assistants and then present a bill to the city for the entire sum. Many irregularities might arise from such methods. For the protection of the civil engineer and of the auditor, as well as for the public good, these bills should be presented by the assistant and the vouchers issued to him.

You state that the city engineer has already paid these assistants out of his own pocket. He might be paid this money by virtue of an assignment, if the auditor chooses to honor such an assignment. The right of an assignment under these circumstances might be questioned as against public policy. I shall not pass upon the sufficiency of an assignment.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

ADDENDUM.

For the disposition of the claim to which you refer I suggest the following: Make voucher in the name of the assistant, have the assistant assign the same over to the city engineer, then the auditor can pay the city engineer, and instruct the city engineer that hereafter all vouchers are to be made out in the name of the proper officers in accordance with the foregoing opinion.

TIMOTHY S. HOGAN,

Attorney General.

C 436

INITIATIVE AND REFERENDUM—ORDINANCE FOR SALE OF BONDS—"EXPENDITURE OF MONEY"—SIXTY DAY SUSPENSION.

An ordinance passed by council under section 3939, General Code, as amended 102 O. L., 262, providing for the issue of bonds for the specific purposes of street improvement involves an expenditure of moneys and therefore comes with the provisions of the initiative and referendum measure requiring it to lay over sixty days.

COLUMBUS, OHIO, October 25, 1911.

HON. B. F. LONG, *Solicitor, Shelby, Ohio.*

DEAR SIR:—Under date of July 28th you wrote me as follows:

> "On the 31st day of May, 1911, there was passed an act, House Bill No. 48, to proide for the initiative and referendum in municipal corporations.
>
> "Under sections 2 and 3 of this act it is provided that certain acts of the council shall remain inoperative for sixty days after the passsage, and that provision contained therein seems to be very broad, and it would seem to include practically all ordinances.
>
> "I was about having an ordinance passed for the sale of bonds for some street improvements, and I presume that I would have to wait sixty days after the passing of the ordinance before I can advertise for the sale of the bonds,"

and you inquire:

> "Whether the sixty days would have to elapse before the ordinance could go into effect so as to advertise for the sale of the bonds."

The act to which you refer is found in 102 Ohio Laws, 521, and the section covering the facts stated by you is section 2 of said act, known as section 4227-2 of the General Code, which provides in part as follows:

> "Any ordinance * * * of a municipal corporation, granting a franchise creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance, * * * by the council, there be filed with the clerk of such municipal corporation, a petition * * *.
>
> "No * * * ordinance * * * of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water, * * * shall become effective in less than sixty days after its passage, during which time, if petitions * * * are filed with the clerk of such municipal corporation petitioning for the submission of any such ordinance * * * to a vote of the people, such clerk shall certify the fact of the filing of such petition to

the officers having control of the elections in such municipal corporation, who shall cause said * * * ordinance to be voted on at the next regular election."

You do not state in your letter whether the sale of the bonds for the street improvements is to be a sale of bonds in anticipation of the collection of special assessments under the law providing for the improvement of streets by the assessment plan, or whether it is an ordinance providing for the sale of bonds under the provisions of section 3939, General Code, as amended, 102 Ohio Laws, 262.

I assume, however, from the wording of your question that you mean that the ordinance is one provided for by section 3939, General Code. If I am right in my assumption, I am of the opinion that the ordinance referred to by you in your question is clearly within the provisions of section 4227-2 of the General Code, for the reason that said ordinance provides for the issuance of bonds for the specific purposes of street improvements, and thus involves an expenditure of money as provided for in said section.

Therefore, in answer to your question I would state that sixty days would have to elapse before the ordinance could go into effect before advertising for the sale of the bonds.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

437.

INITIATIVE AND REFERENDUM ACT—IMPROVEMENTS—PROCEEDINGS OF COUNCIL—"ORDINANCE TO PROCEED" SUSPENDED SIXTY DAYS —"EXPENDITURE."

Among the various ordinances to be passed by a council in proceedings providing for street improvements, the ordinance "determining to proceed" is the only ordinance creating an "expenditure" and therefore the only ordinance required to lay over sixty days under the initiative and referendum act and when such ordinance has been passed prior to the initiative and referendum enactment, the proceedings are not affected by its provisions.

COLUMBUS, OHIO, October 25, 1911.

HON. H. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—Under date of September 2d you submitted for my consideration the question upon the initiative and referendum act found in 102 Ohio Laws, 521, in reference to street improvement under the assessment statutes.

In your letter of transmission you state:

"If the ordinance declaring the necessity to improve a street has been passed, also the ordinance to proceed and authorizing the director of public service to advertise for and enter into a contract has been passed before the 14th of June. The assessing ordinance passed after that date, would the assessing ordinance have to lay sixty (60) days before becoming a law, or do you think that that would come under the head of emergency ordinance to close what had already been done?"

Section 2 of the initiative and referendum act, being section 4227-2 of the General Code, provides in part as follows:

> "Any ordinance * * * of a municipal corporation, granting a franchise creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance, * * * by the council, there be filed with the clerk of such municipal corporation, a petition * * *.
>
> "No * * * ordinance * * * of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water * * * shall become effective in less than sixty days after its passage, during which time, if petitions * * * are filed with the clerk of such municipal corporation petitioning for the submission of any such ordinance * * * to a vote of the people, such clerk shall certify the fact of the filing of such petition to the officers having control of the elections in such municipal corporation, who shall cause said * * * ordinance to be voted on at the next regular election;"

The manifest intent of the act above referred to is to give the electors of a municipality the right to have certain ordinances submitted to them for their acceptance or rejection. Among such ordinances are those creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for certain purposes.

The primary object of the law is to guard against the creating of rights and privileges or the expending of money by a council against the will of the people of a municipality.

The steps in order to improve a street under the assessment plan are as follows:

1. An ordinance declaring the necessity;
2. An ordinance determining to proceed;
3. The assessing ordinance;
4. The bond ordinance.

It will be seen by careful examination of the above ordinances that it is the *ordinance to proceed* with the improvement that involves the expenditure of money. The ordinance of necessity is simply an ordinance declaring that it is necessary to make the improvement. The assessing ordinance and bond ordinance are each of them solely for the purpose of providing the fund with which to meet the obligation created, due to the determination of council to proceed with the improvement under the ordinance determining to proceed.

The ordinance of necessity is a preliminary step necessary to be taken under the statutes, and the assessment ordinance and bond ordinance are only ancillary to the principal ordinance, which is the ordinance to proceed.

These various ordinances are steps necessary to be taken by law for the purpose of exercising the right of a municipality to proceed by the assessment plan for the improvement of streets. Such being the case, and the primary object of the initiative and referendum act being in this instance to permit the electors of the municipality to have caused to be submitted to them the ques-

tion of improvement, I am of the opinion that the only ordinance involved in the various steps necessary for the improvement by the assessment plan that the electors of the municipality may cause to have referred to them for approval, if they so desire, is the ordinance determining to proceed.

In your statement of facts, you say that the ordinance of necessity and the ordinance to proceed, which latter ordinance likewise authorized the director of public service to advertise for and enter into a contract, had both been passed before the initiative and referendum act went into effect. Such being the case, it is my opinion that the assessing ordinance would not have to lay sixty days before becoming a law, for the reason that it is simply ancillary to the main ordinance involving the expenditure of the money, and that it is not necessary that it be declared to come under the head of an emergency ordinance to close what has already been done.

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

A 438

TRANSFER OF FUNDS—POWER OF COUNCIL TO TRANSFER FUNDS, RAISED BY SALE OF BONDS FOR MUNICIPAL HOSPITAL, TO SINKING FUND—CANNOT TRANSFER BACK.

When it has on hand funds derived from the sale of bonds for a municipal hospital, the council, if it sees fit, may abandon the original purpose and by resolution transfer said funds to the sinking fund for the purpose of retiring the bonds.

Such action is final, however, and council may not again transfer said funds back to the former fund to be directed to the purpose formerly intended.

COLUMBUS, OHIO, October 26, 1911.

HON. VAN A. SNIDER, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 16th requesting my opinion upon the following questions:

> "Some four years ago the city of Lancaster issued and sold $25,000.00 worth of bonds for a municipal hospital. No part of said $25,000.00 was ever used for that purpose, and about three years ago the council, by resolution transferred the money to the 'sinking fund.'
>
> "Query: First. Was such transfer legal?
>
> "Second. Can the money be taken out of the 'sinking fund' now, and used for municipal hospital purposes?"

Section 3804, General Code, provides as follows:

> "When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

Obviously the determination of whether or not funds are needed for the pur-

pose for which they were borrowed lies with the council, the authority of which over such funds, including their creation and expenditure, is within the limits of the law complete. The law provides by necessary inference that such funds may be expended only for the purpose for which they were borrowed or for the purpose of retiring the bonds by which they were procured. These limitations, however, do not concern us in considering the question you present as they have been observed.

There may be exceptions to the foregoing rule in the case of funds borrowed for certain purposes. That is to say, there may be instances in which council, for one reason or another, might be compelled to proceed with a municipal enterprise at the suit of a taxpayer or other interested party. That does not appear to be the case, however, with your question. The money was evidently borrowed under the general provisions of the Longworth act, so called, section 3932, General Code. This section and the related provisions of law do not enjoin upon council the duty of expending the money borrowed for a certain purpose, if in its judgment circumstances arising after the money is borrowed make necessary the abandonment of the project, nor do sections 4021, etc., which relate particularly to municipal hospitals, impose any duty upon council in this respect.

From all the foregoing then I am of the opinion that council may lawfully abandon the construction of a municipal hospital after it has borrowed money for that purpose, and that when it has so abandoned such a project it is not only lawful for council to transfer the proceeds of the bond issue to the sinking fund for the purpose of retiring the bonds, but it is mandatory upon council to do so.

As to the second question which you present I am of the opinion that there is no authority of law for the expenditure of money in the sinking fund for purposes other than the retirement of the bonded indebtedness of the city and the satisfaction of judgments final against it. This is true as a general proposition and it is equally true that when money raised for a specific purpose has been transferred to the sinking fund, it must be by section 3804, above quoted, devoted solely to the retirement of the bonds. When council has once so transferred funds and determined that the purpose for which the bonds were issued should be abandoned it cannot rescind its action subsequently and re-transfer the amount of money produced by the original bond issue to the general funds of the corporation to be expended for the purpose for which the bonds were originally issued, or for any other municipal purpose.

I am, therefore, of the opinion that under the circumstances mentioned by you the money heretofore transferred to the sinking fund may not now be taken out of the sinking fund and used for municipal hospital purposes. If it is desired now to proceed with the erection of a municipal hospital it will be necessary to issue other bonds.

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

439.

INITIATIVE AND REFERENDUM ACT—ORDINANCE FOR SUBMISSION OF BOND ISSUE TO VOTE—"EXPENDITURE"—NO SIXTY-DAY INTERVENTION.

An act of council providing for a special election on the question of a bond issue, under section 3942, *General Code, does not involve an expenditure of money within the provisions of the initiative and referendum act, and is not required to lay over sixty days.*

COLUMBUS, OHIO, October 27, 1911.

HON. NICHOLAS M. GREENBERGER, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Under date of September 21st you wrote for my opinion as follows:

> "The city of Akron wishes to issue bonds for the purchase of a privately-owned waterworks plant. As the amount will exceed one per cent. of the duplicate, it is necessary that such question be submitted to a popular vote. The second paragraph of section 2 of the Crosser act, O. L., 102, 422, provides:
>
> "'No resolution, ordinance or measure of any municipal corporation * * * involving the expenditure of money * * * shall become effective in less than sixty days after its passage.'
>
> "Section 3 of the same act provides:
>
> "'All other acts of city council not included among those specified in section 2 of this act, etc.'
>
> "The language of section 3 seems to indicate that an act may take effect immediately, providing the following conditions obtain:
>
> "1. That it be not included within those specified in section 2.
>
> "2. That it be declared an emergency measure.
>
> "3. That it receive a three-fourths vote of council.
>
> "The questions we wish answered are:
>
> "1. Does an act providing for a special election for a bond issue, as above indicated, involve an expenditure of money within the purport of this act?
>
> "2. If it does involve an expenditure of money, is it necessary that it lie over sixty days, or does the fact that by the amount of the bonds called for a special election and a two-thirds vote for passage is required avoid the necessity of waiting the sixty days? In other words, is the submission to a popular vote as provided by the older statute such a substitute for the referendum provided for in the Crosser bill, that in such a case we need not wait the sixty days provided for by the Crosser bill?
>
> "3. When must advertisement of an ordinance be made, at the expiration of the sixty days, or during the sixty days, or before the sixty days?"

Section 2 of the initiative and referendum act found in 102 O. L., 521, being known as section 4227-2, General Code, provides in part as follows:

> "An ordinance * * * of a municipal corporation granting a

franchise creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance * * * by the council, there be filed with the clerk of such municipal corporation, a petition * * *.

"No ordinance * * * of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water * * * shall become effective in less than sixty days after its passage, during which time, if petitions * * * are filed with the clerk of such municipal corporation petitioning for the submission of any such ordinance * * * to a vote of the people, such clerk shall certify the fact of the filing of such petition to the officers having control of the elections in such municipal corporation, who shall cause said * * * ordinance to be voted on at the next regular election."

Section 3 of said act provides as follows:

"All other acts of city council not included among those specified in section 2 of this act, shall also remain inoperative for sixty days after the passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

Section 1 of an act to provide for the issue of bonds by municipal corporations as found in 102 O. L., 262, and being present section 3939, General Code, provides in part as follows:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

"11. For erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof."

Section 2 of said act being known as section 3940, General Code, provides:

"Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

Section 4 of said act being known as section 3942 of the General Code, provides:

> "In addition to the authority granted in section one (1) of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. per annum, as it may determine upon for any of the purposes set forth in said section 1, upon obtaining the approval of the electors of the corporation at a general or special election in the following manner."

While it is true that section 3 of the initiative and referendum act foregoing set forth declares that certain acts may take effect immediately, provided they be declared by council to be an "emergency measure," yet I do not believe that council can declare an act to be an emergency measure which could not be considered under the definition of "emergency" to be such. In other words, I do not believe that council by mere declaration that a measure is an emergency measure can so constitute it if the definition of "emergency" did not apply to such measure.

"Emergency" is defined by the Century dictionary as follows:

> "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances."

Again,

> "A sudden or unexpected occasion for action; exigency; pressing necessity."

Again,

> "Something not calculated upon; an unexpected gain."

"Emergency" is defined by Webster to be:

> "A condition of things happening suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion."

Again,

> "Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

The facts stated in your letter do not give rise, as I view it, to any emergency, and, consequently, an ordinance thereunder could not be considered as an emergency measure. However, the ordinance of council is simply one that calls for the submission to the electors of the municipality the question of whether or not the bonds should be issued in excess of the amount provided for in section 3940 of the General Code, and the ordinance, so providing, could not be considered in any sense, as I view it, as an ordinance involving the expenditure of money for the reason that the ordinance in itself does not pro-

vide for the issuance of such bonds, but provides solely for the submission of the question to the electors themselves in order to determine whether or not such bonds shall be issued, nor do I think that such an ordinance is the exercise of any power delegated to the municipality as the power thereunder for the issuing of such bonds is delegated to the electors to be determined by their vote.

Coming now to answer your questions as propounded, I would say in answer:

To the first: That I am of the opinion that the act providing for a special election for a bond issue as indicated in your letter does not involve an expenditure of money within the purview of the initiative and referendum act.

To the second: Such being my opinion an answer to your second question is not necessary.

To the third: In answer to your third question I herewith submit an opinion which I have heretofore rendered to Hon. Elmer T. Boyd, city solicitor, Marion, Ohio, under date of October 4, 1911.

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

A 468

MUNICIPAL CORPORATION—LIABILITY FOR PUBLICATION MUST REST ON CONTRACT—INTEREST OF PUBLIC OFFICIAL IN PUBLIC CONTRACT—MEMBER OF BOARD OF HEALTH AS OWNER OF NEWSPAPER.

Liability of a municipality for publications in newspapers must be based upon express contract.

A member of the board of health in a municipality while he receives no compensation, holds a position of trust for a definite term, performs important public duties and exercises a delegated police power of the state, and is therefore an "officer" of the municipality.

Such officer is included within the statutory prohibitions against officers having any interest in contracts or expenditures of the corporation during their term of office.

Publications may not be legally made, therefore, by such municipality in a paper owned by a member of the board of health.

COLUMBUS, OHIO, November 17, 1911.

HON. W. A. O'GRADY, *City Solicitor, Wellsville, Ohio.*

DEAR SIR:—Under favor of October 4, 1911, you ask an opinion of this department upon the following:

> "Mr. B. is a member of the board of health of the city of W. and also is the owner of the W. Daily Union, the only paper printed within the corporation.
>
> "The Daily Union has been printing the ordinances and resolutions of the city; also their job department has been doing job work for the city. Apparently this condition has existed for a number of years without any contract between the said paper and city.
>
> "The question has been raised by one of the taxpayers, matter re-

ferred to me for an opinion, and I hold that he is not entitled to participate in any contract with the city either for printing ordinances and resolutions or other job work of the city while he is a member of the board of health and for one year thereafter in case he resigns or his term expires."

The first matter shown in your inquiry is that there has been no contract entered into for the publication of ordinances and resolutions.

The supreme court of Ohio has held that unless there is such a contract payment for such publications cannot be enforced against the city.

The first syllabus in case of McCormick v. City of Niles, 81 O. S., 246, reads:

"The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

The city, therefore, is not liable for payment of such publications, except upon an express contract therefor.

Your next inquiry, Is a member of the board of health of a city such an officer as is prohibited from participating in any contract with the city?

Section 3808, General Code, provides:

"No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Section 12910, General Code, provides:

'Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12910, General Code, 101 Ohio Laws, 145, provides:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than

fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

The establishment of boards of health and the appointment of their members is prescribed in section 4404, General Code, which provides:

"The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

In the case of State vs. Wichgar, 17 Cir. Dec., 743, a member of the board of health is held to be an officer of the municipality.

The syllabus reads:

"A member of a municipal board of health is an officer of the municipality, and as such ineligible to the office of district physician during his term and for one year thereafter, and he cannot therefore recover for services rendered in such capacity."

The court, in a per curiam opinion, says:

"A member of the board of health of a municipal corporation is an officer of such corporation, and under Revised Statutes 6976 (now 12912, General Code), —, to the appointment of district physician by such board during the term for which he was appointed or for one year thereafter, and although rendering services as such physician cannot recover compensation therefor."

Section 3808, General Code, supra, was applied as to a councilman in the case of State vs. Egry, 79 O. S., 391. The court in its opinion cites a number of cases wherein certain officers were prohibited from being interested in contracts with a municipality.

On page 415, Summers, J., says:

"* * * In People ex rel. vs. Mayor of New York City, 5 N. Y. Supp., 538, it was held that the president of the board of health might be removed from office for violation of the provision of a statute that no head of department should become interested directly or indirectly in the purchase of real estate by the corporation, and that it was immaterial that the act also contained a provision for the punishment of such offense."

Also on page 416, he says:

"In the City of Ft. Wayne vs. Rosenthal, 75 Ind., 156, it is held that an employment by a board of health of a city of one of its mem-

bers to vaccinate pupils in a public school, is a void contract, and creates no liability against the city."

In case of Dell vs. State, 45 O. S., 445, a member of the board of public works is held to be an officer of trust or profit. The first syllabus reads:

"A person duly elected to, and holding the office of member of the board of public works of the city of Cincinnati, is 'an officer elected to an office of trust or profit in this state,' within the meaning of section 6969 of the Revised Statutes (12910, General Code), which makes it a crime for such officer to become 'directly or indirectly interested in any contract for the purchase of any property or fire insurance, for the use of the state, county, township, city, town or village,' and is amenable to the provisions of that section, if, while acting as such officer, he becomes interested in a contract for the purchase of property for the use of the city."

A member of the board of health receives no compensation for his services. This is not an essential element in determining whether a person is an officer.

In case of State vs. Anderson, 45 O. S., 196, Williams, J., on page 199, says:

"We are also of opinion that the president of a city council is an officer, and his station a public office, within the purview of section 6760. It is true the place is without emolument, but that is not a necessary incident to an office; nor is it to be denied that character, because the incumbent is chosen by a limited elective body, composed of public officers; many public officers are so chosen."

Boards of health, especially in large centers of population, have important public duties to perform in promoting the health of the community. They conduct one of the departments of the city government and exercise the police power of the state. They are appointed for definite terms of office by the mayor and council of the respective cities. While it is not a position of profit to the members, it is a position of trust, and it is an office of the municipality, and the incumbent is an officer thereof.

As officers of a municipality the members of the board of health come within the provisions of the statutes prohibiting them from being interested in any contract or employment with such city. But the prohibition ends with the term of his office. The one year limitation in section 12910, General Code, relates only to the employment of an officer as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by such corporation or any corporation of the township during the term for which said officer was elected or appointed, or for one year thereafter.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

470.

ADVANCE OF VILLAGE TO CITY—POWER OF EXISTING COUNCIL TO FIX SALARIES OF INCOMING CITY OFFICIALS.

When a village advances to a city, the existing council during the period intervening between the time of the change and the time when the officials of the city government are inducted into office, may fix the salary of the incoming city council and other officials.

COLUMBUS, OHIO, November 20, 1911.

HON. ERWIN E. GUTHREY, *Solicitor, Lakewood, Ohio.*

DEAR SIR:—Your favor of November 16, 1911, is received, in which you ask an opinion of the following:

> "At the recent federal census the village of Lakewood, Ohio, passed to a city. We elected our first city officers at this November election.
>
> "The question arises whether the present council, elected under the village form of government, should fix the salaries of the incoming city officers, or whether their salaries should be fixed by the council elected under city form of government? If the present council should fix the salaries, we desire to pass the salary ordinances Monday night."

The transition of a municipality from a village to a city is provided for in section 3498, General Code, which reads:

> "When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title."

Section 3499, General Code, provides that the officers under the old form of government shall continue in office, as follows:

> "Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

It has been held by this department in an opinion to you on April 26, 1911, that the village form of government continues until January 1, 1912, when the new officers of the city take charge.

Section 3499, General Code, prescribes that the village officers shall continue in office until the new officers of the city government are elected. There is no provision of statute granting to the village officers new powers. There are, however, certain details of preparation which must be performed by the old form of government, in order that the transition from the village form of government to the city form of government can be made without confusion. It was the evident intention of the legislature to continue the village form of government so that the municipality could adjust itself to the changed condition gradually and without disturbing the affairs of the municipality.

For example a city is divided into wards and each ward is entitled to a councilman. The old council has the power to divide the city into wards, in order that the new council may be legally elected.

Again, section 4209, General Code, provides for the salary of councilmen of a city as follows:

> "The compensation of members of council, if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties, but shall not exceed one hundred and fifty dollars per year, each, in cities having a population according to the last preceding federal census, of twenty-five thousand, or less.
>
> "For every thirty thousand additional inhabitants so determined, such compensation may be, but shall not exceed, an additional one hundred dollars per year, each, but the salary shall not exceed twelve hundred dollars per annum, and shall be paid semi-monthly. A proportionate reduction in his salary shall be made for the non-attendance of any member upon any regular or special meeting of council."

This section sets forth the maximum amount that may be paid. The statute leaves it optional as to whether any salary shall be paid. It would be against public policy to permit the councilmen of the new form of government to fix their own salary, or compensation. It is a power which should be exercised by some one at some time. In as much as the city has a legislative body in its council elected under the village form of government, I see no reason why this body should not determine and fix the salary of the incoming councilmen. In fact it appears to me that it is proper and necessary that this should be done by the old council.

The same principle will apply to the other incoming officers. The new council and the new officers take office at the same time. If their salaries were not fixed prior to their taking office, there would be some question as to the right of the new council to fix or change the salaries of officials inducted into office, as the rule is that the salary of an officer shall not be increased or decreased during the term for which he is appointed or elected.

In conclusion, it is my opinion that the present council of Lakewood is authorized to fix the salary and compensation of the new city councilmen and city officials.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

480.

ADVANCE OF VILLAGE TO CITY—POWER OF EXISTING COUNCIL TO FIX SALARIES EXTENDED ONLY TO INCOMING ELECTIVE AND APPOINTIVE OFFICERS WHOSE TERMS AND DUTIES ARE FIXED BY STATUTE—DUTY OF MAYOR TO SIGN ORDINANCES MANDATORY.

December 1, 1911.

HON. O. D. EVERARD, *Solicitor, Barberton, Ohio.*

DEAR SIR:—Your favor of November 23, 1911, is received in which you ask an opinion of the following:

> "On Monday evening, November 20th, the council of Barberton passed an ordinance fixing the salaries of the officials of the city of Barberton, who will take office on January 1st. Barberton is one of the municipalities which has been advanced to the grade of a city, the result of our last federal census.
>
> 'The mayor refuses to sign the ordinance. Has he the right to refuse to sign it, and if not, what is the remedy and whose duty is it to enforce his duty under the village form of government?
>
> "Is it not the duty of the present officials to perfect the new form of government by passing all ordinances fixing the duties of the new departments and their clerks, where additional duties may be prescribed under the Code, and fix their salaries?
>
> "Is it not the duty of the present officials to fix the salaries of all the incoming officials and departments?"

The power of council to fix salaries of incoming officials has been determined in an opinion to Erwin W. Guthery, dated November 20, 1911, a copy of which is herewith enclosed for your reference.

The rule that the old council should fix the salaries of incoming officers, applies only to elective officers and those appointive officers whose term and duties are fixed and prescribed specifically by statute. The duties of new departments, where council has power to fix the same, the number of deputies, clerks and employes, in the departments, with their compensation, should be determined by the new council.

The mayor of a village is the presiding officer of council, and as such presiding officer is required to sign all ordinances passed by council. As this is a ministerial act, performance may be enforced by mandamus.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

483-1.

ASSESSMENTS FOR SEWERS — NON-ABUTTING PROPERTY — DOUBLE HOUSE—ORDINANCES PROHIBITING KEEPING OF HOGS WITHIN CITY. LIMITS.

A lot which does not abut upon a sewer improvement, but which is behind an abutting lot, cannot be assessed for the sewer improvement.

When costs and expenses of a sewer improvement are assessed in proportion to benefits, an abutting lot with a double house thereon may be assessed double the amount of the same sized lot with one house thereon, provided that the benefits under all facts and circumstances reasonably warrant a double assessment thereon.

2. *An ordinance prohibiting the keeping of hogs within corporate limits may be passed under* 3650, *General Code, as amended* 102 *O. L.*, 62, *if such keeping amounts to a public nuisance.*

COLUMBUS, OHIO, December 5, 1911.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of the 13th, ult., wherein you inquire as follows:

> "1st. May a lot be assessed for a sewer which cannot get benefited from said sewer without going through a lot between it and the sewer line? Or in order for it to be assessed would it be necessary for the city to bring the sewer line so that the said lot is immediately accessible?
>
> "2nd. Also where the costs and expenses of a sewer are to be paid by special assessment of the benefited properties may a lot with a double house thereon legally be assessed double the amount of the same sized lot with one house thereon?
>
> "3rd. May an ordinance prohibiting the keeping of hogs within the corporate limits of the city be passed in proper form so as to be valid?

