

OFFICIAL OPINIONS.

CHANGE IN JOINT SUB-DISTRICTS.

COLUMBUS, January 15, 1900.

M. Cahill, Esq., Eaton, Ohio.

DEAR SIR:—Your letter of the 12th inst. at hand, asking for a construction of the latter part of Sec. 3950 of the Revised Statutes. The part of the section in question reads as follows:

“And any joint sub-districts established by proceedings in the Probate Court may be dissolved, changed or altered as provided in this section at any time after the expiration of five years, or the court may dissolve the same at any time upon being petitioned to do so by two-thirds of the voters residing in the district which is affected by the change, when the best interests of the school demand such dissolution, change or alteration.”

Sections 3934 and 3941 inclusive provide for the establishment of joint sub-districts by the Probate Court on appeal from the proceedings of Township Boards of Education having territory included in said joint sub-district.

Now the part of the section above quoted, provides in effect, that any district so established by the Probate Court may not be changed again by the Board of Education having territory included therein, until after the expiration of five years from the time of establishing such district by the Probate Court, but that the Probate Court may dissolve the district at any time upon the petition of two-thirds of the voters residing in the district. That is while the Boards of Education cannot change the district established by the Probate Court until after five years, yet this district may be dissolved sooner if two-thirds of the voters residing in the district (that is the joint sub-district so established), petition the Probate Court to do so. I am

Yours very truly,

J. M. SHEETS,
Attorney General.

DISTRIBUTION OF MONEY COLLECTED BY PROSECUTING ATTORNEYS.

COLUMBUS, January 15, 1900.

Hon. Wm. P. DeHart, Cambridge, Ohio.

DEAR SIR:—Your letter of January 15th addressed to Hon. Lewis D. Bonebrake, State School Commissioner, is referred to this office for answer. In this letter you inquire as to the proper distribution of moneys collected by the prosecuting attorney and paid into the county treasury, under provisions of Sec. 4163 of the Revised Statutes. Said section relates to the distribution of personal estates, and in part provides as follows:

"If there be no person living to inherit the same by the provisions of this chapter, such personal property shall pass to and be vested in the state; and the prosecuting attorney of the county in which letters of administration are granted upon such estate shall collect the same and pay it over to the treasurer of such county, to be applied exclusively to the support of common schools of the county in which the estate is so collected, in such manner as prescribed by law."

The method of distributing moneys so collected and paid into the county treasury, is provided for in Sec. 3964 of the Revised statutes which reads as follows:

"Each county auditor shall annually immediately after his annual settlement with the county treasurer apportion the school funds for his county. The state common school fund shall be apportioned in proportion to the enumeration of youth to districts, sub-districts and joint sub-districts and fractions of districts and joint sub-districts within the county, * * * and all other money in the county treasury for the support of common schools and not otherwise appropriated by law, shall be apportioned annually in the same manner as the state common school fund."

You are advised, therefore, that the money paid into the county treasury in accordance with the provisions of section 4163 is to be distributed among districts, sub-districts and joint sub-districts and fractions of districts and joint sub-districts within the county in proportion to the enumeration of youth, in the same manner as the state common school fund is apportioned.

Yours very truly,

J. M. SHEETS,
Attorney General.

EXPENDITURE BY COUNTY COMMISSIONERS WITHOUT CERTIFICATE OF AUDITOR.

COLUMBUS, January 17th, 1900.

W. H. Fuller, Esq., Wauseon, Ohio.

DEAR SIR:—Your inquiry of January 15th concerning the proper construction to be placed on Sec. 2834-b of the Revised Statutes is at hand.

Your inquiry goes, first: To the validity of a contract involving the expenditure of money by the county commissioners, without the certificate of the auditor to the effect that the money required for the payment of the obligation contracted, is in the treasury to the credit of the proper fund, or the taxes to raise such fund have been levied, and in process of collection and has not been appropriated for any other purpose.

Second: To the authority of the county auditor to draw his warrant on the treasury for the payment of an obligation thus incurred without such certificate being previously made by the auditor.

This section is a substantial copy of Sec. 2702 of the Revised Statutes, but is made to apply to county commissioners.

That county commissioners and other municipal officers have no powers except those conferred by statute, and that when the statute points out the manner in which they shall contract, the manner thus pointed out must be followed, are elementary principles of law.

It has been so frequently held by the courts of Ohio, from the Common Pleas to the Supreme Court, that a contract involving the expenditure of money made

by municipal officers without such certificate as required by Sec. 2702 is void, and imposes no obligation on the municipality, that a citation of the cases is unnecessary.

However, in the case of the City of Lancaster vs. Miller, 58 O. S., 558, the same principle was again announced and emphasized.

Such contracts being void and imposing no obligation upon the county, it follows as a matter of course that the auditor has no power to draw his warrant on the treasury for the payment of such claims. The county owes nothing; it is as though the commissioners had never attempted to act. In such a case the auditor would be liable to a suit on his official bond for a violation of his official duties. This is a salutary provision and prosecuting attorneys should see to it that it is strictly followed. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

FEEES OF COUNTY OFFICERS—SECTION 1069.

COLUMBUS, January 18th, 1900.

E. G. McClelland, Bowling Green, Ohio.

DEAR SIR:—Your letter of inquiry is at hand and contents noted.

You ask whether the county auditor is entitled to compensation for keeping up the index to the commissioners' journal.

Section 1069 Revised Statutes provides what salary county officers shall receive annually; other sections provide for what services the auditor shall receive additional compensation and the amount thereof.

It will be seen by consulting Sec. 1069 of the Revised Statutes that a liberal salary is awarded. This salary is given the auditor in payment for all services for which there is no specified provision for extra compensation. In *Strong v. Commissioners*, 47 O. S., 408, speaking for the court Judge Bradbury says: "The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privileges and other emoluments belonging to the office or by fees permitted to be charged and collected for services connected with such duty or services and hence provides no direct compensation therefor, to be paid out of the public treasury."

In *Jones v. Commissioners*, 57 O. S., 209, Judge Spear speaking for the court, says: "The auditor's services in making the report for the commissioners must be deemed, if not gratuitous, at least satisfied by the salary attached to his office, and that he is not entitled to extra compensation for such services, payable out of the county treasury."

It follows from these decisions and others of like tenor, that unless the statute clearly provides for extra compensation, the auditor must render the services for the salary.

As suggested in your letter it was held in *Jones v. Commissioners* (Supra) that the auditor is not entitled to extra compensation for work on "commissioners' journal." Then why should he be allowed extra pay for keeping up the index? Is not that work on "commissioners' journal?" The same clause which requires him to keep a complete record of the commissioners' proceedings requires him to keep an index of the same.

At the close of Sec. 850 it is provided that in counties where the index has not been kept up, the commissioners may contract for making the necessary index, and the compensation there provided for was evidently intended for

making this index, which the predecessor should have made, as it would be unfair to require a successor to do without compensation what should have been done by the predecessor.

Yours very truly,

J. M. SHEETS,
Attorney General.

FEES COUNTY AUDITOR AND INFIRMARY DIRECTORS.

COLUMBUS, January 22nd, 1900.

Hon. Fred E. Guthery, Prosecuting Attorney, Marion, Ohio.

DEAR SIR:—Your letter of Jan. 18th, addressed to F. S. Monnett, Attorney General, is referred to this office for answer.

A very full discussion of the law as to salary and fees of county auditors is found in the case of *Jones, Auditor, v. County Commissioners*, 57 O. S., 189. From a study of that case and other cases together with the statutes of Ohio these propositions seem to be evident:

1st. A county auditor can only charge a fee for those services to which compensation is by law affixed.

2nd. That the other services required by law of a county auditor must be deemed satisfied by the salary attached to his office.

Keeping these propositions in mind, the answer to each of your questions will depend upon:

1st. Whether the services for which a fee is charged are such as are required by law of the county auditor.

2nd. Whether any compensation is affixed by law to said services.

With these principles before us we will take up your questions in order.

First: As to the charge for clerking for the board of equalization, we presume you refer to the county board of equalization.

Section 2804 of the Revised Statutes provides for a county board of equalization of which the auditor is a member, and the section makes no provision for a clerk for the board or for any compensation for the county auditor.

Section 1021 makes the county auditor by virtue of his office secretary of the commissioners except when otherwise provided by law.

As there is no special provision for a clerk for the board of commissioners when sitting as a county board of equalization, I think that it is clear that the auditor, by virtue of his office, is the clerk of said board, and as no extra compensation is provided for such services, it is equally clear that such services are considered satisfied by the salary attached to his office. This is especially evident from a consideration of Section 1078 of the Revised Statutes which provides that it shall be unlawful for any county auditor to charge or receive any other or further fees or compensation as a clerk of any board or other services rendered by him.

In answer to your second question concerning, "Indexing the Voucher Book," I am unable to find any statute providing for the keeping and indexing of a voucher book. The commissioners can only lawfully order the auditor to keep such records and books as are provided by law. If they direct the making and keeping of records and books for which there is no statutory provision, their proceedings would be entirely without authority and void, and any payments made by them out of the county funds for such services would be illegal.

In relation to the compensation for services under Sections 1029 and 2749, it is sufficient to say that these sections impose upon the auditor the duty of furnishing the assessors of the county with all proper and necessary blanks and

forms furnished by the auditor of state and also to give instructions to the assessors as to their duties. Nothing is said about compensation to the auditor for these services, unless it is to be found in Section 1029, which is as follows:

"The auditor shall furnish the several assessors all blanks necessary for their use in the discharge of the duties enjoined upon them by law and all reasonable charges therefor shall be allowed by the county commissioners and paid out of the county treasury."

From a consideration of both sections above referred to, I am of the opinion that the "reasonable charges" for which payment is provided is not meant as compensation for the services of the auditor, but is designed merely to cover the reasonable cost of the blanks.

Your fourth question relates to charges for special duplicates of ditches, which you say the auditor claims to be a part of the record of the ditch.

Section 4504 provides for making a complete record of each ditch improvement in a suitable book and also what data shall be used to make up such record. You will observe that the record ends with the final order of the commissioners. In the face of this plain provision it is difficult to see how the claim can be made that entering a ditch on the duplicate is a part of the record required by law to be made.

Your fifth question relates to the expenses of infirmity directors while attending to their duties.

Section 668 provides a per diem compensation for members of the board of infirmity directors in addition to "actual traveling expenses." In the absence of any judicial construction of the statute, I have no hesitancy in saying that every proper and necessary expense incurred by a member of the board of infirmity directors in the discharge of his duty, including such items as meals, horse feed, car fare or charge for other mode of conveyance are all properly included in actual traveling expenses and should be paid for by the county.

Your sixth question refers to the charge by county auditors for registering county bonds. The only statutory provision I am able to find allowing the auditor compensation for registering county bonds is found in Sec. 2711-20 which permits the holders of any coupon bonds of the county to exchange them for registered bonds, but the expense of such exchange shall be paid by the holder of the bonds and not out of the county fund. I find no authority for the auditor charging the county for copies or transcripts of any of the records of his office furnished to purchasers of bonds or any other persons. Payment for such copies or transcripts should be made by the parties ordering them.

As to the charge for indexing, I am not entirely clear as to your meaning. If you mean the index of the commissioners' journal, the auditor is not authorized to make any charge for keeping up this index, as it is a part of the work on the journal, and such service is a part of the work which he is required to do for his salary. However, in counties where the index has not been kept, the commissioners are authorized by Sec. 850 of the statutes to cause an index to be made of the past records for such period of time subsequent to the first day of January, A. D. 1880, as they may determine, and for making such index the auditor would be entitled to such compensation as is provided for like services in other cases.

Respectfully submitted,

J. M. SHEETS,
Attorney General.

TAXATION—BOARDS OF EDUCATION.

COLUMBUS, OHIO, Jan. 23rd, 1900.

Hon. W. D. Guilbert, Auditor of State.

MY DEAR SIR:—The letter of Jan. 18th, addressed to you by J. A. Williams asking that you answer certain questions therein propounded is turned over to me for answer by your department.

The questions therein propounded are as follows:

1. As to the liability of the board of education for the payment of assessments for the improvement of city streets under what is known as the "Taylor Law."
2. As to the liability of the board for the payment of assessments for cleaning of streets under ordinances of council.
3. As to the liability of the board for the payment of assessments for the opening or widening of streets in the city.
4. Whether the collection of such assessments can be enforced in contravention of the provisions of Section 3973.

The property referred to in these questions is exempt from taxation by the laws of the State of Ohio, and it was held in *Toledo vs. Board of Education*, 48 O. S. 83, that such lands were exempt from street assessments. It was also held in *Board of Education vs. Toledo*, 48 O. S. 87, that such property was also exempt from side walk assessments. Section 2275a provides for assessing such improvements against the property of the board of education in the city of Cincinnati; but the same was held unconstitutional by the Superior Court of Cincinnati, in the case of the *Board of Education vs. Auditor*, 35, Bulletin 204, so that it seems clear, following up the logic of these decisions, that it is not within the power of the city to assess such property with the expense of street improvement nor of side walk. No more would the city have the power to assess such property with the expense of cleaning the streets.

Hence, it is the opinion of this office that these assessments must be paid by the city.

Respectfully submitted,

J. M. SHEETS,
Attorney General.

CAPITAL STOCK OF INSURANCE COMPANIES.

COLUMBUS, O., Jan. 24th, 1900.

Hon. W. S. Matthews, Supt. Insurance, Columbus, Ohio.

DEAR SIR:—In your letter of Jan. 10th, you ask this department for a written opinion upon the following question:

"Can an insurance company be organized on the stock plan and for profit to do all or any part of the business mentioned in the second clause of Sec. 3641 with a less capital stock than \$100,000.00?"

Section 3641 forms a part of the insurance laws of the State of Ohio, and the second clause of said section is as follows:

A company organized under this chapter may: "make insurance upon the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trust, who may be required to, or do, in their trust capacity, receive, hold,

control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies; guarantee the validity of titles to real property, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed."

I understand that it has been the holding of your department that all insurance companies organized under the laws of Ohio should have a capital stock of at least one hundred thousand dollars. I would be very loath indeed to make a holding that would change the rule of your department in that respect, if I could find authority in the statute for such rule. In view of the importance of the question, a brief review of the insurance legislation of Ohio may not be out of place.

Chapter 1 of Title 2 of the Revised Statutes of Ohio contains the general provisions of the statute governing the creation of corporations; but Sec. 3269 of this Chapter provides that the provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern unless it clearly appear that the provisions are cumulative.

It has been held by the Supreme Court of Ohio (38 O. S. 347) that special provision has been made in Chapters 10 and 11 of Title 2 for the creation of insurance corporations, and that such corporations are thereby withdrawn from the operations of the general provisions of the statute as found in Chapter 1 of said title.

Chapter 10 of Title 2 relates exclusively to life insurance companies, while Chapter 11 in which Sec. 3641 is found, relates to insurance companies other than life.

The first special provision for the regulation of Insurance Companies doing business in Ohio was enacted by the Legislature in the year 1872 (Vol. 69, O. L. 140).

The first chapter of this Act provides for the incorporation of insurance companies other than life; and Section 3 of said chapter in so far as it is pertinent to this inquiry provides as follows:

"No joint stock company shall be incorporated under this chapter with a less capital than \$200,000, which stock shall be divided into shares of \$100 each."

Section 23 of the same chapter made provision for companies heretofore organized for the purpose of insurance other than life, which provision with but little change is to be found in Sec. 3632 of the Revised Statutes. The following year i. e. 1873, Sec. 3 of said Act was amended to read as follows:

"No joint stock company shall be incorporated under this chapter with a smaller capital than one hundred thousand dollars, which stock shall be divided in shares of one hundred dollars each." (70 O. L. 147.)

Section 3 of said Act passed into the Revised Statutes of 1880 as Section 3634 and read as follows:

"No company shall be incorporated under this chapter with a smaller capital than one hundred thousand dollars."

The original act as amended was repealed and Sec. 3664 was amended April 14th, 1888 (85 O. L. 273) to read:

"No joint stock fire insurance company shall be incorporated under this chapter with a smaller capital than one hundred thousand dollars," and the original section 3634 was repealed.

This section was again amended in 1891 (88 O. L. 101) to read as follows:

"No joint stock fire insurance company and no joint-stock live stock insurance company shall be incorporated under this chapter with a smaller capital than one hundred thousand dollars."

In making the above quotations, I have omitted for the sake of brevity all that part of the sections quoted which relates to mutual companies. It would appear from the foregoing that the general provision that all insurance companies should have a capital stock of not less than one hundred thousand dollars which was contained in Section 3634 of the Revised Statutes of 1880 was dropped by the amendment to said Section in 1888, and in that amendment provision was made only for the capital stock of joint stock fire insurance companies, while in the amendment to said Section in 1891 a further provision was made as to the capital stock of joint stock live stock insurance companies. I am unable to find in any other section of the statute a general provision requiring all insurance companies doing an insurance business other than life to have a capital stock of \$100,000.00.

I do find, however, in various sections of the statute special provision as to the capital stock of companies doing a particular kind of business. For example in the third clause of Section 3641 it is again provided that companies insuring live stock shall have a capital of one hundred thousand dollars with at least 25% of the capital stock paid up, and in the fourth clause of Sec. 3641 it is provided:

"That no company organized under the laws of the State to transact the business of guaranteeing the fidelity of persons holding places of public or private trust, or of executing or guaranteeing bonds or undertakings, as aforesaid, shall commence business until it has deposited with the Superintendent of Insurance two hundred thousand dollars in securities etc."

A like provision is also made in the same section for companies organized under the laws of another state. Section 3641-b which authorizes a company to do what is called an Employers Liability Insurance, a deposit of fifty thousand dollars with the Superintendent of Insurance is required before being authorized to transact such business.

Section 3653 provides that mutual insurance companies having net assets not less than two hundred thousand dollars may issue policies upon either the mutual or stock plan.

Section 3660 requires companies organized under the laws of a foreign government to deposit with the Superintendent of Insurance for the benefit of the security of policy holders residing in this State, the sum of not less than one hundred thousand dollars in stocks or bonds. While Sec. 3662 above referred to as a part of the original act of 1872 provides that any company heretofore organized under any law of this State which has not collected in the whole amount of its subscribed capital stock, shall retain from the declared dividends 50% of such dividends and apply the same as a credit upon the unpaid shares of stock until its stock shall be fully paid. If the dividends so credited do not by the first of January 1878 pay up such stock in full, then the whole amount of such dividends should be retained and credited "until the whole subscribed capital, not less in any case than one hundred thousand dollars, shall be paid up." But this section by its terms would seem to apply only to companies organized before its enactment.

It is to be remembered in considering this section that it originally formed part of a comprehensive act, one section of which contained a general provision fixing the minimum amount of capital stock required of insurance com-

panies thereafter to be organized, and this section merely provided a method by which companies already in existence should bring their capital stock up to the required amount. The general provision applicable to all insurance companies has since been repealed, and in its place we have special provisions fixing the amount of capital stock required of insurance companies doing specified kinds of business. It can hardly be claimed that because this section (3662) is retained in the statute, its meaning and purpose is so changed as to take the place of the general provision and fix a standard by which the capital stock of all insurance companies shall be determined. A consideration of all the sections of the statute above quoted seems to me to evince an intention on the part of the Legislature to do away with any general provision fixing the amount of capital stock required of insurance companies, other than life, organized in this State, and to make such special requirements as to the capital stock as the nature of the business to be conducted by the companies might seem to demand. This legislative intent is all the more clearly manifest when we consider the sections of the statute which provide for examination of insurance companies by the Superintendent of Insurance and proceeding against such as he shall find to be in an unsound condition.

I am of the opinion therefore, that a company may be organized in this State to do the business provided for in the second clause of Section 3641 with a less capital stock than one hundred thousand dollars, unless they undertake to do the kind of business provided for in said second clause of said section for which a certain capital stock is required to wit: "To guarantee the fidelity of persons holding places of public or private trust," or "execute or guarantee bonds and undertakings," for which business the fourth clause of said section 3641 requires that a deposit of two hundred thousand dollars shall be made with the Superintendent of Insurance as a condition precedent to commencing business.

Respectfully submitted.

J. M. SHEETS,
Attorney General.

TEACHING CATECHISM IN PUBLIC SCHOOLS.

COLUMBUS, O., Jan. 25th, 1900.

Hon. Lewis D. Bonebrake, Commissioner of Schools, Columbus, Ohio.

DEAR SIR:—Your letter of Jan. 24th requires an answer to the following question:

"Has the board of education of a special school district, in which the patrons are all Roman Catholics, the power to authorize the catechism of the church and Catholic Bible history to be taught in the schools during regular school hours as regular branches?"

It will be observed at the outset that such a school is a public school, organized under and by virtue of the laws of the State of Ohio, and is supported by the school funds of the State. Hence, such a district is part of the public school system of Ohio, and is governed by the school laws of the State. The organic law of the State is the Constitution, and Article 1, Section 7 provides:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted."

Article 6 Section 2 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."

If the question propounded were answered in the affirmative where would such doctrine lead us? The public school funds of the State would be diverted to the use of a particular sect, and used, in part at least, in teaching the religious doctrines of that sect.

One of the provisions of Article 1, Sec. 7 above quoted is;

"No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent."

The public school funds of the State of Ohio are raised by taxation. Every pupil in the State within the school age is entitled to attend, free, the public schools, whether he be a pauper or a millionaire. The patrons of the district referred to, might not pay a single cent of the taxes which are being used to defray the expenses of their schools. The Legislature of the State levies a school tax on all the property of the State, so that a tax payer of Cincinnati may be compelled to contribute to the support of the school in question.

In the case of *Bloom v. Richards*, 2 O. S. 387 et seq., Judge Thurman in commenting upon Article 1, Sec. 12 says:

"Neither Christianity nor any other system of religion is a part of the law of this State. We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate; much less accurate is it to say that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of the government, or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority. We have no union of church and State, nor has our government ever been vested with authority to enforce any religious observance simply because it is religious."

If the board of education had the power to authorize the religious doctrines of any particular sect to be taught in the public schools, the public school funds of the State, which are contributed to by every tax payer in the State, and in which every tax payer in the State is interested, would be diverted to the use of the particular sect and used, in part at least, in teaching the religious doctrines of that sect. This, in my opinion, would be a clear infraction of both provisions of the constitution above referred to. It would compel one person to contribute to the support of a church, whether he was willing or not. It would also be a setting apart of a portion of the school funds of the State for the support, to some extent at least, of the particular religious sect, whose doctrines were being taught.

It was held in *Weir v. Day*, 35 O. S. 143, that a board of education had no power to lease a public school house to be used in teaching a private school, although the branches proposed to be taught were the same as those taught in the public schools. Why? Because that school house for the time being was being diverted from the channel authorized by law. Taxes were levied and col-

lected, and that school house was built to be used and occupied for *public schools*. That was an effort to divert the use of the school house from a lawful purpose, to wit: to be used for private schools. If the board of education had power to lease for a private school, it could lease for dwelling purposes; and that would of course be a complete diversion of the school funds.

In the case suggested in your question, not only would a public school building be used in which to teach the religious doctrines of a particular sect, but the public school funds would be used to pay for such religious teachings. It matters not, that in this particular instance, all the patrons of the school happen to be Catholics, the money defraying the expenses of that school, was not raised in that district, but all over the State of Ohio. Also pupils of different religious faith have a right to attend the school, even though they might not be residents of that district.

If it be lawful to teach the religious doctrines of any particular sect in the public schools, provided the board of education authorizes it, then all that would be necessary to make such a proceeding lawful, would be to elect a majority of the board of education of a particular religious sect, and for the time being the religious doctrines of that sect to which the board of education belonged, would be taught in that school. Go a step further: A particular sect might get control of the Legislature of Ohio, and enact laws enforcing the religious teachings of that sect in all the public schools of the State, which no body for a moment would claim could stand the test of the constitution. The board of education is the mere creature of the Legislature, an agency designated by which to carry out the provisions of the law. If the creator is not authorized under the constitution to enforce the teachings of a particular sect in the public schools, much less is the creature given that power.

If such doctrine were to prevail our proudest boast, that every person may worship God according to the dictates of his own conscience, untrammelled by the fetters of any religious sect, would be a mere mockery.