In answer to your first question I am of the opinion that a lot cannot be assessed for a sewer which said lot cannot be benefited by said sewer except by going through a lot between it and the sewer for the reason that it would impose the burden upon the owner of such lot to acquire an easement or right of way over and through the lot between such owner and the line of the sewer, and such owner might have extreme difficulty in acquiring such right of way over which to reach the main line of the sewer. To impose an assessment upon property so situated would be imposing an unjust burden, and furthermore would be imposing a burden not borne by all the benefited properties alike and in equal proportion.

I am of the opinion that in order to assess the lot it would be necessary for the city to construct the sewer so that the lot would be immediately accessible.

In answer to your second question would say section 3812 of the General Code provides that special assessments for the construction of a sewer may be made upon the abutting, adjacent and contiguous or other specially benefited lots in proportion to the benefits which may result from the improvement. When the costs are so assessed upon the benefit plan I am of the opinion that a lot

having a double house thereon may be legally assessed double the amount of the assessment upon a lot of equal size having only a single house thereon, provided, of course, that the benefits to be received by the double house under all the facts and circumstances of the case reasonably warrants the double assessment thereon for the purpose of constructing the sewer.

In answer to your third question would say section 3616 of the General Code provides as follows:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3646 of the General Code provides as follows:

> "To provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, and to purchase or lease property or buildings for pest houses and to erect, maintain and regulate pest houses, hospitals and infirmaries."

Section 3650 of the General Code, as amended 102 O. L., 62, provides as follows:

> "To cause any nuisance to be abated, to prosecute in any court of competent jurisdiction, any person or persons who shall create, continue, contribute to or suffer such nuisance to exist; to regulate and prevent the emission of dense smoke, to prohibit the careless or negligent emission of dense smoke from locomotive engines, to declare each of the foregoing acts a nuisance, and to prescribe and enforce regulations for the prevention thereof; to prevent injury and annoyance from the same, to regulate and prohibit the use of steam whistles, and to provide for the regulation of the installation and inspection of steam boilers and steam boiler plants."

By virtue of the above cited sections, I am of the opinion that if the keeping of hogs within a municipality becomes offensive, noisome and of such a nature as to create a public nuisance, in that event the council has the undoubted authority to pass an ordinance prohibiting the keeping thereof within the corporate limits of the municipality.

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

483-2.

CIVIL SERVICE — SUPERINTENDENT OF STREETS — UNCLASSIFIED SERVICE—INDEFINITE TERM—DIRECTOR OF PUBLIC SERVICE APPOINTING POWER—POWER OF COUNCIL TO INCREASE SALARY DURING INCUMBENCY.

A superintendent of streets has "charge of a principal department relating to engineering waterworks or street cleaning," and therefore under section 4479, General Code, is a member of the unclassified service, and not subject to civil service regulations.

As the statute does not provide for any definite term, when the ordinance fixing his salary does not state any definite term, and when the office is subject to the will of the appointing power, his term is indefinite and the salary of such superintendent may be increased by the council during his incumbency.

The appointment of such officer, however, under section 4327, General Code, must be made by the director of public service.

COLUMBUS, OHIO, December 6, 1911.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Your favor of May 9, 1911, is received, in which you state as follows:

> "I send you a copy of an ordinance that has been introduced in our council, but its legality has been questioned. I am very anxious to have your opinion on the ordinance and hope that you can have the time to answer this week."

The proposed ordinance enclosed states as follows:

> "Be it ordained by the council of the city of Troy, State of Ohio:
>
> "Section 1. The salary of the superintendent of the streets of the city of Troy shall be the sum of $..... per annum, payable monthly, out of the proper fund of the department of public service.
>
> "Section 2. Said superintendent shall possess the qualifications of a civil engineer, and shall, without cost to the city, except for such helpers required for like service, for said city, in addition to his duties as superintendent of streets, furnish all the lines, stakes, etc., required in building streets, gutters and sidewalks, and shall perform such other duties as such engineer when required by the director of public service.
>
> "Section 3. So much of section 5 of ordinance No. 775, passed June 9, 1910, in conflict herewith, is hereby repealed."

Under date of May 13, 1911, you further state:

> "Yours of the 11th at hand and contents noted. The history of the creation of the office is as follows:
>
> "December 7, 1907, the city council passed an ordinance creating the office of superintendent of streets. This ordinance fixed the salary at $60.00 per month.
>
> "July 1, 1910, this ordinance was repealed and the salary was fixed at $900.00 per year. This has been maintained from that date.

"By reference to the Civil Code, you will notice that this officer does not come under classified list (4479). If he is not in the classified list the rule that his salary cannot be increased or decreased during his term does not apply, for he has no term.

"He is at the head of the street cleaning department and only serves at the pleasure of the appointing power of the city.

"I may be wrong about this, and if I am I want to be set right."

The question to be determined is the right of council to increase or diminish the salary of the superintendent of streets of a city, during an officer's incumbency therein.

Section 4213, General Code, provides as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

The right of council to fix the compensation of employes and officers of the city is prescribed in section 4214, General Code, as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, *and shall fix by ordinance or resolution their respective salaries and compensation*, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Council has the right by virtue of the above section to fix the compensation of a superintendent of streets.

Section 4479, General Code, provides for classified and unclassified service in cities 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, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; persons apopinted or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections; *persons who as members of a board or otherwise, have charge of any principal department relating to engineering, waterworks, street cleaning*, or health, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

The superintendent of streets is at the head of the department pertaining to streets and comes within the unclassified list. He is not subject to civil service regulations.

The statute does not provide any definite term or period during which such superintendent of streets shall serve. Nor does the ordinance fixing his salary state any definite term, so far as shown by your communication. I take it then that the superintendent of streets is appointed subject to the will of the appointing power. His term of service is indefinite.

There is no doubt that the superintendent of streets is an officer or employe of a city as prescribed in section 4213, General Code, supra, and if he comes within the provision of this statute as one having a term of office, his salary cannot be increased or diminished during such term for which he was appointed.

In case of State vs. Massillon, 14 Cir. Dec. (24 C. C. R.), 249, Voorhees, J., on page 252, discussing the meaning of the word "term" in reference to a health officer, says:

> "The statute now applies to cases where there is an increase during the term. The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during the period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is at their pleasure. It is not a term, for the reason there is no limit to it. It may be likened to a tenancy at will, not a term, because it has no limitation. Therefore, it would be difficult to bring such an employe within the terms of section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed. We think that this is the true meaning of section 2115, Revised Statutes."

In case of Somers vs. State, 5 S. D., 564, the syllabus reads:

> "A deputy appointed by an officer to hold during the pleasure of such principal, does not hold for a 'term,' within the meaning of section 3, Article XII, of the constitution, prohibiting any change in the compensation of any public officer 'during his term of office.'"

The syllabi, in case of Harrold vs. Barnum, 8 Cal. App., 21, read:

> "The prohibition in section 9 of Article XI of the state constitution that the 'compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office,' applies only to officers who have a fixed and definite term, and does not apply to appointive officers who hold merely at the pleasure of the appointing power.
>
> "The legislature has power to increase the salary of a deputy county surveyor during the time of his holding of the deputyship, since he holds it only during the pleasure of the county surveyor who appointed him."

In the latter case the court cite a number of authorities, including 24 C. C. R., 249, supra, in support of its decision.

The rule is that where an officer holds his position at the pleasure of the

appointing power, and has no fixed period or term of office, he has no term as meant and used in the constitution and statutes which prohibit an increase or decrease in the salary or compensation of an officer during the term for which he was elected or appointed.

In conclusion, therefore, council may change the compensation of the superintendent of streets who has no fixed term of office or time of service, and who serves at the pleasure of the appointing power, during the incumbency of that officer.

However, let me call your attention to section 4327 of the General Code, which provides as follows:

> "The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

This section was not passed by the legislature until 1908, the same being after the creation of the office by council which was on December 7, 1907. You will observe, therefore, that the office should be created not by the council but by the director of public service. Council, however, still have the right to fix the salaries, and in order that you may have no trouble with the bureau of inspection and supervision of public offices, I suggest that you have the director of public service make the record show the creation of the office and the appointment of the same man designated by the council together with the same duties.

Kindly advise me if this may be done harmoniously.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

484-1.

POOR RELIEF — COUNTY INFIRMARY — DUTIES AND POWERS OF INFIRMARY DIRECTORS AND OF COUNCIL OF A CITY—DISCRETION OF AUTHORITIES—PUBLIC COMMENT.

It is the intention of the law that paupers, if in any way possible, should be cared for in the county infirmary. The infirmary directors, however, are vested expressly with the discretionary power to care for poor, when necessity arises, in any other way which they may deem advisable. This discretion may be abused, however, and is unquestionably limited to such action as will avoid reasonable public criticism.

Cities must do their share and council should be advised to levy sufficient to care for their poor.

COLUMBUS, OHIO, December 9, 1911.

HON. CORNELL SCHREIBER, *Toledo, Ohio.*

DEAR SIR:—I have your favor of December 5th. I believe that a careful study of the opinion I rendered to Hon. Holland C. Webster, prosecuting attorney, Toledo, Ohio, under date of March 31, 1911, fully answers your letter. I fear the trouble is that those interested have not grasped the full meaning of what was contained in that opinion. I quote therefrom. Mr. Webster's first question was·

"Under the provisions of section 2544 of the General Code, what are the prerequisite conditions to a person becoming a 'county charge?' "

In reply thereto I said in part:

"I think the answer to your inquiry is contained in an opinion delivered by one of my predecessors, Hon. Wade H. Ellis, under date of January 30, 1907, to the prosecuting attorney of Allen county. I quote therefrom:

" 'The following language in said section: "they shall forthwith receive said person and provide for him or her in said institution, or *otherwise*," authorizes the infirmary directors, in my judgment, to exercise their discretion as to whether they will provide for the paupers properly coming under their charge, in the infirmary or outside. I desire to say, however, that this discretion may be abused. It is manifestly the intention of the law that paupers coming under the charge of infirmary directors shall be provided for in the county infirmaries and unless there be sufficient cause to justify the infirmary directors in providing for a person who is a county charge outside of the infirmary, it is the duty of the infirmary directors to provide for all paupers coming under their charge, inside the county infirmaries.'

"I concur in that opinion, in that it is manifestly the intention of the law that paupers coming under the charge of the infirmary directors shall be provided for in the county infirmary, and unless there be sufficient cause to justify infirmary directors in providing for a person who is a county charge, outside of the infirmary, it is the duty of the infirmary directors to provide for all paupers coming under their charge inside the county infirmary. If, however, on account of overcrowding, or on account of any special fact or circumstance, such as that the person in need of relief is not in a physical condition to be removed, to the county infirmary, or is affected with some contagious disease, or for other similar reasons, the infirmary directors would deem it advisable to care for a county charge elsewhere than at the infirmary of the county, they may do so and be within the pale of the law; that is, the infirmary directors have some discretion as to whether they will provide for paupers properly coming under their charge, in the infirmary; but this discretion may be abused, and I believe has been abused in your county, in the furnishing of outdoor relief as stated in your letter."

You will notice that I go further along the line of liberality than my predecessor. And let me say further, at this point, that the very abuse of the law, to which I refer, is undoubtedly the cause of the predicament in which the county and city have found themselves, and for which other officials have been improperly blamed.

The second inquiry in Mr. Webster's letter was as follows:

"Quoting from section 2544, of the General Code: '* * * and the directors are satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, *or otherwise*, and thereupon the liability of the township shall cease.'

"Does the language above quoted authorize the board of infirmary directors to accept one as a 'county charge' and thereupon provide for him or his family with the necessities of life as is now being done, at

its office or storeroom in the court house where said assistant clerks, stenographers, storekeepers and inspectors are necessarily employed in furnishing said relief?"

In reply thereto I said:

"Answering your second question, it is my opinion that the board of infirmary directors of Lucas county, having accepted persons as county charges, cannot provide them or their families with the necessities of life, as is now being done at its office or storeroom in the court house, where assistant clerks, stenographers, storekeepers and inspectors are necessarily employed in furnishing relief to said persons, unless the county infirmary is not large enough to take care of all the distressed poor of your county who have need of permanent relief and are 'county charges,' or are that said persons are not able to be removed to the infirmary by reason of some physical infirmity, or that they have some contagious disease, or for other similar reasons justifying the furnishing of outdoor relief. I am of the opinion from the facts stated in your letter that a great portion of the relief is in the nature of temporary relief and would come within the jurisdiction of the director of public safety in your city, that the infirmary directors have no jurisdiction in the premises. However, these statutes in reference to the poor are, in the language of the court in the case of Beach vs. Trustees, 2 W. L. M., page 79, 'to be liberally construed, especially in favor of the destitute and unfortunate poor who are alike entitled to the commiseration and regard of a jury, of courts and the legislature. These laws have provided almost the only, and this but an inadequate, tribute which wealth and property pay to destitution and distress.' I am, therefore, inclined to hold that all money expended in the past in outdoor relief in your county, under the circumstances stated in your letter, should not be questioned, but advise that the jurisdiction of the director of public safety and the board of infirmary directors should be separately maintained, and that if possible all persons who are 'county charges' be maintained in the county infirmary, and if the facilities in the infirmary are not sufficient to maintain the county charges therein, that the proper officers of your county should increase the capacity thereof, for it is the evident intention of the law that county charges should be maintained within the infirmary. I further advise that all persons who are in need of temporary relief in your city shall be provided for by the director of public safety."

Mr. Webster's third question was:

"Is the employment of said assistant clerks, stenographers, storekeepers and inspectors for the purposes indicated in the preceding inquiry, and as set forth in said report, authorized by law?"

My answer thereto was as follows:

"Answering your third inquiry, it is my opinion, therefore, that the infirmary directors having abused their discretion with reference to the furnishing of outdoor relief, having exceeded their authority in furnishing outdoor relief in the city of Toledo, for the reasons above stated, the employment of assistant clerks, stenographers, storekeepers

and inspectors for the purposes indicated in your inquiry, was unauthorized by law, and I am further of the opinion that the statutes do not contemplate under any circumstances that the infirmary directors of any county shall be authorized to establish permanent storerooms, to employ clerks, stenographers, storekeepers and inspectors, for the purpose of furnishing relief in the city of Toledo as indicated in your inquiry."

To every sentence in the opinion to Mr. Webster I still adhere. It is the duty of your public officials in Lucas county, and in the city of Toledo, to take care of your poor, and to provide means according to law to do so. I have no complaint from any other city in the state with reference to the care of the poor, and I impute the condition of affairs that exists in your splendid city to the very practice which I have been asked to sanction. However, you can easily perceive that from my opinion, one fundamental principle is to be gathered, and that is that the poor must be cared for; this is all-controlling, and neither from pen nor mouth has anything to the contrary come from this department.

I am informed that your city is the only one in the state that has made no levy for the poor. Whether or not this is true I do not know.

You will notice it is especially said in the opinion: "If, however, *on account of overcrowding*, * * * the infirmary directors would deem it advisable to care for a county charge elsewhere than at the infirmary of the county, they may do so and be within the pale of the law."

You say in your letter: "For some years past the county infirmary has been so crowded that it was impossible to confine more than a portion of those eligible in the infirmary." Herein lies the very trouble; on account of the existence of your commissary department the public authorities disregarded their duty to provide sufficient accommodations at the county infirmary. If your county had an infirmary large enough to take care of the permanent poor no complaint would have arisen with reference to abuses that, doubtless, cropped out in the way of maintaining a commissary at the court house.

Where funds have been levied for the care of the poor, and you have the poor and helpless that come fairly within the spirit of the law governing outdoor relief, your county infirmary directors not only have the power, but they should exercise it, to afford relief to the deserving poor; and it is not within the province of this department to rule as to just how that should be done, except to say this: it should be done in such manner as not to be a just subject of criticism at the hands of an enlightened public. I shall not rule as to the means that your county infirmary directors may employ to afford outside relief; that is a question of fact for them to determine, under the direction of their prosecuting attorney, subject to approval or disapproval by the attorney general. But I do not hesitate to rule that the county infirmary directors have the right to use the funds at their disposal in such manner as seems to them best, in the light of the situation that exists in Lucas county, so as to afford relief to those that are under the law entitled to it, whether outside of the infirmary or within it.

So that I may not be misunderstood upon the governing principles, I do not say that where counties have infirmaries, and a necessity does not arise, that this may lawfully be done; but where such conditions exist as do exist in your city and county, the law does not contemplate that the poor should be deprived of assistance.

I do not concur with you in your statement that we should be influenced by

a consideration like this: "a man who is hungry and wants something to eat is not particularly interested in the solving of refined problems of law." The law is not in the road of a man who is hungry, and never wrongs the one who is hungry; the trouble is that the law is not always rightly applied.

It is the duty of the city solicitor to advise council to make proper levies to afford temporary relief to the poor of the city. While being entirely satisfied that the principles set forth in their opinion are legal, I do not wish it understood that the practice heretofore existing in Lucas county in respect to the care of the poor is legal; on the contrary it is responsible for the condition which exists there, and that condition alone makes legal what is herein authorized. The attorney general's department finds it necessary always to adhere to the law, and is of the opinion that the law never prevents either justice or charity when rightly applied.

I am sending a copy of this communication to the prosecuting attorney, and likewise to the board of infirmary directors.

I advised Hon. Holland C. Webster, prosecuting attorney at Toledo, last Saturday, that this department ruled that he might advise the infirmary directors of their right to afford even temporary relief in the city of Toledo until that city could provide by levy, at its first opportunity, for the care of the poor of the city, as required by law.

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

486.

CITY AUDITOR—CLERK OF WATERWORKS DEPARTMENT OF A CITY.

A city auditor cannot hold the office of clerk of the waterworks department. The office of city auditor serves as a check upon that of a clerk of waterworks department. Therefore, under the common law the duties of the former are incompatible with those of the latter.

COLUMBUS, OHIO, December 11, 1911.

MR. GEO. C. STEINEMAN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—Your letter of November 23d received. You inquire whether under section 3956, et seq., General Code, it is permissive that the city auditor be appointed clerk of the waterworks department, and as such clerk have charge of the books and accounts, the power to appoint such assistants as may be necessary to take care of the clerical work, all clerk hire, however, to be paid for out of the general fund instead of the waterworks fund.

Section 3956, General Code, provides as follows:

> "The director of public service shall manage, conduct and control the waterworks, furnish supplies of water, collect water rents, and appoint necessary officers and agents."

Section 3958, General Code, provides in part as follows:

> "For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to

time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *"

Section 3959, General Code, provides in part as follows.

"After paying the expenses of *conducting and managing* the waterworks, any surplus therefrom may be applied to the repairs * * *"

Section 3960, General Code, provides that:

"Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

Section 4284, General Code, provides for the duties of the city auditor, and is as follows:

"*At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments.* He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments and * * * shall have the inspection and revision thereof. * * *"

Section 4286, General Code, provides that:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. * * *"

The city auditor, under the above sections, is vested with power to examine and audit the accounts of all officers and departments of the city government.

The waterworks department of a city, under authority of section 3956, General Code, is under the supervision and control of the director of public service, and the clerk of the waterworks department is appointed by the director of public service, and would come in the classified service of the city.

You inquire whether it would be permissive for the city auditor to be appointed clerk of the waterworks department. The statutes do not cover this case, and the question arises whether the common law holds the offices of city auditor and clerk of the waterworks department incompatible. At common law, offices are considered incompatible when one is subordinate to or in any way *a check upon the other;* or where it is physically impossible for one person to discharge the duties of both. The latter element is eliminated from this case, as the duties of both could be discharged by the same person. The only question that remains, then, as to whether those two offices are incompatible, is whether one acts as a check upon the other.

Section 4284, General Code, above quoted, makes it the duty of the auditor to examine and audit the accounts of all officers and departments. Section

4286, General Code, makes it the duty of the several officers and departments of the city government to make a detailed statement, monthly, to the auditor. Therefore, the office of city auditor acts as a check upon the office of the clerk of the waterworks department, and the two offices are incompatible, as measured by the common law test, and they may not be held by the same person.

Since the auditor cannot be appointed clerk of the waterworks department he has not the power to appoint assistants to take care of the clerical work of that department. The clerk of the waterworks department, and all assistants, should be appointed by the director of public service, and their expenses should be paid out of the funds collected under authority of section 3958.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

487-2.

CITY SOLICITORS—PROSECUTORS IN POLICE COURT—PAYMENT FOR SERVICES IN STATE CASES BY COUNTY COMMISSIONERS FROM FEBRUARY, 1910, to MAY, 1911.

City solicitors are not entitled to an allowance for compensation from the county commissioners for services in state cases between the enactment of the Code in February, 1910, and before the adoption of the amendment in May, 1911, even though prior to the enactment of the General Code, the commissioners had ordered that a specified amount should be paid annually for said services.

COLUMBUS, OHIO, December 9, 1911.

HON. CORNELL SCHREIBER, *City Solicitor, Toledo, Ohio.*

DEAR SIR:—Under favor of August 10, 1911, you inquire of this department as follows:

> "I am in receipt of a circular letter from the bureau of accounting, in which it is stated that the city solicitors of the state could not legally be allowed compensation out of the county treasury in state cases for the period beginning February, 1910, the day of the adoption of the new Code, and May, 1911, the day of the adoption of the amendment.
>
> "This matter came up once before in this county when the county auditor of Lucas county refused to allow me compensation as prosecuting attorney of the police court, and on April 16, 1910, I wrote a letter to the then attorney general, Mr. Denman, in which I set forth the facts and also the provisions of the law and constitution applicable thereto. Mr. Denman rendered an opinion about two weeks later, in which he confirmed my opinion of the law, and under that opinion of the attorney general the money has since been paid to me.
>
> "I believe that if you will investigate the facts as stated in my letter and the references to the law found in my letter and in the opinion of the attorney general, you will see that the ruling that you have made does not apply to the city of Toledo, and I wish that you would kindly write me to that effect."

Under date of April 24, 1911, this department gave an opinion to Hon.

Harold W. Houston, a copy of which is enclosed, in which it was held as follows:

> "That the power given to the county commissioners to compensate city solicitors ceased with the enactment of the General Code.
>
> "That the fact that in January, 1910, the county commissioners entered into a two year contract with the city solicitor at a fixed salary would not change the result, as far as services to be performed after the enactment of the General Code were concerned."

The opinion of Attorney General Denman to which you refer has been examined and this matter has been given much attention, and although I dislike to reverse an opinion of my predecessor, I have found no reason to change my conclusion. The opinion enclosed, I believe, covers your case. The city solicitor is not entitled to an allowance for compensation from the county commissioners for services performed as prosecuting attorney of the police court after the enactment of the General Code and prior to the amendment of section 4307, General Code, on May 15, 1911, even though prior to the enactment of the General Code the county commissioners had ordered that a specified amount should be paid annually for such services.

In support of my conclusions I will cite these further authorities.

In case of Rucker vs. Supervisors, 7 W. Va., 661, the first and second syllabus reads:

> "Section nine of article three of the constitution of 1868, of this state, providing that no salary, or compensation of any public officer shall be increased or diminished, during his term of office, applies only to such salaries or compensation of public officers, as have been definitely fixed or prescribed by law; either by the constitution of the state, or by some statute made in pursuance thereof.
>
> "It was competent for the board of supervisors to fix the annual amount, which the prosecuting attorney of a county should be allowed under section sixty-six of chapter thirty-nine of the Code, or to reduce his allowance, after his term of office commenced, without thereby violating the foregoing article of the constitution or said sixty-sixth section of chapter thirty-nine of the Code."

On page 663 of the opinion, Paull, J., says:

> "It will be observed that the prosecuting attorney receives no fixed salary prescribed by law, but his compensation consists of such fees as are allowed to be taxed for his benefit, under different provisions of the Code, as in section sixteen of chapter 128, *and such further allowances as are authorized to be made to him by the board of supervisors under* the aforesaid section sixty-six of chapter thirty-nine, being not less than one nor more than six hundred dollars.
>
> "This court is of opinion that section nine, article three of the constitution applies only to such salaries or compensation of public officers as have been definitely fixed or prescribed by law; either by the constitution of the state or by statute made in pursuance thereof. This is not the case in regard to the compensation of the prosecuting attorney for a county, who is paid for his services in the manner hereinbefore indicated, and by no fixed salary prescribed by law. Consequently, sec-

tion nine, article three of the constitution, and the provision in section sixty-six of chapter thirty-nine of the Code do not apply to the allowance or compensation which the law authorizes to be made to him by the board of supervisors, and which is of uncertain amount. The constitution and Code have not been violated by the order of the supervisors fixing the annual allowance of the prosecuting attorney, the plaintiff, in the present case, after his term of office commenced."

In Collingsworth County vs. Myer, 35 S. W. 414 (Civ. App. of Tex.), the second and third syllabi read:

"Under Rev. Stat. 1895, article 2450, providing that the county judge shall receive such salary for ex-officio services as may be allowed him by order of the county commissioners' court, a resolution fixing the salary of a county judge for ex-officio services for two years ensuing does not bind the county as by contract, and does not amount to a judgment against the county but as to future services may be revoked or modified by the commissioners' court at any time they may see fit so to do.

"Rev. St. 1895, Art. 4853, providing that the salaries of officers shall not be increased or diminished during their term of office, applies only to officers whose salaries are fixed by law, and not to orders of the commissioners' court fixing the amount to be paid to county officers for ex-officio services."

The statute authorizing the allowance of such compensation, as set forth on page 415 of the opinion, reads as follows:

"For presiding over the commissioners' court, ordering elections and making returns thereof, hearing and determining civil causes; and transacting all other official business not otherwise provided for, the county judge shall receive such *salary* from the county treasurer as may be allowed him by order of the commissioners' court."

It will be observed that in the above statute the allowance is called a salary, while in the Ohio statute it is called compensation. The distinction between salary and compensation is covered in the opinion enclosed. The services which a city solicitor performs as prosecuting attorney of the police court in state cases are in their nature ex-officio services, as they are performed by him because of the fact that he is city solicitor.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

492.

INITIATIVE AND REFERENDUM—SMITH ONE PER CENT. TAX LAW—ORDINANCES TO ISSUE BONDS IN EXCESS OF ONE PER CENT. NOT TO LAY OVER SIXTY DAYS.

An ordinance of council authorized by the electors at a special election providing for the issuance of bonds in excess of one per cent. is not required under the initiative and referendum act to lay over sixty days before it becomes effective.

COLUMBUS, OHIO, December 14, 1911.

HON. NICHOLAS M. GREENBERGER, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Under date of December 7th you advise us that the electors of the city of Akron have at an election held for that purpose voted in favor of the issuance of bonds in excess of one per cent. of the duplicate for the purchase of a privately owned waterworks plant, and that council now desires to issue the bonds authorized by such election. Your inquiry is whether the ordinance providing for the issuance of bonds in pursuance of the authorization by the electors at such election must lay over sixty days before it becomes effective under the initiative and referendum act found in 102 Ohio Laws, 521.

Section 9 of Senate Bill No. 131, 102 Ohio Laws, 262, at page 264, but known as section 3947, General Code, provides in part as follows:

> "If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, *the bonds shall be issued.*"

As I view the matter, the electors having declared by a two-thirds vote in favor of the bonds, the ordinance providing therefore is purely ancillary in order to carry out the wishes of the electors voting at the election.

Section 3947, General Code, hereinbefore in part set out provides that if two-thirds of the voters vote in favor thereof the bonds shall be issued.

As I view it this provision makes it mandatory upon council to pass an ordinance providing for the issuance of such bonds in order to carry out the will of the voters.

The object of the referendum is to provide a method whereby the electors of a municipality, should they so desire, may have submitted to them for their approval the various ordinances and resolutions passed and adopted by council. In the matter in question the electors have already had the question of the issuance of bonds submitted to them and have voted in favor thereof. A further submission to them would be in effect but a repetition of the former submission.

Therefore, I am of the opinion that such an ordinance would not be considered as within the purview of the initiative and referendum act. To hold otherwise, would be to hold that although two-thirds of the voters of the municipality voted in favor of the issuance of bonds, yet upon petition filed by fifteen per cent. of the electors thereof the question would again have to be submitted to the electors at the next general election, thus postponing the carrying out of the will of the two-thirds majority voting at the election in favor of the issuance of bonds until the next general election.

While it may be said that the initiative and referendum act as passed by the last legislature is so broad in its language as to cover practically each and

every act of a council of a municipality, yet if such construction were to be placed upon such act it could be used to absolutely block the administration of municipal affairs. It is, therefore, necessary to give such initiative and referendum act a reasonable construction.

For the reasons above given, I am of the opinion that such an ordinance as referred to by you in your letter of December 7th is not within the provisions of the initiative and referendum act as found in 102 Ohio Laws, 521.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

509.

TAXES AND TAXATION—SMITH ONE PER CENT. TAX LAW—BUDGET COMMISSION—COUNTY AUDITOR—STATE LEVIES.

1. *The county auditor has no authority under the Smith one per cent. tax law to place upon the tax duplicate any levies over which the budget commission has control, before that commission has met, organized and performed the duties imposed by section* 5649-3c, *General Code.*

2. *The respective levies for county, township, municipal and school purposes are exclusive of the levy for state purposes; but levies for all these purposes together with the state levy must not exceed, in a given taxing district, the limitations of ten mills, the amount of taxes raised in* 1910 *and fifteen mills, respectively imposed by different sections of the Smith one per cent. tax law.*

COLUMBUS, OHIO, November 27, 1911.

HON. VAN A. SNIDER, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 22d, submitting for my opinion thereon the following questions:

> "First: Is the action of the county auditor legal in placing on the tax duplicate tax levies before the budget commission has made, acted or been qualified in compliance with law?
>
> "Second. Are the three mills that may be levied for county purposes, or the five mills that may be levied for city purposes, or the five mills levied by the board for educational purposes, exclusive of the state levy?"

Answering your first question I beg to state that the Smith tax limitation law of 1910, sections 5649-3a to 5649-3c, inclusive, furnishes a complete answer thereto. The first of these sections requires the various levying authorities in the county to submit budgets to the county auditor. Section 5649-3b provides for the personnel and organization of the budget commission, and particularly requires that "each member thereof shall be sworn * * * to perform the duties imposed upon him by this act." Section 5649-3c provides that:

> "The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a of this act, together with an estimate to be prepared by the

auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budgets, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount, or amounts as will bring the total for each township, city, village, school district or other taxing district, within the limits provided by law.

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of such township, city, village, school district, or other taxing district, returned on the grand duplicate, and place it on the tax list of the county."

Clearly, the county auditor has no authority to place upon the tax duplicate any levies over which the budget commission has control. Practically, all levies which can be made are subject to the control of the budget commission, the exceptions to the general rule being very few. If, therefore, the budget commission in your county has never met, organized or performed any of the duties imposed upon it by section 5649-3c, above quoted, and if the auditor has simply computed the rates of taxation upon the amounts submitted to him in the budgets, or has himself assumed the functions of the budget commission in reducing the various items of the different budgets submitted to him, the entire tax levy of your county is illegal and might be enjoined.

Answering your second question I beg to state that section 5649-3c, above quoted, furnishes an index to the solution thereof. It is therein provided that the auditor shall lay before the budget commissioners the annual budgets "together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county." Without quoting any other provisions of the Smith law, many of which bear upon the question at hand, I beg to state that it is my opinion that the respective levies for county, township, municipal and school purposes, are exclusive of the levy for state purposes, which is made by sections 7575, 7924, 7925, 7926, 7927, 7929 and 7986, General Code, as amended in the same act, 102 O. L., 266.

To avoid confusion, however, permit me to state that the state levy must be considered, together with the levies for local purposes above referred to, for the purpose of determining whether or not the limitations of ten mills, the

amount of taxes raised in the year 1910, and fifteen mills, respectively imposed by different sections of the act in question, are likely to be exceeded in a given taxing district.

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

510.

WARD—REDISTRICTING OF IN CITY—COUNCILMAN—RESIDENCE WITHIN REDISTRICTED WARD ONE YEAR PRIOR TO DATE OF ELECTION.

A councilman-elect who has lived within the territory represented by his ward number at the time of his election is qualified within the provisions of section 4207, requiring a residence within his ward for one year prior to the date of his election, regardless of a change in the number of the ward within that time.

One who moves into said territory in April can not be elected councilman in November of the same year.

COLUMBUS, OHIO, December 28, 1911.

HON. CORNELL SCHREIBER, *City Solicitor, Toledo, Ohio.*

DEAR SIR:—Receipt of your favor of December 26, 1911, is hereby acknowledged, in which you inquire as follows:

> "In April, of 1911, the city of Toledo was redistricted into wards, and in the redistricting what was then the twelfth ward became the fourteenth ward, with identical boundary lines.
>
> "In March, of 1911, a Mr. Harworth moved into the twelfth ward and has resided in the same house ever since, so that of course when the fourteenth ward was created in April, of 1911, he then lived in the fourteenth ward and has resided in that ward ever since. At the November election of 1911 he was elected as member of the council from the fourteenth ward.
>
> "Section 4207 of the General Code provides that a councilman must have resided in the ward from which he was elected at least one year prior to the date of his election. Mr. H. makes the contention that it is impossible for anyone to have resided in the fourteenth ward for one year, because the ward has not been in existence that length of time. On the other hand it seems to me that the object of the statute is that each councilman shall be familiar with the division of the city which is elected to represent, and that the statute means and the only construction that can be placed upon this statute is that a councilman shall have resided for at least one year in territory which at the time of the election is in the ward from which he is elected; and this contention I believe is very fully borne out by a case found in 43 L. N. I., at page 699.
>
> "I believe the law to be that when the new council convenes a vacancy should be declared in the fourteenth ward, and the council elect some one to fill the vacancy."

Section 4207, General Code, provides as follows:

"Councilmen at large shall have resided in their respective cities, *and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election.* Each member of council shall be an elector of the city, shall not hold any public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

While it is true that the particular ward now known as the fourteenth ward has not been in existence for one year, yet the territory which composes this ward has been in existence and has been in the city of Toledo for more than one year. It has been represented in council and known as the twelfth ward. The number only is changed.

The seventh syllabus in case of Renner vs. Bennett, 21 O. S., 431, is as follows:

"Persons residing in said asylum at the time of an election, after the jurisdiction thereover has been restored to the state, and for the year next preceding the election, are to be regarded as residents of Ohio for the entire year, within the meaning of section 1, article V, of the state constitution, notwithstanding the fact that part of the year transpired while the jurisdiction was in the United States."

This case was as to the right of the inmates of the Soldiers Home at Dayton to vote. In 19 Ohio State, 306, it was held that the exclusive jurisdiction of this home was in the United States and that inmates had no right to vote in Ohio. Later congress passed an act relinquishing the jurisdiction of the United States. This was done within a year of the succeeding election and the court held the inmates had resided in Ohio for one year.

On page 450 of the opinion, Welch, C. J., says:

"* * * It seems to us it is sufficient that the voter, at the time of the election, has a residence, in the political and jurisdictional sense of the terms, within the proper political division, and has resided in the same place for the prescribed length of time, to fulfill this requirement of the constitution. In such a case it is true, in the primary sense of the words, that there is no change of residence, but merely a change of jurisdiction. To say that there is a change of residence is to give the words a secondary meaning."

The third syllabus in case of Meffert vs. Brown, 132 Ky., 301, reads.

"Under Kentucky statutes, 1909, section 2746 (Russell's Stats., section 336), requires three years residence in certain cities before persons can hold office therein, one who has resided in annexed territory for three years is eligible though the annexation occurs within that time."

In Gibson vs. Wood, 105 Ky., 740 (43 L. R. A., 699, as cited by you), it is held as follows:

"The annexation of the suburb Enterprise to the city of Louisville in August, 1896, rendered appellee, who had resided in said suburb more than three years, eligible to the office of sinking fund commissioner in said city in November, 1896, although under the statute such commissioner must, to be eligible, have resided in the city three years preceding his election."

On page 747, Hazelrigg, C. J., delivering the opinion of the court, quotes from the opinion of Miller, judge of the lower court, with approval as follows:

"In the case at bar the defendant Wood, has done no act by which he should lose any of his political rights, either as a resident of the town of Enterprise, or as a resident of the city of Louisville. The city of Louisville has seen fit to incorporate the town of Enterprise and making it a part of the city of Louisville. In my opinion, when the city of Louisville annexed the town of Enterprise, it adopted the conditions then existing in the town of Enterprise, as to residence and citizenship, as a part of the city government, and former citizens of the town of Enterprise were entitled to all their rights as former citizens of Enterprise, in determining their eligibility to office in the city of Louisville."

These authorities are not directly in point, but they show the principle to be applied. In the above cases the particular territory had not been within the jurisdiction the required length of time for qualification to office or to vote, but the officers and electors had resided, and still resided, in the same place for the required length of time.

In your case the ward known as the Fourteenth ward has not been in existence for one year, and applying the rule above laid down, any person residing within the territory composing the ward for one year preceding the election would be eligible to council if otherwise qualified. The person, however, who has been elected does not meet this qualification.

The statute requires a residence within the ward for one year. This has reference, not to the name or number of the ward, but to the territory composing the ward. A councilman from a ward represents the territory within the boundaries of the ward and he must, under the statute, reside within that territory for one year next preceding his election. In other words, he must be within the jurisdiction which he represents and must have resided therein the required time.

The person in question has not resided within the territory which he was elected to represent, and is therefore ineligible to hold the office.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

511.

INITIATIVE AND REFERENDUM ACT—ORDINANCES INCREASING SALARY OF TREASURER AND INCREASING NUMBER OF PATROLMEN—EXPENDITURE."

An ordinance increasing the number of regular patrolmen in a city, involves an "expenditure" of money in salaries thereby created and must, therefore, lay over sixty days under the initiative and referendum act.

COLUMBUS, OHIO. December 29, 1911.

HON. JOHN T. BLAKE, *City Solicitor, Canton, Ohio.*

DEAR SIR:—Under date of December 18th you wrote me as follows.

"The city council in December, 1911, passed the necessary legislation increasing the salary of its treasurer. Does the initiative and referdum act of 102 O. L., 521, apply? If it applies, does the fact that the ordinance increasing the salary does not become effective until after the commencement of the new term of the treasurer prevent the treasurer from obtaining the increased salary?

"2. Council in December, 1911, passed an ordinance increasing the number of regular patrolmen of the city? Does the initiative and referendum act above referred to apply likewise to this ordinance?"

In answer to your first question, I herewith hand you copy of an opinion rendered to Hon. H. W. Houston, city solicitor, Urbana, Ohio, which I believe will fully answer your question.

In answer to your second question, it would seem to me that an ordinance increasing the number of regular patrolmen of the city, as the employment of such patrolmen necessarily involves the payment for their services, such ordinance is to be considered as an ordinance involving the expenditure of money, and, therefore, will not become effective in less than sixty days after its passage.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

Enclosure.

512.

SALARY OF MAYOR—INCREASED BY FORMER COUNCIL—ORDINANCE EFFECTIVE AFTER SIXTY DAYS—MAYOR'S RIGHT OF VETO.

An existing council may not increase the salary of the mayor of a succeeding administration unless the ordinance voting such increase shall have been passed, and all the provisions of section 4227 of the General Code complied with before midnight of December 31st.

Where such compliance is made the ordinance is valid and takes effect sixty days thereafter, until which time the incoming mayor takes under the old pay ordinance.

COLUMBUS, OHIO, December 29, 1911.

HON. H. W. HOUSTON, *City Solicitor, Urbana, Ohio.*

DEAR SIR:—Under date of December 15th you requested my written opinion as follows:

"Section 4213 of the General Code of Ohio provides 'The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed.'

"I desire to ask for a construction of this section of the Code covering this feature, viz:

"Can the present council at any time before December 31st at midnight, increase or diminish the salary of the mayor, who takes office January 1st, 1912, or must council act at least sixty days before the last named date?"

Paragraph 2 of section 2 of the initiative and referendum act, 102 Ohio Laws, 521, being section 4227-2 of the General Code, provides that no ordinance involving the expenditure of money shall become effective in less than sixty days after its passage.

Section 3 of said act, being section 4227-3 of the General Code, provides that any act of the city council, not included within those specified in section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council may go into effect immediately, and remain in effect until repealed by city council or by direct vote of the people as therein provided.

The question to be considered, therefore, is whether or not an ordinance increasing or diminishing the salary of a mayor is an ordinance involving the expenditure of money, and therefore not to become effective in less than sixty days after its passage as provided in said paragraph 2 of section 2 of said act.

If it is an ordinance involving the expenditure of money it would, of course, be included among those specified in section 2 of this act as remaining inoperative for sixty days and could not, therefore, be declared to be an emergency measure to go into effect immediately.

The word "involve" is defined as follows.

"To include or contain; especially to contain implicitly; to have in itself a relative significance to (something else); to connect with (something) as a natural or logical conseqence or effect; to imply."

Webster's Dictionary.

"To bring into a common relation or connection; hence, to include as a necessary or logical consequence; imply; comprise."

Century Dictionary.

As I view the matter, the ordinance increasing or decreasing the salary of a mayor, or fixing the salary of a mayor at a greater or lesser figure, since it provides for the salary of such mayor to be expended as the duties of the office are performed, would necessarily involve the expenditure of money. Such being the case, I am of the opinion that such an ordinance is clearly within the provisions of paragraph 2 of section 2 of the initiative and referendum act, and, consequently, will not become effective in less than sixty days after its passage.

Section 4213 of the General Code, in part set out in your inquiry, is in part a codification of section 1536-633 of the Revised Statutes (Municipal Code, section 126), which provides in part as follows:

"Council shall fix the salaries of all officers, clerks and employes in the city government * * *. 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; * * *."

The language that "Council shall fix the salaries of all officers, clerks and employes in the city government" is not contained in section 4213, General Code, but since said section 4213, General Code, is included under the head of "Council" such language would necessarily be understood in reading said section 4213.

It has been held in State ex rel. Ferry vs. Board of Education, 21 O. C. C., 785, that the officers mentioned in section 20, article 2 of the Constitution of Ohio do not refer to either members of a board of school examiners or other officers of a municipal corporation. What is now section 4213 of the General Code was enacted so as to apply to cities the same principle as that contained in the Constitution of Ohio in reference to the officers therein mentioned, which officers are created by the General Assembly and whose salary is to be fixed by that body. We may, therefore, dismiss any consideration of the constitutional provision in reference to the question at issue.

Council has the sole authority to fix the salaries of the officers and employes of a municipality, and the inhibition of the statute, as I view it, is against council effecting the salary of an officer or employe during the term for which he is serving when the ordinance was passed. I reach this conclusion in analogy to the holding of the court in reference to the constitutional provision found in the case of State ex rel vs. Rains, Auditor, 49 Ohio State, 580, wherein it is held that a statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20 of article 2 of the Constitution of this state, in so far as it may effect the salary of an incumbent of the office during the term which he was serving when the statute was enacted.

Paragraph 2 of section 2 of the initiative and referendum act declares that no ordinance involving the expenditure of money shall become effective in less than sixty days. An ordinance fixing salaries having been passed by council its action as to such ordinance is wholly completed, and the ordinance simply lies inoperative sixty days, at the end of which time it goes into effect, if referendum is not petitioned for.

Therefore, an ordinance fixing salaries which either increases or diminishes such salaries passed by council prior to the officer or employe, whose salary is so fixed, entering upon his term, while it remains inoperative sixty days, yet in so far as the officer is concerned, is, as I view it, a valid ordinance fixing his salary as determined by such ordinances at the expiration of said sixty days. Such officer or employe would, therefore, be entitled to the salary under the old ordinance until the new ordinance would go into operation at which time he would be entitled to the salary as fixed by the new ordinance. In other words, it would seem to me that the ordinance having been passed prior to the officer or employe entering upon his duties and merely the operation of the same being postponed, it could not be considered that such change, due to the new ordinance going into operation after the officer or employe entered upon his duty, increases or diminishes his salary as the case may be, within the meaning of section 4213 of the General Code.

You ask whether the present city council may at any time before December 31st midnight pass an ordinance which would increase or diminish the salary of the mayor who takes office January 1, 1912.

Section 4227 of the General Code declares that ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council, and section 4234, General Code, provides that every ordinance and resolution of council shall before it goes into effect be presented to the mayor for approval, and that he shall have ten days after its passage or

adoption to return it to council if he does not approve it, and further that if the mayor disapprove of an ordinance or resolution or any part thereof, council may after ten days reconsider it, and if upon reconsideration it is approved by the vote of two-thirds of all the members, it shall then take effect as if signed by the mayor.

It would seem to me, therefore, that no ordinance or resolution can be considered as fully passed until such ordinance has received the signature of the presiding officer and clerk and the signature of the mayor approving it, or if he disaproves, passed by two-thirds of council.

Therefore, I am of the opinion that such ordinance would have to receive, before it could be considered as finally passed, the action above mentioned.

Therefore, it would seem to me that an ordinance passed before December 31st midnight not having received the action above indicated could not be considered as a valid ordinance. If before that time such ordinance has received the above indicated action it would be considered as an ordinance passed by the outgoing council, but such ordinance would, under the provisions of the initiative and referendum act, not become effective until sixty days after the passage thereof. If an ordinance increasing or diminishing the salary of a mayor who takes office January 1st, 1912, does receive such action prior to December 31st, midnight, I am of the opinion that the mayor would be entitled to the salary fixed by the ordinance which the new ordinance supersedes up to the time such new ordinance becomes effective under the initiative and referendum act, and thereafter would be entitled to the salary under the new ordinance.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Village Solicitors)

32.

VILLAGE—LIABILITY FOR MEDICAL SERVICES RENDERED QUARANTINED FAMILY UPON ORDER OF HEALTH OFFICER.

A village is required, by the statutes, to pay expenses incurred by its health officer in quarantine cases when the family is unable to meet the same, and this obligation extends to medical services rendered the family during quarantine.

COLUMBUS, OHIO, January 17, 1911.

MR. W. R. HARE, *Village Solicitor, Upper Sandusky, Ohio.*

DEAR SIR:—Your communication of January 12th, asking for my opinion on the following state of facts, is received:

> "Villages have no boards of health, but a health officer. In this village we have such an officer, and there was reported to him a family in indigent circumstances, one of whose members was afflicted with scarlet fever; the house was quarantined, the attending physician continued until the quarantine was lifted; he presented his bill for services to the village council, approved by the health officer, and the council refused payment for the reason that the village has no 'poor fund,' while the township has, and that inasmuch as the quarantined family was also a resident of the township as well as living in the village, the township should pay the bill."

Section 4436 of the General Code is as follows:

> "When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

Section 4451, General Code, provides:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary ordinance and pay the expense so incurred and certified. * * *"

It is my opinion that it is obligatory upon council to pay the expenses of the physician for services rendered a family during quarantine placed upon them by the health officer of the village. If they have no fund for the purpose of paying the physician for his services rendered this family they must provide it.

In support of my opinion, I refer you to the case of State v. Massillon, 11 Circuit Decisions, p. 249-255.

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

42.

MAYOR—POWER TO CAST DECIDING VOTE IN ELECTION OF OFFICER BY COUNCIL AND IN CONFIRMATION OF HIS APPOINTMENTS—INCOMPATIBLE FUNCTIONS.

A mayor may cast the deciding vote in case of a tie in council, in an election of an officer required to be elected by council.

In the question of a confirmation by council of a mayor's appointment, the council's action is intended as a check upon the appointment of the mayor and to allow the mayor to cast the deciding vote in such case would effect a violation of the rule of law which prohibits one officer from performing two incompatible functions.

COLUMBUS, OHIO, January 20, 1911.

HON. CHANCE E. DEWALD, *Village Solicitor, Crestline, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 22d, requesting my opinion upon the following questions:

> "1. May the mayor of a village cast the deciding vote, in case of a tie, in council, upon the question of the election of an officer required to be elected by council?
>
> "2. May the mayor of a village cast the deciding vote in case of a tie in council, upon the question of the confirmation of an appointment made by the mayor?"

With respect to your first question, I beg to state that the attorney general has heretofore held, in an opinion addressed to the Bureau of Inspection and Supervision of Public Offices, that a village mayor may cast the deciding vote in council, upon the election of an officer of the village required to be chosen by council. (Annual Report Attorney General for the year 1907, page 152.) In this holding I concur.

Your second question is more difficult. It is true that section 4255 of the General Code provides as to the village mayor, that "he shall be the president of the council and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie," and that said section, by necessary implication, confers upon the mayor the right to vote as a member of the council in case of a tie. It is also true that section 4363 of the General Code provides that "the street commissioner shall be appointed by the mayor and confirmed by council for a term of one year * * *," and that there are similar provisions with respect to other minor officers of the village. In strict logic, therefore, the mayor would be entitled to vote in case of a tie, upon the question of the confirmation of one of his own appointments, inasmuch as he would seem to be entitled to vote upon any question properly coming before council in case of a tie.

There is a principle, however, which, in my judgment, precludes the mayor from voting on this question in case of tie. It is well settled that, where one

public authority is required by law to discharge official functions adversely to others to be discharged by another public authority, the two authorities may not be combined in one individual. This is what is known as the doctrine of common law incompatibility of offices. In a case like the one at hand, this principle would, in my judgment, operate as a rule of statutory construction; that is to say, statutes are always construed, where questions of implication are concerned, so as to accord with sound public policy. The implication then, by which the mayor is entitled to vote in council in case of a tie would be restricted to such cases in which his vote, if cast, would not affect an act of council designed to be a check upon his action as an executive.

I am, therefore, of the opinion that, upon the question of the confirmation of one of his own appointments, the village mayor is not entitled to vote in case of tie. A tie vote in council in such a case is in itself failure to confirm the appointment.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

61.

ACTING MAYOR—PRESIDENT OF COUNCIL MAY NOT EXERCISE JUDICIAL FUNCTIONS IN MAYOR'S ABSENCE.

As there have been no changes in the statutory provisions upon which was based the decision of State v. Hance, holding that the president of the council in villages shall not be permitted to exercise judicial functions in the absence of the mayor, that decision must still be allowed to govern.

COLUMBUS, OHIO, January 25, 1911.

HON. C. N. MOORE, *Village Solicitor, Utica, Ohio.*

DEAR SIR:—I have your letter of January 12, 1911, in which you make the following statement:

> "In the case of State v. Hance, 26 C. C., 273, it is decided that when the president of the council in villages becomes acting mayor in the absence or disability of the mayor, the powers which he may exercise do not include judicial functions. This decision was made under section 200 of the Municipal Code, which, as I view it, was changed by the act of the legislature to amend section 195 of the Municipal Code, passed in 1908 (section 4216, General Code). The latter act adds these words to the original, 'and shall have the same powers and perform the same duties as the mayor.'"

You ask whether the acting mayor, in view of the decision of the circuit court in the case of State v. Hance, 16 Circuit Decisions, 273, can sit in the hearing of cases or impose fines.

The amendment of the legislature, which you refer to, passed April 30, 1908, 99 O. L., 246, is an amendment to original section 195 of the original act, 1536-849 Bates Revised Statutes, and is now incorporated in the General Code as section 4216, and is found in Subdivision 1 of Division 5, providing for the legislative powers of municipal corporations; while the section upon which the

decision of the circuit court was rendered in the Hance case is original section 200 of the Municipal Code, section 1536-854 of the Revised Statutes, and is now section 4256 of the General Code, under said Subdivision 2 of Division 5, providing for the executive powers and duties of the officers of villages.

This section 4256, General Code, except for the provision as to the filling of vacancies caused in council when the president pro tem. thereof becomes mayor, is exactly the same as it stood when the circuit court rendered this decision. Therefore, my opinion is that the amendment you refer to having been made to a different section from the section construed by the court in making this decision, has made no changes in the law as construed by the court; especially as I find no additional provisions, from what existed at the time said decision was rendered, conferring any judicial powers upon the president of council when acting as mayor.

I further call your attention to section 4544, General Code, providing for the appointment, upon the recommendation of the mayor, by the council of a justice of the peace or other suitable person, resident of the corporation, as police justice, who shall have concurrent jurisdiction with the mayor in all such cases as are prescribed by law.

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

171.

OFFICES COMPATIBLE — VILLAGE CLERK AND BOOKKEEPER FOR BOARD OF UNION CEMETERY TRUSTEES — INTEREST OF PUBLIC OFFICIALS IN PUBLIC EXPENDITURES — COMPENSATION OF VILLAGE SOLICITOR AS LEGAL ADVISER OF BOARD OF UNION CEMETERY TRUSTEES.

As the expenditure of funds by union cemetery trustees is independent from the municipal administrations, a village clerk may receive compensation from said fund for acting as its bookkeeper.

As the village solicitor is not an officer of the village, he may be compensated by said board for legal services rendered for it.

COLUMBUS, OHIO, March 9, 1911.

HON. CHARLES J. FORD, *Village Solicitor, Geneva, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 8th, in which you request my opinion upon the following questions:

> '1. May a village clerk lawfully receive compensation for acting as bookkeeper of a board of trustees of a joint cemetery owned by the township and the village?
>
> "2. May the village solicitor lawfully receive compensation for services rendered to such board of trustees?"

While section 4192 authorizes a levy of taxes within the municipal corporation for the support and maintenance of a union cemetery by a joint board consisting of the council of the corporation and the trustees of the township, the expenditure of the moneys so raised seems to be within the power of the trus-

tees of the cemetery (section 4189, G. C.). No portion of the moneys themselves seems to be required to be kept in the treasury of the municipality or disbursed therefrom.

Whether or not this is the intent of the law, I am of the opinion that if, in fact, the moneys of the board of cemetery trustees are so held and disbursed, independently of the treasury of the municipality, the payment of compensation to a bookkeeper would clearly not be "an expenditure of money on the part of the corporation." Accordingly, section 3808, General Code, which prohibits an officer of a corporation from having any interest in such expenditure, other than his fixed compensation, would not apply to or prohibit an officer of a village from receiving money for services performed as bookkeeper for the board of trustees of a cemetery owned jointly by the village and by a township.