Hence, I say to you, that it is my opinion that if any religious sect in the State of Ohio is using the public school funds in the manner suggested in your question, even if authorized by the board of Education, it is an unlawful diversion of the school funds of the State of Ohio, and should be prohibited.

Respectfully submitted.

J. M. SHEETS,
Attorney General.

CONSTITUTIONALITY OF PROPOSED CENTENNIAL APPROPRIATION.

COLUMBUS, OHIO, Jan. 25th, 1900.

W. D. Guilbert, Auditor of State.

DEAR SIR:—I have examined into the question to some extent as to whether the legislature had the constitutional power to contract a debt for the purpose of aiding the Ohio Centennial to be held at Toledo, Ohio, in the year 1903.

Article 8, Sec. 1, of the Constitution provides:

Section 1. "The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand

dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever."

Section 2 of the same article provides:

Section 2. "In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; but the money arising from the contracting of such debts, shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever; and all debts incurred to redeem the present outstanding indebtedness of the state, shall be so contracted as to be payable by the sinking fund, hereinafter provided for, as the same shall accumulate."

Section 3 of the same article provides:

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

These three sections are the controlling sections with reference to the power of the legislature to contract debts. If the legislature has any power to create a debt for the purposes named, it is derived from the following clause of section one: "Or to meet expenses not otherwise provided for." Without going into a detailed discussion of the question or provisions of the constitution, it is clear to my mind that the word "expenses" used in the clause just referred to, comprehends only the constitutional obligation inherent in the government and inseparable from the operations of the government. The whole tenor of the constitution contemplates that one legislature shall not create debt to be turned over as a legacy to its successor. The power to create debts was elaborately discussed by Judge Swan in the case of *Ohio v. Medbery et al.*, 7 O. S. 522, and following.

In commenting upon section 1, article 8, Judge Swan enumerates the circumstances under which the legislature may contract a debt. On page 533 he says:

"Now it is only under the exigencies enumerated, that is: First. When there is a casual deficit or failure in revenue, and, secondly, when, from some cause, the revenue provided is not sufficient to meet the expenses, that the state can contract any debt; for, as an exception to the sweeping prohibition against the state contracting any debt whatever; the constitution provides that 'the state may contract debts to supply casual deficits or failures in revenue, or to meet expenses not otherwise provided for.'"

This seems to be the only case in which the Supreme Court has directly considered and passed upon the meaning of this clause, and the decision of the court in that case, fully sustains the proposition that the legislature is without the constitutional power to create a debt under the circumstances named by you.

Very truly,

J. M. SHEETS,
Attorney General.

FEES OF COUNTY RECORDER—SECTIONS 1154-5.

COLUMBUS, OHIO, Jan. 25th, 1900.

Fred E. Guthery, Marion, Ohio.

DEAR SIR:—Yours of Jan. 23rd is at hand and contents noted. The questions to which answers are sought require a construction of Sections 1154 and 1155 Revised Statutes.

It seems from your letter that the recorder claims the right to enter both direct and reverse in this general index, each tract of land conveyed, as many times as there are grantors in the conveyance, and charge ten cents for each entry: e. g. If there are two grantors and five tracts conveyed, he claims the right to enter each tract twice both direct and reverse, making twenty entries, and charge therefor, two (\$2.00) dollars. While you contend, that he is entitled to ten cents for each lot or parcel of land, regardless of the number of grantors, or whether indexed both direct and reverse or not.

Section 1153 requires the recorder to keep an alphabetical index of the instruments presented for record, and Section 1157 provides that the person presenting the instrument for record shall pay the fee therefor.

Sections 1154 and 1155 provide that the commissioners may order a general index to be made and kept up in addition to the alphabetical index. And Section 1155 further provides that for indexing any lot or parcel of land, ten cents shall be allowed.

Section 1158 provides that for making the general index of records transcribed by order of the commissioners, from other counties and mutilated records, the recorder shall be paid such sum as is fixed by the commissioners. These are all the provisions bearing on the fees of the recorder for keeping up general indexes. So his fees for keeping up the general index are regulated wholly by Section 1155. And this section is so plain there is no room for doubt as to the meaning. He is entitled to ten cents "for indexing any lot or parcel of land." And it matters not whether there be one grantor or twenty. This section provides for payment by "lot or parcel" and in that manner only.

It was held by the Supreme Court of Ohio in *Clark vs. Commissioners*, 58 O. S. 107, 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." That principle has been emphasized so frequently that it would seem those officers who are not satisfied with the compensation the law gives them would either accept of the provision that is made for them or resign.

You are clearly right in your contention.

Very truly,

J. M. SHEETS,
Attorney General.

SOLDIERS' RELIEF COMMISSION.

COLUMBUS, OHIO, Jan. 26th, 1900.

William Klinger, Lima, Ohio.

DEAR SIR:—Yours of Jan. 25th inquires whether section 3107-54 empowers the county commissioners to pay the "Soldiers' Relief Committee" their expenses and compensation for services rendered in performing their duties as such committee.

It will be observed that section 3107-52 provides that the "Soldiers' Relief Commission shall be appointed by the common pleas judge for the respective counties of the state. This commission, after being appointed and qualified, shall

appoint for each township and ward of their respective counties a "Soldiers' Relief Committee." And Section (3107-51) enjoins upon these several committees certain duties. So it will be observed that the "Soldiers' Relief Commission" and "Soldiers' Relief Committee" are two distinct and separate bodies. Section (3107-54) provides for the payment of expenses and compensation to the "Soldiers' Relief Commission," not to the "Soldiers' Relief Committees." Hence, it is apparent that Section (3107-54) makes no provision for payment of expenses and compensation to the several "Soldiers' Relief Committees" of the county, and as the statute makes no provision for the payment of these "committees" for their services or expenses incurred, it is hardly necessary to add that their services must be rendered gratuitously. In *Clark vs. Commissioners*, 58 O. S., 107, it is held, "To warrant the payment of fees or compensation to an officer out of the county treasury, it must appear that such payment is authorized by statute." That principle has been repeatedly emphasized so frequently by the Supreme Court of Ohio that an extended comment is unnecessary.

In all instances where no compensation is provided for, a person accepting a position of public trust must perform these services without compensation. See the cases collected upon that subject in the case just referred to.

Hence, it is clearly my opinion that the commissioners have no right to allow these several "Soldiers' Relief Committees" any compensation for their services, or even pay them for money expended by them in the performance of their duties.

Very truly,

J. M. SHEETS,
Attorney General.

FEES CLERK OF COURTS—SECTION 1248.

COLUMBUS, OHIO, Jan. 26th, 1900.

Hon. Charles Kinney, Secretary of State.

DEAR SIR:—Your communication requires an answer to the following questions: 1st. Is the clerk of the courts entitled to pay for reporting cases to the Secretary of State other than criminal cases? 2nd. For reports made pursuant to section 1248 of the Revised Statutes, shall the county or state pay for such services?

It will probably be conceded that if the clerk is required under the law to report to the Secretary of State divorce cases, judgments, etc., he then is entitled to compensation allowed in Section 1250. As to whether he is required to report cases other than criminal to the Secretary of State depends upon the construction to be given the last clause of Section 1248, viz: "And such other information as the Secretary of State requires." The original statute requiring this information to be furnished will be found in volume 64, p. 17, of the session laws. The last sentence of the first section of that act provided: "Said report shall also show the number of suits for divorce, with the cause and the result in each case; and also such other information of general interest as said commissioners require."

In volume 72, p. 87, et seq., of the session laws, will be found the act providing for the revision and consolidation of the statute laws of Ohio. The second section of this act provided that the commissioners appointed should among other things bring together "All the statutes and parts of statutes relating to the same matter, omitting redundant and obsolete enactments and such as have no influence or existing rights or remedies, making alterations to reconcile contradictions, supply omissions, and amend imperfections in the original acts, so as to reduce the general statutes into as concise and comprehensive a form as is consistent with

clear expression of the will of the general assembly." Pursuant to that authority Section 1248 was substituted in lieu of the first section of the act above referred to. It has been frequently held by the Supreme Court of the State of Ohio that the revision of the statutes on a particular subject presumably has the same construction as the original, although the language has been changed. See *State ex rel vs. Stockley*, 45 O. S., 304, and cases collected.

Going back then to the original act, it is clear that the last clause as it now appears in Section 1248, authorizes the Secretary of State to require statistics with reference to divorce cases and other actions brought in the common pleas court. Hence, as the clerk is required to furnish such statistics, Section 1250 provides that he shall be paid therefor.

What were originally Sections 2 and 3 of the act found in volume 64, p. 17, et seq., session laws are now condensed and form Section 1250 of the Revised Statutes. Section 3 of that act provided that fees for such services should be paid out of the county treasury. Hence, applying the same construction, it will be clear to my mind without any other reason, that fees provided for in Section 1250 should be paid out of the county treasury. But Section 1250 furnishes an additional reason. It provides upon the failure to perform his duties, he shall forfeit double the amount of his fees, and this forfeiture inures to the benefit of the county treasury, for the reason that the forfeiture is to be deducted by the commissioners from his compensation otherwise due.

Hence, my conclusion is, that the clerk is not only entitled to pay for additional statistics over and above that with reference to criminal causes, but he is entitled to pay out of the county treasury.

Very truly,

J. M. SHEETS,
Attorney General.

EMPLOYERS' LIABILITY INSURANCE—SECTION 3641.

COLUMBUS, OHIO, Jan. 27th, 1900.

Hon. W. S. Matthews, Supt. Insurance, Columbus, Ohio.

DEAR SIR:—Your letter to this department under date of January 10th, 1900, requires an answer to the following question:

"Will an insurance company organized under the laws of a foreign government, authorized to do the business mentioned in the second clause of Section 3641, but desiring to do only the business mentioned in Section 3641-b (Employers' Liability) be required to deposit one hundred and fifty thousand dollars, or will a deposit of fifty thousand dollars be sufficient?"

The second clause of Section 3641 provides several different kinds of insurance that may be carried on by an insurance company other than life, to-wit:

- 1st. Make insurance against accidental loss or damage to property from causes other than fire or lightning.
- 2nd. Guarantee the fidelity of persons holding places of trust.
- 3rd. Guarantee the performance of contracts.
- 4th. Guarantee titles to real property.
- 5th. Execute and guarantee bonds.

I do not understand that a single company need engage in all the kinds of insurance above enumerated, although a company might be organized to issue policies in one or more of the class of risks set out in said second clause, but such a company would be thereby excluded from insuring any of the risks provided for in the 1st, 3rd and 4th clauses of said section.

Section 3641-b merely adds another class of risks, i. e., employers' liability, to those enumerated in the second clause of Section 3641, so that a company organized to do one or more of the kinds of insurance specified in said second clause, may also do an employers' liability business.

I have no doubt also that a company might do employers' liability insurance without doing the other kinds of insurance mentioned in said second clause.

The question is, whether the provisions requiring a deposit of fifty thousand dollars of companies doing employers' liability as specified in Section 3641-b is in addition to the general provisions of Section 3660 which requires foreign companies to deposit one hundred thousand dollars. Or, in other words, whether Section 3660 can apply at all to companies doing only employers' liability business?

I understand that the former Attorney General, Mr. Monnett, rendered an opinion to your department to the effect that Section 3660 did not apply to companies doing employers' liability business, and that acting in accordance with such opinion at least one company organized under the laws of a foreign government has been admitted by your department to do such business in Ohio by making a deposit of \$50,000.00 only. I see no reason at present to change the rule in this respect.

Section 3660 formed a part of the general act of 1872 entitled "An act to regulate insurance companies doing insurance business in the State of Ohio." The kind of insurance known as "Employers' Liability" was not known in Ohio at that time, or at least no provision was made for it in said act, and it was not until 1891 that such insurance was recognized by the Statutes of Ohio.

Under the authority of the case of *Ebersole v. Schiller*, Adm'r, 50 O. S., 701, and the cases there cited, I think Section 3660 can have no application to the kind of insurance provided for by Section 3641-b.

Respectfully,

J. E. TODD,
Assistant Attorney General.

AMERICAN SERVICE UNION.

COLUMBUS, OHIO, Jan. 29th, 1900.

Hon. Dwight Harrison, State Inspector of Building and Loan Associations, Columbus, O.

DEAR SIR:—In compliance with your request, I herewith submit an opinion as to the status of the American Service Union. I have carefully examined the policy or contract issued by the American Service Union, and notwithstanding their denial, I am of the opinion that the kind of business done by said Union will make them subject to the provisions of the act of April 25th, 1898 (93 O. L., 401). That the provisions of Sec. 1 of said act are in part as follows:

"Every corporation, partnership and association other than a building and loan association, doing in this state, the business of placing or selling certificates, bonds, debentures or other investment securities of any kind or description on the partial payment or installment plan, and every investment guarantee company doing business on the service dividend plan, shall, before doing business in Ohio, deposit with the State Treasurer, twenty-five thousand (\$25,000) dollars, either in cash or bonds of the United States or of the State of Ohio or of any county or municipal corporation in the State of Ohio, for the protection of the investors of such certificates, debentures or other investment securities."

This Union in its policy or contract specifically guarantees to do three things. First: To pay the dues and assessments required to maintain certain insurance policies in force. Second: To invest such sum in building and loan stock as will produce at a certain time a stated amount of money. Third: In addition to said stated amount of money, if the contract be maintained to maturity to pay a certain dividend.

It seems to me that these conditions and stipulations in the contract clearly bring the business of this Union under the kind designated in said section by the terms, "placing and selling of investment securities," and in order to conduct such business in Ohio, said Union would be required to comply with the further provisions of said act in relation to the deposit with the State Treasurer the sum of twenty-five thousand (\$25,000) dollars either in cash or of the kind of bonds designated in said section.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

FEES COUNTY OFFICERS.

COLUMBUS, O., Jan. 31st, 1900.

Fred E. Guthery, Marion, Ohio.

DEAR SIR:—The questions which you ask in your letter of Jan. 29th, I will try to answer in their order:

1st. Can the Sheriff collect \$2.00 per day while attending on the Common Pleas and Circuit Courts?

Sec. 1211 makes it the duty of the sheriff to attend upon the Common Pleas and Circuit Courts when they are in session. That is part of his official duties, and of course he must attend to them. And it has been repeatedly held, that, an officer can have no extra compensation without it is expressly provided for by statute. Hence, the collecting of \$2.00 per day, in my opinion, is wholly unauthorized. Sec. 553 authorizes the Court to appoint court constables. The purpose of that section is to furnish officers to attend upon the Court when the sheriff is otherwise engaged.

Nor in my opinion can the deputy collect \$2.00 per day for attending upon the Court, for the law applicable to sheriffs, is equally applicable to their deputies.

2nd. In the sheriff's proclamation for holding elections, can he charge and collect 8 cents per mile for conveying the notices to each township and posting the same as required in Sec. 2967 of the Revised Statutes? Sec. 2966 provides that he shall receive 50 cents for each township. It makes no provision for 8 cents per mile, and there is no other provision anywhere in the statutes authorizing this charge for the duties specified in Sec. 2967. Hence, in my opinion 8 cents per mile is wholly unauthorized.

3rd. Can the clerk charge and receive for making court dockets to be paid out of the county treasury when ordered to do so by the Court? Sections 4957 and 5136 provide that such dockets shall be made by him. Neither section provides for any pay therefor. However, Sec. 1260 provides that he shall receive 4 cents for entering each case on the bar and court calendar each term. In these sections, the words, "calendar" and "docket", in my opinion, are used interchangeably for, in no place in the statute is there an express provision that the clerk shall keep a court calendar and those two words are synonymous. Hence, there is provision for pay and it is to be charged as costs in the case, and, as there is no further provision for payment, under the ruling of 58 O. S. 107, and

very many other cases that might be cited, he can receive no further compensation. Hence his charge of \$75.00 per year for making the dockets in the Common Pleas, and \$20.00 for making Circuit Court dockets, are charges unwarranted by the law. It is a matter of no importance that the Court has ordered him to make these dockets, the statute orders him to do so, and the order of the Court is a mere nullity.

4th. Is the Clerk entitled to \$300.00 per year to be paid out of the county treasury in payment for his services rendered in criminal cases wherein the State fails to convict or fails to collect the costs? Sec. 1261 provides that he shall be paid out of the county treasury only in the event he renders services which are not paid by the collection of the costs in the case. It is entirely clear that if he rendered no services in any case in which the costs were not collected, the county would owe him nothing, and it is equally clear, that the county in all events owes him nothing except the actual amount of costs due him in such cases as are mentioned in these sections to wit:—Cases wherein the State fails to collect the costs or fails to convict, and his charge of \$300.00 per year is wholly unwarranted.

5th. Shall the auditor's salary as provided for in Sec. 1096, remain the same throughout the year, or shall it be increased as soon as it is determined by the quadrennial enumeration, that the population will warrant an increase?

* From your statement it would appear that at the commencement of the last year of the auditor's term to wit:—The third Monday in October, 1898, he was receiving his annual salary in monthly payments of \$135.83, and that immediately upon determining the number of male inhabitants pursuant to the quadrennial enumeration to wit: About April 10th, 1899, he commenced to draw \$147.49 a month. In my hasty examination of the question, I have been unable to determine the purpose of the Legislature in authorizing the quadrennial enumeration as provided in Sec. 1527 of the Revised Statutes. And as Sec. 1069 provides for an annual and not a monthly salary, it would seem that his salary would be determined at the commencement of the year. The question has occurred to me whether or not under the constitution, the auditor would not be bound throughout his entire term by the amount of salary due him at the commencement of his term. (See Article 2, Sec. 20 Constitution.) This however, is a mere suggestion as press of business is such that I am unable to follow up the thought. Upon the whole however, I am of the opinion, that the auditor is not entitled to an increase of his salary in the manner suggested in your letter, after the commencement of the year.

6th. Are the commissioners entitled to charge reasonable expenses incurred by them while attending to their official duties over and above their per diem and mileage. Without an extended discussion of the question, it would seem that the latter portion of Sec. 897 authorizes them to make such charges.

Very truly,

J. M. SHEETS,
Attorney General.

IMPROVEMENT BY COMMISSIONERS ON COURT HOUSE.

COLUMBUS, O., Feb. 1st, 1900.

Benjamin Meck, Esq., Prosecuting Attorney, Upper Sandusky, Ohio.

DEAR SIR:—Your letter of recent date is at hand. You ask whether a contract providing for an improvement upon the Court House amounting to \$3,500 can be legally let by the commissioners without plans, specifications and bills of material being prepared and submitted, and without advertising or receiving bids for the same.

The contract submitted to this office, to say the least, provides for an improvement and an alteration of the court house and comes within the provisions of Section 797 of the Revised Statutes, and if no plans and specifications, bills of material, etc., were submitted then the contract would violate the provisions of Sections 795, 796 and 797 of the Revised Statutes.

You say this contract was let without public advertisement. If such be the case, then it is prohibited by Section 798 of the Revised Statutes, which requires that there must be an advertisement and a public letting, where the amount of the contract exceeds one thousand dollars. I take it for granted, as you have said nothing upon the subject, that the auditor has filed and recorded his certificate as provided by Section 2834-b of the Revised Statutes, to the effect that the money is in the treasury to the credit of the proper fund, and not otherwise appropriated sufficient in amount to pay for the improvement proposed to be made. If, however, the auditor has failed to do that, the contract would be void for that reason.

Section 799 provided that before any such contract shall be valid, it must be submitted to the prosecuting attorney for his approval, and until approved by him and his approval endorsed thereon, the contract shall be null and void. I take it for granted from your letter that you have not approved the contract, and if such be the case, for that reason it will be void. I have not the time to call your attention to the different particulars wherein this contract does not comply with the provisions of the sections of the Statute already quoted, but you will readily see upon reading these statutes wherein this contract fails to comply with the statutes cited. I am,

Yours truly,

J. M. SHEETS,
Attorney General.

CHANGE OF SOURCE OF WATER SUPPLY IN VILLAGES.

COLUMBUS, O., Feb. 1st, 1900.

State Board of Health, Columbus, O.

GENTLEMEN:—Your inquiry requires an answer to the following question: What is the remedy where a city or village changes and extends its source of water supply without the approval and against the disapproval of the State Board of Health.

I find upon examination of the provisions with reference to the State Board of Health that Sec. 409-25 R. S. provides that the water supply of cities and villages are subject to the inspection and approval of the State Board of Health, and that they must not extend or use a water supply that has not been approved by the State Board of Health, or use a water supply that has been condemned. Sec. 409-29 provides that all laws prescribing penalties and mode of procedure applicable to local boards of health, shall apply to the State Board of Health. Among the provisions for local boards of health I find that Sec. 2137 provides that any person violating the provisions of the chapter relating to local boards of health, shall be fined any sum not exceeding one hundred (\$100.00) dollars for the first offense, and further provides for both fine and imprisonment for the second offense.

According to your letter the council of the city of Wooster has used a water supply not only without the approval but against the disapproval of the State Board of Health. Hence, they would be violating one of the provisions of Sec. 409-25 above quoted. Hence, under Sec. 409-29, they would be liable to the penalties provided in Sec. 2137.

Yours very truly,

J. M. SHEETS,
Attorney General.

TAXATION OF LAND OWNED BY CEMETERY ASSOCIATION.

COLUMBUS, O., Feb. 8th, 1900.

Cary Jones, Esq., Prosecuting Attorney, London, Ohio.

DEAR SIR:—Yours at hand and contents noted. I gather the following facts from your communication: A Cemetery Association owns a tract of nine acres of land which is used exclusively for burying purposes; it owns another tract of fifty-two acres adjoining, which is not used for burying purposes, but is leased as agricultural lands, and the profits derived therefrom are applied to the improvement of the cemetery. The Cemetery Association holds this tract in trust by virtue of the will of one Richard Cowling, deceased, for cemetery purposes whenever the same shall be needed as such.

The question to which you seek an answer, is whether the fifty-two acres of land is exempt from taxation?

Article XII. Sec. 2 of the Constitution provides.

“Laws shall be passed taxing by uniform rule * * * all real and personal property according to its true value in money; but burying grounds * * * may by general laws be exempt from taxation.”

Section 2732 of the Revised Statutes provides that,

“All lands used exclusively as grave yards for burying the dead, except such as are held by any person, company or corporation, with a view to profit, or for the purpose of speculating in the sale thereof, shall be exempt from taxation.”

Section 3571 provides:

“A company or association incorporated for cemetery purposes may purchase, appropriate, take by gift or devise, and hold, not exceeding one hundred acres of land, which shall be exempt from taxation, and from being appropriated to any other public purpose, if used exclusively for burial purposes, and in no wise with a view to profit.”

It will be observed that the Constitution provides that burying grounds may be exempt from taxation. This provision gave the Legislature the option to exempt them or not. It chose to exempt them. But it will be observed that the prime condition of exemption is that the land must be “burying grounds”, and it will not be claimed that the Legislature can exempt any property from taxation, except that mentioned in the Constitution. In my opinion Sections 2732 and 3571 have in no way conflicted with the Constitution, but they emphasize the fact that in order to escape taxation the lands must be used exclusively for burial purposes and in no manner with a view to profit.

From reading these statutes it is apparent that two conditions must exist before such lands are exempt from taxation:

First: Held exclusively for burial purposes.

Second: Held in no manner with a view to profit.

The absence of either condition makes the land taxable. Both conditions, in my opinion, are wanting in this case. “Burying grounds” are lands in which the dead are laid to rest. The lands in question are leased for agricultural purposes, and with a view to profit. The fact that the profit is used to improve the cemetery is of no importance. It is still profit, whether expended for charity, for the improvement of a cemetery, or is hoarded. If the application of the rentals to the improvement of the cemetery exempts the tract of land from taxation, with equal propriety could a brick block be exempt from taxation by proving

that the rentals were used in improving a cemetery owned by the proprietors of the building.

Courts have frequently been called upon to pass upon exemptions from taxation under the Constitution, and the statutes above quoted, and have uniformly confined the exemption to narrow limits, and have laid down the rule that property, to be relieved from taxation, must come clearly within the exemption. Following out this rule of construction the Supreme Court held in *Gerke v. Purcell*, 25 O. S. 229, that a parsonage was not exempt from taxation even though built on ground attached to the church edifice; for it was not used *exclusively* for public worship, although it was used for the support of public worship.