With respect to the village solicitor, the question is even easier of solution. The solicitor is not an officer of the village; he is a mere employe. See section 4220, General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

B 254.

POOR OF VILLAGE—DUTY OF COUNCIL AND TOWNSHIP TRUSTEES TO CARE FOR—"PROPER OFFICER" OF VILLAGE.

By virtue of section 3476, General Code, the council has power to designate a proper official to look after the poor of the municipality when there is no municipal infirmary.

When, however, council has not taken such action, this duty devolves by provision of the same statute aforesaid, upon the township trustees.

COLUMBUS, OHIO, May 19, 1911.

HON. ARTHUR S. LONGBRAKE, *Solicitor Village of Waterville, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the 2d inst., in which you request my opinion as follows:

> "The council of the village of Waterville has directed me to write you in reference to the duty of the village as to the care and maintenance of the poor living within the corporate limits of the village. The facts are as follows: One Mrs. Nye, living within the corporate limits of the village is very ill and unable to be taken to the county infirmary, and unable to care for herself, being wholly without means, and it is necessary that some one shall look after her.
>
> "Waterville village is situated wholly within and is a part of Waterville township, and the trustees of the township refuse to care for her, claiming that it is the duty of the corporation to do so, and the matter was referred to me as solicitor for the village, and being uncertain as to whose duty it is to care for her, I was directed to write to you for information as above stated. The council further desired to know out of what fund the payment shall be made in the event you rule that the corporation is liable for the support.
>
> "I have examined the Code in regard to this matter, especially sections 4089 to 4096, which seem to apply only to cities and not to villages,

and to sections 3476 to 3496, which seem to apply most nearly in this case.

"In reference to these last mentioned sections, I would also like an opinion from you as to who is meant by proper officer of the municipal corporation. Is it the marshal or the mayor, or should there be an overseer of the poor in villages? Further, how can we go about it, and who is the proper official to notify the infirmary directors to remove such poor person to the infirmary of the county?"

In reply to your inquiry, I would say section 3476 of the General Code is as follows.

"Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

I am of the opinion that by virtue of the above section it is the duty of the township trustees to provide relief for the poor both in the municipality as well as in the township itself. In reference to who is meant by the proper officer of the municipal corporation to look after the poor and destitute in a village, I must confess that the statutes are not specific as to who shall perform this particular duty in villages, for the reason that there is no designated officer whose duty it is to look after the poor and destitute in such villages. I am, however, of the opinion that the council of such village has a legal right to designate a proper officer to look after the poor in the municipality, provided such municipality has not a municipal infirmary, but in the absence of such provision by council it is then clearly the duty of the township trustees to look after such poor and destitute as I have above stated.

I trust that this fully answers your inquiry.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

A 267.

LONGWORTH ACT — WATERWORKS BONDS — LIMITATION PRIOR TO AND AFTER AMENDMENT TO STATUTE.

COLUMBUS, OHIO, June 9, 1911.

HON. PAUL BAINTER, *Village Solicitor, Dresden, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 19th, submitting for my opinion thereon the following question:

"In 1908 the village of Dresden issued bonds in the amount of twenty-five thousand dollars upon vote of the electors, made necessary because such amount was in excess of one per cent. of the tax duplicate and therefore could not be issued in any one year without such submission. The bonds were issued for waterworks purposes, but the waterworks do not pay their running expenses, much less meet the in-

terest on the bonds or pass funds to the sinking fund sufficient to meet the bonds when they come due.

"This amount, twenty-five thousand dollars, is in excess of two and one-half per cent. of the duplicate, but is less than four per cent. of the duplicate, and the entire present bonded indebtedness of the village is less than four per cent. of the duplicate.

"The village now desires to issue bonds for the purpose of defraying its portion of the cost of certain street paving. The proposed issue will not exceed the amount which may lawfully be issued in any one year without a vote of the people. May the village lawfully issue such bonds without a vote of the people?"

You refer to the case of Cleveland ex rel. vs. Cleveland, 13 C. C. R. (N. S.) 436, affirmed by the Supreme Court without report. Without quoting from the decision of the circuit court, per Henry, J., I beg to state that it seems to be broad enough in its scope to exempt from consideration in ascertaining the limit of four per cent. bonds issued in the manner described by you.

It is unnecessary, however, to decide this question and to determine the exact scope of the decision referred to. Your question seems to be based upon the assumption that the limitation of two and one-half per cent., imposed by the provisions of section 3942, General Code, as amended, 101 O. L., 432, controls the question. Such is not the case. Said section 3942 as amended was repealed by the present session of the General Assembly and the old limitation of four per cent. was restored temporarily, so that the law now is that issues of bonds made prior to October, 1911, are governed by the old limitations, and bonds issued after that date are to be governed by the limitations of two and one-half per cent. and five per cent., respectively.

It follows, therefore, that in any event the village of Dresden may, prior to October, 1911, lawfully issue the street improvement bonds in question without submitting said issue to a vote of the electors.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

A 297.

TAXES AND TAXATION—LONGWORTH ACT—EFFECT OF STATUTORY AMENDMENTS UPON LIMITATIONS OF ONE, FOUR AND EIGHT PER CENT—PERCENTAGE BASED UPON DUPLICATE IN FORCE.

The statutes prescribing the limitations of the so-called Longworth act have been frequently amended and their application is attended with much confusion.

During the year 1911, *three separate statutes were in effect which were passed successively and governed different periods,* (a) *One in existence from January* 1 *to February* 24, 1911; (b) *Another passed February* 24, 1911, *governing the period between February* 24 *and October* 1, *and also making provision for the period ensuing after October* 1, *and* (c) *the act of May* 26, 1911, *governing the same periods and repealing the act of April* 24, 1911, *which restored the four and eight per cent. limitations temporarily and provided the two and one-half and five per cent. limitations for the ensuing period.*

The one per cent. limitation by the terms of the original act which has not been affected by the amendments, is to be based upon the total property as "listed and assessed for taxation" and this phrase should be construed to mean as "shown by the grand duplicate in force at the time." This limitation is always to be based upon the duplicate as made up in the previous October and after April 1, *the incoming duplicate may not be anticipated, for the purpose of increasing this one per cent. allowance.*

With respect to the four per cent. limitation; From January 1, 1911, *to February* 24, 1911, *it did not exist, being supplanted by the two and one-half limitation based on the* 1910 *duplicate. From February* 24 *to October* 1, *the limitation has been, and will be, four per cent. based upon the* 1910 *duplicate. From October* 1 *and following, the amount will be two and one-half per cent. based upon the duplicate then in force.*

COLUMBUS, OHIO, July 18, 1911.

HON. D. M. CUPP, *Village Solicitor, Sunbury, Ohio.*

DEAR SIR:—Your note of April 10th has remained unanswered until the present time for two reasons. In the first place, the question concerning which you inquire is one that was affected by legislation pending at the time you submitted the question, as will hereafter more fully appear; in the second place this department has been subjected to an unusual pressure of business during the past few months, so much so that we have gotten considerably behind in our correspondence.

You inquire as to the basis upon which the limitations of the Longworth act, so-called, are to be ascertained during the current fiscal year. You point out that the grand duplicate of the village of Sunbury, as now promulgated, approximates $185,000, but that the appraisement of real estate made during the year 1910, together with the personal property returns made during the spring of this year will, beyond question, produce a grand duplicate for the village during the month of October, 1911, of about $325,000. In ascertaining the amount of bonded indebtedness which may be incurred during the fiscal year without a vote of the people and which may be outstanding at a given time without a vote of the people, the authorities of the village would naturally prefer to be guided by the larger duplicate and desire advice as to whether this course may lawfully be taken.

I shall consider the question of the ascertainment of the one per cent. limitation separately from that relating to the ascertainment of the four per cent. limitation, for reasons which will appear.

The statutes prescribing the limitations in question have been amended with great frequency since the adoption of the original Longworth act in 1902. In answering your question, however, I shall ignore many of the amendments and confine myself to consideration of such only as are material.

The said original Longworth act was in form an amendment of and supplement to section 2835, Revised Statutes, as follows:

> "Section 2835. The * * * council of any municipal corporation * * * shall have the power to issue and sell bonds * * * for any of the purposes provided for in this act * * *
>
> "The bonds herein authorized may be issued for any or all purposes enumerated herein, but the total bonded indebtedness hereafter created in any one fiscal year under the authority of this act by any * * * municipal corporation shall not exceed one (1) per cent. of the total value of all property in such township or municipal corporation, *as listed and assessed for taxation*, except as otherwise provided in this act.
>
> * * * * * * * * * * *
>
> "For the purpose of this act the fiscal year shall hereafter be the calendar year from January 1st to December 31st, inclusive * * *"

Ignoring the numerous amendments, the foregoing portions of the original Longworth act, so-called, were carried into the General Code in 1910 in the following form:

> "Section 3796. In municipal corporations the fiscal year of each office * * * shall terminate on the thirty-first day of December, in each year * * *"
>
> "Section 3939. When it deems it necessary, the council of a municipal corporation * * * may issue and sell bonds * * * for any of the following specific purposes: * * *"
>
> * * * * * * * * * * *
>
> "Section 3940. Such bonds may be issued for any or all of such purposes, but the total bonded indebtedness *created in any one fiscal year* under the authority of the preceding section, by a municipal corporation shall not exceed one per cent. of the total value of all property in such municipal corporation, *as listed and assessed for taxation*, except as hereafter provided in this chapter."

Section 3940, above quoted, was left intact by the act of May 10, 1910, familiarly known as the "Smith-Alsdorf Tax Limitation Law." This act amended sections 3942, 3945, 3948 and 3954, General Code, in such manner as to reduce the four and eight per cent. limitations of the Longworth act to two and one-half and five per cent., respectively. This portion of the act of May 10, 1910, was in turn repealed and the sections therein amended re-enacted by the act of February 24, 1911, restoring temporarily the limitations of four and eight per cent. of the original Longworth act. The following are pertinent provisions of the act of February 24, 1911:

> "Section 3945 (as amended). Such limitations of one per cent. and four per cent., hereinbefore prescribed, shall not affect bonds lawfully issued for such purposes upon the approval of the electors * * *

"Section 2. That from and after the passage of this act and until and including the thirtieth day of September, 1911, the limitations *prescribed in this chapter* shall be applied to and based upon the total value of all property listed and assessed for taxation in such municipal corporation * * * *as determined by the duplicate for the year* 1910; on and after the first day of October, 1911, the four per cent. limitation provided in this chapter shall be reduced to two and one-half per cent., and the eight per cent. limitation provided in this chapter shall be reduced to five per cent., and such reduced limitations shall be applied to and based upon the value of all the property listed and assessed for taxation in such municipal corporation * * * *as determined by the duplicate* then or thereafter in force."

Later, to wit, on May 26, 1911, there was passed and approved an act repealing sections 3939 to 3954, inclusive, of the General Code, being all of the provisions of the original Longworth act included in the General Code, excepting that one which defines the fiscal year. The effect of this act was, of course, to repeal so much of the act of February 24, 1911, as re-enacted sections of the General Code. For such Code sections hereinbefore quoted the following provisions were substituted:

"Section 1. When it deems it necessary the council of a municipal corporation, * * * may issue and sell bonds * * * for any of the following specific purposes: * * *"

"Section 2. Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation * * * shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

The act then proceeds to incorporate certain changes in the provisions of the act of February 24, 1911, restoring the four and the eight per cent. limitations of the original Longworth act. Section 14 of said act of May 26, 1911, is similar to section 2 of the act of February 24, 1911, and provides as follows:

"That from and after the passage of this act and until and including the 30th day of September, 1911, the limitations of four and eight per cent. prescribed in this act shall be applied to and based upon the total value of all property listed and assessed for taxation in such municipal corporation as determined by the duplicate for the year 1910. On and after the first day of October, 1911, the said four per cent. limitation shall be reduced to two and one-half per cent., and the said eight per cent. limitation shall be reduced to five per cent., and such reduced limitations shall be applied to and based upon the value of all the property listed and assessed for taxation in such municipal corporation as determined by the duplicate then or thereafter in force."

It is to be observed that the limitation of one per cent. is not mentioned in said section 14. It is also to be observed that section 2 of the act of February 24, 1911, is not expressly repealed. Inasmuch, however, as section 2 was indissolubly related to sections 3942, 3945, 3948 and 3954 of the General Code, as amended in the act of February 24, 1911, I am of the opinion that the repeal of such sections by the act of May 26, 1911, by implication repeals section 2,

especially in view of section 14 of the act of May 26, 1911, covering all but a part of the subject matter of section 2 of the act of February 24, 1911.

From all the foregoing it will be observed that during the fiscal year beginning on January 1, 1911, three separate statutes were in force pertaining to the limitations upon the power of a municipal corporation to incur bonded indebtedness, as follows.

I. From January 1, 1911, to February 24, original section 3940, General Code, governed the one per cent. limitation, and sections 3942 and 3954, General Code, prescribed the limitations upon the power of a municipal corporation with respect to the amount of the bonded indebtedness outstanding at any one time without and with a vote of the people, respectively.

II. From February 24 to May 26, 1911, the limitation upon the amount of indebtedness which might be incurred in any one fiscal year was governed by original section 3940, General Code, and the other limitations referred to were defined by sections 3942 and 3954, respectively, as amended by the act of February 24, 1911.

III. From May 26, 1911, to the present time, and from the present time to January 1, 1912, the entire subject is governed by the act of May 26, 1911, which said act in turn provides two sets of limitations, viz: (a) the limitations which shall be effective up to and including the 30th of September, 1911; (b) the limitations which shall be operative from and after the 30th of September, 1911.

It will be seen, therefore, that the subject is involved in much confusion.

Directing attention to the one per cent. limitation, the amount of which has never been changed, permit me to point out certain peculiarities thereof. In the first place, the limitation is upon the amount of indebtedness that may be incurred *in any one fiscal year*. There can be no doubt whatever that the fiscal year referred to is the calendar year beginning with January 1st. At first blush, it would seem unreasonable to suppose that the General Assembly intended, in passing the original Longworth act, that more than one standard or basis for computing the one per cent. should be used in any one fiscal year. On the other hand, however, every calendar year witnesses the existence of two separate amounts, ascertained by computation of the total value of all property within the corporation as listed and assessed for taxation, regardless of the manner in which amounts are computed. That is to say, from January to April of a given year the total value of all property within a corporation as listed and assessed for taxation must be the total value as assessed upon the returns of the preceding year as to personal property, and at the last quadrennial appraisement as to real property; after the first of April in any year and at all times during the year following the quadrennial appraisement of real property the *probable* aggregate value of the property within a corporation as it *will* appear upon the duplicate to be formulated in the month of October following is subject to estimate. Such estimate becomes an ascertained and definite amount when the duplicate is made up by the auditor and transmitted to the treasurer in October.

From all the foregoing, the natural inference that the legislature did not intend that the standard of computation should shift during the fiscal year is greatly weakened and it becomes at least doubtful as to whether or not under the original Longworth Act, regardless of the above quoted amendments, a municipal corporation would not have, so to speak, two standards within any one fiscal year by which its authority to issue bonds without a vote of the electors in such year might be measured, viz:

I. The grand duplicate of the corporation as it exists at the opening of the fiscal year.

II. The grand duplicate of the corporation as it exists at the end of the fiscal year.

I confess that such a dual standard of computation seems irrational, but I am informed that it has been the uniform practice to regard the old duplicate as the basis of computation during the early portion of the year and the new duplicate as the proper basis for computation during the last few months of the year.

Under the old Longworth act a further difficulty was presented in the language "as listed and assessed for taxation." It is reasonable to suppose that the General Assembly used this language designedly and did not mean it to be synonymous with "as shown on the grand duplicate." Now, the word "listed" pertains to the valuation of personal property for taxation and the word "assessed" pertains to the valuation of real property for taxation. Property then is listed and assessed when the valuation is placed upon it by the person making the return or by the assessor of real estate, as the case may be.

On the other hand, however, the word "listed" is used in another sense, namely: in the sense of being placed upon the original tax list. This tax list is made up by the county auditor only after the work of the boards of review or equalization and the board of revision has been completed. The tax list of which the duplicate is a copy is the only source from which *definite* information can be obtained as to the total value of real and personal property in a given corporation. Until it is made up additions and subtractions are continually being made to and from such total by correction of original returns and assessments, as well as by the processes of equalization and revision. It seems unreasonable to suppose that the General Assembly intended that the power of a municipal corporation to issue bonds should be determined by a shifting and uncertain factor. In the absence of any authority, I am of the opinion that by the terms of the original Longworth act the phrase "listed and assessed for taxation" should be construed to mean "as shown by the grand duplicate in force at the time."

Still considering the question as it would have arisen under the original Longworth act, the further inquiry is presented as to the right of the officers of a municipal corporation to anticipate the probable duplicate which will be in force at the end of a given fiscal year. That is to say, assuming that the limitation of one per cent. is to be ascertained in October, might the local authorities lawfully issue bonds which at the time exceed one per cent. of the existing duplicate in amount, but the amount of which will fall short of one per cent. of the incoming duplicate as estimated at the time of the issue? Answering this question under the original Longworth act, I am of the opinion that such authorities would have no right to take such action as above described. The validity of an issue of bonds is determined by conditions existing at the time the issue is made. This is made clear by the provisions of section 3954 that "bonds issued in good faith and for such purposes which at the time of issue were within the limitations herein provided shall be valid obligations of the municipal corporation which issued them." This provision has been retained in all of the subsequent legislation.

Again, this provision clears up a doubtful point arising by virtue of the adoption of the view that both duplicates may be looked to for the ascertainment of the limitation of one per cent. in the same fiscal year. Were it not for this provision municipal corporations would always issue bonds at the peril of a logically possible reduction in the total grand duplicate of the corporation. This fact alone might have justified the rejection of the current view that the corporation is permitted to incur indebtedness from January to October accord-

ing to the one duplicate and from October to January according to the other duplicate.

Because, then, the evident intention of the law is that conditions as they exist at the time a given bonded indebtedness is incurred shall determine the validity of the issue, I am firmly of the opinion that the officers of a municipal corporation might not, under the original Longworth act, anticipate an incoming duplicate even though such duplicate is certain to be greatly in excess of the existing duplicate.

To summarize with respect to the original Longworth act, it is my opinion that under its provisions the one per cent. limitation was always to be based upon the duplicate of the preceding October.

This being the case, it follows from an examination of the amendments above referred to that no material change has been made by either of the acts passed this year with respect to the one per cent. limitation. The act of February 24th merely declares the legislative intent as to the ascertainment of "all property listed and assessed for taxation in such municipal corporation" according to the rule which I have already laid down and provides specifically that it shall be determined by the duplicate for the year 1910 "until and including the 30th day of September, 1911." That the first sentence of section 2 of that act applies to the one per cent. limitation seems to me to be perfectly clear, although I am aware of contention to the contrary. The one per cent. limitation is specifically referred to in the act itself, viz: in section 3945. The language of section 2 does not refer merely to "the limitations prescribed *in this act:* the reference is directly to "the limitations prescribed in this chapter." The "chapter" refered to is that chapter of the General Code in which the sections amended by the act of February 24, 1911, are found.

It follows then that so long as original section 3940 and the act of February 24, 1911, were both in force, viz: until at least May 26, 1911, the one per cent. limitation of the original Longworth act as amended was to be ascertained by consideration of the duplicate delivered by the county auditor to the county treasurer in October, 1910. From and after May 26, 1911, section 14 of that act was in force. As already pointed out, this section did not specifically refer to the one per cent. limitation as subject to determination by the duplicate for the year 1910. On the other hand, however, said section 14 does not indicate any other manner in which the one per cent. limitation shall be ascertained. Regardless then, of the repealing effect of section 14 of the act of May 26, 1911, upon section 2 of the act of February 24, 1911, and in view of the only workable interpretation of the original Longworth act itself, as I have heretofore described the same, I am of the opinion that the one per cent. limitation under said act of May 26, 1911, is to be ascertained in precisely the same way as it would be if the said one per cent. limitation were specifically mentioned in both the sentences of section 14. That is to say, from May 26, 1911, to and including September 30, 1911, the said one per cent. limitation is to be ascertained by taking one per cent. of the duplicate formulated in October, 1910; and from and after September 30, 1911, the said limitation is to be ascertained by consideration of the duplicate to be made up in October, 1911.

From all the foregoing it follows that the law with respect to the one per cent. limitation has undergone no real change and that at the present time the duplicate of the year 1910—not the real property appraisement of that year—must be used as a basis for ascertaining said one per cent. limitation.

While the law with respect to the four per cent. limitation has been changed many times within the past year these changes are comparatively easy to follow.

In the first place, from January 1, 1911, to February 24, 1911, there was no four per cent. limitation. The limitation was two and one-half per cent. and this was based upon the duplicate for the year 1910. From February 24th to September 30th, inclusive, the limitation has been and will be four per cent., based, by the express terms of section 2 of the act of February 24th and section 14 of the act of May 26th, upon the duplicate for the year 1910; after September 30, 1911, the four per cent. limitation will be reduced to two and one-half per cent., also by the express terms of section 14 of the act of May 26, 1911, repealing the similar provisions of section 2 of the act of February 24, 1911, and said two and one-half per cent. will be based upon the duplicate then in force, to-wit: the duplicate of the year 1911.

The questions which you have submitted are very difficult; the more so in view of the fact that, strangely enough, there seems to be no authority whatever in this state as to the proper construction of the Longworth act upon the particular point concerning which you inquire. I have given weight in deciding certain phases of this question to the established custom of municipal corporations and to the rulings of attorneys who have been passing upon their bonds. I have not found such customs and rulings to be uniform, but have followed the majority opinion, so to speak. At the same time I assure you that the foregoing sets forth my own best judgment in the matter. I hope it may be of service to you.

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

C 304.

SINKING FUND TRUSTEES—RIGHT TO PURCHASE BONDS OF VILLAGE AND STOP ADVERTISEMENT FOR THE SALE OF SAME.

After a village has commenced advertisement to sell bonds, the same may be stopped and the bonds sold to the sinking fund trustees if they see fit to purchase the same at par and accrued interest.

The purchase of the property for which the bonds were issued may then be sold without delay.

COLUMBUS, OHIO, July 22, 1911.

HON. ALLEN B. NICHOLS, *Solicitor Village of Batavia, Batavia, Ohio.*

DEAR SIR:—Your letter of July 19th is received in which you give the following statement of facts:

> "On July 3 the council of the village of Batavia, Ohio, under the Longworth act, as amended May 15, 1911, by resolution accepted an offer of two parties in Batavia to sell to the town two lots for the sum of $1,600, which resolution was passed unanimously; and that thereupon council passed resolutions, according to law, to issue bonds in the sum of $1,600, said bonds to be sold August 7th, and that advertisement is now running; that your sinking fund trustees found that there is sufficient money in the sinking fund of your village, which is in the bank lying idle, to take care of the entire amount of the bonds, and you also state that the sinking fund trustees would like to take these bonds now and save the interest until October. You request my opinion upon the following question, viz:

"Can the sinking fund trustees of your village at this time stop advertisement and take the bonds and buy the property at once?"

In reply I desire to say that section 4514 of the General Code, provides that:

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner."

Said section makes it the duty of your sinking fund trustees to invest all moneys lying idle in said fund in bonds of the United States, etc., which includes bonds of municipal corporations.

Section 3922 of the General Code provides as follows:

"When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer to the board of commissioners of the sinking fund of the city school district such bonds or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds, or any part thereof."

Construing the two sections above quoted, I am of the legal opinion that in the first instance it was the duty of the council of your village to have offered said bonds to the sinking fund trustees under the provisions of the last above quoted sections; and I am further of the opinion that in view of said fact that the statute gives the option to the trustees of the sinking fund to purchase all bonds issued by any municipal corporation, according to law, your council at this time may legally stop the advertisement, and that your sinking fund trustees have ample legal authority to take the bonds at par and accrued interest, and consequently the proposition of the right to buy the property at once of necessity follows.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

351.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—BOND ISSUES FOR STREET IMPROVEMENTS IN ANTICIPATION OF ASSESSMENTS NOT WITHIN LIMITATIONS—BOND ISSUES FOR VILLAGE PORTION WITHIN FIVE AND TEN MILL LIMITATIONS.

COLUMBUS, OHIO, September 8, 1911.

HON. I. H. HUGGETT, *Solicitor for the Village of Chagrin Falls, Cleveland, Ohio.*

DEAR SIR:—In your letter of August 25th you ask whether a levy for the purpose of paying the principal and interest of bonds issued by a village for street improvement purposes, without a vote of the people, may be made under the provisions of the Smith bill, so called.

Without quoting the sections of the Smith bill, which you have before you, permit me to state that in my opinion the power of a village to issue street improvement bonds is unimpaired by the Smith bill. Such bonds, however, as are issued without a vote of the people must be met by taxes levied within the five-mill and ten-mill limitations of the law in question.

I may add, also, that the Smith bill has no application at all to bonds issued in anticipation of the collection of assessments. Its provisions apply only to the raising of revenue by taxation on the general duplicate. In the case of street improvement the Smith bill is to be taken into consideration only in determining what portion of the debt of the city incurred in paying for *its portion* of the improvement may be paid in any one year by general tax levy.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

F 352.

OHIO STATE BUILDING CODE—PRIVATE DWELLINGS NOT INCLUDED—POWER OF COUNCIL TO REGULATE—"IN CONFLICT WITH"—APPROVAL OF PLANS BY STATE AND MUNICIPAL AUTHORITIES.

The Ohio State Building Code is intended to apply only to certain enumerated classes of buildings. Part IV thereof, with reference to sanitation, cannot be construed to apply to private dwellings.

Council may make regulations with respect to the matters covered by the Building Code under the restriction that the same shall not be "contrary to, in opposition to, or at variance with the provisions of the code." Council may not, therefore, compel or permit a higher grade of material or a larger size of pipe, than is provided for by the State Building Code.

Plans, specifications and details must be approved by both the proper state and municipal authorities within the language of the act.

COLUMBUS, OHIO, September 11, 1911.

HON. JOHN L. CANNON, *Village Solicitor, Cleveland Heights, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of August 14th, and to reply to the several questions therein contained, regretting that the large volume of business in this office has delayed answering until this time. You ask for an opinion upon the following:

"1. Does the Ohio State Building Code—Part Four, Sanitation—apply to all classes of buildings, including dwellings?"

While the title of the act seems to refer to "public and *other buildings*," and in section 1 there appears to be no limitation as to the duty of the state board of health, building inspector or commissioners, or health departments of municipalities having building or health departments, "to enforce all the provisions in this act contained, in relation to and pertaining to sanitary plumbing," still a search of the various parts and sections of the building code will, I think, make manifest that if there was any intention at all of including dwellings, the language used by the legislature fails to bring them within any of the provisions of the law.

Section 12600-1, found in 102 O. L., 588, to my mind, limits the kind of buildings that must meet the requirements of the code. This section appears to be and is designated "preamble," and is as follows:

"Under part two, which follows, will be found, under their respective titles, the various classes of buildings *covered by this code*, together with the special requirements for their respective design, construction and equipment.

"The classification of the various buildings will be found under the following titles, viz:

"Title 1. Theaters and assembly halls.
"Title 2. Churches.
"Title 3. School buildings.
"Title 4. Asylums, hospitals and homes.
"Title 5. Hotels, lodging houses, apartments and tenement houses.
"Title 6. Club and lodge buildings.
"Title 7. Workshops, factories and mercantile establishments."

* * * * * * * * * * *

Title 1 of the act expressly applies to theaters and assembly halls and is found on pages 589 to 618, inclusive, of 102 O. L., sections 12600-2 to 12600-43, inclusive.

Part 2, Title 3, is found on pages 619 to 693, inclusive, 102 O. L., and treats particularly of "school buildings." In section 1 of that title it gives the classification of said school buildings.

The remaining part of the act, pages 693 to 729, inclusive, contains Part 4, Sanitation, to which your inquiry is directed.

An examination of Part 4 discloses that in no section or part of section thereof is any mention made of *dwellings;* so the inference is irresistible that it applies only to the classes of buildings spoken of in the preamble above referred to. This view is strengthened by a consideration of the penal sections of the building code. While it is provided that any violation of the requirements as to public buildings and the other classes of buildings included in the preamble shall be punished in the manner as in said penal sections provided, you will find no provision for any penalty against the owner, or other person having charge of a dwelling. I therefore conclude that Part Four does not apply to dwellings.

"2. Do the words 'not in conflict' and 'not in direct conflict,' in section 5, permit of the interpretation that nothing which this code permits can be prohibited, and nothing which it prohibits can be per-

mitted? Or, can a council compel a higher grade of material or larger size of pipe to be used, or simply permit it?"

Section 5 of the building code (page 587, 102 O. L.) provides as follows:

> "Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions in this act contained, nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act. Where the use of another fixture, device or construction is desired at variance with what is described in this statute, plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in section 1 for examination and approval and, if required, actual tests shall be made to the complete satisfaction of said state and municipal authorities that the fixture, device or construction proposed answers to all intents and purposes the fixture, device or construction hereafter described in this statute; instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests."

It will be noted that the words "not in conflict" in the first instance refer to the further and additional regulations which councils of municipalities might make to regulations heretofore adopted; while the words "not in *direct* conflict" refer to the modification or repeal by the new building code of any portions of any building code adopted by a municipal corporation.

The word "conflict" is used in the sense of "being in opposition to, being contrary to, or at variance with," and I can see no added meaning by the use of the term "direct" in the last instance, where the conflict is spoken of in the section. So long as the further and additional regulations are not contrary to or at variance with the provisions of the code, council is not limited, and so long as the provisions of the municipal building code are not contrary to or at variance with, or in opposition to, the provisions of the state building code it could not be interpreted to modify or repeal any portions of the municipal building code.

A council of a municipality certainly could not compel or permit a higher grade of material or a larger size of pipe as a provision of the municipal building code than is provided for by the state building code, because such regulations would be in conflict with the state law.

> "3. Do the words 'proper state and municipal authorities' mentioned in section 1 for 'examination and approval,' in section 5, mean that such approval must be concurred in by both, or that each in their separate jurisdictions may give such approval?"

That portion of section 5 about which you inquire affords an exception in the character of a fixture, device or construction to the fixture, device or construction provided for in the state building code. It is eminently proper that before such exception would be allowed that it be passed upon by those whose business and duty it is to be convinced that the fixture, device or construction would be amply sufficient for the purposes required, and since the legislature saw fit to join together the state and municipal authorities I can see no reason

for reading the phrase in any other manner than literally. The provision is that the plans, specifications and details shall be furnished "to the proper state *and* municipal authorities" for approval. Had it been intended to have such plans, specifications and details furnished to either the one or the other of the aforesaid authorities it would have been very easy for the legislature to so provide. The language should be read in its ordinary meaning, and in my opinion the approval mentioned in section 5 must be concurred in by both the state and municipal authorities before the use of another fixture, device or construction at variance with what is described in the statute would be permitted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General

384.

INITIATIVE AND REFERENDUM ACT—APPLICATION TO VILLAGE AND CITY COUNCILS.

From a general construction of the initiative and referendum act, sections 4227-1 and 4227-2 apply to acts of village council as well as to those of a city council.

COLUMBUS, OHIO, September 22, 1911.

HON. JOHN J. ACOMB, *Solicitor for Pleasant Ridge, Cincinnati, Ohio.*

DEAR SIR:—Under date of August 24th you ask for my opinion as follows:

> "I am writing to you to obtain your opinion upon a law passed by the 79th general assembly of Ohio, May 31, 1911, approved June 14, 1911, by Governor Harmon, page 521, volume 1102 O. L., entitled 'An act to provide for the initiative and referendum in municipal corporations.'
>
> "Does that law, in your opinion, apply to villages in the state of Ohio? While sections 1 and 2 of the same use the expression 'any municipal corporation,' sections 3 and 4 seem to restrict the said sections (1 and 2) to cities."

The act to provide for initiative and referendum in municipal corporations is known as sections 4227-1 to 4227-5, inclusive, General Code, and is found in 102 O. L., 521.

Section 4227-1, being section 1 of said act, refers exclusively to the initiative feature of said act and does not distinguish between cities and villages, but refers to all municipal corporations.

The same is true of section 4227-2, being section 2 of said act, which refers to the referendum feature of the act.

Section 4227-3, being section 3 of said act, provides as follows:

> "All other acts of city council not included among those specified in section 2 of this act, shall also remain inoperative for sixty days after passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths

> majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

It is clear that the legislature in the enactment of said section sought to differentiate between the acts of a city council and those of a village council, in reference to all subjects not embraced in section 2 of said act. Since the classification of municipalities into cities and villages is recognized as a reasonable classification, I am of the opinion that such section of the act does not show a legislative intent to restrict the general provisions of sections 4227-1 and 4227-2 to cities alone.

Section 4227-4, being section 4 of said act, prescribes the form of petition for initiative and referendum of any act of a *city* council, but does not prescribe any form for such petition on an act of a village council. As the classification of municipalities into cities and villages is considered as a valid classification, I am of the opinion that it is within the power of the legislature to prescribe forms of petition for initiative and referendum in reference to acts of a city council and not to do so in regard to acts of a village council, leaving to the electors of the village the right to prepare such form of petition as seems to cover the requirements of sections 4227-1 and 4227-2, and that, therefore, sections 4227-1 and 4227-2, by their terms applying to all municipal corporations the operation of said sections would not be restricted by the language used in section 4227-4 to cities alone.

Section 4227-5 (paragraph 3), providing penalties for wrongful signing of a petition, is as follows:

> "Every person who is a qualified elector of the state of Ohio, may lawfully sign any of the petitions mentioned in this act, for an initiative or referendum vote, in the municipality where he is entitled to vote. Any person signing any name other than his own to any petition, or knowingly signing his name more than once upon a petition or petitions for a referendum election upon the same ordinance or measure or upon a petition or petitions proposing the same ordinance or measure, at one election, or who is not at the time of signing his name a qualified elector of the city, or any officer or any person wilfully violating any provision of this state, shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail or workhouse, not exceeding six months, or both."

It will be noted that said paragraph, above set out, provides a penalty for one who signs a petition "who is not at the time of signing his name a qualified elector of the *city*," but does not provide a like penalty for one who is not at the time of signing his name a qualified elector of the *village*. Providing that the act of signing a city petition by one who is not a qualified elector of such city shall be punishable by fine and imprisonment, and not so doing in reference to a village petition, is, to my mind, as it deals with an act which is applicable to the one as well as to the other, and being penal in its nature, an unjust classification and is contrary to the provision that laws of a general nature shall have uniform operation. It cannot, however, be said that the legislature would not have enacted the other provisions of said paragraph separate from said sentence, "or who is not at the time of signing his name a qualified elector of the city."

"One part of a section of a statute may be void for want of conformity to the constitution, without affecting the validity of the remainder, unless the objectionable and unobjectionable portions are essentially and inseparably connected in substance, or, are so interdependent, that the general assembly would not have enacted the one without the other."

Treasurer vs. Bank, 47 O. S. 503 (3d Syl.).

I am, therefore, of the opinion that said sentence "or who is not at the time of signing his name a qualified elector of the city," as found in said paragraph, above set out, might be considered unconstitutional and void, but that it does not affect the remainder thereof, which applies generally to all municipalities.

Furthermore, section 6 of said act provides:

"If any section or portion of this act shall for any reason be declared to be unconstitutional, such invalidity shall not affect any other section or portion thereof.

"All laws and parts of laws in conflict herewith are hereby repealed."

This provision, as I view it, shows a legislative intent that each section of the act under discussion is to be considered as a separate entity and, therefore, sections 1 and 2 of the act, being general in their application, would apply to a village as well as a city.

Coming now to answer your specific inquiry as to whether the act in question applies to villages, I am of the opinion that as sections 4227-1 and 4227-2 apply generally to all municipalities, the provisions thereof are applicable to acts of a village council as well as to those of a city council.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 399.

VILLAGES — OPTION TO PURCHASE ELECTRIC LIGHT PLANT IN A FRANCHISE GRANTED TO THE ELECTRIC LIGHT COMPANY— POWER TO ACCEPT OR REJECT.

When a village grants a franchise to an electric light company with an option therein granted to the village to purchase the plant upon the establishment of a municipal electric light plant, such option is a mere offer which the village may accept or reject at its pleasure.

COLUMBUS, OHIO, September 29, 1911.

HON. PAUL BAINTER, *Village Counsel, Dresden, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 22d, in which you state:

"December 2, 1901, the council of this village passed an ordinance, which was duly published, in which they granted to C. M. Haas, a franchise to erect electric light wires, poles, etc., in the streets and

alleys of the village, and to maintain same for the period of twenty-five years, and at the same time made a contract for having the village lighted with electricity, for the period of ten years, which time expires next December.

"Among other things, the ordinance contains the following:

" 'Section 10. That at any time the said village shall decide to operate its own electric light plant the said C. M. Haas, his successors or assigns, shall select one appraiser, the council of the village of Dresden shall select one appraiser, and the two appraisers so selected shall select a third appraiser, none of which appraisers shall be residents of Dresden, owners of property in Dresden, or in any way interested; and these three appraisers shall fix a value upon said plant and said village shall have the option of purchasing said plant at such appraised value.'

"Now, council have asked me to write you for your opinion as to whether the village need first make any attempt to purchase the said plant from the said C. M. Haas, either in the manner above stated, or in any other manner, before proceeding to build their own plant, when the ten years for which the contract for the public lighting was given shall have expired."

In my opinion, section 10, above quoted, is nothing more nor less than an option to the city to purchase the plant at any time the village shall decide to operate its own electric light plant. The section can as well be read that if the village, at any time after the expiration of the ten year contract for lighting, decide to operate its own electric light plant, it shall have the option of purchasing said plant at an appraised value, to be determined as follows: "The said C. M. Haas, his successors or assigns, shall select one appraiser and the council of the village shall select one appraiser and the two appraisers so selected shall select a third appraiser * * *"

It is apparent that the right to purchase was secured long prior to the time when it was to be exercised and that neither the value of the property nor the ability of the city to pay for it, any price great or small, could be then foreseen. The city was given the right and privilege, without any corresponding obligation to purchase when a certain event happened, to wit: the decision to operate its own electric light plant. It is not to be assumed that either party expected to gain any advantage over the other by this stipulation; they contracted upon terms of equalization; the rights of the parties are precisely the same as if the contract had been silent as to the city's right to purchase, and Mr. Haas, of his own volition, not induced thereto by antecedent obligation had then offered to sell his property to the city at the price to be determined as in section 10 set forth, and the right secured to the city by the incorporation of section 10 of the ordinance was to say whether it would accept or reject this offer. So it is my opinion that the section conferred an option upon the city.

"An option is not a sale. It is not even an agreement for a sale. At best it is but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell."

Hapgood v. McCauslin, 94 N. W. 469 (120 Ia. 218).

"An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land if the holder elects to accept them within the time limited. If the holder

does so elect he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed the owner no longer is bound, but his offer and the option are at an end."

McMillen v. Philadelphia Co. 28 Atl. 220.

I am of the opinion, therefore, that while, if the village as a matter of courtesy desires to notify Mr. Haas that it does not want to consider the option, it can do so, there is no liability on its part to so notify him. I am further of the opinion that when the ten years for which the contract for the public lighting was made shall have expired, the village may proceed to build its own plant without first making any attempt to purchase the plant of Mr. Haas.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 406.

INITIATIVE AND REFERENDUM—BOND ORDINANCE—IMPAIRMENT OF CONTRACT—CONSTITUTIONAL LAW.

An ordinance providing for an issue of bonds and passed after the initiative and referendum act was passed, whilst the resolution declaring the necessity, the ordinance determining to proceed, and the award of the contract, had all been passed prior to the enactment of the initiative and referendum statute, cannot come within the provisions of the initiative and referendum act, as the effect thereof would be an impairment of the obligation of a contract.

COLUMBUS, OHIO, October 3, 1911.

MR. BURLE HUNE, *Village Solicitor, La Rue, Ohio.*

DEAR SIR:—Under date of August 29th you submitted for my opinion the following:

"On the 15th day of March, 1911, the council of the village of La Rue, Ohio, passed a resolution entitled 'Resolution declaring it necessary to improve High street from a point 133 feet south of South street to School street in the village of La Rue, Ohio, by paving the roadway of the same with vitrified brick or asphalt block.' On the 5th day of May, 1911, it passed an ordinance entitled 'Ordinance determining to proceed with the improvement of High street from a point 133 feet south of South street to School street in the village of La Rue, Ohio, by paving.' On the 12th day of June, 1911, the council of the village of La Rue, Ohio, awarded a contract for the construction of the improvement above mentioned, which construction is about half completed, and on the 14th day of August, 1911, the council of said village passed an ordinance entitled 'Ordinance to issue bonds to be paid for by assessments specially levied upon abutting property, to pay the cost and expense of the improvement of High street from a point 133 feet south of South street to School street by paving the roadway.'

"As village solicitor I write you for an opinion as to whether or not section 2 of an act entitled 'An act to provide for the initiative and referendum in municipal corporations' passed May 31, 1911, and ap-

proved by the governor June 14, 1911, Laws of Ohio, Vol. 102, page 521, would require the bond ordinance above mentioned to be held up for a period of sixty days, or would section 28, Article 11 of the Ohio constitution save it, the bond ordinance being based upon and a continuation of the resolution, ordinance and awarding of contract as above mentioned."

From a letter from you it appears that in the resolution declaring the necessity and in the ordinance determining to proceed with the improvement it was stated that the bonds would be issued in anticipation of the collection of assessments specially levied upon property abutting said improvement, and that upon these proceedings the contractural relations with the contractor were established and completed all before the act above mentioned became effective. It further appears from said letter that the money with which to pay the contractor was to be raised by a bond issue and to be paid upon the completion of the work.

Section 28 of Article II of the Ohio Constitution reads in part as follows:

"The general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts."

And your question is whether or not section 2 of the initiative and referendum act approved by the governor June 14th, 1911, is applicable to the bond ordinance mentioned in your inquiry.

You state in your letter that the determining ordinance, passed before the enactment of the initiative and referendum act, set forth that bonds were to be issued in anticipation of the collection of assessments specially levied, and that a contract for the improvement was duly awarded by the council of the village prior to the enactment of such act, which contract provided for the payment to the contractor thereunder at the completion of the work.

The purpose of the bond ordinance passed on August 14th, 1911, was to provide an issue of bonds, the proceeds from the sale of which were to be used to meet the obligation of the contract.

If this ordinance should be considered as within the provisions of the initiative and referendum act, petitions could be filed with the village clerk ordering the submission of such ordinance to a vote of the electors of such village, and the same could not be voted upon until the next general election, which, if it received an affirmative vote of the majority would then go into effect, and if not, could not go into effect at all. This would clearly impair the obligation of the contract as it would in any event postpone the time of payment to the contractor under such contract.

The case of Goodale v. Fennell et al., 27 O. S., 426, while not precisely in point, is instructive.

The second syllabus of said case is as follows:

"Where a statute authorized a municipal corporation to improve its streets, and make assessments on abutting lots to pay the cost thereof, and it has, after taking the necessary steps required by law and the ordinances governing in such cases, made a contract with an individual to do the work for a stipulated price, and binding itself to pay such price in assessments under such statute, which the contractor agrees to accept in full payment, the obligation of the corporation to pay in the manner stipulated cannot be impaired by a subsequent

amendment of such statute, which takes away the power to make an assessment equal to the amount agreed to be paid."

In such case Johnson, J., on page 431 says:

"The obligation of a contract consists in its binding force on the party who made it. This depends on the laws in force when it was made.

"These are necessarily referred to in all contracts as forming part of them, as the measure of the obligation to perform them, and as creating the right acquired by the other party to compel performance. "When the contract is once made, the law then in force defines the duties and rights of the parties under it. Any change which impairs the rights of either party, *or amounts to a denial or obstruction of the rights accruing by a contract*, is obnoxious to this constitutional provision."

(Art. II, Sec. 28, Ohio Constitution.)

The court in the case of Lewis, Auditor, vs. Symmes et al., 61 O. S., 471, at page 487, referring to the case of Goodale vs. Fennell, supra, and other cases, says:

"They merely hold that the constitutional provision against laws impairing contracts preserves not only the contracts themselves, but all existing remedies which are necessary to their practical enforcement."

I am, therefore, of the opinion that the bond issue mentioned in your letter is not within the provisions of the initiative and referendum act for one reason at least, that if it was considered as being within the provisions thereof it would be an impairment of the obligation of the contract theretofore entered into by the village and would be in derogation of section 28, article II of the Ohio Constitution.

TIMOTHY S. HOGAN,
Attorney General.

411.

COUNCIL—ESTIMATE OF TAX LEVY BY RESOLUTION VALID—PUBLICATION NOT REQUIRED.

The estimate of a tax levy to be submitted to the budget commission by council, under the Smith one per cent. law, is a question of a temporary nature and it prescribes no permanent rule of government. Such estimate may, therefore, be determined by resolution which does not require publication.

COLUMBUS, OHIO, October 4, 1911.

HON. C. M. CALDWELL, *Village Solicitor, Waverly, Ohio.*

DEAR SIR:—I beg your pardon for not sooner replying to your letter of July 1st. The Attorney General's office has been almost submerged with work along every conceivable line, and although our force is on duty from early

morning until late at night, we are unable to answer opinions with the promptitude we desire.

You inquire whether or not in view of the provisions of the so-called Smith one per cent. law it is now incumbent upon council to publish a tax levy ordinance. On account of the opinion which I entertain with reference to the publication of the tax levy ordinances prior to the passage of the Smith bill, I I believe it is not necessary to go into a consideration of the question of whether under the Smith one per cent. law the estimates certified by the council to the budget commission should be determined by ordinance or resolution. I assume that the resolution of the council is all that is necessary to be adopted in order to determine the amount that the municipal corporation would ask to be raised for its purposes. But whether resolution or ordinance, the same need not be published in view of the language of Judge Scott in the case of Blanchard, Treasurer, v. Bissell, to be found in 11 Ohio State Reports, 103; Judge Scott, speaking for the court directly upon the point, says this:

> "Beside, we are not aware of any provision in the statute which requires a town council to levy taxes solely by *ordinance*. Such an act, by whatever name it may be called, is properly in the nature of a resolution. It is of a temporary character, and prescribes no permanent rule of government. And though clothed in the forms of an ordinance, it may well have the effect of a resolution without the signature of the presiding officer."

The language of the judge is in no sense obiter because he uses the expression "We are not aware," etc., thus showing the court is one on the subject.

Section 4227 of the General Code provides, inter alia, that ordinances of a general nature, or providing for improvements, shall be published before going into operation.

The estimate provided for in the Smith one per cent. tax law may without any doubt be determined by resolution. It is a question of a temporary character; there is no permanent rule of government prescribed by it.

I do not see what possible good could come from the publication of such an estimate, nor what good could come from the publication of such an ordinance, because the action of council under the old law prior to the Smith law was final if the council kept within the limit. If the council under the old law failed to keep within the limit it was the duty of the auditor to return the resolution or ordinance of the council to the council for correction.

I am, therefore, clearly of the opinion that there is no need for publication of the action of the council in fixing its estimate to be certified to the budget commission, and that the action of the council is properly taken by resolution.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

A 436

COUNCILMAN—QUALIFICATIONS—REMOVAL FROM OTHER CITY WORKS FORFEITURE.

A councilman who removes with his family to another city, even though he intends such removal to be for a temporary period, changes his domicile within the meaning of section 4218, *General Code, and forfeits, thereby, his position as councilman.*

COLUMBUS, OHIO, October 25, 1911.

HON. JOHN S. ROLLER, *Village Solicitor, Lowellville, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of October 9th, 1911, wherein you inquire as follows:

> "A legal question has arisen in the village council here, which it has been deemed proper to submit to you for your consideration and opinion. It is as follows, to wit:
>
> "A member of council of this village, a married man, living with his family, has moved his family to Youngstown, Ohio, merely for temporary purposes, as he states, with no intention of making that place his future residence, but intends to return here, when the temporary purpose which caused the removal ceases to exist, which may be next week, next month, or next year. The member is a large property owner here and is extensively engaged in business in this place, which he personaly supervises, he being here each day during business hours.
>
> "The matter was submitted to the undersigned for opinion and I concluded and so answered council, that the member, notwithstanding removal of his family as stated, for the purpose as stated, still remains a legal member of the council."

In reply to your inquiry as to whether or not said member so removing from the municipality remains a legal member of the council, I desire to cite section 4218 of the General Code, which provides as follows:

> "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

The former provision of the statutes as to the removal of an officer from the municipality was contained in section 1715, Bates Revised Statutes (68 O. L., 115), and provided as follows:

> "When any officer shall remove without the limits of the corporation, such removal shall be deemed a vacating of the office, and the vacancy shall be filled as in other cases; provided, however, that the provisions of this section shall not be held to apply to either the city solicitor or police judge."

It is clear from the provisions of the said section 1715 that when an officer removed from the municipality and thereby established his domicile beyond or outside of the corporation, such act or removal ipso facto created a vacancy of the office, even though such removal was for an indefinite period of time. I believe it was the intent of the legislature to retain this qualification in respect to the domicile of councilmen in the present municipal code in the use of the following phrase:

> "Any member who ceases to possess any of the qualifications herein required or removes from the village forfeits his office."

I am, therefore, of the opinion that said member, when he removes from the village with his family, even though such removal is for an indefinite period of time, that he thereby changes his domicile and forfeits his office, and that he is no longer a legal member of the council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General

452.

NEWSPAPERS — PUBLICATION — ORDINANCES DETERMINING TO PROCEED AND TO EMPLOY VILLAGE SOLICITOR — INITIATIVE AND REFERENDUM ACT — ORDINANCES DETERMINING TO PROCEED AND BOND ISSUE AND SEMI-ANNUAL APPROPRIATION ORDINANCE.

Where there are no newspapers of daily circulation in a municipality, nor newspapers of opposite politics of general circulation therein, an ordinance determining to proceed with a street improvement need be published but once in a weekly newspaper of general circulation in said municipality.

An ordinance determining to proceed will not become effective for sixty days, and until that time, an ordinance for the issuing of bonds cannot be passed. The latter ordinance, however, when validly passed, is not required to lay over for sixty days.

A semi-annual appropriation ordinance does not of itself expend money and is, therefore, not within the initiative and referendum act.

An ordinance providing for the employment of a village solicitor is not of such a general nature as to require publication.

COLUMBUS, OHIO, November 3, 1911.

HON. C. C. MIDDLESWART, *Solicitor for the Village of Matamoras, Marietta, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 22d wherein you state in part as follows:

> "I am writing you as the village solicitor of Matamoras, this county, and would like to have your ruling on the questions involved.
>
> "On August 25, 1911, the village council of Matamoras passed a street improvement ordinance determining to proceed with the improvement of a portion of First street of that village, the necessity resolution therefor having been passed June 19, 1911.
>
> "The improvement ordinance was published on two successive Thursdays, August 31st and September 7, 1911, in the Matamoras En-

terprise, a weekly newspaper of general circulation in the village, there being no daily paper published therein.

"I had publication made twice in order to be perfectly safe, although one publication might have been sufficient.

"R. S. O. section 1695 provides 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.'

"Was one publication of this ordinance sufficient, and is one publication of similar ordinances and resolutions sufficient, or should they be published twice?

"When will this ordinance take effect, ten days from the date of its first publication, September 10, 1911, R. S. O. section 1695, or sixty days from the date of its passage, October 24, 1911, 102 Ohio Laws, page 522, providing no petition for submitting the question to voters is filed?

"Does 102 O. L., pages 521-4, repeal the following clause in R. S. O. section 1695? 'No ordinance shall take effect until the expiration of ten days after the first publication of such notice.'

"On September 19, 1911, an ordinance of the village to issue a bond to provide for its share of the paving of said First street was passed, and the first publication was made in the same paper September 21, 1911.

"When will this bond ordinance take effect, October 2, 1911, ten days after its first publication, R. S. O. section 1695, or November 17, 1911, sixty days after its passage, 102 O. L., page 522, provided, of course, no petition is filed, or should I have waited to pass this bond ordinance until October 24, 1911, the date of the expiration of the improvement ordinance?

"In case, however, no petition to submit the question to the vote of people is filed in either case within the proper time, would not the bond ordinance be just as valid, passed and published as it has been, as if it had been passed and published in accordance with 102 O. L., pages 521-4?

"Does 102 O. L., 522-4, apply to the semi-annual appropriation ordinance, too? If it does, how are the employes of the village to be paid for their services until the time this ordinance would go into effect?

"Is an ordinance employing a village solicitor for the term of two months one of such general nature that it should be published in a village newspaper?"

The first question submitted by you is whether the publication in the Matamoras Enterprise of the ordinance determining to proceed with the improvement of First street was sufficient, and also whether one publication of similar ordinances and resolutions is sufficient.

From the statement made by you in your inquiry to the effect that the Matamoras Enterprise is a weekly newspaper of general circulation in the village, and that there is no daily newspaper published therein, I assume that there are no newspapers in such village which would conform to the requirements of sections 4228 and 4229, General Code.

As I view the law the ordinance determining to proceed with a street improvement is an ordinance of a general nature, and although section 4227, Gen-

eral Code, does not contain the language of section 1695, Revised Statutes, referred to by you in your letter, I have in an opinion rendered to the bureau of inspection and supervision of public offices, under date of August 15, 1911, given it as my opinion that the language of section 1695, Revised Statutes (Sec. 1536-621, General Code), should be restored to section 4227, General Code, in order to give effect to the general scheme of the publication of ordinances.

The language to be restored is as follows:

> "In some newspaper of general circulation in the corporation; if a daily, twice, if a weekly, once, before going into operation"

in place of the language found in section 4227, General Code, as follows:

> "as herein provided for before going into operation."

Such language having been restored to said section 4227, General Code, I am of the opinion that one publication of such ordinance mentioned in your inquiry in such a newspaper is sufficient, there not being in the municipality two newspapers of opposite politics published and of general circulation therein, nor two newspapers of opposite politics of general circulation therein, and that all ordinances of a similar nature shall likewise be published as above indicated.