So the 52 acre tract in question is taxable for it is not used exclusively as a cemetery. Although it may be used for the support of a cemetery. It will be seen from the foregoing that the fact, that the testator limited the purposes to which this Association might apply this land, is of no importance in the case.

Respectfully submitted.

J. M. SHEETS,
Attorney General.

LABEL UPON EXTRACT FOR FLAVORING.

COLUMBUS, O., Feb. 7th, 1900.

Hon. Joseph E. Blackburn, Dairy and Food Commissioner.

DEAR SIR:—Yours of Feb. 6th, at hand and contents noted. You ask whether a label upon an extract in the following form, "VANILLA for flavoring ICE CREAM, CAKES, ETC. This is a compound of 50% extract of vanilla and 50% extract of tonka," is in conflict with the pure food laws of Ohio.

This purports to be a compound and the label purports to set forth the ingredients of that compound, which is required by the act of April 22nd, 1890, 87 O. L. 248. There is no other provision of the statute that we are able to find that bears upon this question. Hence, we are of the opinion that such a label is not in conflict with the pure food laws of Ohio.

Yours truly,

J. M. SHEETS,
Attorney General.

ANNUAL ALLOWANCE OF COUNTY AUDITOR—SECTION 1076.

COLUMBUS, OHIO, Feb. 8th, 1900.

W. J. Beckley, Attorney-at-Law, Ravenna, Ohio.

DEAR SIR:—Your letter of the 6th inst. calls for a construction from this office of Section 1076 of the R. S.

In the act of April 24th, 1877 (74 O. L., 124) Sections 1069 and 1070 of the R. S. appeared as Sections 1 and 2 of said act, while Section 1076 of the R. S. appeared as Section 9 of said act and read as follows:

"Section 9. That the board of county commissioners of the several counties in this state shall have authority and are hereby required to make an additional allowance to the county auditor for clerk hire, not exceeding twenty-five per cent. of the *annual allowance* made in Sections one and two of this act, in the years when the real property is required by law to be appraised."

It is beyond controversy therefore that the "annual allowance" contemplated by the legislature in the original act, was the allowance now found in Sections 1069 and 1070 of the R. S.

Section 1076 was amended and changed to its present form by act of the legislature June 3rd, 1879 (76 O. L., 117). The change was accomplished by omitting the words, "Sections one and two of this act, and substituting in their place the words, "preceding sections." Is this such a change in the phraseology of the statute, as to change the meaning of the term, "annual allowance"? I cannot think so. A mere change of phraseology in a revised or amended statute does not change the former construction further than appears evidently intended. And this is true although there may be an omission or addition of words. Such has been the uniform holding of the Supreme Court of Ohio.

The change made in the phraseology of this section does not disclose evident intent on the part of the legislature to change the construction of the section, and hence, the former construction should be adhered to.

This view is strengthened when we consider the nature of the allowance made to the county auditor in Sections 1069 and 1070 and the allowance made in Sections 1071 and 1075 inclusive. The allowance made in the last sections above referred to is not annual in its nature, but is merely fees, which are paid to the auditor upon the performance of the services stated in those sections. While the allowance referred to in Sections 1069 and 1070 is strictly annual in its nature, and is paid to the auditor, not as payment for particular services, but as salary for the performance of the general duties of his office.

You also call attention to an opinion from this office to the effect that the county commissioners were entitled to their expenses over and above their mileage and per diem while performing their duties within the county, and suggest that Section 897 will hardly bear that construction and request further opinion from this office.

The opinion referred to was sent out at a time when the office was very much pressed with urgent business, and the statute was not carefully considered. Owing to the fact of press of business and the statement of the prosecuting attorney desiring opinion that upon examination of the statute he was of the opinion himself that the commissioners were entitled to such allowances, the opinion in question was rendered hastily. Since the decision of the Circuit Court of Morrow county to the effect that they were not entitled to such allowances, this office has carefully considered that question and is now of the opinion that the construction placed upon this statute by the Circuit Court is entirely correct. The mileage provided for in this section was evidently intended to pay the reasonable expenses of the commissioners while within the county, and it would hardly be reasonable to construe that they should at the same time be paid their expenses in addition thereto.

Section 897 provides that in counties wherein no special provision is made the commissioners shall receive for services,

"when necessarily engaged in attending to the business pertaining to his office under the direction of the board, and when necessary to travel on official business outside of his county, shall be allowed in addition to his compensation and mileage as herein provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty."

The clause, "And when necessary to travel on official business outside of his county," in my opinion limits the payment of additional necessary expenses to business performed while outside of his county.

True, this section as it now stands is somewhat ambiguous, but we are aided in the construction now adhered to by consulting the original act.

The act which became Section 897 of the R. S. will be found in O. L., volume 72, pages, 169 and 170. It is there provided among other things that:

"Each commissioner for his services when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, other than in attending regular or called sessions of the board of commissioners shall be allowed the same per diem as is provided by this act for attendance upon session of the board, and when necessary to travel on official business out of his county, shall be allowed in addition thereto his reasonable and necessary expense actually paid in the discharge of his official duty."

The provision as it then stood was unambiguous and clearly provides for payment of expenses only when on business out of the county (and as stated above in this opinion), "A mere change of phraseology in a revised or amended statute does not change the former construction further than appears evidently intended. And this is true although there may be an omission or addition of words." I deem it unnecessary to cite decisions in support of this proposition as they are familiar to you.

I have been unable to get the opinion of the Circuit Court of Morrow county, hence do not know the reasons given for the decision.

Very truly yours,

J. M. SHEETS,
Attorney General.

RIGHT OF INSPECTOR TO CONDEMN COURT HOUSE.

COLUMBUS, OHIO, Feb. 9th, 1900.

Marcus Shoup, Esq.: Xenia, Ohio.

DEAR SIR:—Yours containing communication from the Inspector of Work-shops and Factories at hand. Your inquiry requires an answer to the following question: Does a county court house come within the class of buildings enumerated in Section 2572 of the Revised Statutes, and has the Inspector of Work-shops and Factories the right to examine and condemn such building, and order repairs thereon as provided by Section 2572-a.

The original act, of which Section 2572 now forms a part, is found in 62 O. L., 139. Section one of that act provides, "That it shall be unlawful for any hall, theater, opera house, church, school house or buildings of any kind whatsoever, in any city or incorporated village, to be used for the assemblage of people, unless the same is provided with ample means for the safe and speedy egress of the persons therein assembled in case of alarm."

Since the original act was passed the legislature added other buildings to the list until we have the following enumeration of buildings:

(Section 2572.) "Whoever being the owner or having control as an officer, agent or otherwise, of any opera house, hall, theater, church, school house, college, academy, seminary, infirmary, sanatorium, children's home, hospital, medical institute, asylum, or other buildings used for the assemblage or betterment of people in a municipal corporation, county or township in the State of Ohio, permits the same to be used, etc., etc."

While an infirmary is named as one of the buildings, it will be observed that in none of the numerous amendments is a county court house named. Hence, it is apparent, that if a county court house is intended to come within the provisions of Sections 2572 and 2572-a it must be by virtue of the following clause just quoted: "Or other buildings used for the assemblage or betterment of people." Had the legislature intended a court house to be included, why was it not specifically mentioned?

Again, county court houses are not primarily "used for the assemblage or betterment of people," nor are the commissioners required to provide an assembly room in the court house. While people frequently assemble in the court room, yet it is a matter of grace and not of right. All the laws that I have been able to examine upon the subject of the erection of court houses, make no provision for an assembly room or for allowing the public generally to assemble in the court house.

While courts are always open to suitors, yet that does not mean that the sessions of the court are open to curiosity seekers.

It is a well recognized rule of statutory construction that "where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned."

Black on Interpretation of Laws, p. 141.

Whitcomb v. Springfield, 3 C. C., 244.

"General words, following particular and specific words, must, as a general rule, be confined to things of the same kind as those specified."

Schultz v. Cambridge, 38 O. S., 659.

With this rule of construction in view, let us observe the character of the buildings specifically mentioned in Section 2572. It will be observed that they are all of the character in which people in large numbers rightly congregate, and are maintained for that specific purpose; while a court house is maintained as a place in which to perform the public duties imposed upon the county by the state. A county is a political subdivision of the state organized for the convenience of the state to assist in collecting and disbursing public revenue, in making public improvements and in executing the laws. Its corporate existence is forced upon it without its consent or the consent of its inhabitants. It is without power to make laws for its own government or to raise revenue—is absolutely dominated by the legislature.

Such being the purpose of the organization of counties, it occurs to me that the legislature would hardly be inclined to intrust such absolute power to the Inspector of Workshops and Factories without in turn giving the commissioners ample authority to carry out his commands. If the inspector has the power to condemn the court house and order repairs, then the commissioners in order to escape the heavy penalty that is provided in Section 2572, must close the door of the court house against the officers of the county and the courts of the state until the repairs can be made. By reason of the many safeguards thrown around the action of the commissioners in making improvements in order to protect the tax payer, the process of making such improvement is a slow one. The several sections bearing upon the subject need not be specifically enumerated here. So that the inconvenience to the public under the circumstances would certainly be very great.

It will also be observed on examination of Sections 2568, 2569, 2570, 2571 and 2572 that the mayor and council of municipalities have equal jurisdiction with the Inspector of Workshops and Factories to examine and pass upon the

condition of the buildings enumerated in these sections. It would seem hardly probable that the legislature of the state would give the mayor and council authority to inspect and condemn one of the public buildings of the state. If a county court house is to be included by implication from the general terms used in the statute, with equal propriety might the State House be inspected and condemned by the Inspector of Workshops and Factories.

Taking all these things into consideration, it appears to this office that the Inspector of Workshops and Factories is without jurisdiction to examine and condemn a county court house and order repairs thereon. I am,

Very truly yours,

J. M. SHEETS,
Attorney General.

REVOKING CERTIFICATE—VOTING BY PROXY.

COLUMBUS, OHIO, Feb. 12th, 1900.

William R. O'Gier, Secretary State Board of Pharmacy, Columbus, Ohio.

DEAR SIR:—Your letter of Feb. 9th requires an answer to two separate inquiries.

First: As to the revocation of the renewal certificate referred to in your first question.

I have no doubt that the Board of Pharmacy has the same power to revoke a renewal certificate that they have to revoke an original certificate. In other words, if the pharmacist receiving the renewal certificate has been guilty of fraud in procuring the same or is addicted to any of the vices referred to in Section 4410 of the R. S., the Board would have the same right to revoke his certificate that they would have if it was an original certificate.

Second: As to a member of the Board voting by proxy for the officers of the Board.

I am of the opinion that this cannot be done. There is no statutory provision one way or the other, but on the grounds of public policy, I think such voting would not be permitted.

Very truly,

J. M. SHEETS,
Attorney General.

FEES OF PROBATE JUDGE.

COLUMBUS, OHIO, Feb. 13th, 1900.

J. D. Hill, Esq., Montpelier, Ohio.

DEAR SIR: Your inquiry of Feb. 10th requires an answer to the following question:

Has the Probate Judge, when employed by the commissioners, pursuant to the provisions of Section 533-1 R. S., to collect and preserve together the papers in different proceedings in his court, the right to separate the papers into classes as follows, e. g.: The papers in the settlement of a deceased person's estate and place the application for letters of administration and bond in one envelope and call that a cause; inventory, appraisal and sale bill in another envelope and call that a cause; each account a cause; proceeding to sell real estate a cause; motion to increase the widow's allowance a cause, etc., and charge for each of those separate steps in the settlement of the estate the sum of twenty cents?

An answer to this question requires a construction to be placed upon Sections 533-1 and 533-2 R. S.

Section 533-1 of the R. S. provides:

"The Probate Judge of each county may cause to be assorted, arranged and preserved together all the pleadings, accounts, vouchers and other papers on file in the Probate Court of such county, in each estate, trust, assignment, guardianship or other proceeding, ex-parte or adversary, begun or commenced prior to the first day of January, 1888, keeping the said pleadings, accounts, vouchers and other papers in every other case or proceeding. And such papers so assorted and arranged shall be properly jacketed and otherwise tied, fastened or held together, and be numbered, lettered or otherwise marked in such manner that the same may be readily found and examined by reference to proper memoranda upon the docket record or index entries of such cases, causes or proceedings, respectively, which memoranda shall be made or caused to be made, by said Probate Judge."

Section 533-2 provides:

"Such probate judge shall be entitled to receive compensation for assorting, arranging, preserving and marking said pleadings, accounts, vouchers and other papers, as required in the preceding section, in such amount as may be allowed by the commissioners of such county, not exceeding, however, the sum of twenty cents for each case or cause so assorted, arranged, marked and docketed."

It will be observed that Section 533-1 provides that the probate judge may cause to be assorted, arranged and preserved together the papers in each estate, trust, assignment or other proceeding in his court.

Section 533-1 also provides that after being properly assorted and arranged they shall be jacketed and tied together.

The law in question was not enacted to preserve the files of the probate office, for those had been preserved before in separate files and throughout the records of his office. But it was evidently, as stated in the act, to "preserve together" in order that any person desiring to examine the papers in any proceeding, from the first step to the last, could find them without delay.

Under the provisions of this statute, the probate judge might properly place the papers, referred to in your question, in separate envelopes, provided he then tie them together in one bundle as required by the act.

The duties required are merely clerical, and certainly it was not the purpose of the legislature to provide exorbitant pay for such services. To claim pay for a separate cause, for the papers placed in each envelope, would result in exorbitant compensation for the services rendered. In my opinion neither the letter nor the spirit of the law will bear out the construction contended for by the probate judge.

Upon the death of a person, and the appointment of a personal representative, every step thereafter taken until the estate is finally administered is part and parcel of one proceeding. So it is with the settlement of an insolvent estate, or the administration of the estate of a minor. It is one proceeding from the appointment of the trustee to his discharge.

Hence it is my opinion that the probate judge is not entitled to separate the papers named in your question into separate packages and charge twenty cents for each package. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

MILEAGE OF COMMISSIONERS.

COLUMBUS, OHIO, Feb. 14th, 1900.

C. A. Reid, Esq., Washington, C. H.

DEAR SIR:—Yours of Feb. 13th at hand and contents noted. You refer there to an opinion sent from this office to the prosecuting attorney of Marion county as to the right of commissioners to charge expenses incurred by them while attending to their duties within the county. This office did say to Mr. Guthery, prosecuting attorney of Marion county, that we were inclined to the opinion that the commissioners were entitled to such expenses. This opinion was sent in answer to a suggestion from Mr. Guthery that they were so entitled, and also when we were very much pressed with a rush of business and had not time to consider the question. Since then, however, another inquiry has come from the prosecuting attorney of Portage county, and upon carefully examining the question we have changed the former ruling and now are of the opinion that they are not entitled to their expenses over and above their per diem and mileage while attending to their official duties within the county. The mileage provided for in this section was evidently intended to pay the reasonable expenses of the commissioners while within the county, and it would hardly be reasonable to construe that they should, at the same time, be paid their expenses in addition thereto.

Section 897 provides that the counties wherein no especial provision is made shall receive for his services:

“When necessarily engaged in attending to the business pertaining to his office under the direction of the board, and when necessary to travel on official business outside of his county shall be allowed in addition to his compensation and mileage as herein provided, any other reasonable and necessary expenses actually paid in the discharge of his official duties.”

The clause, “and when necessary to travel on official business outside of his county,” in my opinion, limits the payment of additional necessary expenses to business performed while outside of his county.

True, this section as it now stands is somewhat ambiguous, but we are aided in the construction now adhered to by consulting the original act.

The act which became Section 897 of the R. S. will be found in O. L., Vol. 72, pages 169 and 170. It is there provided among other things that:

“Each commissioner for his services when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, other than in attending regular or called sessions of the board of commissioners shall be allowed the same per diem as is provided by this act for attendance upon sessions of the board, and when necessary to travel on official business out of his county, shall be allowed in addition thereto his reasonable and necessary expense actually paid in the discharge of his official duties.”

The provision as it then stood was unambiguous and clearly provides for payment of expenses only when on business out of the county. It has been repeatedly held by the Supreme Court of Ohio that a “mere change of phraseology in a revised or amended statute does not change the former construction further than appears evidently intended. And this is true although there may be an omission or addition of words.” I deem it unnecessary to cite decisions in favor of this proposition as they are familiar to you.

I am informed also that the Circuit Court of Morrow county, in a late decision has held that they are not entitled to such expenses, but have not been able to see the opinion. I am

Yours very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF OWNER OF A SECOND STORY TO CONSTRUCT STAIRS.

COLUMBUS, OHIO, Feb 16th, 1900.

Hon. J. W. Knaub, Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR:—Your letter of Feb. 16th, requires an answer to the following question: Can the owner of a lower story of a building be required to permit the owner of the upper story of the same building to construct and fasten to said lower story a stairway, leading from said upper story to the ground when said stairway is ordered by the Inspector of Workshops and Factories?

The question is a somewhat novel one and depends for its answer upon the general law of Easements. If this stairway can be constructed at all it is because it is a way of necessity, and as such the right to construct it would pass by implication, with a grant of the right to erect the upper story. It is a general principle that where the owner of an estate grants another a portion of the estate there goes with it, by implication, all such rights, privileges and easements as are necessary to the use, occupation and enjoyment of the part granted. Among such easements in the case suggested in your letter would be the right to have the upper story supported by the walls of the lower story; also the right of ingress and egress through the lower story. These rights would be necessary to the use and enjoyment of the upper story. On the same principle if an outer stairway is required as a necessary condition to the use and enjoyment of the upper story and such stairway can not be constructed except by fastening it to the walls of the lower story, the owner of the upper story would have the right to make such use of said walls. He would not have such right merely as a matter for his own convenience when he already possessed the means of ingress and egress to the upper story, but it is only upon the ground that such stairway is a necessity to the use and enjoyment of the upper story, that such right could exist. Whether this necessity arises from the requirement of the laws of the State or from other causes would make no difference. I am,

Yours very truly,

J. E. TODD,
Assistant Attorney General.

DIVISION OF SCHOOL FUNDS.

COLUMBUS, OHIO, Feb. 19th, 1900.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—Your letter of Feb. 16th, addressed to Hon. Lewis D. Bonebrake, State Commissioner of Common Schools is referred to this office for answer.

Your question as to whether Collinwood Village School District is entitled to any portion of the school funds in the hands of the treasurer of East Cleveland township at the time of the annexation of the territory to said village school district, we are of the opinion should be answered in the negative.

It is a general principle, well established that when a county, township school district or other governmental organization is divided and a portion of its territory annexed to a similar organization, that the old organization remains liable for all of the indebtedness existing at the time of the division and also retains all of the property (including money) on hands at the time of the division. This rule obtains except where it has been abrogated by statute. 2 O. S. 509. 6 C. C. 597

Section 3893 Revised Statutes provides that the portion of the village, township or special school district annexed to a city or village is thereby transferred and becomes a part of such village or city school district. And said section further provides that the amount of existing school indebtedness in the district from which such territory is taken shall be apportioned by the county commissioners in the same manner as provided in Section 1615. While this section (3893) provides for the apportionment of the school indebtedness it makes no provision for the division of the school funds, and as this division of school funds is thus left unprovided for, the rule above referred to must govern, and this is true of the funds in the hands of the county treasurer at the time of the division as well as the funds in the hands of the township or district treasurer.

As to the taxes levied for the tax year of 1899 but as yet uncollected, the question is more difficult. We think there can be no doubt as to the State school fund, Section 3964 provides that the county auditor shall annually apportion this fund in proportion to the enumeration of youth to districts, subdistricts etc., but if in any district an enumeration of youth for any year has not been taken and returned, said district shall not be entitled to receive any portion of said fund. I conclude that no enumeration of the youth in this territory attached to Collinwood Village District was taken and returned to the county auditor, and therefore no distribution could be made of the State Common School fund. The only moneys upon which the Collinwood district could possibly have a claim would be that portion of the contingent fund levied by the township for the year 1899 and still uncollected which was properly charged to this territory. It seems to me it would be the duty of the county auditor to apportion this fund, giving to the Collinwood Village District the amount paid by the annexed district. I am,

Yours very truly,

J. E. Todd,
Assistant Attorney General

RIGHT TO PAY COUNSEL FOR INDIGENT PRISONERS.

COLUMBUS, OHIO, Feb. 19th, 1900.

John Ray, Esq., Prosecuting Attorney, Sandusky, Ohio.

DEAR SIR:—Yours of Feb. 17th at hand and contents noted. Your letter requires an answer to the question, whether under Sections 7245 and 7246 of the Revised Statutes an attorney appointed for an indigent prisoner has the right to take the case for the prisoner to the Circuit Court on error and be paid for his services out of the county treasury.

In my opinion this question must be answered in the negative. An indigent prisoner has no constitutional right to have counsel assigned him by the Court, they to receive their pay out of the county treasury. That is a matter of grace. The Legislature might repeal this law at any time and an indigent prisoner cannot object.

Section 7245, in my opinion is clear on the proposition that it makes no provision for the payment of counsel except in the trial in the Common Pleas Court. If the prisoner is convicted the law conclusively presumes he is rightly

convicted, unless he wishes to take his case to a higher court and the higher court reverses it.

The State was liberal enough in furnishing to indigent prisoners counsel and payment of all fees of such witnesses as he might wish to subpoena in his own behalf. He is liberally protected by the law and we can hardly contort the provisions of Section 7245 so as to hold that he might take the case from court to court and the county still pay his counsel. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

REPORTS OF DAIRY AND FOOD COMMISSIONER.

COLUMBUS, OHIO, Feb. 20th, 1900.

Hon. Joseph E. Blackburn, Dairy and Food Commissioner.

DEAR SIR:—The question submitted by your department for answer is, whether the reports of the Dairy and Food Commissioner shall be published as required for the reports of other departments under Sec. 63 of the R. S. Upon examination of Sec. 4 of the act amended April 12th, 1898 93 O. L., p. 103, I find this provision with reference to the duties of the Dairy and Food Commissioner.

"The commissioner shall make an annual report to the governor, on or before the fifteenth day of November each year, containing itemized statements of all receipts and disbursements, attorney fees in each specified suit brought in this department, and all persons employed by him, together with such statistics and other matter as he may regard of value; said reports to be published as are the other reports of the other state officers."

Sec. 63 however, does not especially provide for the publication of your reports and there is no other provision of the statute that I am able to find that authorizes any particular number to be printed.

That being the case it is the opinion of this office that such reasonable number as the needs of the occasion require should be published.

Yours very truly,

J. M. SHEETS,
Attorney General.

LABEL, BROMO SEDATIVE.

COLUMBUS, OHIO, Feb. 21st, 1900.

Hon. Joseph E. Blackburn, Dairy and Food Commissioner, Columbus, Ohio.

DEAR SIR:—Your letter of Feb. 2nd enclosing letter from F. D. Felt, Cleveland, Ohio, at hand. The letter of Mr. Felt requires an answer to the following question:

Would it violate any provisions of the laws of Ohio to sell a medicine or preparation under the name of "Bromo Sedative" or "Bromide Sedative," when in fact, said preparation contained no bromo or bromide or any preparation of bromine?

We think this would be a violation of Sec 4200-6. The third clause of the first subdivision of that section provides:—An article shall be deemed adulterated within the meaning of this act in the case of drugs if its strength, quality or purity falls below the professed standard under which it is sold.

A preparation sold as "Bromo Sedative," which in fact contained no ingredient of bromine, it seems to me would not measure up to the professed standard under which it is sold, and would be a fraud on the purchaser.

The Supreme Court in the case of *State vs. Dreher*, 55 O. S., 115, said in speaking of the sale of substances composed of liquid coffee and chicory under the name of liquid coffee:

"This is an offense under the statute whether the compound be deleterious or not; it is a fraud on the purchaser, and one of the purposes of the statute is to protect him against such frauds."

It is true the court was speaking of the sale of a food product and not a drug, but the reasoning would be as potent in one case as the other.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF Y. M. C. A. OF CINCINNATI TO CONFER DEGREES.

COLUMBUS, OHIO, Feb. 23rd, 1900.

Hon. Charles Kinney, Secretary of State, Columbus, Ohio.

DEAR SIR:—The question presented by your inquiry is whether the Young Men's Christian Association of Cincinnati can, under its present charter, upon complying with the provisions of Sec. 3726 of the Revised Statutes of Ohio, confer degrees authorized in that section upon those who take the course of study prescribed by the institution.

The object for which this institution was organized, as set forth in its charter, is:

"The improvement of the spiritual, mental, moral, social and physical condition of young men, by the support and maintenance of lectures, libraries, reading rooms, social and religious meetings and such other means and exercises as may be conducive to the accomplishment of these objects and not contrary to the teachings of the Bible."

Section 3726 of the Revised Statutes provides:

"The trustees of a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality or the fine arts, which has acquired real or personal property of the value of five thousand dollars, and which has filed in the office of the Secretary of State a schedule of the kind and value of such property, verified by the oaths of the trustees may appoint a president, professors and tutors, and any other necessary agents and officers, and fix the compensation of each, and may enact such by-laws, not inconsistent with the laws of this state or of the United States for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary; and may, on the recommendation of the faculty confer all such degrees and honors as are conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student, as they may deem proper."

It will be observed that this section permits any institution, "incorporated for the purpose of promoting education, religion, morality or the fine arts" to

confer degrees when it complies with the other requirements enumerated. And we are of the opinion that the purposes of the organization of the Young Men's Christian Association of Cincinnati as enumerated in its charter brings it substantially within these provisions. Hence, if it complies with the other provisions of Sec. 3726 it may confer degrees without amending its charter. I am,

Yours respectfully,

J. M. SHEETS,
Attorney General.

FEEES OF COUNTY TREASURER—COUNTY BONDS.

COLUMBUS, OHIO, Feb. 25th, 1900.

Addison C. Lewis, Steubenville, Ohio.

DEAR SIR:—The question presented in your inquiry is, whether the county treasurer is entitled, under Sec. 1117 R. S. to percentage on proceeds of bonds issued by the road commissioners, in carrying out the provisions of Title VII, Chapter 7, R. S.? Under the provisions of this chapter after the proper petition is filed with the county commissioners they are required to appoint road commissioners, who must take oath and give bond and thereupon become a body corporate. They then proceed to lay and establish the road designated in the petition therefor and return to the county commissioners a map of the same and lands assessed, together with all the costs of construction.

The county commissioners transmit these proceedings to the auditor, with instructions to levy the necessary tax on all the property within the taxable bounds of the road. Sec. 4808 provides, that the road commissioners may issue bonds payable at the county treasury to pay for the construction of such turn-pike road to liquidate any indebtedness incurred in its construction.

This section also provides that the tax collected under the provisions of this chapter shall be paid to the road commissioners to be used by them in paying, first, bonds and interest and next the cost of construction and improvement to such road. Sec. 4796 provides that when the road has been constructed and paid for, and the bonds and coupons redeemed, the road commissioners shall upon the order of the county commissioners cease to be a body corporate.

If these bonds thus provided for are county bonds then by the provisions of Sec. 1117 the county treasurer is not entitled to his percentage. Or if the county treasurer is not required to become the custodian of their proceeds upon sale, he is not entitled to his percentage upon the money received from the sale of the bonds. Two questions then present themselves for solution.

First: Are such bonds county bonds? The statute is silent as to whether the faith of the county shall be pledged to their payment. If it is not, what security has the bond holder? The road commissioners have neither power to levy or collect tax to be used in their payment. The county commissioners under Sec. 4777 order the tax to be levied; and under Sec. 4812 they may continue to levy for fifteen years beyond the time set forth in the petition for the purpose of paying such bonds. The treasurer collects such taxes. It thus appears that the whole machinery for levying and collecting taxes to be used in the payment of such bonds is in the hands of the county officers. After the free turn pike is constructed, the only duty left for the road commissioners to perform is to receive from the county treasurer (Sec. 4808) the taxes collected by him and apply the same toward the payment of the bonds previously issued by them.

Hence, I am of the opinion that such bonds should be regarded as county bonds.

Second: If these bonds are not county bonds then why should the treasurer become responsible for their proceeds?

I am unable to find any provisions requiring him to become such custodian. The treasurer does not apply the tax collected to the payment of such bonds direct, but turns the same over to the road commissioners, who are required to pay the bonds from the tax thus received. Again, as these road commissioners are required to execute bonds in such sum as the county commissioners may require payable to the State of Ohio for the use of the county, it would seem that the law contemplated that they should be responsible for this fund and its proper application.

There is another thought that might be worthy of consideration and that is, the treasurer is entitled to his percentage upon the tax collected to pay the bonds thus issued and if he is entitled to percentage upon the money received for the sale of the bonds and upon the tax collected for their payment, he would thus receive double percentage, and it seems to be the policy of the law to avoid that.

The conclusion is: If these bonds are county bonds, then the treasurer by express provision of the statute is not entitled to percentage, and if not county bonds he is not required to be the custodian of the money and not entitled to the percentage.

Very truly,

J. M. SHEETS,
Attorney General.

FEEES OF BOARDS OF HEALTH--ARREST OF HEALTH OFFICERS.

COLUMBUS, OHIO, Feb. 26th, 1900.

C. O. Probst, M. D., Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Your letter of Feb. 21st submits two questions to this office for answer.

First: "Are boards of health entitled to charge fees for issuing permits of any kind?"

It is especially provided in Sec. 2113 R. S., that the members of city and village boards of health "shall serve without compensation," and nowhere am I able to find in the statutes any salary, compensation, fees or allowances made to members of city, village or township boards in payment for their services. Like members of school boards, town councils, etc., they are expected to render their services gratuitously.

When we consider the officers of such boards of health the case is different. Section 2115 provides for the appointment of a health officer, clerk, physician, etc., and also that "the board shall have exclusive control of their appointees, and define their duties and fix their salaries." Section 2121 which provides that the township trustees shall constitute the board of health for the township outside of municipalities, also contains this provision, "that they may appoint a health officer and as many sanitary officers as they deem necessary to carry out the provisions of this act and define their duties and fix their compensation." Again Section 2133 which provides for the appointment of inspectors of dairies, slaughter houses, etc., also provides that the board may define their duties and fix their compensation. While Section 2140 provides for the payment of expenses incurred by the board of health under the provisions of this chapter by the council.

Thus, it will be seen that some of the sections above referred to speak of "compensation" for these officers, while Section 2115 speaks only of "salary."

There is quite a broad distinction between the two terms. While salary is always in the nature of compensation, compensation is not always salary. Construing these sections together, however, I am of the opinion that the legislature intended that such officers should receive for their services a stated salary, and I am more convinced that such was the intention from the fact that nowhere in the statute is there any specific warrant or authority for either the board or its officers to charge a specific fee for any of the services required of them. These services are all of a public character in which the public are more vitally interested than the person procuring the permit or other service from the board, and hence it is but reasonable that the public should pay for such services.

Second: "Has a health officer or sanitary policeman authority to arrest a person found violating an order of the board of health without having a warrant for such arrest?"

Section 2131 provides for the appointment of sanitary policemen and that such person so appointed shall have general police powers. Other sections of the statute make it a misdemeanor punishable by fine and in some cases imprisonment to violate an order of the board of health. A sanitary policeman or health officer would thus be clothed with the same power that other officers of the law have in relation to arrests for misdemeanors. This authority is defined in section 7129 which provides that any officer shall arrest and detain any person found violating any law of this state or any legal ordinance of any city or village until a legal warrant can be obtained.

It is to be remembered, however, such arrest without a warrant can only be made by an officer when the offense or misdemeanor is committed in his presence. The language of the statute is, "any person found violating any law," and it has been repeatedly decided by the courts of Ohio, that if the officer did not see the breach of peace or other misdemeanor, he cannot arrest without first obtaining a warrant. (See 50 O. S., 179.)

Very truly yours,

J. M. SHEETS,
Attorney General.

RELIEF DEPARTMENT—PENNSYLVANIA LINES.

COLUMBUS, OHIO, February 27th, 1900.

Hon. W. S. Matthews, Supt. of Insurance, Columbus, Ohio.

DEAR SIR:—Replying to your communication of February 26th, I have examined the regulations governing The Voluntary Relief Department of the Pennsylvania Lines west of Pittsburgh, submitted with said communication, and find that the Pennsylvania Company, The Pittsburgh, Cincinnati and St. Louis Railway Company and the The Chicago, St. Louis and Pittsburgh Railroad Company have each adopted a so-called Relief Department, of which the following are the pertinent provisions:

First:—The object of this department is the establishment and management of a fund to be known as the "Relief Fund," for the payment of definite amounts to employes contributing to the fund, who under the regulations shall be entitled thereto when they are disabled by accident or sickness, and in the event of their death to the relatives or other beneficiaries specified in the application of such employes.

Second:—This Relief Fund is formed by voluntary contributions from employes, appropriations, when necessary to make up any deficit, by the company, and income or profit derived from investments of moneys of the fund, and such gifts or legacies as may be made for the use of the fund.

Third:—Membership in such Relief Departments is limited to employes in the service of the railroad company establishing such department. Such membership is said to be voluntary on the part of the employe. In other words, while all the employes of the company are eligible to membership, only those who voluntarily make application and contribute to the Relief Fund are entitled to its benefits.

Fourth:—Members in such Relief Departments are divided into five classes, the basis for the classification being the amount of monthly wages or salaries paid the employe by the company.

Fifth:—Members of the said Relief Department are required to make a stipulated monthly contribution or payment to the Relief Fund, the amount of such payment being regulated by the class to which said member belongs.

Sixth:—Members of such Relief Departments are entitled to benefits from said Relief Fund as follows:

When disabled by accident in the service, or by sickness or injury other than accident in the service, a stipulated sum per diem, depending upon the class to which such member belongs, and the nature of such disability, and the time of its continuance. Also a stipulated amount upon the death of such member, payable to the relatives or other beneficiaries, said amount being determined by the class to which said member belongs.

Seventh:—That in order to secure uniformity and economy in the management of said Relief Departments, the said above-named companies have associated themselves under one common organization known as "The Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." The management of such associate organization is under the control of the general officers of the Pennsylvania Company, and an advisory committee selected by the constituent members of such associate organization, and the members of the Relief Department of each of said associated companies. The purpose of this organization seems only for management and neither of the associated companies are liable for deficiencies in the Relief Fund of the Relief Department of any other company, but the Relief Department of each of the associated companies is separate and distinct from that of any of the others.

Eighth:—It is manifest from an examination of the above provisions that, if the said amount contributed by the members of such Relief Department to the Relief Fund, together with the interest or profit accruing from the investment of said Relief Fund, and the gifts and legacies that may be made to said Relief Fund, exceed the amount of benefits paid out of said Relief Fund, then the company so maintaining such Relief Department makes a profit; but if the amount of benefits paid out of said Relief Fund exceed the amount of accretion to said fund from the above-named sources, then the company so maintaining said department would do so at a loss.

Ninth:—It appears that neither the Relief Department of the separate companies nor the associate organization is incorporated as an insurance company, but that such Relief Departments are maintained as a part of the business conducted by the said railroad companies.

This plan of relief was adopted by the above-named companies in 1889. Since that time I believe that two of the associate companies have consolidated under another name, but this fact does not materially affect the question we have to decide.

It can hardly be disputed that these railroad companies are engaged in the business of life insurance; they collect from their employes, who become members of these relief departments, a stipulated monthly premium, and in return they agree to pay stipulated amounts upon the happening of certain contingencies. This is in effect a contract of life insurance and the question to be determined is—have they a right under the statutes of Ohio, to conduct the business of life insurance in the manner above set forth.

"The business of life insurance in this state is regulated by statute. These regulations are found in Chapter 10 of the R. S., commencing with Sec. 3587; and in certain amendatory acts." 38 O. S., 9.

Sec. 3596 contains the following provision:

"Nor shall the business of life insurance, or life and accident insurance, in this state be in any wise conducted or transacted by any company, partnership or association which in this state, or any other state or county, makes insurance on marine, fire, inland, or any other risk, or does a banking business or any other kind of business in connection with insurance."

This section is sufficient to show the want of lawful right on the part of these railroad companies to transact the business of life insurance in connection with the other business of a railroad company, unless it can be shown that these voluntary relief associations are excepted from the general operation of the statutes of Ohio.

The only exceptions that could by any possibility apply to such associations are found in Sections 3631a and 3631-23. But an examination of these sections and the other sections to which they relate, will show that they were not intended to apply to associations of the class under consideration.

Section 3631a provides as follows:—

"This act (viz., Sections 3630a to 3631) shall not apply to any associations of religious or secret societies, or to any class of mechanics, express, telegraph or railroad employes, or ex-union soldiers, formed for the mutual benefit of the members thereof and their families exclusively."

This section is supplemental to the sections providing for the organization of associations to transact the business of life insurance and accident insurance on the assessment plan for the mutual protection of the members of such association; and the exception contained in this section relates to societies of the classes specified, which are organized on the same plan, to-wit, the assessment plan, "for the mutual benefit of the members thereof and their families exclusively."

The voluntary relief associations under consideration are not conducted on the assessment plan, nor are they "for the mutual benefit of the members thereof and their families exclusively." On the contrary, as heretofore pointed out, the railroad company maintaining such relief associations may make a profit, when the amount of accretions to the relief fund exceeds the amount of benefits payable from said fund. The entire plan of insurance is foreign to the assessment plan provided for in Sec. 3630 et seq.

In Section 3631-23 is found this language:

"And provided further, that no society, lodge or body of any secret or fraternal society or association of employes of any particular trade, firm or corporation paying only sick benefits not exceeding two hundred and fifty dollars (\$250.00) in the aggregate to any person in any one year, or a funeral benefit to those dependent on a member, not exceeding three hundred and fifty dollars (\$350.00), shall be required to make any report thereof under this article or any article of the insurance laws."

This section is part of the act providing for fraternal beneficiary associations; but the relief departments maintained by the above-named railroad companies are not in any sense fraternal organizations, and hence cannot possibly claim to be included within the statutes providing exemption of such associations from the general insurance laws. On the whole I am unable to find any statute that would

authorize or permit a railroad company to conduct a life insurance business in connection with or as a part of its railroad business; nor can I find any statute which would relieve an association doing business on the plan outlined in the regulations as above set forth, from complying with the general provisions of the statute regulating life insurance companies doing business in Ohio.

In regard to other papers submitted, viz., the policy of insurance and the assessment notices issued by the Big Four Railroad Company, I have only to say that such papers do not furnish sufficient data to enable this office to determine whether the business conducted by said railroad company is within the requirements of the statutes further than may be indicated in the above opinion.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

BRANCH BANK — RIGHT TO ESTABLISH.

COLUMBUS, OHIO, March 2nd, 1900.

T. T. Ansberry, Defiance, Ohio.

DEAR SIR:—Your letter of March 1st, requires an answer from this office as to whether the Produce Exchange Bank, which, by the terms of its articles of incorporation is located at Cleveland, and which has established what it terms a branch at the City of Defiance, without amending its charter, is a bank situated in Defiance county and entitled to bid for and receive county deposits.

Sec. 1136-1 provides:

“In each county where depositories are not otherwise authorized by law, the commissioners thereof may designate in the manner hereinafter provided, a bank situated in such county, and duly incorporated under the laws of this State, or of the United States as a depository of the money of the county.”

Hence, the question for determination is, whether the bank in question is situated in Defiance county within the meaning of the law.

The general provisions applying to the creation of corporations is found in Division II, Title 2, Chapter 1, R. S.

Sec. 3236 provides that articles of incorporation must contain among other things the place “where it is to be located, or where its principal business is to be transacted,” and must also contain the purpose of its organization, and amount of capital stock if a stock company.

Sec. 2369 provides:

“The provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title but the special provision shall govern, unless it clearly appear that the provisions are cumulative.”

Chapter 16 of the same title provides for governing savings and loan associations: but no provision is made for the manner of their organization. Hence, the sections above quoted govern the manner of their creation.

Sec. 3797 provides:

“The Secretary of State shall submit the articles of incorporation of any savings and loan association received by him to the attorney general, who shall, if the same are in conformity to law, and sufficient, certify thereto on the same, and the secretary of state shall then record the same; and no association shall commence business with a subscribed

capital of less than fifty thousand dollars, except in villages having a population at the federal census of 1880, or at any federal census to be taken thereafter, of less than twenty-five hundred, and in such villages no such associations shall commence business with a subscribed capital of less than twenty-five thousand dollars, which shall be divided into shares of one hundred dollars (each), nor until at least one-half of each subscription has been fully paid up."

From the tenor of this section just quoted and the general provisions governing the creation of corporations, it follows that a corporation must have a domicile, and that domicile must be designated in its charter. As re-inforcing this view, I cite *Pelvin vs. Treasurer*, 37 O. S., 450, (455).

Judge McElvain speaking of the Court says:—

"For many purposes, a corporation is regarded as having a residence—a certain or fixed domicile. In this state, where corporations are required to designate in their certificates of incorporation the place of their principal office, such office is the domicile or residence of the corporation."

If the branch of the Produce Exchange Bank of Cleveland, which is located at the City of Defiance, is a bank situated in Defiance county, then, without amending its charter or increasing its capital stock, it could likewise locate a branch in every city and village in Ohio, and thus clearly evade the provisions of Sec. 3797, requiring twenty-five thousand dollars capital in villages of twenty-five hundred or under, and fifty thousand dollars in all municipalities of greater population. The purpose of this provision is to afford protection to depositors, and if permitted to locate such branches this protection would be almost wholly taken away.

Hence, it is my opinion that the commissioners have no right to deposit the funds of the county in the branch bank referred to.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF COUNTY AUDITOR TO CHARGE FOUR PER CENT.
SECTION 1039.

COLUMBUS, OHIO, March 2nd, 1900.

Hon. Fred. E. Guthery, Prosecuting Attorney, Marion, Ohio.

DEAR SIR:—In your letter of March 1st, 1900, you ask an opinion from this office as to the right of the county auditor to charge 4% of the amount of taxes paid on additions to the tax list made by the auditor after the duplicate is in the hands of the treasurer, such additions being assessments for ditches ordered after the making of the duplicate.

I do not see how the auditor would be entitled to the 4% compensation provided in Section 1071. If I understand your question, the work done by the auditor is of the character specified in Section 1039. If these assessments were in the hands of the auditor at the time of making the duplicate, it would be his duty to place them on the tax list and duplicate, and for this he would not be entitled to extra compensation. And the mere fact that he placed them on the duplicate at a later period, it seems to me, would make no difference.

Again, the 4% compensation provided in Sec. 1071 is for property omitted from the duplicate, and which the auditor by his zeal and industry succeeds in discovering and placing on the duplicate thereby increasing the tax list by the amount

of such property, which property would otherwise escape taxation; and I do not think that it was intended to be charged on property which is placed on the duplicate in the regular way.

As to your other questions, I have no doubt that you are correct in your construction of the law, and I need not answer them in detail. I am,

Yours very truly,

J. E. TODD,
Assistant Attorney General.

RIGHT OF BOARDS OF EDUCATION TO EMPLOY COUNSEL.

COLUMBUS, OHIO, March 5th, 1900.

Hon. Lewis D. Bonbrake, Commissioner of Schools, Columbus, Ohio.

DEAR SIR:—Your inquiry requires an answer to the following question: Has a board of education power to employ and pay counsel and costs incurred in litigation, in which it is a party or is interested as guardian of the school funds of its district?

By the provisions of Sec. 3871 of the Revised Statutes boards of education are bodies corporate capable of suing or being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of property, both real and personal. Not only has the board of education the power of contracting and being contracted with and acquiring, holding, possessing and disposing of real and personal property, but it is the owner in trust of the school funds of its district, and may sue and recover judgment against the treasurer for funds received by him but for which he fails to account; i. e. While the treasurer is the custodian of the funds, yet the title thereto rests in the board of education.

Board of Education v. Milligan, 51 O. S. 115.

As it is the duty of the board of education to sue for and recover funds of the district wrongfully diverted, so is it its duty to protect those funds from assault; and it matters not whether the action is against the board of education itself, or whether it is against the clerk to compel him to issue an order on the treasurer, or against the treasurer to compel him to pay an order already issued, it is equally a defense against an assault upon the fund. If the board of education has not such power to provide for the defense of the clerk or treasurer, it would present the illogical condition of the board of education being the owner of a fund, yet have to stand by and see it depleted without power to provide for defense. Ownership of property always implies power to defend that ownership; and all such methods of defense as the law recognizes may be employed. Foote & Everett in their work on Municipal Corporations in speaking of the incidental powers of such corporations say:

“But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And, therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation.”

Foote & Everett on Municipal Corp. Vol. 1, p. 235.

The question remaining is: Is the board of education restricted from employing anybody except the prosecuting attorney?

Unless Sec. 3977 restricts it from so doing, it is at liberty to employ such counsel as in its judgment is necessary and proper. For there is no other provision of the statute that I am able to find which throws any light upon the subject.

It will be observed that this section does not prohibit in terms the employment of other counsel, but provides that the prosecuting attorney shall defend actions brought against an officer or member of a school board, and that he must do so without compensation. But nowhere provides that the board of education or officer is limited to the services of the prosecuting attorney. Hence, there is no restriction, unless it is thrown on by construction. If however, this were the proper construction to be placed upon these provisions, then boards of education would be helpless if the prosecuting attorney for any cause was unable to act, was interested as a party or was adverse to their interests. Or suppose two boards of education of the same county should get into litigation, must the prosecuting attorney act for both or act for one and the other go without counsel? Such would be the dilemma in which boards of education would be placed if we were to hold that they were restricted to the services of the prosecuting attorney.

Hence, we are of the opinion that they may employ counsel in any action in which they are a party or in which the clerk or treasurer of the board may in his official capacity be a party provided the cause involves the property of the district if in their opinion such employment is for the best interests of their trust. And counsel thus employed may act either with or without the co-operation of the prosecuting attorney as the exigencies of the case may seem to require. And as the costs and attorney fees are part of the expenses incident to such litigation they may provide for their payment out of the contingent fund of the district, provided it is not otherwise appropriated.

Yours truly,

J. M. SHEETS,
Attorney General.

OHIO HOSPITAL FOR EPILEPTICS—CONSTRUCTION OF CONTRACT.

COLUMBUS, OHIO, March 6th, 1900.

The Board of Trustees of the Ohio Hospital for Epileptics, Gallipolis, Ohio.

GENTLEMEN:—Your inquiry requires an answer to the question, whether the present board of trustees is bound by a contract entered into between one J. W. Yost, an architect, and the commission appointed by the Governor pursuant to the act of April 11, 1890, providing for the establishment of a hospital for epileptics and epileptic insane. By the terms of this act the commissioners to be appointed had power to purchase a site, and adopt plans and specifications for hospital buildings sufficient in size to accommodate 1,000 patients. When a site was procured and plans and specifications adopted, the commission was to report the same to the Governor, who then appoints trustees who are authorized to approve the plans and let the contract; not, however, until the money necessary to pay for the same is appropriated by the legislature. It will thus appear that when the commission procured the site, and adopted plans and specifications and reported to the Governor, its duties were at an end.

Twelve thousand dollars were appropriated for the expenses of the commission, to be used in paying for a site, and for the preparation of plans and

specifications for the hospital buildings. The contract in question requires the architect to furnish the commission with drawings, plans and specifications of the proposed hospital buildings; also bills of material and estimated costs of construction. The contract further provides the amount of compensation to be received by the architect for such services. To this extent the commission had power to contract with the architect but to no greater extent. And the payment for such services would have to be provided for out of the \$12,000.00 appropriated by the act. The commission could not create a debt to be turned over as a legacy to the trustees thereafter appointed.

As your letter of inquiry does not state to what extent the contract in question was performed by the architect and commission, or in what respect it is sought to be enforced against the present trustees, I am unable to give you a more definite answer. I am,

Yours truly,

J. M. SHEETS,
Attorney General.

SALE MAUMEE ISLAND.

COLUMBUS, OHIO, March 7th, 1900.

Ohio Canal Commission, Columbus, Ohio.

GENTLEMEN:—I have before me your inquiry of March 7th, 1900, in regard to the sale of Maumee Island, situated in sections 7 and 8 of township 5, north range 7 east, Henry county, Ohio, under deed of April 18th, 1895, to S. E. Kelley and G. W. Van Pelt for the consideration price of \$35.00.