You next inquire as to the time an ordinance determining to proceed with the street improvement will take effect in view of section 2 of the initiative and referendum act, 102 O. L., 521.

In answer thereto I herewith enclose copy of an opinion rendered to Hon. Elmer T. Boyd, city solicitor, Marion, Ohio, under date of October 4th, 1911.

You next state that on September 17, 1911, an ordinance was passed providing for an issuance of bonds to pay for the share of the village for the paving of First street and that the first publication was made on September 21, 1911, and you desire to know whether or not you should have waited to pass this bond ordinance until October 24th, 1911, the date on which the ordinance determining to proceed would become effective if no petition were filed.

The petition determining to proceed with the improvement would not take effect until sixty days after its passage, and until it would so become effective there was no power in council to pass any ordinance for the issuance of bonds to pay for such improvement.

Your inquiry discloses that the ordinance determining to proceed was passed on August 25th, 1911, and, therefore, such ordinance would not become effective in less than sixty days after its passage, that is not until at least October 24th, and, therefore, as the ordinance for the issuing of bonds was passed on September 19th, it was premature, as such ordinance for the issuance of bonds is based upon the proposition that the ordinance determining to proceed is effective.

I am, therefore, of the opinion that you should have waited until October 24th, 1911, to pass the bond ordinance.

You then ask whether the bond ordinance above mentioned would not become effective in case no petition was filed to submit the question of the determining ordinance to a vote of the people.

As the determining ordinance does not become effective in less than sixty days and as there was no authority in council to pass the bond ordinance until the determining ordinance was effective, the validity of the bond ordinance being based upon the effectiveness of the determining ordinance, the passage

of the bond ordinance, as you have stated, is premature, and, consequently, would not be valid if passed and published before the determining ordinance becomes effective.

The determining ordinance having become effective it would not be necessary that the bond ordinance should also lie sixty days before becoming effective as is shown by opinion which I have heretofore rendered to Hon. M. R. Smith, city solicitor, Conneaut, Ohio, under date of October 25th, 1911.

You next inquire whether the semi-annual appropriation is within the provisions of the initiative and referendum act.

The appropriation ordinance of a municipality divides the money in the general treasury into various sums and sets them apart for specific purposes. While it is true that the appropriation ordinance deals with the revenues derived from taxes, and sets apart for the various departments of the municipal government certain sums to be expended by such department, yet it does not of itself expend the money, and I am, therefore, of the opinion that it is not within the purview of the initiative and referendum act.

You next inquire whether the employment of a village solicitor is one of such general nature as to require publication.

The employment of a village solicitor is for the purpose of advising the various officers in the performance of their duties, and although it is true that part of the moneys derived by taxation is expended to pay the salary of such village solicitor, as fixed by council, yet as I view it, the statute providing for such employment is not such a general nature as is contemplated in the statute, and, therefore, it is not necessary to publish an ordinance so providing.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

456.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWERS TO CONTRACT—HAVE FORMER POWERS OF WATERWORKS TRUSTEES NOW VESTED IN DIRECTOR OF PUBLIC SERVICE.

The board of trustees of public affairs has the powers formerly vested in waterworks trustees. These powers are the same as are now vested in the director of public service and the board of trustees of public affairs shall be governed accordingly. Such board may, therefore, contract with respect to municipal waterworks and must advertise for bids, and conform with other requirements, when a contract involves more than $500.00.

COLUMBUS, OHIO, November 8, 1911.

HON. ALLEN C. AIGLER, *Village Solicitor, Bellevue, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 27th, in which you call attention to the manifest defect in section 4361, General Code, which confers upon the board of trustees of public affairs in villages, all the powers of waterworks trustees, whereas there are no such officers as waterworks trustees mentioned in the code. The specific question which has been raised under this statute is as to the authority of a board of trustees of public affairs of a village by contract to create an indebtedness of more than five hundred dollars, without advertising for competitive bids.

The question as to the meaning of section 4361, General Code, was pre-

sented to this department and a bill prepared under the direction of my predecessor was presented to the general assembly for the purpose of correcting it, so as to make it read:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the director of public service with regard to waterworks."

Your inquiry was delayed, pending the action of the legislature thereon. The general assembly, however, failed to pass the bill referred to.

Section 4361, General Code, provides in part as follows:

> "The board of trustees of public affairs shall have all the power and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks."

As you point out, "this title" does not again mention "trustees of waterworks"; it is, therefore, an ambiguity, apparent upon the face of the codified section. I have, in numerous instances held, following the established weight of authority, that where an ambiguity is created in process of codification the pre-existing law may be looked to for the purpose of ascertaining the intention of the legislature. The pre-existing law being consulted discloses at once the fact that the powers of trustees of waterworks are the same powers now vested in the director of public service of a city by sections 3956 to 3981, General Code. Those powers, in my opinion, are the statutory powers of the board of trustees of public affairs. In addition thereto the board has such powers as may be conferred upon it by ordinance of council.

Coming now to the special question which you ask, namely: as to the power of a board of trustees of public affairs to enter into a contract involving the expenditure of more than five hundred dollars without advertising for bids, I beg to state that in my judgment this question, too, requires reference to the pre-existing law in order to determine the exact intention of the legislature.

Section 3961, General Code, provides that,

> "*Subject to the provisions of this title* the director of public service may make contracts * * * necessary to the full and efficient management and construction of waterworks."

As you know, of course, "this title" provides in section 4326 that the director of public service, in making contracts, must advertise for bids if the expenditure involved exceeds five hundred dollars. Of course, this section does not refer to the trustees of public affairs. I find, however, that sections 3961, et seq., General Code, were sections 2415, et seq., Revised Statutes. These sections of the Revised Statutes applied, as I have pointed out, to the trustees of waterworks. I have already indicated that my opinion that the powers of the trustees of waterworks, under the old law, constitute the powers of the board of trustees of public affairs. Section 2419, Revised Statutes, now in part incorporated in section 3965, General Code, provided as follows:

> "The trustees or board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars, shall cause at least two weeks' notice to be given, in one or more

daily newspapers of general circulation in the corporation, that proposals will be received by the trustees, for the performing of the work specified in such notice; and the trustees shall contract with the lowest bidder, if in their opinion he can be depended on to do the work with ability, promptness, and fidelity; and if such be not the case, the trustees may award the contract to the next lowest bidder, or decline to contract and advertise again."

In my opinion, the limitation of section 2419, Revised Statutes, must be regarded as applying now to the trustees of public affairs, although the section itself is technically repealed.

It is my opinion, therefore, that the board of trustees of public affairs has the right to contract with respect to municipal waterworks, but that in so contracting it must advertise for bids, etc., if the amount involved exceeds five hundred dollars.

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

504a.

MAYOR ELECT — QUALIFICATIONS OF — FAILURE TO TAKE OATH WITHIN TEN DAYS — POWER OF COUNCIL TO DECLARE VACANCY.

Section 4242, requiring an officer-elect to take oath and file his bond within ten days after notification of his election, is not a mandatory but a directory provision.

Failure of a mayor, through mere neglect, to file his bond within such time, confers upon the council, in its discretion, the power to declare the office vacant or to permit said officer to qualify.

COLUMBUS, OHIO, December 22, 1911.

HON. ARTHUR C. LONGBRAKE, *Solicitor, Waterville, Ohio.*

DEAR SIR:—Receipt of your favor of December 18, 1911, is acknowledged, in which you ask an opinion of the following:

"On November 18th the clerk of the village notified the mayor-elect, at the last November election, of his election, and advised him to take the oath of office within ten days thereafter. Whether this notice was the certificate of election provided for by section 5114, I am now unable to state, but I am inclined to think that it was. At any rate, the clerk gave the notice on his own responsibility and without any direction or authority on the part of the council.

"The mayor-elect failed to take the oath of office within the ten days, but did take the oath of office and filed the same with his bond with the clerk of the council on the 2d day of December, 1911.

"The clerk, as I am informed, desires to approve the bond, providing the office has not been forfeited by the laws of the state of Ohio, and providing they may legally do so at the present time. They refer to section 4242 of the General Code and question whether that statute requires the council to declare the office vacant."

You then give your conclusions upon the question with the statutes and authorities upon which you rely. I am glad to have you express your views and cite authorities, as this is of great assistance to me in reaching my conclusion.

Section 5114, General Code, provides as follows:

> "The returns of municipal elections shall be made by the judges and clerks in each precinct to the clerk or auditor of the municipality. Such clerk or auditor, or, in his absence or disability, a person selected by the council, shall call to his assistance the mayor, and, in his presence, make an abstract and ascertain the candidates elected, as herein required with respect to county officers. *Such clerk or auditor shall make a certificate as to each candidate so elected, and cause it to be delivered to him.* If there is no mayor, or he is absent, disabled or a candidate at such election, the clerk or auditor shall call to his assistance a justice of the peace of the county."

The clerk or auditor is required to give a certificate of election to the successful candidates. This is the official notice of election. Nothing short of this certificate will constitute legal notice of election. You are in doubt as to whether this certificate has been issued to the mayor-elect. I take it, however, that due legal notice was given on November 18, 1911.

Section 2, General Code, provides as follows:

> "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."

The mayor-elect has complied with this statute and it therefore cannot apply to the question asked.

Section 7 of the General Code provides:

> "A person elected or appointed to an office who is required by law to give a bond or security previous to the performances of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law."

This section does not fix the time for giving the bond, except that it must be done before entering upon the duties of his office, but it declares the office vacant if such bond is not given within the time and in the manner prescribed by law.

Section 4666, General Code, provides:

> "Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, *and before entering upon his official duties shall*

take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors."

Section 4669, General Code, provides:

"*Each officer required by law or ordinance to give bond shall do so before entering upon the duties of office, except as otherwise provided in this title.* In its discretion council at any time may require each officer to give a new or additional bond. Except that of the auditor or clerk, each bond upon its approval shall be delivered to the auditor or clerk, who shall immediately record it in a record provided for that purpose and file and carefully preserve it in his office. The bond of the auditor or clerk shall be delivered to the treasurer, who shall in like manner record and preserve it."

By virtue of these sections the officers-elect of a municipality must take the oath and give the bond required of them before entering upon the discharge of their duties. This has been done by the mayor-elect in your case.

Section 4242, General Code, provides:

"*The council may declare vacant the office of any* person elected or appointed to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be."

The mayor-elect has not taken the oath of office, or given the bond required of him, within ten days after receiving official notice of his election. This section, in such cases, authorizes council to declare the office vacant. Is it directory or is it mandatory upon council to declare the office vacant?

In case of Poorman vs. County Commissioners, 61 O. S., 506, the syllabus reads:

"If one elected to the office of sheriff fails, without justification, to give an official bond before the first Monday of January next after his election there occurs on that day a vacancy in the office which the county commissioners should fill by appointment."

This case was decided upon section 7, General Code, supra (R. S. section 19), and Revised Statute section 1205, which provided:

"If the sheriff fails to give bond within the time above specified, or fails to give additional sureties on his bond, or a new bond within ten days after he has received written notice that the county commissioners require such additional surety or new bond, then the *said commissioners shall declare the office vacant and* said office shall thereupon be filled as provided by law."

Dillon on Municipal Corporations at section 394, 5th Ed., states the rule as follows:

"* * * Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared."

In case of Cawley v. People, 95 Ill., 249, the first syllabus is as follows:

"The provision of law requiring a county treasurer to file or renew his official bond on or before the first day of December next after his election is not mandatory, but directory. The neglect to file such bond in the prescribed time is but a ground of forfeiture, and is not forfeiture of itself, and a subsequent approval of his bond filed at a later day is a waiver of a right to declare a vacancy in the office."

In case of Chicago v. Gage, 95 Ill., 593, Sheldon, J., at page 622, says:

"* * * The object of the statute was not a change of person to hold the office, but to secure an official bond. That having been given, the person whom the people had elected would seem the more proper person to have the office, than one appointed by the mayor and council.

"It is conceded that after the expiration of the fifteen days the mayor and council would have been fully justified in refusing to accept and approve this bond, because of this default; and in appointing Gage's successor, as in the case of Ross v. People, 78 Ill., 375. Had they so elected Gage's right to the office would have been forfeited, and a person appointed who would give a bond. But (in theory at least) the rights and interests of the public were made equally secure by electing to waive the right of forfeiture and accepting and approving the bond in suit, after the fifteen days."

Section 4242, General Code, controls in your case, as none of the other sections have been violated. This section is directory and not mandatory. That is, council may declare the office vacant upon failure to take the oath of office and give the bond within ten days after notice of election thereto, or it may waive this right and permit the officer-elect to qualify after said ten days has elapsed. Failure to give bond within said ten days is a ground for forfeiture, but is not an actual forfeiture of the office.

Council has not as yet acted, and until it declares the office vacant the officer-elect may proceed to qualify as required by law, and the proper officer or officers may proceed to approve the bond.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(Miscellaneous)

52.

BOARD OF VETERINARY EXAMINERS—POWER TO COMPEL APPLICANT TO APPEAR AND ANSWER ORALLY—DISCRETIONARY RIGHT TO REFUSE CERTIFICATE UPON ABSENCE OF SATISFACTORY EVIDENCE.

COLUMBUS, OHIO, January 23, 1911.

HON. MICHAEL CAHILL, *Eaton, Ohio.*

DEAR SIR:—Your communication of January 19 asking for my construction of section 1174-1, 101 O. L., p. 355, is received.

I beg to advise you that this department has already given a construction of the section referred to in an opinion dated December 1, 1910, addressed to Dr. David S. White, secretary Ohio State Board of Veterinary Examiners, a copy of which is herewith enclosed.

The opinion rendered to Dr. White does not answer specifically your inquiry as to whether oral testimony can be required to be given by the board touching on or bearing upon the practice of the applicant.

I am of the opinion that in the use of the words "satisfactory evidence" this board is given a broad discretionary power, and that under this section they may require that the person making application for a certificate must present himself in person before said board, and the board may ask him, or any other witness, orally any question touching on or bearing upon the practice of the applicant prior to May 21st, 1894, and that if for any cause said applicant fails to satisfy said board of veterinary examiners that he comes within the spirit of this law, then said board not only has a right, but it is their duty to refuse to grant said applicant a certificate as provided in this section, and the act of said board in refusing to grant such certificate being discretionary, is not reviewable unless there has been manifest abuse of such discretionary power.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

Enclosure.

62.

MUNICIPAL PAWN SHOPS—CONSTITUTIONALITY—PUBLIC PURPOSE.

A bill to authorize cities to establish, regulate and maintain municipal pawn departments and to provide means therefor, by empowering council to levy and collect a tax on the property of the municipality, is for a "public purpose" and its burdens may be borne by the municipality whose citizens receive the benefit thereof.

The constitutionality of said bill may not, therefore, be assailed.

COLUMBUS, OHIO, January 25, 1911.

HON. JOSEPH F. BERTSCH, *Columbus, Ohio.*

DEAR SIR:—You request my opinion as to the constitutionality of House bill No. 63, entitled

"A bill to authorize cities to establish, manage, regulate and maintain municipal pawn departments and to provide the means therefor."

I confess that I am averse to passing upon the constitutionality of proposed acts of the General Assembly. I feel that the Attorney General, in considering a bill which has not even been enacted by the General Assembly, should feel even more reluctant to consider this question than a court feels in considering a like question as to an act of the General Assembly.

In this case, however, I have no hesitancy in stating that the bill in question is constitutional. Its constitutionality would be assailed, if at all, because of the provision of section 3, which provides that council,

"For the purpose of creating a municipal pawn fund shall have the power to levy and collect the tax * * * on the taxable property of the municipality * * * until said municipal pawn department becomes self supporting."

In no other particular, so far as I am able to ascertain by the examination of the bill, would the rights of the public or of individuals be in any way affected by the enactment of the bill.

There is a principle of constitutional law inherent in the institution of popular government itself which is to the effect that taxation must be for a public purpose. There are many decisions defining what constitutes a *public purpose.* In such examination as I have been able to make of the decisions, however, I have not been able to find any decision in point as relating to the question presented by this bill. My examination, however, satisfies me as to one significant fact, viz: that the trend of judicial opinion with regard to what enterprises and purposes are public enterprises and purposes is decidedly toward a broader application of that term.

The general rule which runs through all of these decisions is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, page 598, et seq. Although the text of this work was written a number of years ago, the principles it sets forth are still applicable, subject only to the remarks above made as to the tendency of the courts, in applying them. The following statements of the learned author are of interest in this connection:

"In the first place, taxation having for its only legitimate object the raising of money for *public purposes* and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power and must therefore be unauthorized. In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. * * *

"It must always be conceded that the proper authority to determine what should and should not constitute a public burden is the *legislative department of the state.* This is not only true for the state at large, but it is true also in respect to each municipality or political division of the state; these inferior corporate existences having only such authority in this regard as the legislature shall confer upon them. And in determining this question the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely

essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. * * * There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and in regard to the one as much as to the other, the decision of that department which alone questions of state policy are addressed must be accepted as conclusive. * * * When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised:

"First, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and

"Second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed."

Tested by these rules, the bill submitted to me in its present form, is undoubtedly constitutional. The General Assembly in enacting it would exercise its judgment to the effect that a public pawn shop is a public utility; this judgment would, in no event, be reviewed by the courts. The pawn department created by the bill is for the benefit of all citizens of the municipality who may desire to avail themselves of its privileges, but its business is limited by section sixteen of the bill to persons who are "settled legal residents of the city" and therefore liable to become public burdens therein. From this it follows that not only is the enterprise one for which taxes may lawfully be levied, but such taxes would be properly levied upon the duplicate of the city.

I may add that there does not seem to be any question as to the application of section 6, Article VIII, of the constitution of Ohio, which provides that,

"The General Assembly never authorized any city * * * to become the stockholders * * * in any * * * corporations, or to raise money for, or loan its credit to, for * * * in aid of, any such * * * corporations * * *"

The enterprise contemplated in the bill is entirely public.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

121.

COUNCIL—MAJORITY A QUORUM TO DO BUSINESS—PASSAGE OF ORDINANCES BY A MAJORITY OF MEMBERS "ELECTED."

As under section 4237, General Code, a majority of the members elected to council shall be a quorum to do business, a health officer may be elected by the vote of three out of five members present at a special meeting, which the sixth councilman was unable to attend because of sickness.

Ordinances, however, shall be passed by virtue of section 4224, General Code, only by a majority vote of all members elected to council.

February 15th, 1911.

HON. A. J. MCNAIR, *Attorney at Law, Cincinnati, Ohio.*

DEAR SIR:—Your favor of February 3d received. You state:

> "I am the town solicitor of Newton, Ohio, and the following point of law has been presented to me, upon which I would like to have your opinion: At a special meeting of council held for the purpose of appointing a health officer, in January, 1911, which was the end of the term for which the old health officer was heretofore appointed, one of the six members of council was sick and unable to attend said meeting. Three members voted for a new physician, a resident of the town, for health officer for the ensuing year; the other two members present voted for the present health officer, a physician, resident of the town. Had the sick member been present, and it is not known now when he can be present, he would have voted for the old health officer, which would have made a tie vote.",

and you inquire:

Whether the new physician referred to in your letter was elected health officer by reason of receiving three votes out of five members of council present and voting.

Section 4237, General Code, provides:

> "A majority of all the members elected shall be a quorum to do business."

Section 4224 provides how ordinances and resolutions of council may be passed, and states that no ordinance shall be passed by council without the concurrence of a majority of all the members elected thereto.

I am of opinion, therefore, that the concurrence of a majority of a quorum may elect members of the board of health and perform any and all other business that may come before council, except the passage of ordinances which require "a majority of all the members elected thereto," and that the physician who received the votes of three members out of five members of council of Newton, Ohio, as stated in your letter, was elected the health officer, even though the council is composed of six members, one being absent from said meeting. This opinion is sustained by the supreme court of Ohio in the case of The State ex rel. William Shinnich, Jr., vs. John A. Green, 27 O. S., 227. In that case the council of the city of Zanesville was composed of eighteen members, all present at the meeting of organization of council; the mayor was act-

ing as president and an election of clerk was had at that meeting. A motion was made by one of the councilmen to elect S. as clerk and nine members out of the eighteen voted, the other nine refraining from voting. It was held that S. was legally elected clerk of council of the city of Zanesville, although he received but nine votes, which was not a majority of all the members elected. The answer to your first question naturally disposes of your second question.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

130.

COUNTY COMMISSIONERS—POWER TO REGULATE VEHICLES IN USE OF COUNTY ROADS.

February 23, 1911.

HON. W. D. SHERWOOD, *County Commissioner, Delaware, Ohio.*

DEAR SIR:—Your favor of February 21st, regarding my decision in respect to hauling over improved roads of the Girls' Industrial Home in your county, is at hand. The opinion to which you refer that I rendered the Girls' Industrial Home was to the effect that the county commissioners cannot legally prevent the said home from hauling coal over the pike in question, *provided the said home complied with the provisions of section* 7459 *of the General Code.*

It is my opinion that the provisions of said section apply to any person, firm or corporation using the said road, or any other roads in your county, and that you have the right as a "board of directors" to regulate "the increased gross weight in quantity greater than thirty-four hundred pounds that may be carried, including weight of vehicles, in vehicles having a width of tire three inches or upwards."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

170.

FEES OF CLERK OF COURTS FOR DISBURSEMENT OF MONEYS RECEIVED BY ORDER OF COURT OR ON JUDGMENTS, OTHER THAN FEES AND COSTS—NO APPLICATION OF STATUTE TO CRIMINAL CASES.

COLUMBUS, OHIO, March 9, 1911.

HON. WM. E. BECK, *Clerk of Courts, New Philadelphia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 3d, in which you submit the following question and request my opinion thereon, viz:

> "Does that part of section 2901 of the General Code which provides that the clerk of court is entitled to a commission of one per cent. on the first thousand dollars and one-fourth of one per cent. on all exceeding one thousand dollars, for receiving and disbursing money other than costs and fees paid to such clerk in pursuance of an order of court, or on judgments, and which has not been collected by the sheriff

or other proper officer on order of execution, to be taxed against a party charged with the payment of such money, apply to criminal cases?"

In reply thereto I desire to say it is my opinion that that part of said section above referred to does not apply to criminal cases, but to civil cases where the clerk receives and disburses money other than costs and fees paid to him in pursuance of an order of court or on judgments.

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

A 175.

CLERK OF COURTS—SUPPLIES, BOOKS, ETC., TO BE FURNISHED BY THE COUNTY COMMISSIONERS.

Books, supplies and necessary things for the office of clerk of courts must be furnished by the county commissioners and these officials may determine in what manner they they shall be supplied.

When the commissioners fail to provide the same, the clerk may order them and the commissioners will be obliged to pay the bill.

COLUMBUS, OHIO, March 11, 1911.

HON. ABRAM W. ALGER, *Clerk Common Pleas Court, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 3d wherein you state:

"I wish your opinion upon the right and duty of the clerk of courts to order the supplies and books and necessary things for the proper conduct of the business of his office and of the courts.

"Our commissioners have passed a resolution that no supplies will be paid for unless the county official files a requisition with them, and then they let them upon bids submitted. At times I find that it is impossible to get things that I need in time, when the judges order them.

"The question is, whether or not I must file a requisition, or can I get them and must they pay for them a reasonable price?"

Section 2872, General Code, provides:

"The county commissioners shall furnish the clerk all blank books, including the printed trial dockets, blanks, stationery, and all things necessary for the prompt discharge of his duty. The clerk may procure all such articles and upon his certificate shall be allowed therefor."

This department recently made a ruling to the effect that, under the provisions of the General Code, just quoted, if the county commissioners actually furnished or offered to furnish the necessary supplies, the clerk is bound to accept the same, it being the duty of the commissioners under section 2872 to furnish him with the things that are necessary for the prompt discharge of his duty. It was also held that, in the event the commissioners failed at any time to supply the necessary books, stationery, etc., the clerk is authorized to procure such articles and obtain allowance therefor on his certificate.

In the opinion referred to it was further suggested that the commissioners should consult with the clerk and in that way determine what supplies he might need.

As to the second part of your question, namely: the necessity of filing a requisition under the rules of the commissioners, "when the judges order supplies," the matter is not clear. Section 1531 of the General Code provides:

> "Upon the written requisition of the court the clerk thereof shall provide it with necessary stationery, and furnish for its use reports of the decisions of the courts of this state and the latest edition of the Revised Statutes and Annotated Codes, which books shall be the property of the county. The expenses so incurred by the clerk shall be paid from the county treasury on the warrant of the county auditor. The performance of such duties by the sheriff, clerk and commissioners respectively may be enforced by the court."

But this section comes under chapter 3 of title 4, and applies only to the circuit court. I find no provision in the General Code that gives the same or similar rights to the courts of common pleas.

I am of the opinion that as a general rule all of your supplies, books and necessary things for the proper conduct of the business of your office should be ordered in such a way as the commissioners determine.

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

186.

BOARD OF EDUCATION OF TOWNSHIP—APPOINTMENT OF OTHER THAN TOWNSHIP CLERK AS ITS CLERK — ELECTION ON BOND ISSUE HELD WHEN CLERK SERVES ILLEGALLY VOID—LEGAL ASSISTANCE OF PROSECUTING ATTORNEY IN CONTROVERSY BETWEEN BOARD OF EDUCATION AND TOWNSHIP CLERK.

An attempt by a township board of education, after April 26, 1910 (the date of the amendment making a township clerk the clerk of the school board), to organize and elect other than the township clerk to the office of clerk of the board is void.

After such an organization, an election held to issue bonds, while the illegally appointed clerk is acting without bond, is void.

As the prosecutor is made by statute the legal adviser of both the township clerk and the township board of education, when a controversy arises between these two, he may defend the side which, in his view, appears just.

COLUMBUS, OHIO, March 21, 1911.

HON. JOHN W. KEELER, *Attorney at Law, West Salem, Ohio.*

MY DEAR SIR:—We are in receipt of request from the Hon. Price Russel asking that we render an opinion to you direct upon the following statement of facts submitted by you, to-wit:

> "Board of education of Homer township organized on first Monday in January, 1910, and B. was elected clerk for one year.

"In November, 1910, E. was elected township clerk and qualified and is now the acting clerk of said township. Also E., on the first Monday of January, 1911, was present in person with his bondsmen and met with the board of education of Homer township. Requested that said board should reorganize; informing them he was ready with his bondsmen to execute any bond they should require and that he was ready to assume the duties of clerk of said board; all of which the said board refused to do. That afterward and on several occasions when the board of said township met, E. was present and offered to give the bond required and enter on his duties. Also E. demanded of B. the books and papers pertaining to the office of clerk of said board of education, which demand B. refused.

"That B. usurping said office has continued with the consent of three members of said board to hold the same. That there is no evidence of any bond having been filed with the auditor of Medina county by the said B. since 1909. That under the direction of the board as above, B., acting as clerk, an election was held February 11, 1911, on a proposition to issue bonds to build additional school buildings. Same carried.

"That sometime since said election said board attempted to reorganize. That at said reorganization or attempted reorganization said board attempted to appoint and did so far as the records show appoint B. to the office of clerk of said board. That B. to all intents and purposes is, under said action of the board still acting as said clerk and that he still refuses to turn over the books and papers of said office to the regularly elected township clerk.