The certificate of purchase issued by the president of the Board of Canal Commissioners under that date has been assigned by written assignment thereon to one W. H. Kerman and by him assigned to A. B. Blank, of Napoleon, Ohio. Your inquiry is as to whether the assignments on the certificate of sale are sufficient authority for deeding the premises in question to the assignee, A. B. Blank.

Upon an examination of the various assignments indorsed on the certificate of purchase it is made apparent that S. E. Kelley and G. W. Van Pelt, who each owned a one-half interest in the premises in question, have assigned in writing their separate interests to W. H. Kerman, and Kerman in his assignment to Blank states: "This is to certify that in consideration of \$65.00 to me paid I have this day sold to A. B. Blank, of Napoleon, Henry county, Ohio, all of my right, title and interest in and to the island described in the within certificate of sale and request that said island be conveyed to him by the State of Ohio by deed." (Signed) W. K. Kerman."

His signature has been regularly acknowledged before a notary public under date of March 5th, 1900.

Under the act of May 14, 1894, pursuant to which such sale was made, found in Vol. 91, O. L., pages 229 and 230, it is provided that "such land shall be sold to the highest bidder at not less than three-fourths of its appraised value, and the purchase money therefor may be paid in full at the time of sale, or at the option of the purchaser, one-fourth at the time of sale and the balance in three equal annual installments with interest at 6 per cent. per annum payable annually; and the auditor of state shall give to the purchaser certificates for the amount of purchase money so paid, and when said purchase price shall have been paid in full, the Governor shall execute a deed for such land to the purchaser."

If it is found and duly certified that the consideration price for which said land was sold has been duly paid and all the provisions complied therewith on

the part of the purchaser, it will be the duty of the State to have said deed executed to A. B. Blank, the assignee, as is provided for in said act, with such provisions inserted therein as are contained in said act, viz: The reservation to the state of the riparian rights as set forth in House Joint Resolution No. 86, adopted April 12th, 1889. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

MONEY DUE PRISONERS.

COLUMBUS, OHIO, March 8th, 1900.

Frank Cook, Esq., Secretary Board of Managers Ohio Penitentiary, Columbus, O.

DEAR SIR:—Your letter of March 8th at hand. You do not state whether the money to the credit of Wagner is money earned by him while in the penitentiary or money that has been received from other sources.

If it is money earned, there can be no doubt that subject to the provisions of Section 7388-12 of the Revised Statutes of Ohio, the warden and the board of managers are the custodians of said money for the benefit of the state as well as the prisoner and may pay the same to the prisoner or to his family at such time and in such manner as they may deem best, and they would not be bound to honor any order given by the prisoner on such money since the prisoner has no control over the same. Indeed, under the provisions of this section the credit of the prisoner may be entirely canceled by the warden as a punishment for misconduct and the prisoner would be without any right of action.

If, however, the money in the hands of the warden comes from other sources, and is not the earnings of the prisoner, then the money belongs to the prisoner and the warden is merely bailee for the same, and he would have no right to hold the money and would have to pay it out on the order of the prisoner. The only way to obviate this would be to refuse to hold the money as bailee and return the same, if such can be done, to the person or persons from whom it was received. I am,

Yours very truly,

J. E. TODD,
Assistant Attorney General.

NO RIGHT TO APPROPRIATE MONEY WITHOUT CONCURRENT ACTION OF BOTH HOUSES.

COLUMBUS, OHIO, March 9th, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Yours at hand. I gather from your communication that the Senate of the Seventy-third General Assembly passed a resolution granting to its clerks ten days' extra pay; the contingent fund having already been exhausted these claims were not paid; that Senate Resolution No. 43 passed a few days ago ordered the payment of these claims out of the appropriation provided in House Bill No. 464 for the contingent expenses of the Senate of the present General Assembly.

The question you ask is whether it is your duty to honor the vouchers drawn pursuant to Senate Resolution No. 43 on the contingent fund of the Senate to pay these claims.

It will be observed that House Bill No. 464 provides for the contingent expenses of the present General Assembly, \$5,000.00 being set apart for the use of the Senate.

Article II, Section 22, of the Constitution provides that, "No money shall be drawn from the treasury except in pursuance of specific appropriation made by law."

"Specific appropriation" means the bill appropriating the money must specify the purpose for which the money is appropriated. The "specific appropriation" in this case is for the contingent expenses of the present Senate, not those of the Seventy-third General Assembly. The sums ordered paid are contingent expenses of the Senate of the Seventy-third General Assembly. These unpaid contingent expenses are, at most, simply a debt due from the State of Ohio, and the way to provide for its payment is by an appropriation bill for that purpose which passes both houses. In *State ex rel. v. Oglevee*, 36 O. S., 325, the first paragraph of the syllabus reads:

"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."

Here the Supreme Court expressly limits the power of disposition of a fund placed under the control of either branch of the General Assembly to the purposes for which it was set apart by the act appropriating it. Hence we are of the opinion that you are not warranted in honoring vouchers drawn on the fund in question for the purposes above set forth. I am,

Yours truly,

J. M. SHEETS,
Attorney General.

RIGHT OF AMERICAN CLAY MANUFACTURING COMPANY TO FILE
ARTICLES OF INCORPORATION.

COLUMBUS, OHIO, March 10th, 1900.

Hon. Charles Kinney, Secretary of State, Columbus, Ohio.

DEAR SIR:—Yours at hand and contents noted. The question for solution is whether The American Clay Manufacturing Company, a foreign corporation, upon complying with the provisions of Section 148c of the Revised Statutes of Ohio, is entitled to a certificate from your office to the effect that it has complied with the requirements of the laws of Ohio, authorizing it to do business in Ohio as provided in Section 148d of the Revised Statutes.

An answer to this question involves an examination into the terms of the charter of this corporation. Its charter recites, in substance, that it is organized for the purpose of manufacturing, selling and dealing in commercial products made out of clay and other earthy substances. There is a further provision of the charter which purports to authorize this corporation "to purchase, hold, sell, assign, transfer, mortgage, pledge and otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidence of indebtedness created by any corporation or corporations of the State of New Jersey or any other State, and while owner of such stock or securities, to exercise all rights, powers and privileges of ownership including the right to vote thereon."

The indispensable condition upon which the certificate is issued from your office, authorizing foreign corporations to do business in Ohio, is that the

business which it is authorized to do under its charter is such as can be lawfully carried on by any domestic corporation. By the terms of its charter above quoted it may buy and sell stock and bonds of any other corporation, may vote the stock and exercise all the privileges of ownership. Power to vote the stock means power to elect directors; power to elect directors, in turn, means power to manage any corporation, a majority of whose stock it might own. Thus it will be seen that with such power it might engage in any kind of business wholly foreign to the purpose of its organization.

In *Bank v. Bank*, 36 O. S., 354, Judge Boynton, speaking for the court, says:

"There would seem to be but little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such owner is clearly conferred by statute."

To the same effect see *Railway Co. v. Iron Co.*, 46 O. S., 44.

Section 3863 of the Revised Statutes authorizes certain corporations named to purchase stock in a transportation company when necessary to afford transportation facilities for its products, but then only upon the written consent of two-thirds of the owners of the capital stock of the company. But no where is a corporation given statutory power to deal in the stocks of other companies at will.

Section 3266 provides: "No corporation shall employ its stocks, means, assets or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation."

The legitimate objects of the creation of The American Clay Manufacturing Company is the manufacture of commercial products from clay and other earthy substances.

Power to deal in stocks of other companies is against public policy, and such power cannot be conferred by its charter.

People v. Trust Company, 130 Ill., 268.

There is another objection to the charter as presented. If this company has power to acquire and hold and vote stocks of other companies by purchase, it may do so in trust, hence could become the holder in trust of the stocks of all other corporations engaged in the same business and thus organize an illegal combination, designed to control production and prices.

State ex rel. v. Standard Oil Company, 49 O. S., 137.

If, however, the objectionable features of the charter above quoted are eliminated, I see no reason why your certificate should not issue. I am

Very truly yours,

J. M. SHEETS,
Attorney General.

FEEES AND COMPENSATION OF SHERIFF—INSANE PATIENT.
SALARY OF PROBATE JUDGE.

COLUMBUS, OHIO, March 12, 1900.

Hon. Frank W. Ketterer, Prosecuting Attorney, Monroe County, Ohio.

DEAR SIR:—Your letter of March 8th, 1900, submits to this office three questions for answer to wit:

1st. Can the sheriff collect transportation for a patient in taking him to a lunatic asylum in addition to the seventy-five cents per day and five cents per mile going to and returning from the asylum?

2nd. Is the sheriff entitled to receive compensation and mileage for an assistant, whether he takes one with him or not?

3rd. Can the county commissioners allow the Probate Judge a salary for the ensuing year to be paid quarterly without reference to the services to be performed or must the judge file with the commissioners a statement at the end of the year and have allowance made at that time?

The answer to the first two questions will depend upon the construction of Section 1719 which is as follows:

"The taxable costs and expenses to be paid under the provisions of this chapter shall be * * * to the sheriff or other person other than an assistant for taking an insane person to the 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 the support of each patient to and from the hospital and to one assistant five cents per mile each way and nothing more for said services. The number of miles to be computed in all cases by the nearest route traveled."

There is a further provision in the statute that the sheriff may provide a conveyance for the patient from the nearest railroad station to the asylum. It will be observed that the items of expense above referred to, are to be taxed as costs by the Probate Judge and paid as other costs in the case. As nothing is said in this section about transportation for the patient there would be no authority for the Probate Judge to include such transportation in the cost bill. The provisions of the statute in relation to the benevolent institutions are to be found in Title V., of the Revised Statutes. Chapter 1 of this Title contains general provisions applicable to all the State Institutions, while the following chapters of the title refer to particular institutions. The provisions of Chapter 1 are applicable to each institution except where special provision is made in the chapter relating to that particular institution.

Sections 631 and 632 are to be found in Chapter 1 of this Title and would seem to indicate that the traveling expenses of the patient should be paid by himself or those having him in charge.

As to the second question, the compensation allowed for an assistant is to be paid to the assistant and not to the sheriff, so that whether an assistant accompanies the sheriff or not can make no difference in the compensation of the sheriff, and if an assistant accompanies the sheriff the compensation of the assistant, as provided in the statute, shall be included in the cost bill and the money paid to the assistant. The language as it now stands, is almost identical with the language of this section prior to its revision April 8th, 1892, and was construed by the Supreme Court in 57 O. S. 144.

In answer to the third question a reasonable construction of Section 6470 would seem to be that the compensation of the Probate Judge should bear some proportion to the amount of criminal business done by him in the time for which the compensation is allowed, and as this cannot be determined in advance, it would seem that the allowance should be made at the end of the year or at such other period of time as may be deemed advisable, but the allowance when made should pay for the services already performed.

The law in relation to compensation of public officers, contemplates that the compensation should be earned, that the officer should render some service in return for the money which he receives; and in cases where the amount or value of such services cannot be known, and no fixed salary is affixed by law for their performance, then the Board of Commissioners or other officers whose duty it is to

fix the amount to be paid for the same, must wait until after the services have been performed, before they can make the allowance, and there can be no authority or warrant of law to justify them in fixing the amount, or paying the same in advance. I am,

Yours very truly,

J. E. TODD,
Assistant Attorney General.

RUSSELL SALARY BILL.

COLUMBUS, OHIO, March 13, 1900.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—The letter of C. A. Roberts, Auditor of Meigs County, referred by you to this office for answer, is at hand.

The question presented in said letter is, "What will be the effect of the Russell Salary Bill upon the salary of the auditor's office in Meigs County on May 1st, 1900?"

The Russell Salary Bill is a local salary bill providing fixed salaries for the various county officers of Meigs County. In said bill the auditor of said county is given a salary of \$1,000 per year and provision is made for the employment of a deputy auditor by the county commissioners at a salary of \$500 per year, and it is further provided in said bill that said bill shall take effect May 1st, 1900.

The constitution of Ohio, Section 20, Article 2, 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 question to be determined is, Does the county auditor of Meigs county receive a salary as contemplated by the above section of the constitution? If so, it is evident that no change can be made during the existing term. In the case of *Thompson vs. Phillips*, 12 O. S., 617, the court in construing this section of the constitution says, "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, the payment dependent on the time and not on the amount of services rendered." See also 51 O. S., 68.

Sections 1069 and 1070 provide for a fixed annual compensation for county auditors and such compensation being for a determinate portion of time and not dependent upon the amount or value of services performed is a salary as the term is used in the constitution. True, the amount of such salary is made to depend upon the population of the respective counties, and hence, is not definitely stated in the statute, but the rule is prescribed by the legislature whereby the amount for each county can be readily computed. In effect it is the same as though the legislature had specified the amount to be paid each auditor in the state. Instead of doing this, however, the legislature has formulated a rule by which the amount is to be ascertained and all that is left is the mere computation. Neither can it make any difference that a portion of the sum so received may be used in paying for the services of a deputy. The statute does not require the auditor to employ a deputy, but merely permits him to do so. If he can perform all the labor of his office himself, he may do so and retain the entire amount provided in the above sections for his compensation. But if either through inability or disinclination to perform all or any part of the work himself, he shall prefer to employ a deputy, he may do so, but the expense must come out of his own pocket.

If we are correct in our conclusion that the annual compensation provided for county auditors by said sections 1069 and 1070 is a salary, then the same cannot be increased or diminished during the existing term. It follows therefore, that the late act, the Russell Bill, cannot take effect until the close of the term of the present auditor. Neither do we think could the provisions of the bill in respect to the employment of a deputy auditor by the commissioners take effect, but the entire bill so far as the auditor's office is concerned must be postponed in its operation until the end of the existing term.

Very truly yours,

J. E. TODD,

Assistant Attorney General.

[Approved.]

J. M. SHEETS,

Attorney General.

ALLOWANCE OF DAMAGES BY BOARD OF PUBLIC WORKS—AP-
PROPRIATION FOR BOARD OF PUBLIC WORKS.

COLUMBUS, OHIO, March 14th, 1900.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Your inquiry is at hand. The questions propounded are,

First:—Whether persons claiming damage by reason of leakage or overflow from the Public Works of Ohio have an adequate remedy before the board of Public Works should present their claims to the legislature for allowance?

Second:—Should the legislature, in making its annual allowance for the Board of Public Works, take into consideration such claims as may be allowed under the provisions of Section 218-32 of the Revised Statutes and make appropriation for that purpose.

Section 218-32 provides: "That any person whose property has been or may be injured by leakage, breach or overflow of any reservoir, pool or slack-water appertaining to the Public Works of Ohio, may within a year from the happening of the injury apply to the Board of Public Works for damages." If the claimant and Board of Public Works cannot agree this section further provides "for the appointment of a board of arbitration; also provides for hearing evidence for the purpose of determining whether the damages were the result of negligence of the officers of the state, and if so, the amount of damage suffered."

Hence, this section makes ample provision for a remedy to any person who conceives himself to be injured by reason of a breach in any of the reservoirs or canals or overflow, as mentioned in this section.

The purpose in enacting this provision was evidently so that cases might be scrutinized and none but meritorious claims be allowed. The legislature has not the time nor the means at its disposal to investigate such claims, hence persons having such claims should comply with the provisions of this section.

Second:—It is my opinion that the Board of Public Works should take into consideration the amount of damages awarded for which payment has not already been made, and the amount of damages which may and probably will be awarded for the coming two years, when it makes up the amount which it asks to be appropriated for its department.

Section 218-33 provides, "That payments authorized by the preceding section shall be made out of moneys appropriated for that purpose by the General Assembly."

Also Section 218-8 provides, "That all claims against the state arising in the nature of awards shall be paid by the check of the acting commissioner in charge on the Auditor of State, whose duty it shall be to issue his warrant on the Treasurer of the state for the payment of the amount specified, and to charge the same to the proper account from which the expenditure shall be made."

It is apparent that it was the purpose of the legislature at the time these provisions were enacted to provide a method by which the Board of Public Works could have at its command a fund for the payment of such claims without the person, in whose favor the award had been made, being compelled to wait until some succeeding legislature might choose to pass a special bill for that purpose.

I am, Respectfully,

J. M. SHEETS,
Attorney General.

COMPENSATION COUNTY OFFICERS.

COLUMBUS, OHIO, March 14th, 1900.

Hon. J. F. Greene, Prosecuting Attorney, New Philadelphia, Ohio.

DEAR SIR:—Yours at hand and contents noted. I gather from your communication that under the salary law for Tuscarawas county, passed March 30, 1898, a sum certain was provided as yearly compensation for each county officer, also that no deputy of such officer should be paid out of the county treasury. While the provisions of this law were in force, the probate judge, sheriff and prosecuting attorney were elected and had entered upon their official terms. A commissioner and county treasurer were elected but have not yet entered upon their official terms. On February 28th, 1900, a law was passed changing the compensation for some of these officers, and providing for the appointment of deputies and the payment of the compensation of such deputies out of the county treasury.

Your inquiry requires an answer to two questions:

First:—After a person is elected to an office for which a salary is provided, can that salary be changed by legislative enactment before he enters upon his official term?

Second:—When the law fixes a sum certain as the yearly compensation of a county officer, and provides that no compensation shall be paid to a deputy of such officer out of the county treasury, can the legislature, after the term is commenced, provide for the payment of compensation to a deputy of such officer out of the county treasury?

The first question must be answered in the affirmative.

Article II, Section 20, of the Constitution, provides: "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and of 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 will thus be observed that the constitution provides that any change in the law shall not affect the salary of an officer during his existing term. A term *does not exist* until an officer has entered upon the discharge of his duties.

"Unless the constitution otherwise expressly provides, the legislature has power to increase or vary the duties, or diminish the salary or other compensation pertaining to the office, or abolish any of the rights and privileges, before the end of the term, or alter or abridge the terms or abolish the office itself. But if either of the incidents of the office is fixed by the constitution, the legislature has no power to alter them, unless the power to do so is expressly reserved to it in the constitution itself." Throop on Public Officers, Section 19.

Hence, the commissioner and county treasurer not yet having entered upon their official terms, will be governed by the terms and provisions of the act passed February 28th 1900.

The answer to the second question depends upon whether the law in force at the time the probate judge, sheriff and prosecuting attorney entered upon their respective terms, provided a salary for these offices within the meaning of the constitution, or a mere compensation subject to change from time to time by the legislature.

Salary is a fixed sum to be paid to the officer, dependent on the time served, and not on the amount of service rendered. While compensation as distinguished from salary depends upon the amount of service rendered and not upon the time served. This distinction is clearly made in

12 O. S., 617.

49 O. S., 580.

51 O. S., 68.

Under the provisions of the act of March 30th, 1898, the prosecuting attorney receives an annual salary of one thousand dollars. This is for the performance of all his duties as prosecuting attorney, enjoined upon him by the statute. He gets that sum regardless of the amount of service rendered. True, a duty foreign to his general duties as prosecuting attorney is enjoined upon him by the provisions of this act, i. e., to collect costs where they remain unpaid for more than a year. But for such services he gets a fee. That, however, in no manner affects his salary as prosecuting attorney. Hence the salary of the prosecuting attorney is governed by the provisions of the Act of March 30th, 1898.

The probate judge receives an annual salary of \$2,600.00. This is for the performance of the duties of the office for the period of one year, be those duties great or small. It matters not whether these duties require all his time or but little of his time, his salary is \$2,600.00. Whether he is required by the terms of the Act of March 30th, 1898, to employ and pay for his own clerk hire depends upon the construction to be placed upon that Act in connection with the general statutes upon the powers and duties of probate judges.

Section 533 of the Revised Statutes provides, that a probate judge may appoint a deputy clerk or clerks when occasion requires. The Act of March 30th, 1898, provides, that no clerk hire shall be paid out of the county treasury; also provides heavy penalties for the failure of any officer to perform the duties of his office faithfully and promptly. Hence, the legislative intent is manifest that the officer receiving a stated salary shall, either by himself or clerks, perform all the duties of the office enjoined upon him by law, and if he is unable to do so without assistants he must provide and pay for the assistants, unless they are willing to work without compensation. This conclusion is irresistible. He is elected to perform the duties of the office and is subject to heavy penalties if he fails to do so. If by reason of the accumulation of business he is unable to perform all the duties, the law gives him the right to employ deputies, but provides that the county shall not pay for their services. This conclusion is borne out by the

reasoning of the court in *State ex. rel. v. Raine*, 49 O. S., 580. The commissioners of Hamilton county were entitled to a salary of \$2,000 a year and traveling expenses when outside of the county on business, but must pay their own traveling expenses in the county. The law undertook to provide for traveling and other expenses to the extent of one thousand dollars per year, and the Supreme Court held it was in effect an increase of salary during the term, hence unconstitutional. If the duties of the commissioners were so extensive that it required all their time their expense, of necessity, would be much greater than if they had but few duties, hence their net salary would be in the reverse ratio to the amount of service rendered.

So it is with the probate judge, and having entered upon the term with the law as it stood, there can be no change during that term.

The principle applying to the office of probate judge applies with equal force to that of the sheriff, hence that question need not be especially noticed. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

COURT PROCEEDINGS CERTIFIED TO BY GOVERNOR.

COLUMBUS, OHIO, March 15, 1900.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—Yours containing communication from Ottoway and Munson of Westfield, N. Y., is at hand.

It seems from this letter your certificate is desired authenticating certain proceedings of the Probate Court of Hardin County, Ohio, to be used as evidence in the Courts of New York. It is requested that you certify that the Court assuming to act has jurisdiction of the subject matter and has proceeded within its jurisdiction and that the signature of the officer attesting the copy of the proceedings and the seal attached thereto are genuine.

The question arises whether the law enjoins such duty upon the governor for the purpose of proving the proceedings of the Courts of the state to be used as evidence in another state. I have carefully examined the statutes of Ohio and have found no law upon the subject, and I am clearly of the opinion there is no such provision in the laws of Ohio.

Article 4, Section 1 of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every state, and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Pursuant to this provision of the Constitution, Section 905 of the Revised Statutes of the United States provides: "The records and judicial proceedings of the Courts of any state or territory, or of any such country, shall be proved or admitted in any other Courts within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be such seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form of law. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the States from which they are taken."

Hence, it is the opinion of this office that the certificate desired of you is of no probative force toward authenticating such proceedings.

Very truly,

J. M. SHEETS,
Attorney General.

MEDICAL ASSISTANCE TO PAUPER.

COLUMBUS, OHIO, March 19, 1900.

M. Cahill, Eaton, Ohio.

DEAR SIR:— Yours at hand and contents noted.

It seems from your statement of facts that the person requiring medical assistance was a resident of Preble County but was then actually in Butler County, but the medical services were rendered without having given notice to the authorities that the pauper needed such assistance until after the services were actually rendered.

The question then arises whether Preble County is liable for the services thus rendered.

Section 1494 of the Revised Statutes provides that where a person being in any township or corporation is in need of medical relief, notice of such fact shall be served upon the trustees or other proper officers of the corporation, and that thereafter the proper authorities shall be bound to pay for such medical services; provided, however, such township or corporation has no regularly employed physician to attend upon the indigent.

Section 1496 provides that where such person requiring medical relief is a resident of another county, the authorities furnishing such relief shall notify the infirmary directors of the other county, and if they do so within a period of twenty days after they have ascertained the legal residence of such person, then the county in which such person has a legal residence is required to pay the amount expended in caring for such person.

It will be observed that as a condition precedent to a recovery for medical services rendered, the person rendering such services must first notify the trustees or other proper authorities of the necessity for such services. This was not done in this case. The notice was not served until after the services were rendered. Consequently that created no obligation against either the County of Butler or the township in which this person was found at the time the services were needed.

Since the physician rendered these services without first notifying the proper authorities that he would look to them for pay, it will be conclusively presumed that he intended to look to the patient for pay and not to the public.

You suggest in your letter that possibly by reason of the fact that the claim for nursing having been accepted and paid, that the authorities thereby became liable also for the medical attendance. This was no claim against the County of Preble unless it was created in the manner provided by law.

A public officer can bind a corporation for which he acts only in the manner pointed out by statute, and as the provisions of the statute had not been complied with in this case, there was no foundation upon which to base a valid claim against Preble County, and the infirmity cannot be waived by the officers of Preble County.

This principle has frequently been announced by the Court of the last resort of our own state, and is very much emphasized in the case of Buchanan Bridge Co. vs. Commissioners, 60 O. S., 406.

Very truly,

J. M. SHEETS,
Attorney General.

SURVEYOR EMPLOYED UNDER SECTION 4772.

COLUMBUS, OHIO, March 20, 1900.

A. E. Jacobs, Prosecuting Attorney, Jackson, Ohio.

DEAR SIR:— In your letter of March 17, you ask, "Does the surveyor referred to in Section 4772 R. S., necessarily mean the county surveyor, or may the commissioners employ any engineer of their own selection under this section to perform the duties therein specified?"

I do not understand that the county commissioners are necessarily required to employ the county surveyor except for such services as the statute specifically provides shall be performed by such officer. Under the turn pike law, Section 4758 provides that the county commissioners "may appoint three disinterested freeholders of their county as commissioners to view, locate and survey one or more roads," and Section 4760 provides that said road commissioners may be authorized to call to their assistance the county surveyor to lay out, survey and locate such turn pike roads.

The road commissioners so appointed seem to have no further duties to perform in relation to said road than merely to survey and locate the same, while the actual construction of the road is done under the supervision of the county commissioners, and as the statute does not specifically require the county commissioners to employ the county surveyor they may employ any other competent engineer to superintend the construction of such road.

The compensation of the engineer so employed by the county commissioners is by Section 4773, the same as that allowed by law in the construction of county roads. This, under Section 4664 allows the surveyor a compensation of \$5.00 per day for each day he is necessarily employed.

As the work of the surveyor is done under the supervision of the county commissioners, they would be the proper judge as to the necessity of the work for which the engineer claims compensation, the evident purpose of the statute being that he shall only be paid for such time as he is actually and necessarily employed.

As to the employment of assistants for the engineer, I have no doubt that the whole matter rests with the commissioners, and that they may employ such assistants as they may deem necessary and fix their compensation.

You further ask, "Can boards of county commissioners employ their whole time after attending to other duties appertaining to their offices in overseeing, directing and inspecting turn pike work, if, in their judgment the interest of the county demands it?"

The question as to the amount of time to be employed by the commissioners on any particular work is one resting so entirely on their own discretion that it would be impossible to fix any limits upon it. I presume that any gross abuse of their power in this respect might be made a ground of impeachment and removal from office, and they also might by injunction proceedings be restrained from drawing compensation for such services. These remedies, however, would only apply where there has been a clear abuse of their powers. As a general proposition the only remedy the people have in such case is, to exercise more care in the selection of their public servants, and place the administration of their county affairs in the hands of men of integrity and honesty.

Very truly yours,

J. E. Todd,

Assistant Attorney General.

J. M. SHEETS,

Attorney General.

[Approved.]

WARRANT FOR PERSON IN JAIL.

COLUMBUS, OHIO, March 20, 1900.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR: . . . The question submitted by you is, "Whether the clerk has authority to issue a warrant and the sheriff authority to serve the same on a person against whom an indictment is returned, when the person accused is already in jail or released on bail?"

Sec. 7229 provides:

"A warrant may be issued in term time, or in vacation of the court, on any indictment found, and when directed to the sheriff of the county where such indictment was found, or presentment made, he may pursue and arrest the accused in any county, and commit him to jail, or hold him to bail, as provided in this title."

It will thus be seen that a warrant is issued for the purpose of apprehending the accused and committing him to jail or holding him to bail. In the case named by you the person is already either in jail or admitted to bail, hence, the only possible purpose of issuing a warrant had already been accomplished.

As the law does not require vain or foolish things to be done, it is clear that there is no authority for issuing and serving a warrant under the circumstances named in your letter.

Very truly,

J. M. SHEETS,
Attorney General.

FEES IN HAMILTON COUNTY.

COLUMBUS, OHIO, March 22, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Your communication requires a solution of the question, whether the Auditor of Hamilton County may take into consideration the provision of Section 1069 of the Revised Statutes in calculating the earnings of his office with a view to crediting the same to the fee fund, out of which the salary of himself and clerks are to be paid.

The original act under which the Auditor of Hamilton county is now operating is found in 67 O. L. 36, Section 1 of this act with immaterial modifications is now Section 1341 Revised Statutes and provides as follows:

"The fees, costs, percentage, penalties, allowance, and all other perquisites of whatever kind, which, by law, the clerk of the courts, probate judge, sheriff, either as such, or as special master commissioner, or receiver in any case, treasurer, auditor, recorder, and coroner, in Hamilton county, may always receive and collect for any efficient services rendered, shall be received and collected by said officers, respectively, for the sole use of the treasury of said county as public moneys belonging to it, and shall be accounted for and paid over as such in the manner hereinafter provided."

Section 3 of that act (now Section 1343) provides for the appointment of deputies and assistants and for fixing their compensation by the common pleas judges.

Section 5 (now Section 1345) limits the amount to be paid to the clerks, assistants and officers to the fee fund.

At the time the original act was passed, the Auditor of Hamilton County operated under the fee and salary system the same as the other auditors in the state. Hence, in order to determine the earnings of the auditor's office with a view to placing the same to the credit of the fee fund, resort was necessarily had to the statutes then in force. As "the fees, costs, percentages, penalties, allowance, and all other perquisites of whatever kind," the auditor was then receiving, were measured by the statutes then in force, Section 1069 became an important factor in calculating the earnings of the fees to be credited to the fee fund.

Section 1069 as now numbered, was then Section one of an act found in 64 O. L. p. 249, and applied to Hamilton County as well as all other counties of the state. Hence, this section, together with the other provisions of the statutes upon the subject, furnish the basis for calculating the earnings of the auditor of Hamilton county, which, by the provisions of this act placing the officers of Hamilton county upon a salary, had to be credited to the fee fund of that office. This same section (1069) which has been amended from time to time so as slightly to reduce the salary under its provisions, has furnished the basis for much the largest item of the income of the auditor's office from that time to the present, unless this source of income was cut off by virtue of Section 7 of the act of March 22, 1893, 90 O. L. p. 104.

While this act assumed to revive and re-enact Section 1069, yet we find upon examination, this section was never repealed, but was merely supplemented by Section 1069a, and as that section by its very terms did not apply to Hamilton county, Section 1069 never ceased to operate as a basis for calculating the earnings of the auditor, unless, as has been stated, it ceased by virtue of the provisions of Section 7 of that act.

This section (7) so far as applicable to the question at issue, provides: "The provisions of this act shall not apply to Hamilton and Cuyahoga Counties."

Upon reading the act in question, it will readily be observed that it purports to provide a compensation to be charged by county officers throughout the state, and being general in its terms, and having been enacted after the passage of the special salary bill for Hamilton and Cuyahoga counties, it could be claimed with some degree of plausibility that these special provisions for these two counties were repealed by implication, unless these two counties were exempted; hence, the provisions of Section 7, do nothing more, in my opinion, than to declare that Hamilton and Cuyahoga counties shall continue to be governed by the special acts applying to those counties. This section does not in express terms purport to modify in any particular the provisions governing these counties; hence, the earnings of the office remain the same, unless changed by implication.

Let us inquire the result of such a construction. From the statement of the earnings of the auditor's office of Hamilton county shown me by you, it appears that more than half the income of the auditor's office results from the provisions of Section 1069, and upon examination of the act in question, it appears that almost the whole earnings of the office of probate judge, treasurer, recorder and clerk result from the provisions of Sections 1117, 1157 and 1260, all of which are included in this act. Hence, to hold that Section 7 cuts off this source of earnings, would take away the means of paying, even the clerks and assistants their salaries, dropping out of view the salaries of the officers themselves. The legislature is presumed to have had a knowledge of the condition of these two counties at the time of passing this act; and the amount of the earnings of the several offices, and the several sources from which derived. It can hardly be presumed that it intended to cut off the earnings of these several offices to a degree, where not even a clerk could be paid.

There is an old and familiar rule of statutory construction to the effect that a statute should receive a reasonable construction, and should not be so construed as to lead to unjust or absurd conclusions.

Black on interpretation of laws pp. 100-104.

What reasonable man could contend that the legislature intended to take from the auditor's office more than half of its earnings, and from the probate, treasurer, recorder and clerk's office nearly all of their earnings and thus cut off the possibility of paying compensation to those who give their services to the public.

You call my attention to Section 1365-16 which you say it is claimed specially exempts Cuyahoga county from the provisions of the act in question, and should be considered as bearing upon the legislative intent with reference to Section 7. It will be observed that this section was passed April 8th, 1880, 77 O. L. p. 137, being 13 years prior to the passage of the act which, it is claimed to be superseded by it. And besides Section 1365-14 to section 1365-17 inclusive are repealed by Section 15 of an act passed April 12th, 1889, 86 O. L. 264. And this act in turn, is repealed by Section 14 of the act of April 23rd, 1896, 92 O. L. 602, which is now in force for Cuyahoga county.

Hence, I am clearly of the opinion that Section 1069 is still applicable to Hamilton county, so far as estimating the earnings of the auditor's office is concerned. I am

Yours very truly,

J. M. SHEETS,
Attorney General.

JURISDICTION OF OHIO OVER THE OHIO RIVER.

COLUMBUS, OHIO, March 27th, 1900.

Dr. C. O. Probst, Secretary State Board of Health.

DEAR SIR:—Your inquiry as to the validity of the ordinance of New Richmond, Ohio, which prohibits polluting the waters of the Ohio River within certain limits of the intake of the water works of that city, is at hand.

It appears from your statement that it is claimed that the ordinance is void for the reason that the title to the Ohio River to low water mark on the Ohio side belongs to the State of Kentucky. Hence, the State of Ohio and consequently none of the municipalities of that state would have jurisdiction over the river for any purpose.

That the bed of the river to low water mark on the Ohio side does not belong to Ohio is conceded. But that Ohio has concurrent jurisdiction over the whole bed of the stream from low water mark on the Ohio side to low water mark on the opposite side with the state bordering on the Ohio on the opposite side is equally conceded. The seventh article of Compact between Virginia and Kentucky at the time Virginia ceded jurisdiction over the territory to Kentucky in order that it might become an independent state provides:

"Seventh. That the use and navigation of the river, Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

Kentucky was afterwards admitted to the Union upon the conditions contained in this Compact, and ever since the Courts of the states bordering on the Ohio have upheld this Compact as binding. Concurrent jurisdiction over the Ohio river has never been denied, but has been frequently upheld by the Courts of Last Resort of Virginia, West Virginia, Kentucky and Ohio; also by the Supreme Court of the United States.

Handley v. Anthony, 5, Wheaton, 385.
 Pennsylvania, v. Bridge Co, 13 Howard, 566.
 Greene v. Biddle, 8, Wheaton, 1.
 Garner's Case, 3, Gratton, 674.
 State v. Plants, 25 West Virginia, 119.

In the early history of jurisprudence of Ohio it is held in the case of State vs. Hoppess, 2, W. L. J., 279, that Ohio had concurrent jurisdiction over the Ohio river with the states bordering on the other side by virtue of this compact. It has been so well recognized as the law of the land, that a short time ago the Supreme Court affirmed a judgment involving that question without report for the reason that the principal had been announced and re-announced by the Supreme Court of the United States so that it was unnecessary to report the case.

Section 2433 of the R. S. of Ohio provides:

"The jurisdiction of any corporation owning water works, to prevent or punish any pollution of the water shall extend ten miles beyond the corporate limits."

It will thus be seen that municipalities having water works have jurisdiction ten miles beyond its limits for the purpose of protecting the water supply from pollution in any direction over the State of Ohio, and as we have already seen, the State of Ohio has jurisdiction over the Ohio river, it is my opinion that the ordinance cannot be successfully attacked on the ground stated in your letter.

Very truly,

J. M. SHEETS,
 Attorney General.

ELECTIONS IN SECOND REGIMENT, O. N. G.

COLUMBUS, OHIO, March 30, 1900.

Hon. George R. Gyger, Adjutant General of Ohio, Columbus, Ohio.

DEAR SIR:—In your communication of March 27th, you request an opinion from this office as to the validity of the election of J. R. Deming and J. D. Leitner as Majors of the Second Regiment, O. N. G. I.

From the facts submitted in said communication, it appears that orders were issued November 15th, 1899, for an election to be held November 21st, 1899, to elect a full complement of field officers for said regiment. That among the officers to be elected at said election were three majors. It further appears that the voting strength of the regiment at that time was five hundred and twelve; that the highest number of votes cast for any officer at said election was four hundred and fifty-three; that Major Clucker received four hundred and forty-seven; Major Leitner two hundred and forty-nine, and Major Deming two hundred and forty seven votes, and that votes were not cast for any other candidates for said offices of major.

The election of officers of the O. N. G. is controlled by Section 3045 R. S. which, so far as it is pertinent to this inquiry, reads as follows. "Each officer shall be separately voted for, and any person receiving a majority of the votes of the electors present at such meeting shall be deemed elected; provided, that no election shall be held unless a majority of the electors be present and voting."

To constitute an election each of these three requirements must be complied with. These conditions have been added to the statute at different times and thus their logical sequence has not been preserved. Their meaning will more-readily be perceived if they are read in the following order:

1. "Each officer shall be separately voted for."
2. "No election shall be held unless a majority of the electors be present and voting."
3. "Any person receiving a majority of the votes of the electors present at such meeting shall be deemed elected."

It is apparent that if this election had been ordered solely for the purpose of electing these two majors, i. e., Deming and Leitner, and the vote for these two officers had been the same as in the election under consideration, neither would have been elected, even though a majority of the electors had been present, for the reason that a majority must not only be present but voting. Would it change the result if a majority of the electors were present and voting for other officers at the same election but refrained from voting for the candidates for major. I cannot think so. A construction must be given this statute which will give force and effect to each of the provisions contained in it. If it is claimed that all that is necessary to constitute a quorum for the election of all the officers that may be ordered chosen at such an election, is that a majority of the electors be present and voting for some officer at such election, then the requirements that each officer shall be separately voted for is without effect, and the same results would be obtained if this provision was eliminated from the statute. This requirement however, was considered of sufficient importance to be added as an amendment to the statute, (83 O. L. 96) and should not be disregarded in considering this question. To give it any effect or force in this statute, it is necessary to consider the election of each officer as being held separate and apart from that of any other officer. And to make such election valid it is necessary that a majority of the electors be present and voting for each particular officer, and that a majority of such votes are necessary to elect.

I am of the opinion therefor, that as a majority of the electors of the regiment were not present and voting for the candidates for major except in the case of Major Clucker, that the two candidates, Deming and Leitner were not legally elected.

Very truly,

J. E. TODD,
Assistant Attorney General.

J. M. SHEETS,
Attorney General.

[Approved.]

COST BILL IN CRIMINAL CASES.

COLUMBUS, OHIO, March 31, 1900.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—Yours containing cost bill in case of Ohio v. Billow, is at hand. You ask the opinion of this office as to the legality of the fees and expenses therein charged, which the state is required to pay in order to aid the warden of the penitentiary in passing upon the items of the bill. We shall call attention to such items as appear upon the face of the cost bill to be incorrect.

1. The item of \$133.12, which the clerk charges for entering the appearance of witnesses, is, in my opinion, incorrect.

It appears upon the face of the cost bill that there were but two hundred and eighty-eight witnesses in attendance upon the trial of the case. Sixteen of these were excused and re-subpœnaed. Section 1260 R. S. provides that the clerk shall receive for "entering the attendance of each witness four cents." A witness appears in a case in obedience to a subpoena and remains in attendance until excused.

The statute does not say that the clerk shall receive four cents for each day the witness attends. This is the method employed by the clerk in computing this item, which we think is wholly erroneous. We are aided in this construction not only by the plain words of the statute, but by the fact that the fees charged are wholly out of proportion to the services rendered, and it will not be presumed that the legislature intended the clerk should have more than reasonable fees for the services required. As there were two hundred and eighty-eight witnesses in attendance, sixteen of whom were excused and re-subpœnaed, the clerk is entitled to four cents for entering the attendance of three hundred and four witnesses or \$12.16.

2. As to the mileage allowed for witnesses in said cost bill, there are two witnesses who are credited with four hundred and sixty miles (going and coming) or as residing two hundred and thirty miles away from Fremont. Several others are credited with four hundred miles. It would seem very probable that these witnesses came from outside the state. If so, a subpœna could not be served on them and their attendance was voluntary and they would not be entitled to mileage. Hence, the mileage of these witnesses if they resided without the state, and any others who appeared voluntarily and without service of subpœna, cannot lawfully be charged against the state.

3. Some question has been raised as to the item of \$252.00 stenographer fees. Under the provisions of Section 475 R. S., a stenographer is entitled to \$7.00 per day. Section 478 provides that a stenographer's per diem is taxed as costs in the case. Hence, we see nothing wrong with this item.

4. The item of \$1600.00 charged for transcripts of the evidence in my opinion is an illegal item and should be rejected. It is claimed this charge is authorized by the provisions of Section 480, R. S. This section provides:

"The fees of the official stenographer for making such transcripts shall be eight cents per folio of one hundred words and shall be paid forthwith by the party or parties for whose benefit same is ordered, and when paid shall be taxed as other costs in the case; but all transcripts made in criminal cases and transcripts ordered by the court when not asked for by the parties, shall be paid out of the county treasury in the manner herein provided for the payment of fees for taking short-hand notes."

This section only authorizes such transcripts to be taxed as costs in the case as are ordered by one of the parties and provides that all transcripts in criminal cases and those ordered by the court when not asked for by the parties, shall be paid out of the county treasury, because it would be manifestly unjust to tax the losing party with the transcripts which the court ordered for his own use.

But this section provides that such transcripts shall be paid for "out of the county treasury in the manner herein provided for payment of fees for taking shorthand notes." In what manner are shorthand notes paid for? Out of the treasury of the county in which the court is held and upon the certificate of the clerk, certifying the number of days attendance of the official stenographer. But the fees for such transcripts in criminal cases and in other cases when transcripts are ordered by the court, are not authorized by the statute to be taxed as costs in the case.

Yours very truly,

J. M. SHEETS,
Attorney General.

DECEDENT'S ESTATE—FEES OF TAX INQUISITOR.

COLUMBUS, OHIO, April 12, 1900.

E. G. McClelland, Bowling Green, Ohio.

DEAR SIR:—Your inquiry requires an answer to the following question: Is the tax inquisitor, who has been employed by virtue of the provisions of Section 1343—1, Revised Statutes of Ohio, to discover and furnish to the auditor evidence of property improperly omitted from taxation, entitled to a percentage out of the taxes and penalty placed on the duplicate by the auditor against the estate of a deceased person, by reason of false returns of the decedent, where the inventory of his estate furnished the data for the action of the auditor?

Section 1343—1 provides:

"The county commissioners, county auditor and county treasurer, or a majority of said officers in any county, when they have reason to believe that there has not been a full return of property within the county for taxation, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate."

This section further provides that the commissioners, auditor and treasurer may pay the tax inquisitor thus employed compensation, not to exceed twenty per cent of the taxes placed on the duplicate and collected pursuant to the evidence furnished by him.

Section 6044 provides that the probate judge shall, at the end of each month, deliver to the auditor of the county a statement showing the inventory of personal property filed in his office during the month, for the use of the auditor and board of equalization in the performance of their respective duties in correcting false or untrue tax returns; and further provides that taxes so added to the duplicate within nine months from the date of filing the inventory of the deceased in the probate court, shall be a preferred debt against the estate of such decedent the same as other taxes. Sections 2781, 2 require the auditor to proceed and correct tax returns and add to the duplicate, taxes omitted, together with a penalty thereon. In making this investigation with a view of correcting any tax return, he is authorized to subpoena and enforce the attendance of witnesses and compel the production of books and papers. For these services he is entitled to four per cent of the amount of taxes added to the duplicate. He receives a liberal compensation for his services and the law contemplates that he shall be active in his duties in discovering and placing omitted taxes on the duplicate.

Upon reading Section 1343—1 it will be observed that the law contemplates that the tax inquisitor shall do something for the compensation he receives. He must furnish the auditor the evidence of the omitted taxes in order to earn the compensation provided for in this section. The legislature is presumed to have intended only a fair reward for the services rendered, and in view of the most liberal provisions made for tax inquisitors, it will be presumed that the legislature contemplated that he would be stimulated to proceed in the most difficult cases, and in the most vigorous manner, to thwart the ingenuity of the tax dodger, collect the evidence, and lay it before the auditor for his action. His position was not created as a sinecure in which he should have something for nothing.

It was held in *Treasurer v. Borck*, 51 O. S. 320, that, although Section 1094 provides, if taxes are not paid within the time prescribed by law, "The treasurer

shall proceed to collect the same by distress or otherwise, together with a penalty of five per centum on the amount of taxes so delinquent," (the penalty being a compensation to the treasurer for such collection), yet where a person voluntarily paid delinquent taxes the treasurer could not collect the five per centum penalty; he could not merely stand behind the counter and receive the delinquent tax and collect the penalty thereon; he must proceed actively by distress, suit, or otherwise to enforce the collection in order to be entitled to the five per centum penalty. This case emphasizes the proposition that a public servant shall render an equivalent for any compensation provided for him.

With these rules in view let us consider the case submitted by you. The inventory filed with the probate court furnishes the data for exposing the false returns of the deceased; the probate judge furnishes that inventory to the auditor (Section 6044); the auditor must then proceed to correct the false returns and place the proper amount of tax upon the duplicate (Sections 2781, 2). Pray, what service has the tax inquisitor rendered for the twenty per cent he seeks out of the taxes thus placed on the duplicate? By the express provision of the statute other officers are required to furnish this evidence. Hence, it is taken out of the province of the tax inquisitor. Even if he should become officious and furnish the auditor this data from which he proceeds to correct the tax returns, he can claim nothing for it, for the reason that the probate judge is required to furnish this data; the tax inquisitor cannot voluntarily assume the duties imposed by law upon another and then claim compensation out of the county treasury. This conclusion is reached without taking into consideration the latter part of Section 6044. In my opinion, however, this section clearly furnishes another reason why the tax inquisitor is not entitled to a per cent under the circumstances named by you. The provisions of Section 6044 referred to read as follows:

"No percentage, nor any part of any increased tax on the property of any such estate, covered by any such inventory, and required by law to be listed in the name of the executor or administrator, shall be allowed or paid to any person or persons under any contract for securing for taxation, or putting on the tax list or duplicate, property improperly or otherwise omitted, or not listed or returned for taxation."

It will thus be seen that he is entitled to no compensation for any increase of tax on the property of the estate of a deceased person covered by the inventory, and required to be listed in the name of the executor or administrator. Here, the proceeding to correct the tax returns of the decedent is against the executor or administrator; he is notified to appear and defend. When corrected the orderly and proper method is to place the taxes so added to the duplicate against him or such personal representative of the deceased, and a certificate of taxes so placed upon the duplicate and handed by the auditor to the treasurer shows the tax to be against the personal representative.

In reading Section 6044, it appears beyond cavil that the legislature intended to cut off forever the claim that previously had been made by tax inquisitors that they were entitled to a compensation out of taxes added to the duplicate where the evidence was furnished by the inventory of the decedent's estate; it being so manifestly unfair that he should receive compensation under such circumstances, the legislature chose to speak upon the subject.

It is my conclusion, therefore, for the two reasons above suggested, the inquisitor is entitled to no per cent under the circumstances given.

Very truly,

J. M. SHEETS,
Attorney General.

SUFFICIENCY OF ARTICLES OF INCORPORATION OF MUTUAL
BENEFIT SOCIETY.

COLUMBUS, OHIO, April 19th, 1900.

Hon. Charles Kinney, Secretary of State, Columbus, Ohio.

DEAR SIR:—In reply to your communication requesting a written opinion from this department as to the sufficiency of the articles of incorporation of "The Mutual Benefit Society" I desire to say that I have examined the same, and, in my opinion, the said society should not be permitted to file its articles of incorporation.