"Query 1: Is the above described election valid, and are the bonds of any value?

"2. What, if any, effect has the action of the board in attempting to reorganize as above by appointing B. clerk and refusing to permit E., the regularly elected township clerk, from qualifying.

"3. Has E., the regularly elected township clerk and clerk of the school board, the right to expect the prosecutor to bring the necessary action against the said B., clerk appointed by the board, to investigate by quo warranto the rights of the parties?"

Section 4747 of the General Code provides:

"The board of education of each school district shall organize on the first Monday of January after the election of the members of such board. One member of the board shall be elected president, one as vice-president, and in township school districts the clerk of the township shall be clerk of the board. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

Section 8 of the General Code provides:

"A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

Section 4747, prior to the amendment of April 28, 1910, read as follows:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president, and a person who may or may not be a member of the board, shall be elected clerk. The president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meetings."

By virtue of the provisions of section 4747, prior to the amendment of April 28, 1910, B. was duly elected clerk of the board of education for one year on the first Monday of January, 1910, and by virtue of section 8 above, he is entitled to hold his said office *until his successor is elected and qualified.*

In answer to your first question I would state that my opinion is that the *election held on February* 11, 1911, on the proposition to issue bonds to build additional school buildings *is valid.*

In answer to your second question would say that as section 4747 was amended on April 28, 1910 (101 O. L., 138), making the township clerk the clerk of the board, *the action of the board* in attempting to reorganize and appoint B. to the office of clerk of the said board was *null and void* and of no force and effect.

Answering your third question I would state that section 4761 of the General Code makes the prosecuting attorney of the county the legal adviser of all boards of education (except in city school districts); and section 2917 makes the prosecuting attorney the legal adviser for all township officers.

It is my opinion, therefore, as there is a controversy between two different parties to whom the prosecuting attorney is by law the legal adviser, it would be perfectly proper for him to decide as to which side the merits of the case belong and to represent that side.

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

226

GUARDIANS OF SEVERAL WARDS OF SAME PARENTS—MANDATORY TO FILE SEPARATE ACCOUNTS.

It is mandatory upon a guardian of two or more wards, children of the same parents, to file separate accounts.

COLUMBUS, OHIO, April 20, 1911.

HON. OSCAR W. NEWMAN, *Attorney at Law, Portsmouth, Ohio.*

MY DEAR MR. NEWMAN:—I am very sorry that delay has ensued in answering your letter regarding the matter of the filing of separate accounts by a guardian of two or more wards, children of the same parents. I distinctly recall receiving your letter and examining into the matter at the time, but in some unaccountable way your letter has been mislaid. Supposing that it had been answered, I dismissed the matter from my mind.

I find the opinion of my predecessor to which you, if I recall correctly, referred in your letter, was based upon certain authorities submitted in an opin-

ion to the probate judge of Mercer county by the prosecuting attorney of that county, and by the probate judge referred to the bureau of inspection and supervision of public offices. That department in turn referred the question to this department and the opinion was to the bureau. The authorities, however, were, I find, returned by this department to the bureau and by the bureau to the probate judge.

It has, therefore, been necessary for me to examine into the question de novo. On so doing I have, however, come to the same conclusion as that at which my predecessor arrived. In one view of the case it does not seem to be reasonable that a guardian of two or more wards, children of the same parents and sharers in the same estate, should be required to file more than one account for all of his wards, especially in view of the fact that the statute permits him to act as guardian of all of such wards under single letters of administration and under a single bond. The statutes do not, however, expressly authorize guardians to file single accounts in such cases, and under similar statutes in other states it has been held repeatedly that separate accounts for each ward are mandatory.

Connelly vs. Weatherby, 33 Ark., 658.
Crow vs. Reed, 38 Ark., 482.
Forteaux vs. LePage, 6 Ia., 123.
Armstrong vs. Walkup, 9 Grattan, 372.
State vs. Foy, 65 N. C., 265.
Wood vs. Black, 84 Ind., 279.

I do not find that the question has ever been decided in Ohio. Giauque in his manual, recommends filing separate accounts.

The foregoing are all the authorities I have been able to find in such search as I have been able to make. In the absence of other authorities which I should be glad to entertain, if there are any, I am of course compelled to follow my predecessor's opinion.

With kind personal regards I am,

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

268.

OFFICES COMPATIBLE—MEMBER OF LEGISLATURE AND SUPERINTENDENT OF A DIVISION OF A CANAL.

COLUMBUS, OHIO, June 14, 1911.

HON. BERNARD BELL, *Massillon, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your inquiry of yesterday which is as follows:

> "Can A., who is a member of the present legislature, hold a position of superintendent of a division of a canal?"

and in reply I must confess that I have been unable to find any statutory inhibition against holding these two positions by the same person. The only restriction I find against a member of the legislature holding any other position is section 15 of the General Code, which is as follows:

"No member of either house of the general assembly shall be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by the funds from the state treasury. A trustee or manager of any such institution, or a member of the state board of agriculture, who accepts a certificate of election to either house of the general assembly, shall forthwith resign as such trustee, manager or member, and in case he neglects or refuses so to do, the office shall be deemed vacated."

I am therefore of the opinion that A., who is a member of the present legislature, can legally hold a position of superintendent of a division of the canal.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

270.

BOARD OF REVIEW—MEMBER HOLDS UNTIL SUCCESSOR ELECTED AND QUALIFIED.

The outgoing member of a board of review of a city holds his position until his successor is appointed and qualified.

COLUMBUS, OHIO, June 14, 1911.

HON. S. D. LANE, *President of Board of Review, Alliance, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your inquiry of June 13th, and also your inquiry of date June 8th, and in which latter inquiry you enclose an endorsement of your central committee of J. W. Teeters for reappointment for member of the board of review of Alliance.

I wish to say first that I will give this matter my careful consideration and will keep your endorsement in mind when the state board of appraisers acts on the matter of reappointment of a member of the board of review for your city.

In your letter of June 13th, you ask as follows:

"On the 8th inst. we wrote inquiring regarding the continuance of Jesse W. Teeters on our board pending the appointment of his successor. Please let us have your opinion on this matter, as we are being detained in our work."

and in your letter of June 8th you write:

"Will you please send to Jesse W. Teeters, the outgoing member of our board, papers qualifying or instructing him to continue on board until his successor is appointed, and oblige?"

and in reply to your two inquiries, I wish to say that section 8 of the General Code provides as follows:

"A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

In an interpretation of the above section, the court said in the case of State ex rel. vs. Killets, 8 Circuit Court Report, 30, at page 32, of the opinion, says:

> "Section 8 is a general law, and passed at an early day under the constitution, and we think, for the express purpose, as far as the constitution will permit, of continuing and extending the term of office of any officer of the state, until such time as his successor shall be elected and qualified, so that there shall be no vacancy in the office. Section 1240 must be read and construed with section 8, as each was undoubtedly passed by the legislature with relation to the other. The constitution provides that the clerk 'shall hold his office for the term of three years, and until his successor shall be elected and qualified.' The statutes provide, when properly construed together, that the term shall continue until the successor is elected and qualified, unless some provision of the constitution prevent; but the constitution does not in this case prevent, but say his term shall continue."

So that, in conclusion, and by reason of the above citations, there being no constitutional or statutory provisions to the contrary, I am of the opinion that Mr. Teeter, the outgoing member of the board of review of the city of Alliance, holds his office as such member of said board until his successor is appointed and qualified; and further, it is not necessary to furnish said Mr. Teeter with any papers or commission to so act as such member until his successor is so appointed and qualified.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

274.

BASEBALL—UNLAWFUL SUNDAY FORENOON—POWER OF COUNCIL TO REGULATE.

Section 13049, *General Code, makes baseball playing on Sunday forenoon a penal offense. Baseball playing in the afternoon, in the absence of regulation or prohibition by council, under authority of section* 3657, *General Code, is not unlawful.*

COLUMBUS, OHIO, June 22, 1911.

REV. JAMES M. BENNETT, *Secretary Manchester Ministerial Association, Manchester, Ohio.*

REV. SIR:—I have your esteemed favor of June 6th in which you inquire as follows:

> "I am writing you by authority of the Manchester ministerial association to inquire into the matter of Sunday baseball. Do the township trustees have any voice concerning it? If not, what officials may act and upon what grounds? Of course the ball ground here is outside of the village corporation."

In reply to this inquiry I desire to state that the recent general assembly amended section 13049, General Code, relating to Sunday observance, so as to read as follows:

"Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden, or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, *baseball playing in the forenoon*, ten pins or other game of similar kind or participates in keeping a low or disorderly house of resort or sells, disposes of or gives away ale, beer, porter or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or house or place is kept, on complaint within twenty days thereafter, shall be fined not more than one hundred dollars or imprisoned in jail not more than six months or both."

As you will observe, this section makes baseball playing Sunday *forenoon* an offense, and the conclusion necessarily follows from the plain wording of this statute that it is not unlawful to participate in baseball games on Sunday afternoon.

Section 3657 of the General Code was also amended at the recent session of the legislature so as to give to councils the power "to regulate, by license or otherwise, restrain or prohibit athletic games, etc." While baseball is not specifically mentioned therein, in my judgment it clearly comes within the classification of an athletic game, and accordingly, I am of the opinion that councils may by ordinance regulate, restrain or prohibit the playing of baseball on Sundays, within the limits of the municipalities over which they exercise control.

A careful search of the statutes on this subject fails to reveal a power resident in township trustees or any other authority, except as above indicated, to prohibit baseball games on Sunday.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

276.

JUSTICE OF PEACE—FILLING VACANCY BY TOWNSHIP TRUSTEES—TERM OF OFFICE OF APPOINTEE AND ELECTION OF SUCCESSOR.

When a vacancy occurs in the office of justice of the peace, the township trustees may fill the vacancy. The appointee shall hold until his successor is elected and qualified, which successor should be elected for a term of four years at the next regular election for justices of the peace to-wit: the first Tuesday after the first Monday in November in the odd numbered year. The successor so elected should qualify on the first day of January following his election.

June 26, 1911.

MR. R. A. MACK, *Gallipolis, Ohio.*

DEAR SIR:—Under date of June 22d you state the following:

"Sometime ago one of the justices of the peace of this township died and another was appointed in his stead. The term of the justice who died expires January, 1914. Does the justice of the peace who was appointed to fill the unexpired term hold his office until January, 1914, or must one be elected this fall? Section 1714 says that the trustees

shall appoint a justice of the peace in case of vacancy and he shall serve until the next regular election of justice of the peace, and until his successor is elected and qualified."

Section 1714 of the General Code provides in part as follows:

"If a vacancy occurs in the office of the justice of the peace by death, * * * the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall *serve until the next regular election for justice of the peace, and until his successor is elected and qualified.* * * *"

Section 1715 of the General Code provides:

"At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, *for the term of four years* commencing on the first day of January next following his election."

Section 4831 of the General Code provides:

"Township officers and justices of the peace shall be chosen by the electors of each township on the first Tuesday after the first Monday in November in the odd numbered years."

As section 1714, supra, provides that the township trustees shall fill the vacancy until the next regular election for justice of the peace and until his successor is elected and qualified, and as section 1715, supra, provides that the justice elected at the next regular election shall serve for a term of four years commencing on the first day of January next following his election, and as section 4831, supra, provides that the regular election for justice of the peace shall be on the first Tuesday after the first Monday in November in the odd numbered years, I am of opinion that the justice of the peace who was appointed to fill the unexpired term will hold his office only until January 1, 1912, and that an election for justice of the peace should be held this fall, which newly elected justice will assume his office on January 1, 1912.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

A 296.

AUTOMOBILES—SPEED REGULATIONS—POWERS OF MUNICIPALITIES —DISPOSITION OF FINES COLLECTED BY MAYOR.

Automobile speed limits are fixed by state law and the municipality has only the power to define what are the business and closely built up portions of its territory for the eight-mile speed limit application.

All fines collected therefore by the mayor, for the violation of these speed provisions, should be turned into the county treasury monthly, in accordance with section 4270, General Code.

COLUMBUS, OHIO, July 15, 1911.

HON. J. W. DUNLAP, *Mayor of Lodi, Lodi, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of July 3, 1911, in which you inquire as follows:

> "I write you for information regarding a point in the state motor vehicle law, and that is in regard to the disposition of fines collected for violating the speed law. There is a diversity of opinion regarding this, especially since the new law has been passed.
>
> "Lodi is an unincorporated village and the offense was committed within the incorporate limits of said village. A fine was imposed and collected. Does it go into the county or village treasury?"

In reply to your inquiry I will say that section 12604 of the General Code provides as follows:

> "Whoever operates a motorcycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 12608 of the General Code provides as follows:

> "The rates of speed mentioned in section twelve thousand six hundred and four, shall not be diminished or prohibited by an ordinance, rule or regulation of a municipality, board or other public authority, but municipalities, by ordinance, may define what are the business and closely built-up portions thereof."

By reason of the above cited sections, it is my opinion that any violation of the speed limit by one operating a motor vehicle is a violation of a state law rather than a violation of any municipal ordinance for the reason that section 12608 of the General Code specifically says that the speed limit fixed by said section 12604 of the General Code shall not be changed by an ordinance or a resolution of a municipality and that the municipality only has the power and authority to define what are the business and closely built-up portions of the respective municipalities of the state.

Section 4270 of the General Code provides as follows:

> "All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over. All fines, penalties, and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

In conclusion, therefore, I am of the opinion that the provisions of section 4270 of the General Code applies to fines collected from those violating the provisions of section 12604 of the General Code, and that such fine so imposed and collected by the mayor in violation of said section 12604 should be paid over to the county treasurer, as provided by section 4270 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 298.

SALE OF ARTICLES BY WEIGHT AND MEASURE—AGREEMENT OF PARTIES—MERE ACCEPTANCE NOT AN AGREEMENT.

All articles enumerated in section 6418-1, General Code, known as the weight law, may be sold either by weight or measure if the parties so expressly agree. The mere acceptance by a purchaser with no understanding that they are sold by measure, would not constitute an agreement, however.

COLUMBUS, OHIO, July 19, 1911.

HON. C. W. GOLDEN, *Mayor, Ironton, Ohio.*

DEAR SIR:—Under date of July 12th you wrote me as follows:

> "I have a great many inquiries regarding the new weight law, passed by the last legislature. The question that arises, is: Can articles, named in this law, be sold by weight or measure either, if both parties agree to the transaction?
>
> "Section 6418-1 reads as follows: 'All articles, hereinafter mentioned, when sold, shall be sold by avoirdupois weight or numerical count (unless by the agreement of all contracting parties).' It also reads 'Whoever sells or offers for sale any article in this section, enumerated in any other manner than herein specified, shall be deemed guilty of misdemeanor, etc.'
>
> "If you have time to consider this matter, I would be very glad if you would give me your opinion."

The law concerning which you inquire is entitled "An act to supplement section 6418 of the General Code, relative to selling articles of merchandise by weight of numerical count," and bears the number 6418-1 and provides as follows:

"All articles hereinafter mentioned, when sold, shall be sold by avoirdupois weight or numerical count, unless by agreement of all contracting parties, viz: * * * (articles here designated). Nothing in this section shall apply to seeds and other articles in sealed packages. The provisions of this act shall in no way apply to goods sold or bought in car lots until said goods are sold at retail. Whoever sells or offers for sale any articles in this section enumerated, in any other manner than herein specified, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than $10 nor more than $100 for the first offense, and not less than $25 nor more than $200 for the second offense, or imprisoned not more than three months, or both."

I am of the opinion that such articles as are named in such law can be sold by weight or measure either if both parties agree to the transaction.

I hold, however, that the mere acceptance by the purchaser of such articles, without any distinct understanding between the parties to the transaction that they are to be sold by measure, would not be sufficient to constitute an agreement of such contracting parties.

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

308.

COUNCILMAN — COMPENSATION FOR ATTENDANCE AT ADJOURNED REGULAR MEETING — MONEY RECEIVED MAY BE DONATED TO CITY BUT NOT REFUNDED.

A councilman who is present at an adjourned regular meeting, though not present at the regular session, is deemed to be present at the meeting within the meaning of section 4209, General Code, providing for compensation of councilmen.

Compensation received for such services is, therefore, rightly earned and can only be returned by said councilmen by way of a donation to the city.

COLUMBUS, OHIO, July 29, 1911.

HON. M. R. SMITH, *Attorney at Law, Conneaut, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of May 10, 1911, and I wish to apologize to you for the delay in answering your inquiries. The delay has been due entirely to the large number of requests which this department has received for consideration. Your letter of inquiry is as follows:

"I received a communication from our city auditor which I think fully explains itself, a copy of which I herewith enclose to you, and I have been requested to get your opinion on this matter, which I think is as fully set out in his letter as I could explain it. Thanking you in advance, I am,"

and the copy of the communication received by you from the city auditor, and to which you refer in your letter, is as follows:

"I am in a controversy with two of the members of the city council. I paid them for last month's services their full pay, there being two regular meetings of the month held on the 10th and the 24th. At the meeting of the 24th they were absent, but it held an adjourned session on the 26th, at which they were present and took part in the business, it being an adjourned session of the 24th, or second meeting of the month.

"As I read the law, they were in attendance at both the regular meetings, and I paid them accordingly. Now they insist on returning the pay for half of the month. I refuse to accept it as a refund for the reason, as above stated, that they were legally present at both the regular meetings of the month, and one of the 26th being an adjourned meeting from or of the 24th, and were legally paid and it could not legally be a refund, and could only be accepted as a donation. Now, I would be glad to have an authoritative opinion in this case. You know the men. Everybody is wrong but them and nothing but the highest attainable authority will satisfy them."

The question which you ask is in substance as to whether or not a councilman who attended the first regular meeting of the council of your city for a certain month, and who also attended an adjourned meeting of the second regular session of the council in and for the same month can now return one-half his monthly salary as a refund on account of his absence from the second regular meeting, although present at an adjourned meeting of the said council of its regular second meeting of the month. In reply to your inquiry, section 4209 of the General Code provides as follows:

"The compensation of members of council, if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties, but shall not exceed one hundred and fifty dollars per year, each, in cities having a population according to the last preceding federal census, of twenty-five thousand, or less. For every thirty thousand additional inhabitants so determined, such compensation may be, but shall not exceed, an additional one hundred dollars per year, each, but the salary shall not exceed twelve hundred dollars per annum, and shall be paid semi-monthly. *A proportionate reduction in his salary shall be made for non-attendance of any member upon any regular or special meeting of council.*"

Inasmuch as the said member of council of your city was present at the first regular meeting of the month and was also present at an adjourned meeting of the second regular meeting of the same month, it is my opinion that within the meaning of the said statute said member of council was present at all of the meetings held during that month, and is, therefore, entitled to his full monthly salary, and if he desires to give back any part of the said salary, it would have to be in the way of a donation to the said city for the reason that he has already earned his salary and he is legally entitled to the same. However, if he desires to return it or to give it to the city, it would have to be either as a gift or a donation.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 318.

SALE AND ABANDONMENT OF WABASH AND ERIE CANAL LANDS—ACT PROVIDING FOR INVALID.

The statutory enactment providing for the sale and abandonment of certain Wabash and Erie Canal lands, 95 O. L., 77, contains irreconcilable provisions and its validity, therefore, fails.

The question, however, is one which must be settled in the courts.

COLUMBUS, OHIO, August 8, 1911.

HON. TIMOTHY T. ANSBERRY, *Defiance, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 29th submitting to me the following question:

> "Our citizens here desire to know who owns the land formerly a part of the Wabash and Erie canals, heretofore abandoned, between the Junction and the Indiana State line, and desire to acquire title thereto to use as an adjunct to our hydraulic dam now under course of construction.
>
> "See Ohio Laws, volume 95, page 77.
>
> "Section 1 abandons the canal.
>
> "Section 2 provides for the sale of the property.
>
> "Section 3 transfers the title, apparently, to the owners of the property through which it ran.
>
> "The title of the act does not indicate the purport of the act. Is this constitutional?"

The act to which you refer is in full as follows:

> "An act to provide for the abandonment and sale of a portion of the Wabash and Erie Canal.
>
> "Be it enacted by the General Assembly of the State of Ohio:
>
> "Section 1. That the portion of the Wabash and Erie Canal, lying between the junction of said canal with the Miami and Erie canal and the lock one mile west from said junction, all in Paulding county, Ohio, be and the same is hereby abandoned.
>
> "Section 2. Said canal lands shall be sold subject to the provisions of section 218-231 of the Revised Statutes of Ohio.
>
> "Section 3. And the land occupied by said canal, towing path and berme banks in total be, and the same is hereby transferred to the owners of the tracts of land through which said canal runs, except so much thereof as has been sold heretofore by the state, but subject to all legal highways and legally established ditches and watercourses along, across and upon the same."

There is considerable ambiguity in this act as between sections two and three thereof, as you point out. Section 218-231 of the Revised Statutes, referred to in said section two, provides in general for the sale of canal lands not necessary for canal purposes and its provisions are not helpful in the solution of the question under consideration. Section three is manifestly inconsistent with section two and both cannot stand. Some authorities hold that the later of two sections in the same act, though passed at the same time, controls;

but I do not find that this doctrine has ever obtained strong sanction in this state. The rule is recognized and proper weight given to it in the syllabus of the case of State ex rel. v. Mulhern, 74 O. S., 363, as follows:

> "1. In giving construction to a legislative act the position in the order of precedence of the several provisions will be given due consideration, but there is no arbitrary rule which requires that a provision found in the later part of the act shall necessarily be given an effect to repeal conflicting provisions in the earlier part of the act.
>
> "2. Where such conflicting provisions are irreconcilable, the court may, if the subject matter is of minor interest, hold the whole act to be inoperative. But where the matter is of vital interest, a court will seek such construction as will make the act enforceable, and in doing so will be governed by the apparent purpose and obvious policy and intent of the general assembly, as gathered from the whole act, even though it results in a disregard of the later provision."

The opinion in this case is very instructive, but I shall not quote from it; suffice it to say that it establishes the rule, in this jurisdiction, that where conflicting provisions are irreconcilable and no general policy can be ascertained the whole act will be held inoperative.

Now, in the case just presented, it is impossible to ascertain the policy of the legislature with respect to the manner of disposing of these canal lands. The intention to abandon the canal is clear, but that intention of itself is imperfect and cannot be carried into effect without some method of disposing of the land. That is to say, the intention cannot be carried into effect as divesting the state of its property in the canal.

Upon the whole, I am satisfied that the act of March 31, 1902, is not a valid act, for the reason that it expresses no definite legislative intent, and that for this reason alone the title of the state in the canal lands in question has never been divested.

The other point which you mention, relating to the title of the act, is not of importance, as our supreme court has held this constitutional requirement to be simply declaratory.

The question, of course, is one that is not to be determined by any expression of my opinion. A number of law suits may be necessary to settle it. I suggest that you take the matter up with the board of public works again, with a view to having that department direct me to take whatever official action in the premises may seem necessary.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

H 236.

CONGRESSMAN-AT-LARGE — METHOD AND TIME OF ELECTION AND NOMINATION.

The election of a congressman-at-large will be held in November of the even numbered years and they will be nominated at the state convention of the respective political parties to be held prior to the elections in the same year.

COLUMBUS, OHIO, August 19, 1911.

CHARLES C. PAVEY, ESQ., *Attorney at Law, 404 Brunson Building, Columbus, Ohio.*

MY DEAR MR. PAVEY:—I herewith beg to acknowledge receipt of your letter of August 14th, 1911, and I wish to say that I regret very much that you were unable to see me at the various times when you called at my office.

I wish further to say that while, under the law, I am limited to giving official opinions to the various state officers and the prosecuting attorneys of the various counties of the state, as a personal favor to you I am herewith answering the inquiries which you submitted, which are as follows:

> "1. When will the election for the congressman-at-large take place?
>
> "2. How will he get his name upon the ticket? By that I mean, will he get his name upon the ticket through the political party nomination, or will there be a separate nomination for this congressman?"

In answer to your first inquiry, I desire to say that the congressman-at-large in this state will be elected in November, 1912, at the regular state election.

In answer to your second inquiry I desire to say that the respective candidates for congressmen-at-large will get their names upon the ticket through and by the nomination of the respective political parties. That is to say, in other words, the candidates for congressmen-at-large will be nominated at the state convention of the respective political parties, which convention will be held next year.

I believe that this fully answers your inquiries, and I remain,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

358.

CHANGE OF NAME OF CORPORATION CREATED BEFORE ADOPTION OF CONSTITUTION — SPECIAL LEGISLATIVE ACT.

Inasmuch as section 8732, General Code, with reference to the acceptance of the Code provisions by corporations created before the adoption of the present constitution is ambiguous, such company, if it desires to preserve its corporate powers intact, should have its name changed by special act of the legislature.

COLUMBUS, OHIO, September 13, 1911.

MESSRS. MULHOLLAND & HARTMAN, *Attorneys at Law, Toledo, Ohio.*

GENTLEMEN:—Further answering your letter of July 21st, I beg to remind

you of the fact, of which you are doubtless aware, that my official powers of an advisory nature extend only to rendering opinions to state officers, both houses of the general assembly, and prosecuting attorneys. Presuming, however, that you have asked me the question which you present with the understanding that it may ultimately come before the secretary of state and department of insurance, I have no hesitancy in answering you as a matter of information.

You inquire whether the Sandusky Life Insurance Company, a company created by special act of the general assembly prior to the adoption of the constitution of 1851, may change its name under the general corporation act of the state, without being amenable to all of the provisions relating to corporations and insurance companies in particular.

You call my attention to section 3234, by which I presume you mean section 3234, Revised Statutes. This section is no longer in existence, but is supplanted by section 8736 of the General Code. Permit me to call attention, in this connection, to section 8732, General Code, formerly section 3233, R. S., which provides as follows:

> "A corporation created before the adoption of the present constitution, and now actually doing business, may accept any of the provisions of this title. When a certified copy of such acceptance is filed with the secretary of state, so much of its charter as is inconsistent with the provisions of this title is hereby repealed."

This section is somewhat ambiguous. It seems to permit the acceptance of a part only of the provisions of the title, which includes, of course, those provisions relating to the organization and powers of insurance companies, and at the same time it provides that when such acceptance is made and the certificate thereof filed with the secretary of state, so much of the charter of the company as is inconsistent, not with the provisions accepted, but with "the provisions of this title," is to be repealed.

This department has not passed upon this question. My own notion of the matter is that it would be much safer if you desire to preserve your corporate powers intact, to have the name of the company changed by special act of the legislature.

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

398.

OFFICES INCOMPATIBLE—TEACHER AND MEMBER OF BOARD OF EDUCATION—TEACHER AND CLERK OF BOARD OF EDUCATION.

The positions of teacher and member of board of education and those of teacher and clerk of board of education cannot be held by one person at the same time.

COLUMBUS, OHIO, September 28, 1911.

MR. JOHN STEWART, *Aid, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 17th, in which you state:

> "As a member of the board of education, I want your opinion on the following:

"Can a member of the board, who is also clerk of the board, teach the school in the district of which he is a member, and still retain his membership and clerkship on the board?

"I am a member of the board of education and also its clerk. The board has hired me to teach the school. Can I teach the school and still retain my membership; or will I have to resign as a member of the board and as clerk?"

In reply to your inquiry I desire to state that section 4757 of the General Code of Ohio reads in part as follows:

"* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. * * *"

Under the foregoing provisions your contract of employment to teach the school of the district of the board of education of which you are a member is clearly illegal and void. If you desire to teach the school you must resign from the board of education. The only safe legal way for you to retain your position as teacher is to enter into a new contract after you have resigned your membership on the board.

I can find no statute which expressly prohibits a clerk of a board of education from being employed as teacher by the board of which he is clerk. Unless there is a conflict between the duties of the two positions, it is apparent they are not inconsistent. Section 7786, General Code, provides in part as follows:

"No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the state commissioner of common schools and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught."

Under the above provisions it is made the duty of the clerk of the board of education to require teachers employed by the board to make the reports therein enumerated before an order may be drawn by the clerk for the payment of their salaries. The clerk is the sole judge of the performance of such duty. It would be within his power to draw an order for the payment of his own salary without having made such report and thereby violate the plain provisions of section 7786, supra. I am clearly of the opinion, therefore, that one person may not be clerk of the board and teacher at the same time.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

400.

SOUVENIR BOOKS MADE AND SOLD BY BOYS OF OHIO SAILORS' AND SOLDIERS' HOME—PROCEEDS MUST BE TURNED INTO STATE TREASURY.

Money received by boys of the Ohio Sailors' and Soldiers' Home, from the printing department therein, through the sale of souvenir booklets made in said institution, cannot be put in trust for the benefit of said boys, but must be turned over to the state treasury.

COLUMBUS, OHIO, September 30, 1911.

HON. D. Q. MORROW, *Hillsboro, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of August 24th, 1911, in regard to a fund of $200.00, which was created by the sale of souvenir booklets at the time of the G. A. R. encampment at Xenia in June, 1910. It seems that there has been considerable controversy in regard to this fund and, as stated in my letter to you of August 21, 1911, my attention was first called to the above matter by a letter I received from the Hon. E. D. Sawyer, of Cleveland, Ohio, and of which letter the following is a copy:

> "There is a fund of two hundred dollars ($200), which was earned by the sale of souvenir books illustrative of the O. S. and S. O. Home, Xenia, Ohio, during the encampment of the G. A. R. held there last year.
>
> "At the July meeting, 1910, this money was, on the motion of Judge Joseph O'Neal (one of the trustees of the home) kept 'for the use of the board' as they might direct, and Colonel Morrow, another trustee, was made trustee of the fund.
>
> "It clearly should be returned to the state treasury. It would be as lawful for the trustees to take charge of money earned by the sale of farm products as of the printing department (state material and labor being used in both instances), or from the products of any of the many departments of 'the home,' as to take possession of this fund, and it should be paid into the state treasury.
>
> "The money is now, or was a month ago, in the bank at Xenia, deposited by Morrow as 'trustee,' and has not yet been used by reason of my objection. I respectfully ask that you proceed to recover this money for the state.
>
> "My reason for asking this is, that my record as superintendent of that 'home' for seventeen months, and which position I resigned from lack of proper support, may be clear.
>
> "The governor has full knowledge of this, reported by me, and so far as I know through correspondence with him has made no effort to cause it to be paid into the state treasury."

As a consequence of the above letter received from Mr. Sawyer, I wrote to you on August 21 for additional data, and in reply thereto received your communication of August 24th, referred to above, and of which communication the following is a copy:

> "I have your letter of the 21st inst., containing a copy of letter from Mr. E. D. Sawyer to you and concerning a fund of two hundred

dollars created by the sale of souvenir books by the boys of the printing department, at our institution, and during the G. A. R. encampment at Xenia in 1910.

"I think that the best way I can give you the facts is to enclose a copy of a letter written by our superintendent to the governor. Mr. Sawyer had written the governor, and he wrote Mr. Elton asking about this matter.

"As you will observe, Mr. Barnes was refusing to turn over the money except to me, claiming it belonged to the boys, and not to the state. I did not want to take it, and only consented when all the board present and Mr. Sawyer insisted that I should, so that payment of same could be obtained from Mr. Barnes. It is indeed strange that Mr. Sawyer should take the position he has, when he knows all about the facts, and knows that everything was in the best of faith and that he, more than any other person, insisted that I receive the money.

"But times have changed, and since this occurrence he has lost his place as superintendent. The money is to my credit as trustee in a savings bank, where it has accumulated a little interest, and I am ready and anxious to turn it over at any time.

"The question has been, as you will readily see, whether it should go to the boys or to the state.

"I thank you very much for writing me so I could have an opportunity to give you the facts, and will be glad to give any further information, if desired. Also, I will be pleased to follow your direction as to this fund, and so will our board."

The letter written by Mr. Elton to the governor, and to which you refer in your reply, is as folows:

"I have your letter of April 19th, concerning the $200.00 which Colonel Sawyer wrote you about.

"I am surprised that this inquiry should come from him, for he was present and a party to the whole transaction.

"Still I am glad you have given me an opportunity to state the facts as I understand them. Before the Grand Army encampment held in Xenia, in June, 1910, Mr. Barnes, then the foreman of the printing department, obtained permission from Colonel Sawyer to get out a souvenir booklet to be sold to the visitors, the money to be used for the benefit of the boys in this department; from the sale of these booklets $200.00 was realized.

"Soon after the encampment Mr. Barnes resigned and at that time had this money in his possession; his position was that the money had been acquired by the labor of the boys in this department with the understanding that it was to be for the purpose of aiding them as they might need aid when they left the home, and he declined to turn over the money except in one way, that was to deliver it to Colonel Morrow, president of the board, to be held in trust for the boys.

"This was the only way that Mr. Barnes would turn over the money, because he held that the state had no claim to it; and for this reason it was insisted by other members of the board and by Colonel Sawyer that the best thing to do under the circumstances was for Colonel Morrow to hold the same.

"He took Mr. Barnes' check and informs me that he deposited the money in a savings bank to the credit of 'D. Q. Morrow, Trustee,' where

it is now, with a small addition of interest, and subject to whatever disposition is right and proper.

"The arrangement for the printing and sale of souvenirs was made between Colonel Sawyer and Mr. Barnes. Although I was financial officer at the time, I was not consulted in the matter, I never had the booklets or the money in my possession. However, I believe the whole transaction was one in good faith."

I have quoted all of the above correspondence for the reason that it was necessary to do so in order to have all the facts in proper form upon which to base an opinion, as to the proper disposition of the $200.00 fund, which was created in the manner as set forth in all of the foregoing correspondence.

As I gather it from all of the facts as herein disclosed, the material was state material from which said souvenir booklets were made, and said booklets were made and sold by only a portion of the boys in the Ohio Sailors' and Soldiers' Orphans' Home, towit, those boys in the printing department, and that the fund so created is to inure only to the benefit of the boys so engaged in the printing department of the said home.

My opinion, based upon all of the foregoing facts, is that the said $200.00 fund should be paid into the state treasury, for the reason that said souvenir booklets were made from state material and they were made by the wards of the state, who are under the care and protection of the state, and whatever they so produce by their skill and labor from state materials should accrue to the benefit of their guardian, towit, the state, for the benefit of all the state's wards.

An additional reason for my so holding is that it would not be fair or equitable for one part or branch of the state's wards to receive aid and assistance not granted to all of the wards of the state alike.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

B 411.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWER TO PAY BILLS BY DIRECT ORDERS ON VILLAGE TREASURER—NO POWER OF VILLAGE CLERK TO INTERVENE.

The board of trustees of public affairs has authority and power to issue orders directly upon the village treasurer for payment of its bills without the intervention of the village clerk.

Bills pertaining to matters within the control of the board should be filed with said board and not with the clerk of the village.

The clerk of the village has no authority to pass upon bills allowed by the board, nor is the signature of the village clerk necessary to make valid orders of the board upon the treasurer of the village.

COLUMBUS, OHIO, October 5, 1911.

HON. EARL D. BLOOM, *Attorney at Law, Bowling Green, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of September 16th, 1911, in which you submit for my opinion the following inquiries from the board of trustees of public affairs of the village of Bradner, towit:

"1. Has the board of trustees of public affairs the authority and power to issue orders direct upon the treasurer of the village, without the intervention of the village clerk, to pay bills allowed by it and coming within its jurisdiction?

"2. Should the bills against said village pertaining to matters within the jurisdiction of the board of trustees of public affairs be filed with said board or with the clerk of said village?

"3. Has the clerk of the village anything to do with the issuing of orders on the village treasurer for bills allowed by and within the jurisdiction of the board of trustees of public affairs, and if so, are the original bills required to be presented to or filed with him before he issues such orders, and *has he any authority or power to again pass on the bills so allowed?*

"4. Is the signature of the village clerk required to make valid, or as a prerequisite to the payment of, any orders issued by the board of trustees of public affairs on the treasurer of the village?

"5. Is the clerk of the village required to issue orders on the village treasurer for bills allowed by the board of trustees of public affairs?"

In reply to your inquiries I desire to say that section 1536-859, Bates Revised Statutes (section 205, Municipal Code), provides for the term of election of members of the board of trustees of public affairs as follows:

"In all villages in which waterworks, electric light plants, artificial or natural gas plants or other similar utilities are situate at the time of the passage of this act, or which at such time are in process of construction, or when council orders waterworks, electric light plants, natural or artificial gas plants, or other similar public utilities to be constructed or to be leased, or purchased from any individual company or corporation, council shall at such time establish a board of trustees of public affairs for such village, consisting of three members, who shall be residents of the village and shall be each elected for a term of two years."

And it further provides for the organization, powers and duties of such board as follows:

"Said board shall organize by electing one of its number president, and shall have authority to elect a clerk, who shall be known as the clerk of the board of trustees of public affairs. Said board shall have all powers and perform all the duties that are provided to be performed by the trustees of waterworks in sections 2407 to 2435 of the Revised Statutes of Ohio, and such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Section 2413, and later changed to section 1536-524, Bates' Revised Statutes, which constitutes part of the powers and duties of the board of trustees of public affairs, provides as follows:

"The trustees, or board, shall make monthly reports to the council of the receipts and disbursements of money belonging to the waterworks, and an annual report of the condition of the same, which report the council may cause to be published in some newspaper of gen-

eral circulation in the corporation; and all money collected for waterworks purposes shall be deposited weekly, by the collectors thereof, with the treasurer of the corporation, and one of the receipts therefor shall be by such collectors deposited with the trustees, board or authorized agent."

Section 2414 (former sectional number and changed to section 1536-525, Bates' Revised Statutes) also constitutes part of the duties of the said board of trustees and provides as follows:

"Money so deposited shall be kept as a separate and distinct fund, subject to the order of the trustees or board; and all orders drawn by the trustees or board, on the treasurer of the corporation, shall be signed by one of the trustees or board, and countersigned by the clerk of the waterworks, or of the board of public works."

Section 1536-859, Bates' Revised Statutes (section 205 of the Municipal Code), and which is quoted above, appears in the General Code as section 4361, and the pharseology thereof in the General Code is as follows:

"The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

You will, therefore, observe that the wording of the said section 1536-859, Bates' Revised Statutes, and which now appears in the General Code as section 4361, has been slightly changed by the codifying commission, but I am of the opinion, nevertheless, that the legislative meaning and intent of the said section has not been changed by the codifying thereof. You will furthermore observe that old section 2413 (Bates' Revised Statutes, 1536-524) and old section 2414 (Bates' Revised Statutes, 1536-525) appear in the General Code as section 3960, as follows, towit:

"Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

The only change made by the codifying commission in the last mentioned section is that the director of public service has been substituted for and in the place of the board of trustees of public affairs. It is, nevertheless, my judgment that the duty of members of the board of public affairs in villages in regard to receipts and disbursements of moneys remains the same under the provisions of the General Code as before the adoption of the General Code; and that the fund collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation; and that it shall be kept as a distinct and separate fund and when appropriated by council, such fund *shall be subject to the order of the said board of trustees of public affairs.*

My conclusion in regard to the matter is in keeping with the holding of the court in the case of the State of Ohio ex rel. v. Griffin, 4 C. C. Reports, 156, in which case the court construed the above cited section, holding that moneys

belonging to the waterworks fund are to be paid out under section 2414 Bates' Revised Statutes (now section 2360 of the General Code), rather than under section 2690 of Bates' Revised Statutes. At page 159 of the opinion the court said:

> "Sections 2413, 2426, 2429, 2430, 2431, Rev. Stat. (old sections), in connection with other sections, seem to us to evince the intention of the legislature to give, substantially, the whole care and control of the waterworks to those waterworks trustees, including contracting for enlargements and improvements thereto after their original erection. And we are of the opinion that the intention was and is to give them the control and disbursement of the moneys raised to pay for work done under the contracts which the trustees are empowered to make, and that such moneys are more properly moneys belonging to the waterworks funds under section 2413, than city funds referred to in section 2690, and that the provisions in the latter section were not intended to relate to waterworks funds. The statute is not as clear and definite as it might be, and some of its sections do not seem to be in entire harmony with others in this regard, but in view of all the provisions bearing on the subject, we think the legislative intention is that the moneys in question in this case, being moneys raised after the original construction of the works and for their improvement, are to be paid out on the order of the trustees of waterworks under section 2414, and that the treasurer is authorized and may be required to pay such orders of the trustees."

Said section 2690, Bates' Revised Statutes, referred to by the court in the above case, provided as follows:

> "No claim against a municipal corporation shall be paid by the treasurer except upon the warrant of the auditor, and in all municipal corporations where there is no auditor, on the warrant of the clerk; and all boards of trustees, directors, or commissioners, having charge of the expenditure of city funds, shall certify claims against their respective departments to the auditor for payment; provided, that in cities of the third grade of the first class, the auditor, under such rules and regulations as may be adopted by the council, may draw his warrant on the treasurer in his own favor, for the aggregate amounts due employes of the city in the various departments, and disburse the money received upon such warrant to pay the claims of the employes on payrolls, taking receipts therefor; and it shall be the duty of the auditor, in addition to his other duties, to keep accurate and detailed accounts of the receipts and expenditures of the city in all its departments, and for all purposes."

In the case of State ex rel. v. Corzilius, Treasurer, 35 O. S., 69, the supreme court held:

> "The treasurer of a city or village having a board of waterworks trustees is required, under section 8, chapter 1, division 8, of the municipal code of 1878 (75 O. L., 342), to disburse the waterworks funds deposited with him in accordance with section 7 of said act, upon orders drawn by the board of trustees and signed by one of the trustees and countersigned by the clerk of the waterworks."

Said section 2690, Bates' Revised Statutes, was repealed at the time of the enactment of the municipal code. Its general provisions, however, with reference to paying out municipal funds were retained in section 41 of the municipal code, now section 3795 of the General Code. Said section 3795 of the General Code provides:

> "The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council."

It is, therefore, my judgment by reason of the holding of the court in the above cited cases that said original section 2690 was not intended to relate or apply to waterworks fund, and accordingly section 3795 of the General Code, which retains the general provisions of the old section 2690, Bates' Revised Statutes, does not apply to the waterworks funds. Therefore, in answer to your first question, I am of the opinion that the board of trustees of public affairs has the authority and power to issue orders direct upon the treasurer of the village to pay bills coming within its jurisdiction without the intervention of the village clerk.

In answer to your second inquiry, I am of the opinion that bills against the village pertaining to matters under the control of the board of trustees of public affairs should be filed with the board and not with the clerk.

In answer to your third question, I am of the opinion that the clerk of the village has nothing to do with the issuing of orders on the village treasurer for bills allowed by the board of trustees of public affairs and that he has no authority or power to pass upon bills so allowed by the board of trustees of public affairs.

In answer to your fourth question, I am of the opinion that the signature of the village clerk is not required to make valid any orders issued by the board of trustees of public affairs on the treasurer of the village.

Answering your fifth question, it is my judgment that the clerk of the village is not required to issue orders on the village treasurer for bills allowed by the board of trustees of public affairs for the reason, as above stated, that all such orders are to be issued by the board when an expenditure of the waterworks fund is involved.

I believe that I have fully answered all of your inquiries, and beg to remain,

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

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JUSTICE OF THE PEACE—FILLING OF VACANCY BY TOWNSHIP TRUSTEES—ELECTION OF SUCCESSOR TO APPOINTEE.

When a person is appointed to fill a vacancy in the office of justice of the peace, his successor should be elected at the next regular election for such officers. When the successor is not so elected, the appointee holds over by virtue of section 1714 *until his successor is elected and qualified.*

COLUMBUS, OHIO, November 17, 1911.

MR. W. M. TRACY, *Mineral City, Ohio.*

DEAR SIR:—I have your letter of the 13th, which is as follows:

"I desire your opinion on a matter touching the election of justice of the peace. I was appointed some three months ago to fill a vacancy caused by death. (See section 1451, Revised Statutes; also section 367.) The present term of the office of justice of the peace is four years. My predecessor was elected in 1909; his term would expire in 1913. When does my term expire?

"Your opinion on this matter will be received and treated as a favor, and I will be glad to reciprocate."

Section 1713, General Code, provides in part that,

"All justices of the peace shall be elected for a term of four years."

This was adopted in conformity to Article XVII, Section 2, of the Constitution, part of which is as follows:

"* * * and the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years as may be so prescribed."

It will, therefore, appear that the term of office of justice of the peace is definite and does not continue beyond the end of the period under the head of "until his successor is elected and qualified."

Section 1714 of the General Code provides as follows:

"If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy; who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

Section 1715 provides:

"At the next regular election for such office, a justice of the peace

shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

Under the last section, your successor should have been elected at the recent election in November and served for the term of four years, from the first of January, 1912. In case of failure to elect, you will hold over, under the provisions of section 1714, and until your successor is elected; that is, until January 1, 1914; your successor should be elected at the November election, 1913, which is the earliest time now for holding a general election for office of justice of the peace.

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

513.

BOARD OF EDUCATION—MEMBERSHIP IN MUTUAL INSURANCE ASSOCIATION — CONSTITUTIONAL PROHIBITION — NO STATUTORY AUTHORIZATION.

Board of education may not become a member of a mutual insurance association. There is a broad distinction between "loaning of credit" of a board of education to private business enterprises for the procurance of its immediate needs, such as coal, etc., and the loaning of its credit as a member of a mutual insurance association. The latter is within constitutional inhibition upon the government or any of its subdivisions against becoming a stockholder in, raising money for, or loaning its credit to, a joint stock company, corporation or association. Furthermore, membership in such an association would be inharmonious with the nature of the board of education and with its statutory duties.

Such membership would include a view to gain and an object to further pecuniary interest.

COLUMBUS, OHIO, December 29, 1911.

MESSRS. AMOS KELLER, *President,* GEORGE W. MILLER *and* D. B. FLORY, *Legislative Committee of the Federation of Mutual Insurance Associations of Ohio, and* D. L. GASKILL, *Attorney for Said Committee, Greenville, Ohio.*

GENTLEMEN:—I received your communication, which does not bear date, many weeks ago, and would have written you sooner but for the fact that this department has been practically overwhelmed with work, much of it of a perishable nature.

Agreeably to your request, I again considered the subject matter of your communication, even though I had carefully considered the original. No opinion goes from this office at any time until after the subject has been very fully and carefully considered by at least two counsel in the office and myself, and close cases are usually considered by practically the entire office force.

I read with great care, interest and attention Mr. Gaskill's well prepared and lucid brief, but the same, instead of changing my mind, had the effect of confirming my former opinion for reasons hereinafter stated. On account of the importance of the subject I called in the office force last night and got each one's opinion independent of my own, and our conclusions were unanimous in this case.

First, Mr. Gaskill quotes section 7620 of the General Code, as follows:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase all land sites therefor, or rights of way thereto, or rent suitable school rooms, provide the necessary apparatus, and make all other necessary provisions for the school under its control."

He further advises:

> "A very large part of the expenditures of the board of education cannot be definitely ascertained, and contracts must be made for their purchase. For instance, in the providing of coal for school houses, contracts are made at so much per ton and the amount that is required is indefinite and uncertain because it is impossible to tell the exact amount required."

Conceding all this, it is an entirely different proposition from loaning the credit of a board of education to an association for an indefinite time. There is a legal limit in fact to what are referred to in the brief as indefinite contracts. A contract for the amount of coal required by a board of education is practically definite in itself, likewise for the number of books that would be needed, but the liability of each person who belongs to an association of say twenty that goes into the insurance business is unknown and indeterminate. The Baltimore fire caused financial disaster to some of the best citizens in northwestern Ohio. However, this case need not be decided upon that point.

The Constitution, article 8, section 6, provides:

> "The general assembly shall never authorize any county, city, town or township by vote of its citizens or otherwise to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for or *loan its credit to or in aid of any such company, corporation or association.*"

Measured by this, what have we in the statute? I will not take the time to quote it all. Section 9593 of the General Code provides in part:

> "Any number of persons of lawful age, not less than ten in number * * * owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire * * * and assess and collect from each other such sums of money from time to time as are necessary to pay losses which occur by fire, etc."

Now let us see, will it be said for a moment that the credit of a board of education, the same being a branch of the government, is not of a higher order than the credit of any person? The very object of the constitution is to forbid any person or persons from having the aid of the government in any financial transaction. Suppose twenty persons, of whom a board of education is one, are associated, and fifteen turn out insolvent, the board of education and the other four must make good the loss, and the membership of a board of education in an insurance company is a guarantee that the association cannot fail in the discharge of its duties. If the board is liable at all, it is liable for all losses. The

object of the constitutional provision if twofold. Yes, more, it is manifold. It is to prevent individuals from using a political division for its business advantage, and that appears clearly in the line of argument used by Mr. Gaskill. The complaint against the opinion is not from boards of education nor from public authorities, but from the insurance companies. I mention this, of course, only in a legal way and in no offensive sense, because it is proper for every association to defend what it believes to be its rights.

The object of the constitutional provision further is to forbid the government or any of its divisions from going into a partnership business, and to forbid political subdivisions from incurring liabilities that result from enterprises not within the exclusive control of such political divisions. There is no provision in the statute whereby any member of the board is authorized to participate in any of the meetings of the association. Questions arise at meetings that cannot be contemplated in advance. How is any one going to know the wish or desire of the board of education in the premises? It is a member, with all the responsibilities, and necessarily without privileges.

I quote from May on Insurance, section 552:

> "Mutual insurance membership. When a party takes out a policy and the contract is complete he becomes a member, *and is bound by its rules*, which he is presumed to know."

This principle is not in harmony with the statutory duties of a board of education.

Quoting further:

> "The records of the company are then his records and evidence for or against him, and the doings of the officers within the scope of their authority are binding upon him."

Unquestionably, under the statute, any person that is a member of an insurance association may qualify to be an officer, but how may a board of education be president of a mutual insurance association?

I quote again from the brief of counsel for the legislative committee of the Federation of Mutual Insurance Associations of Ohio:

> "Coming now to the consideration of section 6, article 8, of the Constitution of Ohio, which is as follows:
>
> "'The general assembly shall never authorize any county, city, town or township by vote of its citizens or otherwise to become a stockholder in any joint company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company, corporation or association.'
>
> "We do not see how you can construe a fire association organized under the provision of section 9593 of the General Code of Ohio to come under the classification as laid down in this section."

A fire association is certainly an association under the language of the Constitution, and an inhibition against a town or township is certainly broad enough to include a board of education, and from what is hereinbefore stated the joining by a board of education of a fire insurance association too clearly comes under the head of "lending its credit to and in aid of such association" to be disputable.

I quote from the opinion of the court in the case of Walker v. Cincinnati, 21 O. S., 14, which is relied upon by counsel for the fire association:

> "The mischief which this section interdicts is a business partnership between a municipality or *subdivision of the state* and individuals or private corporations or associations. *It forbids the union of public and private capital or credit in any enterprise whatever.*"

This is certainly comprehensive and covers the matter at hand completely. Quoting further:

> "In no project originated by individuals, whether associated or otherwise with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability."

The brief filed with me has underscored the words "with a view to gain." In that case it further appears, quoting from the opinion of Judge Scott:

> "The city council of Cincinnati has resolved that it is essential to the interests of that city that a line of railway to be named 'The Cincinnati Southern Railway,' shall be provided between the said city of Cincinnati and the city of Chattanooga, in the state of Tennessee."

Without going into detail, it appears that the object to be served in that case was the interest of the city. The same thing can be said as to a board of education embarking in the insurance business as a member of a mutual association. The gain is the reduction of rates. With a view to gain has no more legal meaning than with a view to serving the interests, and in both instances the idea of money predominates, more clearly in the case of the board of education than in the Cincinnati case, because in the latter the object may be to serve the general public in the way of the welfare of the city, and, too, the idea of pecuniary expense and liability is without dispute as to the matter at hand.

Quoting further from Judge Scott's opinion:

> "They (meaning municipalities or subdivisions of the state) may neither become stockholders nor furnish money or *credit* for the benefit of the parties interested therein. Though joint stock companies, corporations and associations only are named, we do not doubt that the reason of prohibition *would render it applicable to the case of a single individual.* The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together. As this alliance between public and private interest is clearly prohibited in respect to all enterprises, of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private partners, it follows that they are powerless to make any improvement, however necessary, with their own means, and on their sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the constitution."

It will be noted that Judge Scott gives effect to the purpose and spirit of the constitutional inhibition. A reading of this opinion impresses one that the

constitutional inhibition is broad and comprehensive and not to be narrowly construed.

It is elementary that the acts of officials concerning public property under their control must be limited to those expressly granted or necessarily implied therefrom, and without reference to the constitutional inhibition. It is my judgment that in the absence of statutory authority boards of education might not become members of mutual insurance companies. True, the statute provides "such associations may only insure farm buildings, attached dwellings, school houses, churches and township buildings, etc." This, however, is not a grant of power, but a limitation upon it, the legislature doubtless having in mind the character of risks that would be safe.

Now, in respect to the ownership, there is no doubt, of course, of the right of boards of education to insure property, but nevertheless they are not the owners of property in this state. They simply hold the title in trust for the state, and the expression "owning insurable property in this state" may well be intended as a provision looking to responsibility as well as having an insurable interest in property. Again, I find no authority for the proposition that the board of education may subject itself to the judgment of others as to their liability. When a board buys coal the price is agreed upon and the amount of coal it orders is subject to its own control, and there is nothing left but mere computation, and has all the elements of certainty. It will not be claimed that a board of education now existing could buy coal for its district for the coming ten years. If the amount of the purchase exceeds $500 the same must be let by competition, while the liability of the board in a mutual insurance company might exceed that and the element of competition does not appear.

I dislike very much to be constrained to hold against the practice of insurance companies doing an honorable business, as I am sure has been done by the Federation of Mutual Insurance Associations of Ohio, and I regret exceedingly to feel compelled to adhere to my former opinion. No personal pride would deter me a minute from reversing that opinion if I could do so consistently with my ideas of the law of this state. I was pleased to reconsider the matter and thank the committee and its able counsel for presenting it.

Very respectfully yours.

TIMOTHY S. HOGAN,
Attorney General.