This society proposes "To establish and maintain a benefit society, the membership of which shall be composed of unmarried persons of both sexes, and to establish and maintain a fund, by assessments upon its members, voluntarily paid, for the payment of stipulated sums of money to its members upon their marriage, and not otherwise, in such manner as may be provided by the by-laws of said society, and to accumulate, invest, distribute and appropriate such sums in such manner as it may deem proper." This is certainly a novel proposition. It invites reflection. It is not easy to decide whether the would-be-incorporators are projecting a scheme to promote matrimony, or propose to operate a swindle. If the former they should be encouraged. "It is not good for man to be alone," and "Marriage is honorable in all." For this we have high authority. A corporation that would bestow a prize upon the happy wight who seeks relief from the solitary state at the hymeneal altar would be a public benefactor.

The custom of county fairs to offer a reward in the form of a cooking stove and cradle to the couple who would be publicly married upon the fair grounds is to be improved upon. That was good in its way, but was too limited in its application. Only a few could take advantage of such opportunity. Now, the chance to get a comfortable sum of money in addition to a matrimonial partner is open to all. Marriage is no longer a lottery, but the prize is sure. All that is needed is for the prospective bride or bridegroom to join "The Mutual Benefit Society" and the future is assured; while if both parties to the contract should have the foresight to provide for the future in this way, then assurance would be doubly sure.

It is difficult to consider this matter seriously. But the question presents itself: Can such a society be honestly conducted with success? Can this society successfully carry on the business of making a contract with its members, which the member has the power to terminate whenever it is his interest to do so?

Who would join such a society except the prospect of marriage was immediate, and he hoped to mature his contract and reap the benefits at once? Does any intelligent man believe that this society could honestly meet its obligations arising from maturing contracts for a single month? If not, then there is no escape from the conclusion that the business of such a society would have to be conducted dishonestly to enable the society to live. Should the state incorporate a society which, upon the face of the articles of incorporation, proposes to conduct a business which cannot be honestly conducted, and succeed? I do not think so.

The Statutes of Ohio provide that "Corporations may be formed in the manner provided in this chapter, for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business." Sec. 3235.

But people may not lawfully associate themselves for the purpose of swindling, or to conduct a business which cannot succeed if the principles of common

honesty are adhered to. We are not advised of the exact manner in which this corporation proposes to transact its business. We are only informed that it shall be conducted "in such manner as may be provided by the by-laws of said society"—"and in such manner as it may deem proper." This is too vague and indefinite. An association through which large sums of money are to be collected and disbursed for benevolent purposes should be constructed on a more substantial foundation. If these incorporators have any method by which such a business can be honestly conducted and succeed, they should more fully state their proposed methods, if they hope to receive any consideration for the sincerity of their purpose.

Very truly yours,

J. E. TODD,
Assistant Attorney General.

OHIO CENTENNIAL APPROPRIATION.

COLUMBUS, OHIO, April 20th, 1900.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—The question propounded by you, in your inquiry to this office, is whether the \$500,000 appropriated by the 74th General Assembly "for the Centennial and Northwest Territory Exposition" is available for that purpose without further legislation.

This appropriation consists of two items of \$250,000 each; one contained in the general appropriation act for the year 1900, the other in the general appropriation act for the year 1901. These acts are identical in language, and read as follows: "The following sums, for the purposes herein specified, are appropriated out of any money in the state treasury to the credit of the general revenue fund, not otherwise appropriated." Then follows this item, "For the Centennial and Northwest Territory Exposition, \$250,000."

House Bill No. 385 made complete provision for the receipt and expenditure of the money so appropriated; designated who should receive it, the purpose of its expenditure, the manner, and under whose supervision it should be expended. This appropriation was evidently made, anticipating that House Bill No. 385 would become a law. But, as this bill failed of passage, the appropriation cannot be made available, unless by virtue of pre-existing law.

On February 19th, 1896, a joint resolution was adopted by the General Assembly of Ohio, providing for the appointment of a commission of seven persons to formulate plans, and devise ways and means for the due observance of the centennial of Ohio, in the year 1903." On April 21, 1898, another joint resolution was adopted by the General Assembly providing for the observance of the one hundredth anniversary of the admission of Ohio into the Union "by holding a grand exposition, which shall be an institution of the State of Ohio, beginning on the 15th day of June and ending on the 15th day of October, 1903."

On April 26th, 1898, the legislature passed an act creating a Centennial Commission, and defining its powers and duties. The preamble of this act recites the fact of the passage of the joint resolution last referred to, and also provides, "The duties of said commission shall consist in examining and acquainting itself with the grounds upon which it is proposed that said exposition shall be held, and the general plans for their improvement which should receive its approval before adoption, and shall inspect from time to time such improvements and make such suggestions and recommendations as shall appear desirable or necessary, and in obtaining information as to other expositions of like nature

which have heretofore been held or which are now being held and to obtain suggestions from the citizens of this state as to the nature, extent and character of the exposition which they desire to have held, and to procure plans and propositions pertaining to said exposition and recommendations and suggestions generally that would be of profit in determining what this state should do in forwarding said exposition, including also, invitations to other states, particularly those in the old northwest territory, to participate therein, which invitations shall be approved and endorsed by the governor; and all of which plans, recommendations, suggestions, propositions and information said commission shall report to the next general assembly within ten days from the beginning of its first session. For the purpose of paying the expenses incurred by said commission in the performance of its said duties to the date of its first said report there is hereby appropriated from the general revenue fund of the state from any money not otherwise appropriated, five thousand dollars which shall cover all expenses herein authorized, and the auditor of state shall draw his warrants on the state treasurer in payment of such expenses from time to time on vouchers as aforesaid, which warrants shall be paid by said treasurer out of said fund. Provided, however, that nothing in this act shall be construed as obligating the state for any appropriation for such centennial exposition, or in any way as expressing the sense of this general assembly, that an appropriation further than the one herein provided should be made."

The above are the only provisions bearing upon the subject, and, in my opinion, they fall short of making the appropriation available.

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." In order to make an appropriation specific the specific purpose for which the money is to be used must be pointed out; also some body must be authorized to receive it. In this appropriation the money is not to be applied in the payment of an obligation due to the recipient, but, if received at all, is received in trust. What shall the trustee do with it? How shall he expend it? Shall he use it in erecting buildings, providing exhibits, or is it to go directly to the "Ohio Centennial Company?" The statute is silent upon all these questions. There is no answer but conjecture. It may be said, however, that the money should be paid to the centennial commission to be used by it. But, the question at once arises, how shall this commission use it? It has the powers conferred upon it by the act creating it, and no more. The act creating this commission gave it power to receive and expend five thousand dollars only, and that was for the purpose, as designated in the act, of paying the personal expenses of the members of the commission. But the act further expressly declared, "that nothing in this act shall be construed as obligating the state for any appropriation for such centennial exposition, or in any way as expressing the sense of this general assembly, that an appropriation further than the one herein provided, should be made," thus negating the idea that the commission should have power to receive and expend any sum whatever in aid of the proposed centennial.

This commission is purely a creature of the statute; it has no implied authority; and the authority expressly given must be exercised in strict compliance with the terms of the statute. These propositions are elementary, and need no elaboration.

Hence, as indicated above, it is my opinion that the appropriation must fail for want of proper legislation.

Very truly,

J. M. SHEETS,
Attorney General.

CORRUPT PRACTICE ACT.

COLUMBUS, OHIO, April 26th, 1900.

Hon. Lewis D. Bonebrake, State Commissioner of Common Schools, Columbus, O.

DEAR SIR:—Your letter of April 24th, making inquiry as to the application of the "Garfield Corrupt Practice" Act to candidates for school officers, is at hand.

The "Garfield Corrupt Practice" Act (Sec. 3022-1 et seq.) applies to all public offices created by the Constitution or laws of this State to be filled by popular election, and as the office of member of the board of education is an office created by the laws of this State and filled by popular election, it would seem that the provisions of said Act would apply to such office. I am not aware of any exceptions to the Act in favor of the office of school sub-director in townships, as it is also a public office created by statute and filled by popular election, and also comes within the provisions of the Act in question.

While it seems an unnecessary requirement, as applied to these offices, yet if it had been the intention of the legislature to exempt them from complying with the terms of the Act, such exemptions should have been stated in the statute.

Yours very truly,

J. E. TODD,

Assistant Attorney General.

LEWISTOWN RESERVOIR.

COLUMBUS, OHIO, April 26th, 1900.

Ohio Canal Commission, Columbus, Ohio.

GENTLEMEN:—Your inquiry of April 23rd, with regard to the powers conferred upon you to lease that portion of the public lands now embraced within Lewistown Reservoir and its embankments, and otherwise known as "Indian Lake," has received my consideration. And, upon the questions proposed, I find that the powers conferred upon your board, in connection with the Board of Public Works and the Chief Engineer of Public Works, is contained in the main in Sections 218-225, 218-226, 218-230, of Bates' Annotated Statutes, as revised. The powers therein conferred have been so frequently exercised by you that I am confident without further dwelling upon them, that you are fully cognizant of the authority therein vested in you. The only question that seems to be new to your board is with regard to the particular portion of the public works known as "Lewistown Reservoir," and whether by the act contained in the 93rd volume, Ohio laws, page 142, you have been curtailed of any of the powers granted you by the sections hereinbefore cited. By that act it will be found that Lewistown Reservoir was merely set apart and dedicated as a public lake, to which was given the name of "Indian Lake." In the subsequent section, viz., Section 5 of the act, it is provided that "the dedication and use of the reservoir as a public lake shall, in no wise, interfere with, or affect, and the same shall be subject to the use of the reservoir for canal purposes." By Section 6 of the act the reservoir was placed under the supervision and control of the Commissioners of Fish and Game only so far as the protection of fish and game is concerned. There is nothing in the acts at all that divests the Board of Public Works, the Chief Engineer and yourselves of the power conferred by the former acts, which fully give you the authority, under the circumstances therein set forth, to execute leases for any portion of these lands that are not necessary for canal purposes, and that will not interfere with the actual use, efficiency and operation of the canal.

I therefore hold that the Canal Commission, the Board of Public Works and the Chief Engineer of the Public Works, subject to the restrictions and limitations contained in Sections 218-225, 226 and 230, have the power to make and execute leases, and that power extends over the Lewistown reservoir or Indian Lake, the same as any other portion of the canal system of the State.

I herewith return the application of the several parties for right to lease without passing upon the merits of the individual applications.

Yours truly,

J. E. TODD,

Assistant Attorney General.

FEES OF SHERIFF—INSANE PATIENT TO ASYLUM.

COLUMBUS, OHIO, May 2nd., 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Your communication referring the letter of John M. Webster, sheriff of Van Wert county, to this office for an opinion is at hand.

The letter of Mr. Webster relates to the fees and compensation of sheriffs in transporting patients to the state hospitals for the insane.

Section 719 of the Revised Statutes, in so far as pertinent to the question under consideration, provides as follows:

"The taxable costs and expenses to be paid under the provisions of this chapter shall be * * * to the sheriff, or other person, other than the assistant for taking an insane person to the 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 the support of each patient to and from the hospital. * * * the number of miles to be computed in all cases by the nearest route traveled. The costs specified shall be paid out of the county treasury upon the certificate of the probate judge; provided, that when it appears necessary to the sheriff * * * he shall be authorized to provide a conveyance for said patient from the nearest railroad station * * * and the costs of the same shall be taxed in the bill of costs and paid as other costs in the case."

It will be observed that three items are included in this section to be paid the sheriff, to-wit:

1. Five cents per mile going and returning.
2. Seventy-five cents per day for support of patient.
3. Hack hire when the sheriff deems it necessary or the condition of the patient requires it.

This section also provides compensation for an assistant when an assistant accompanies the sheriff, but this is paid directly to the assistant and the sheriff is not concerned in its amount. These various items are to be included in the cost bill and paid as other costs in the case, and the probate judge is not authorized to include any other items for the sheriff in said cost bill than the three items provided in Section 719, as above set out.

It is intimated in the letter of the sheriff above referred to that he is required to pay the transportation or car fare of the patient out of the amount

allowed him in this section, and the question arises whether or not a sheriff in transporting a patient to a state hospital is required to pay out of his compensation the transportation of the patient.

This question, I think, should be answered in the negative. It will be observed that the compensation provided in Section 719 for the sheriff is "for taking an insane person to the hospital or removing one therefrom." The compensation of the sheriff is the same in both cases. Section 709 provides for the removal of patients from insane asylums and it appears from that section that when the patient is financially able, he shall pay his own traveling expenses, and when not, his traveling expenses shall be paid by the institution. (See also 7th Circuit Court Reports, 128.)

This section, (709) however, only relates to removals and is referred to only for the purpose of showing that traveling expenses are paid by the patient when he is able, while the sheriff removing such patient receives the same compensation as is provided in taking the patient to the asylum.

Asylums for the insane are but one of the many benevolent institutions of the state. The provisions of the law relating to benevolent institutions are found in Title V. of the Revised Statutes. Chapters 1, 2, and 3 of this Title contain the general provisions applicable to all benevolent institutions, while succeeding chapters of this Title contain special provisions relating to particular institutions named in such chapters. The special provisions relating to asylums for the insane are found in Chapter 9 of this Title, and Section 700 of this Chapter provides that "persons admitted into either of the state hospitals shall be maintained therein at the expense of the state, except as is provided in Section 631." Sections 631 and 632 are found in Chapter 1 of this Title and are therefore a part of the general provisions applicable to all the state benevolent institutions. These sections provide as follows:—

Section 631. "All persons admitted into an institution, except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state, subject only to the requirement that they shall be neatly and comfortably clothed and their traveling and incidental expenses paid by themselves or those having them in charge."

Section 632. "If there be a failure in any case to pay incidental expenses or furnish the necessary clothing, the steward or other financial officer of the institution is hereby authorized to pay such expenses and furnish the requisite clothing and pay for the same out of the appropriation for current expenses of the institution, keeping and reporting a separate account of the same."

From a consideration of all these sections I think it is quite clear that the sheriff is not required to pay the traveling expenses of patients, but that such traveling expenses being a part of the incidental expenses not provided for by the state, shall be paid by the patient or those having the patient in charge, and if not so paid, then by the steward or other financial officer of the hospital. Money so paid to be collected in the manner pointed out in Section 632.

Very truly,

J. E. Todd,

Assistant Attorney General.

VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, May 3rd, 1900.

P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—Your letter of May 1st, to Hon. L. D. Bonebrake, is referred to this office for an answer.

In this letter you inquire as to the legal existence of a board of education of a village district, which district was erected within the limits of an incorporated village, immediately following the acts of incorporation of said village, and before the election of any of the officers of said village.

Section 3912 et. seq. provides the manner in which electors of a village may erect it into a village school district, which sections, it appears from your letter, were followed in the case under consideration. It is to be noticed in this connection that nothing in these sections requires any act or duty to be performed by any village officer, in connection with the creation of such village school district. The question, I take it, to be determined, is, "Was the territory included in said village actually incorporated as a village at the time of the attempted creation of the village school district?" It further appears from your letter that said village attempted to incorporate under Sections 1561 a, 1561 b, and 1561 c of the Revised Statutes. These sections provide for a petition to the township trustees for incorporation, and for an election by the qualified voters, resident in said territory, to ascertain whether said voters assent to the incorporation of said territory, and if a majority of the ballots cast at such election shall be in favor of incorporation "the trustees shall cause to be entered upon their journal, a minute of all their proceedings, the number of votes cast at the election, the number of votes cast for incorporation, and the number cast against incorporation, and they shall then declare that said territory shall, from that time, be deemed an incorporated village or hamlet, and shall make an order declaring that such village, or hamlet has been incorporated under the name adopted. And further, the trustees are required to make a certified transcript of their proceedings, and deliver the same to the County Recorder, who shall make a record, and certify and forward to the Secretary of State a transcript of the same. The corporation shall then be a village or hamlet, as the case may be, under the name adopted in the petition, with all powers and authorities, and be recognized as such, the same as if such corporation had been organized under Chapter 2, Division 2, Title 12, of the Revised Statutes of Ohio."

It would thus appear from the statute that the village was deemed incorporated, and all proceedings necessary thereto complete without the election of officers; and this, we think, is in accord with the general principles of municipal law. A village must exist before any officers can be elected. The officers of a municipal corporation are merely the agents selected by the corporation to carry out the purposes of the incorporation, and to exercise the powers conferred upon it by law. A corporation has its existence, and the powers conferred by law upon such corporations attach thereto entirely independent of the existence of any officers.

I am of the opinion, therefore, that as soon as the statutory provisions, in relation to the incorporation of a village had been complied with, that it was entirely competent for the electors of said village to erect it into a village school district in the manner provided by statute, even though there were not at the time such proceedings were had, any officers elected for such incorporated village. If the officers of the village had anything to do in the matter of the creation of the village school district, then a different question might be presented, but, as

above pointed out, the Statute imposes no duty upon any village officer, but merely requires that a village should exist as a condition precedent to the establishment of a village school district.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

INCOMPATIBLE OFFICES.

COLUMBUS, OHIO, May 4th, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Your communication of April 27th, enclosing letter from J. E. Lawrence of Cambridge, Ohio, requires an answer of this office to the following question, viz:

“Can a member of the city board of equalization in a city of the fourth grade, second class, be also a member of the decennial board of equalization in the same year?”

Some of the states have a constitutional provision that no person shall hold more than one office at one time. No such provision however, is found in the Ohio Constitution, nor is there any general statutory provision of this kind. In the absence of either constitutional or statutory prohibition, the common law rule, “that there is no limit to the number of offices which may be held simultaneously by the same person provided that neither of them is incompatible with any other,” would apply. There are some statutory provisions in Ohio to the effect that persons holding certain designated offices shall not at the same time be eligible to certain other offices. (See Sections 18, 1020, 1164, 1268, 1722.) But these are merely exceptions to the general rule. As none of these exceptions apply to the office of member of the board of equalization, the right of a person to be a member of both the annual city board and decennial city board will depend upon whether or not the two offices are incompatible.

It is not easy to define incompatibility in office. Dillon on Municipal Corporations (Sec. 166, Note) says:

“Incompatibility in office exists when the nature and duty of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both”

and the Supreme Court of New York has said:

“The offices must subordinate, one the other and they must per se have the right to interfere one with the other before they are incompatible at common law.” (58 N. Y., 295.)

These are perhaps as good definitions as can be found, and with these before us let us inquire whether the two offices of annual and decennial boards of equalization are incompatible.

In cities of the class designated in the above question the decennial board is composed of the county auditor and six citizens of such city appointed by the council thereof. They are required to convene for the duties of their office on the third Monday of September in the years in which the decennial appraisalment of real estate is made, and their duties seem to be to equalize the valuation of real estate as returned by the district assessors. (See Secs. 2815, 2816 and 2814, R. S.)

The annual city board of equalization in cities of the class above referred to is composed of the county auditor and six citizens of such city appointed by the council thereof, and they are required to meet for the performance of the duties of their office on the fourth Monday in May, and to close their session on or before the second Monday in September, and their duties appear to be to equalize the assessments of personal property, moneys and credits, new entries and structures for the current year by the township assessors and county auditors. (Sections 2805, 6, 7, R. S.) In reference to their duties and powers as to the valuation of real estate the Supreme Court of Ohio in 47 O. S., page 460, say:

"These annual boards of equalization have two sets of duties to perform in reference to real estate, which, while closely allied, are, in fact, independent of each other; one is to correct any gross irregularities that may exist in the appraisement value of the several lots and tracts of land within their jurisdiction, as these valuations appear on the duplicate of the preceding year; and this they are required to do, whether new structures have been erected or old ones destroyed during the preceding year or not; their power to equalize gross irregularities of this class is neither enlarged or diminished by the erection of, or the total failure to erect new structures; the other is to equalize the value of new structures erected, and old ones destroyed, as the same have been returned by the several assessors for the year, in order that the net increase for the year of the value of real property may be added to the duplicate of the preceding year."

To the extent that the annual board has the power to increase or reduce the valuation of real estate as fixed by the decennial board, it would seem that the powers of the two boards conflict, and one is subordinate to the other. Sec. 2805 confers upon annual city boards the same powers as are conferred by Sec. 2804 on annual county boards, and they are thereby authorized upon reasonable notice to all persons interested to increase or reduce the valuation of any real estate in "cases of gross inequality," and in no other. But if this power exists in relation to a single lot or tract of land, the principal is the same as though it existed in relation to all the land within the city. Both the city and the land owner are interested in having the gross inequalities in the valuation of real estate as fixed by the decennial board of equalization reviewed, if at all by an entirely different board.

I am of the opinion therefore that since the annual city board has the power in certain cases to increase or reduce the valuation as fixed by the decennial city board, that the two offices are incompatible, and should not be held by the same person. I have not overlooked the fact that the auditor of the county is a member of both boards, but this, I take it, is merely by virtue of his office, and his duties are not to sit with the board in its judicial capacity in determining the valuation to be placed upon property, but rather to furnish the board with the returns, duplicates and other matter pertaining to their duties of which he is the legal custodian. This opinion is strengthened by the fact that the chief clerk or deputy in the auditor's office is authorized to perform the duties required of the auditor upon these boards.

Yours very truly,

J. E. TODD,

Assistant Attorney General.

FEES PROBATE JUDGE.

COLUMBUS, OHIO, May 10, 1900.

C. A. Reid, Attorney at Law, Washington C. H., Ohio.

DEAR SIR:—Your letter of May 4th requires an answer to two questions:

First:—Is the probate judge entitled to compensation from the county for services in connection with the appointment of examiners of the county treasury?

Second:—Is the probate judge entitled to compensation from the county for services performed in lunacy cases in addition to those for which a fee is specifically provided by Section 719, Revised Statutes?

And of these in their order.

The services required by statute (Section 1129 et seq.) of the probate judge in connection with the semi-annual examination of the county treasury are to issue a certificate of appointment under seal of court to two examiners; to record a copy of the certificate returned by such examiners, showing the results of their examination; to furnish a copy of such certificate to two newspapers for publication, and to approve the warrants for the compensation of the examiners. For these services no special compensation is provided, and so far as I can find there is no statute authorizing any compensation to be paid for these services, unless the general provision for compensation to probate judges contained in Section 546, Revised Statutes, can be made to apply. On examination of this section, I am of the opinion that it has no application to the question under consideration. The various items of fees therein enumerated are fees allowed to be charged in matters and proceedings pending before the probate court and to be paid by the party or parties for whom the services were rendered, or taxed as costs to be paid by the person against whom such costs are adjudged, and not compensation for services rendered to the general public to be paid out of the county treasury. There is, however, in this section one exception, which has the effect of proving the rule: viz., the fee allowed for hearing and determining applications in habeas corpus in criminal cases is specifically required "to be paid out of the county treasury." Why should this particular item be specially provided for if the legislature intended that any of these services might be paid for from the county treasury when they were rendered for the benefit of the public and could not be charged to any particular person? True, this construction of the statute would probably result in such services being performed gratuitously or in other words, the statute enjoins certain specific duties upon the probate judge and provides no direct compensation for such services, but I take it, this does not necessarily weaken the construction placed upon the statute. This is not an unusual or necessarily unjust requirement. As was stated in the case of the Board of Commissioners of Lucas County v. Milliard by Pugsley, J.,

"The law is well settled that for any services required of a public officer, he is not entitled to compensation unless a fee therefore is fixed by statute either expressly or by the clearest implication. The rule works no injustice because the fees actually allowed for specific services, are presumed, to, and so far as is known, actually do furnish a sufficient compensation for all of the services required to be rendered." (4th N. P. R., 556; affirmed 13 C. C. R., 518.)

Again,

"The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance; for the legislature may deem the duties imposed to be fully compensated by the privileges and other

emoluments belonging to the office, or by fees permitted to be charged and collected for services connected with such duty or services." (47 O. S., 408.)

I take it that it is a general principal that no money can be paid out of the county treasury for any services performed by an officer unless the statute makes specific provision for that mode of payment.

In relation to your second question, Section 719, Revised Statutes, specifically provides the items of fees which shall be paid out of the county treasury. Hence, if the correct conclusion was reached in relation to your first question, no money can lawfully be drawn from the county treasury in payment for any other services imposed by law upon the probate judge in connection with inquests in lunacy cases, except where the statute makes specific provision for the payment of such services by the county.

Yours very truly,

J. E. Todd,
Assistant Attorney General.

TAXATION OF LAND CONTAINING OIL.

COLUMBUS, OHIO, May 10, 1900.

George H. Withey, Attorney, Fremont, Ohio.

DEAR SIR:—In your letter of May 8th you ask for a construction from this office of Section 2792, Revised Statutes, in relation to the following question: "Should the fact that land contains or produces petroleum be considered by the land appraisers in determining its true value in money?"

Section 2792 reads as follows:

"Each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops growing thereon; but the price for which such real estate would sell at auction, or at forced sale, shall not be taken as the criterion of the true value; and where the fee of the soil of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right to any minerals therein in another or others, the same shall be valued and listed agreeably to such ownership in separate entries, specifying the interest listed, and shall be taxed to the parties owning the different interests respectively. Provided the assessor shall deduct from the value of any such tract of land lying outside of municipal corporations, the amount of land occupied and used by a canal, or used as a public highway at the time of such assessment, and if the assessor fails to do so, the county auditor is hereby authorized to make the deductions as herein provided. And provided, further, that the annual board of equalization may reduce the mineral value assessed against land containing or producing petroleum (oil), natural gas, coal, ore, limestone, fire-clay, or other minerals in proportion as the product of such mineral has diminished, if such mineral product was considered as a part of the value of said real estate in its previous appraisement for taxation, and annual assessors or boards of equalization may assess such mineral values as developments of its product or existence are made. (88 v. 13, 86 v. 50; R. S., 1880; 56 v. 175, 9; S. & C., 1443.)

It is no longer a question in Ohio as to whether or not petroleum is a mineral. This is not only settled by the statute under consideration, but also by the Supreme Court in the case of *Kelley v. Ohio Oil Company*, 57 O. S., p. 317, in which the Court, Burkett, C. J., say:

"Petroleum oil is a mineral, and while in the earth it is a part of the reality, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches the surface, and then for the first time it becomes the subject of distinct ownership separate from the reality, and becomes personal property, the property of the person into whose well it came."

Hence, the provision of this section in relation to the appraisalment of mineral land applies to land containing deposits of petroleum. (While the question is not presented in your letter, and has never been before the Supreme Court to my knowledge, I have no doubt that natural gas would also be considered a mineral substance.)

This provision as to mineral lands is "where the fee of the soil of any tract, part or parcel of land is in any person or persons, natural or artificial, and the right to any minerals therein in another or others, the same shall be valued and listed agreeably to such ownership in separate entries, specifying the interest listed, and shall be taxed to the parties owning the different interests respectively."

In construing this section the Circuit Court of the Seventh Circuit, Laubie, J., say:

"This section refers simply to real estate, and it is to be listed 'as the ownership thereof appears.' So that in order to have minerals separately assessed and listed from the soil, they must be owned separately and owned as land; a mere interest in them by lease to a party is not sufficient; he must have a fee in them as of land; and if he has, if they have been so separated by the owner of the whole from the soil, then under this section, and Section 2804, the Board of Equalization has a right to assess their value, and direct that they should be entered upon the duplicate as against the owners thereof. (9th C. C., p. 560.)"

The question in this case was whether the value of these minerals could be placed on the duplicate for taxation against the owner of the land or against the lessee under what is known as an "oil and gas lease". And the Court further say, "these minerals could not be placed on the duplicate for taxation as against Jones, the assignee of these leases, except as lands, and they could not be considered as lands unless the fee in the soil and in the minerals had been separated by conveyance from the owner of both."

There can scarcely be a doubt that the presence of valuable mineral deposits in land, whether of oil or other mineral substances, should be taken into consideration by the appraisers in determining the true value in money of such land; and the value thus found should be assessed against the owner of the fee in the land unless by a conveyance, the owner of the fee in the land has parted with the fee in the mineral, and in such case, the value of the land without the mineral should be assessed against the owner of the fee in the land, and the value of the mineral should be assessed against the owner of the fee in the mineral. This rule would present a question of fact in relation to

every piece of land concerning which the owner executed any kind of lease or other conveyance. The question of fact would be, whether or not such lease or conveyance operated to transfer the fee in the minerals and thereby separate the ownership of the fee in the land from the ownership of the fee in the minerals. In this connection it may be remarked that the ordinary oil and gas lease is not such a conveyance of the fee as would require the minerals to be assessed for taxation separately from the land.

This view of the statute is further substantiated by the provisions of the latter part of Section 2792, which point out the method by which the valuation of lands containing petroleum and other minerals, may be reduced in proportion as the product of such mineral has diminished, or the method by which the valuation of such land may be increased as developments show the existence of such mineral products.

I am, very truly yours,

J. E. TODD,
Assistant Attorney General.

CONSTRUCTION OF GAME LAWS.

COLUMBUS, OHIO, May 10, 1900.

Hon. L. H. Reutinger, Chief Warden Fish and Game, Athens, Ohio.

DEAR SIR:—Having before me your inquiry with regard to the construction of Section 6961, of the Revised Statutes of Ohio, relative to the season for the hunting of wild duck, I will say that by that Section, as passed April 16, 1900, it is apparent that the open season for the hunting of wild duck is expressly fixed between November 10th, and December 1st, and from March 10th to April 10th. Following the portion of the act referred to, and after the description of the manner and the methods by which such game therein mentioned can not be killed, occurs the following words: "No person shall kill any wild duck on Sunday or Monday of any week, or on any of the reservoirs belonging to the State of Ohio, or upon the waters of Lake Erie, and the estuaries and bays thereof, or on the rivers, creeks, ponds, or other waters, or bodies of water in this State." To give the latter clause a literal interpretation would destroy the right which is conferred by the first portion of the act, that is, it would make it unlawful to kill any wild duck anywhere that by their habits or nature they are led to congregate, or be found. If given the literal interpretation spoken about, no open season would be permitted at all, as conferred by the other portion of the act. The question as proposed by you is whether there really remains any open season for the killing of wild duck, and what interpretation should be given to the act, by the officers appointed for the purpose of the enforcement of the law. The view of the act that it seems to me must be adopted, and would be adopted by the courts, if the question is ever presented to them for consideration, is, that this is an instance of the presence in a statute of words to which effect can not be given.

(40 O. S., 252.)

It is a settled rule of construction that the intent of the law-maker is to be deduced from a view of the whole, and every part of the enactment, taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the law.

(2 O. S., 152.)

"A statute should be so construed that the several parts will not only accord with the general intent of the legislature, but also harmonize with each other; and a construction of a particular clause, that will destroy or render useless any

other provision of the same statute, can not be correct. No word ever should be rejected, if the statute will admit of a rational and consistent construction without it."

(3 Ohio Report, 193.)

Can the act in question be considered consistent throughout and can a rational construction be given thereto so as to preserve the intent of the legislature made evident by the first part of the act, that is, by the creation of the open season for the killing of wild duck, and at the same time accept the latter part of the act literally, which directly emasculates the power conferred by the first portion of the act? It is evident that when the legislature used the words "No person shall kill any wild duck on Sunday or Monday of any week", they thereby placed a limitation upon the open season the same as they did in the lines immediately following, which are as follows: "No person shall shoot at or kill any wild duck before 5 o'clock in the morning, or after 6 o'clock in the afternoon of any day upon which it shall be lawful to kill the same." Such would be a limitation upon the open season restricting the killing of wild duck to certain hours of the day, and excluding Sundays and Mondays of each week. But, following the language which forbids the killing on Sunday or Monday of any week, occurs the disjunctive conjunction "or" connecting the clauses which forbids the killing on those days of the week, and the clause which refers to any of the reservoirs, lakes, bays, rivers, creeks, ponds, or any other waters, or bodies of water in this state. If the word "or" is eliminated, as it appears to me it plainly should be, to give the act a consistency and reasonableness throughout, so as to preserve its intent, that portion of it would then read: "No person shall kill any wild duck on Sunday or Monday of any week, on any of the reservoirs belonging to the State of Ohio, or upon the waters of Lake Erie and the estuaries and bays thereof, or in the rivers, creeks, ponds, or other waters or bodies of water in this state." By eliminating the word "or", and by that only, can the intent of the act be preserved.

This principle of the elimination of words from an act has been well settled, where it is necessary so as not to defeat the real object of the enactment.

Where a statute provided for an indictment "on conviction" of bribery, the words "on conviction", which, if retained, would have made the act nugatory, were rejected upon a construction of the act.

(U. S. vs. Stern, 5 Blatch, 512.)

So the word "such", where it was apparent that it had no reference to anything preceding it, was rejected as surplusage.

(State vs. Beasley 5 Mo., 91.)

So in the act providing a punishment "If any guardian of any white female under the age of 18 years, or of any other person to whose care or protection any such female should have been confided, shall defile her," etc., the word "if" before "any other person", was rejected as surplusage.

(State vs. Acuff 6 Mo., 54.)

So in a statute intended to confer jurisdiction, the word "not", which, if retained, would have rendered the act meaningless, was rejected as surplusage.

(Chapman vs. State, 16 Texas App., 76.)

"Where an act gave and regulated the exercise of the right of appeal from the judgment of a justice of the peace, and then provided, that, "upon such appeal from the decision, determination, or order of two justices," it was held that the word "two", in view of the explicit reference to the appeal before given, which was distinctly an appeal from the judgment of a single justice of the peace, must have been inserted by mistake, and, was, therefore, rejected.

McCahan vs. Hirst, 7 Watts Pa., 175.

Comfort vs. Leeland, 5 Wharton Pa., 81.

Gue vs. Kline, 13 Pa. State page 60.

And many other cases might be cited, both of a civil and a criminal nature wherein the courts have held that to eliminate certain words from enactments, is proper so as to give effect and operation to the intent of the legislature.

I therefore would hold, in view of the authorities cited, and the manifest incongruity of the act with the word "or" remaining therein, that you should so construe the act as read with the word "or" eliminated therefrom, and, in this connection, express the belief that the courts would sustain such construction.

Very truly yours,

J. E. TODD,
Assistant Attorney General.

TIME WHEN A BILL BECOMES A LAW.

COLUMBUS, OHIO, May 11, 1900.

Hon. Wm. C. Gear, Upper Sandusky, Ohio.

DEAR SIR:—In your communication of May 10th, you state that a certain bill was regularly passed by both branches of the last General Assembly, and was duly signed by the presiding officer of each branch as shown by the respective journals of each house, and was regularly enrolled, but that the engrossed copy of said bill never came into the possession or custody of the Secretary of State, and hence, is not certified by him to the public printer as one of the bills passed by the General Assembly to be included in the annual volume of Ohio laws passed by the 74th General Assembly. And you inquire whether or not, under these circumstances said bill can be considered as a valid and subsisting law.

The Constitution of Ohio requires:

"That each house shall keep a correct journal of its proceedings, which shall be published * * * and on the passage of every bill in either house, the vote shall be taken by yeas and nays and entered upon the journal; and no law shall be passed by either house without the concurrence of a majority of all the members elected thereto."

Also,

"The presiding officer of each house shall sign publicly in the presence of the house over which he presides while the same is in session and capable of transacting business, all bills and joint resolutions passed by the General Assembly." (See Constitution of Ohio, Article II, Sections 9 and 17.)

It also provides by Section 56, R. S., of Ohio, that:

"The clerk of each branch shall keep a journal of the proceedings thereof, which shall be read and corrected in its presence. After the reading and approval of the journal of the proceedings of each day, it shall be attested by the proper clerk, after which the same shall be recorded in books furnished to the clerks, respectively for that purpose, by the secretary of state; and after the journals are recorded in these books, they shall be deposited with the secretary of state, who shall carefully preserve them; and these records shall be considered and held to be the true and authentic journals."

And by Section 128 of the Revised Statutes, the secretary of state is required to have charge of and safely keep all laws passed by the General Assembly and deposited in his office. The method by which bills when passed by the General

Assembly are deposited with the secretary of state as required by the foregoing section, is fixed by the joint rules of the General Assembly, which rules, as adopted by the 74th General Assembly are as follows:

Rule 13. "After a bill shall have passed both houses it shall be enrolled by the clerk of the house in which it originated."

Rule 14. "When a bill or joint resolution is enrolled, it shall be examined by a joint committee of five members from each house, to be appointed a standing committee for that purpose, whose duty it shall be to compare the enrolled with the engrossed bill or joint resolution passed by the two houses, and correct any clerical errors which may be discovered, and report forthwith to their respective houses, the report to be signed by a majority of the joint committee.

Rule 15. "No bill shall be subject to amendment, commitment, or other action of either house, after the enrolling committee shall have reported the same correctly enrolled."

Rule 16. "Each bill and joint resolution shall be first signed by the Speaker of the House of Representatives, and then by the President of the Senate; who shall fix the date thereto, and be by him delivered to the Clerk of the Senate, who shall immediately deposit the same in the office of the Secretary of State, and take his receipt therefor, which receipt shall be filed with the papers of the Senate."

I assume from your statement and without personal examination of the journals and records of the General Assembly, that all these constitutional and statutory provisions as well as the rules above quoted were duly complied with in reference to the bill under consideration, except the deposit of the act with the secretary of state and taking his receipt therefor. The question therefore to be considered is, does this failure on the part of the clerk of the Senate to deposit the act with the secretary of state, have the effect of nullifying the proceedings of the legislature and cause the bill to fail to become a law? I cannot think so. It would be most unreasonable to thus place in the hands of one man the fate of important legislation. It will be observed that the bill required to be deposited with the secretary of state, is the bill passed by the legislature. The entire work of the legislature in relation to the enactment of a law is completed with the signing of the bill by the President of the Senate, who thereupon fixes thereto the date at which he signs it, and this determines the date of the passage of the bill.

In the case of the State ex rel. v. O'Brien et al., 47 O. S. p. 464, in the first syllabi the court say:

"Under the constitution of this state, and the joint rules and practice of the general assembly, a bill, which provides that it shall be in force from and after its passage, becomes a law and takes effect when it has received the requisite number of votes of the members elected to each house, and is signed by the presiding officer of each house."

In determining whether or not a bill has been duly enacted into a law, the ultimate question to be considered is, whether or not the legislature has given its sanction to the bill in the manner and form required by the constitution and statutes of the state, and not whether the bill has been deposited with the secretary of state, and by him certified to the printer to be incorporated in the annual volume of the acts of the General Assembly; and in the determination of this question the house and senate journals are the highest and best evidence.

In the case of the State ex rel. Rogers, v. Price, 8 C. C. R., p. 25, the court in the first and second syllabi say:

1. "In determining the existence of a statute, the house and senate journals may be examined notwithstanding the act appears in the annual laws with the required certificate of the speaker of each house, and the usual certificate of the secretary of state appended to the volume."

2. "Neither of the acts appearing in vol. 88 O. L., pp. 256 and 279, were ever passed by either house, nor was the same act on the subject passed by both houses."

In the case of Miller & Gibson v. the state, 3 O. S., p. 476, the court say:

"No bill can become a law without receiving the number of votes required by the constitution, and if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity."

In the case of Fordyce v. Godman, 20 O. S., p. 1, the court had under consideration the question whether or not an act had received a constitutional majority of votes on its passage, and after quoting from the case in 3 O. S., above cited, say:

"The case then before the court did not require a decision of the question now made. It was assumed for the purposes of that case, that the legislative journals were the appropriate evidence on the question whether a bill had been passed by the constitutional number of votes. And were we to hold otherwise, we would in effect hold that a bill *may* become a law without receiving the number of votes required by the constitution; that a single presiding officer may by his signature give the force of law to a bill which the journal of the body over which he presides, and which is kept under the supervision of the whole body, shows not to have been voted for by the constitutional number of members. The plain provisions of the constitution are not to be thus nullified; and the evidence which it requires to be kept under the supervision of the collective body, must control, when a question arises as to the due passage of a bill."

If a bill properly deposited with the secretary of state, and by him certified to the printer and incorporated in the annual volume of the statutes can thus be shown by the journal of the legislature not to have been passed, there can be no reason why the same journal may not be used to show that an act not included in the annual volume or certified by the secretary of state, was in fact regularly passed by the General Assembly. As before stated, the journals of the legislature are the conclusive evidence of the passage of an act. In this connection a very full discussion will be found in 47 O. S., p. 348. Other authorities might be cited, but we deem what has already been said sufficient to show that the act in question, if shown by the journals and rolls of the last General Assembly to have been regularly passed and enrolled and signed by the presiding officer of both houses, is a valid and existing law although the same was never deposited with the secretary of state nor certified by him for publication in the annual volume of Ohio laws.

Very truly,

J. E. TODD,

Assistant Attorney General.

SCHOOL PROPERTY—OWNERSHIP.

COLUMBUS, OHIO, May 16th, 1900.

P. H. Kaiser, Attorney at Law, Cleveland, Ohio.

DEAR SIR:—Your letter of May 12th, addressed to Hon. Lewis D. Bonebrake, is referred to this office for answer. In said letter you state that Nottingham village school district has been created out of only a portion of the territory which constituted a sub-district in Euclid township, and that a small portion of the territory of the former sub-district is outside the limits of that village school district, the territorial boundaries of the village and the village school district being identical; and the specific question asked is, to whom do the school lot and building belong; to the township school district or the village school district, said school lot and building being situated within the limits of the newly created village district?

In the first place I have my doubts as to the regularity of the creation of a village district out of a part only of a sub-district. The fact that a village existing within the limits of a sub-district becomes incorporated does not thereby sever it from the remaining portion of the sub-district, but the entire territory included within such sub-district continues under the control of the board of education of the township until the same is erected into a special or village district, that portion of the territory lying outside of the incorporated village being territory annexed to such village for school purposes. Now when such village desires to erect a village district, such territory annexed to said village should properly be included as a part of such village district and the electors residing in such annexed territory should have the right of participating in the creation of such village district and the election of officers therefor. Were this not true, a portion of a sub-district by causing themselves to become incorporated as a village and afterward erected into a village district, might exclude the remaining portion in such sub-district from all educational privileges. It is not a sufficient answer to this objection to say that the remaining portion of such district would still be under the control of the township board of education. The provisions made by the township board for the remaining portion of the township might be entirely inadequate to provide the residents of this portion of the sub-district with adequate school privileges.

It is not within the power of a portion of a district to thus change the boundaries of the district by the incorporation of a village within a portion of the territory included in a sub-district, and then erect such village into a village district, or by any other means. The boundaries of a school district can only be changed by the action of the boards of education having control over the territory affected by such change. The township board having fixed the boundaries of this sub-district, including Nottingham village, such district could only be changed by the consent of the township board of education, so that when Nottingham village attempted to erect itself into a village district, the territory annexed to such village for school purposes must be included in the territory forming the village district.

This would probably furnish the answer to your main question, viz.: "To whom does the school property located in such village belong?" I presume the school property referred to was provided by the board of education for the especial use and benefit of this sub-district in which it was located; a change in the form of this district would, in no way, affect the use to which this property is to be applied; it is still school property for the use and benefit of the inhabitants of this district; it properly belongs to the district and not to the board of education, although, technically speaking, the board of education holds the title. They hold it, however, for the benefit of the inhabitants of the district

in which it is situated. When this district changed its form from a sub-district to a village district the control of this property would pass from the township board of education to the village board of education. There is no analogy between such a case and the case of the Board of Education against the Board of Education in the 46 O. S., to which you refer in your letter. In the latter case the property in question was provided by the board of education of the township for the use and benefit of the entire township, and not for the use and benefit of a particular district. The board of education of a township might, for the purpose of a high school, purchase property lying within the limits of a village or special district, and no one would claim that such property, as soon as purchased by the township board, would pass to the board of education having control of the district in which such property was located; neither would a change in the district in which such property was located change the ownership or control of the property, but it would still be held by the township board of education for the use and purposes for which it was originally acquired. The case you referred to is widely different from the case under consideration. Here the property is not for the use and benefit of the entire township, but for the use and benefit of the particular district in which it is situated, and, I think there can be no question but that the title to such property becomes vested in the board of education having control of the particular district in which it is situated. If I correctly understand the case reported in the Ohio Legal News, under date of May 21st 1900 it fully sustains the position above taken, in so far as it is applicable at all to the question under consideration.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

Approved:

J. M. SHEETS, Attorney General.

SALARY PROSECUTING ATTORNEYS.

COLUMBUS, OHIO, May 16th, 1900.

E. G. McClelland, Bowling Green, Ohio.

DEAR SIR:—Yours of May 14th at hand and contents noted. Your inquiry goes to the question, as to when the federal census taken this year (1900) shall be taken as the basis of computing the salary of the prosecuting attorneys in those counties of the state in which their salaries depend upon the population of their respective counties?

While I have no copy of the law before me, yet I understand the census is required to be completed by July 1st. Hence, the inquiry arises as to whether the salary for this year shall be computed according to the population as returned by the enumerators for 1890 or 1900? Section 1297, after making provision for the salaries of prosecuting attorneys of certain counties, provides that the prosecuting attorneys of each other county shall receive as an annual salary, \$2.00 for each one hundred inhabitants of such county contained at the next preceding federal census. This "annual salary" of the prosecuting attorney commences on the first Monday of January—the day he assumes the duties of his office; and as a matter of course for each succeeding year thereafter, his annual salary commences on the first Monday of January, and it is my opinion, the population of the county as shown by the federal census next preceding the time when his annual salary commences should determine his salary for the whole year. It could hardly be an annual salary, and be increased or diminished during the year.

It is true this question is not free from doubt, but I am of the opinion the data for computing the salary of the prosecuting attorney for the year 1900 must be taken from the population as shown by the census of 1890.

J. M. SHEETS,
Attorney General.

APPROPRIATIONS.

COLUMBUS, OHIO, May 17th, 1900.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—Your communication is at hand and contents noted. You call my attention to three several bills passed by the last General Assembly. And inquiry is made as to whether the legislature made any appropriation for the payment of the salaries and awards required to be paid by virtue of the provisions of these acts.

I will consider them separately.

First. The first act is H. B. No. 17, which provides for the appointment by the Governor of a chief examiner of steam engines and six district examiners. The salary of these officers aggregate \$9,000.00 per year. There is no appropriation for the payment of these salaries unless the following language in the act is sufficient for that purpose:

“The chief examiner shall receive a salary of \$1,800 per annum, and the district examiners shall each receive a salary of \$1,200 per annum, which salary and all necessary traveling and office expenses incurred by said examiners in the discharge of their duties, shall be paid out of the treasury of the state, from any fund therein not otherwise appropriated, on the warrant of the auditor, on the presentation to him of the proper vouchers.”

This act, it will be observed, provides that these officers shall receive their salaries and expenses out of the state treasury, out of any fund not otherwise appropriated, upon the warrant of the Auditor of State; but does not specifically set apart and appropriate the amount of money required for this purpose. If it is held that there was no appropriation, the law either becomes inoperative or else the officers must act without compensation. Surely it was not the intention of the legislature that this promise of a salary should turn to “dead sea ashes” upon the lips of the officers appointed. Hence, if by a reasonable construction the language quoted can be held to carry with it the necessary appropriation, such should be the construction. The act, however, does expressly provide that these salaries and expenses shall be paid out of any fund in the state treasury not otherwise appropriated; so it seems to me that this language in effect sets apart and appropriates the necessary fund for the payment of the salaries and expenses of these officers. Although the act does not designate from what fund the salaries and expenses shall be paid, yet as the general revenue fund is the only fund available for that purpose, it is reasonably clear that the legislature intended that payment should be made out of this fund.

This view is strengthened by the case of *Ohio ex rel. vs. Oglevee*, 37 O. S., 1. The following language in that case was held to carry with it an appropriation:

“That the sum of \$20,000.00, from any money not otherwise appropriated, is hereby added to the fund now existing in the treasury of the state, for the purpose of repairing the buildings of the Ohio University.”

This was the holding notwithstanding the act did not designate from what fund the money should be appropriated; and notwithstanding there was no money in the state treasury to the credit of the Ohio University to which the \$20,000.00 thus appropriated could be added.

Second. S. B. No. 51 provides for the appointment of a state fire marshal and two deputies whose aggregate salaries amount to \$6,300. This act also provides that the money necessary to pay the salary and expenses of these officers shall be raised by an annual assessment on the gross premium receipts of all fire insurance companies doing business in Ohio. These assessments are required to be paid to the superintendent of insurance, and he in turn is required to pay the same to the treasurer of state, to be held by him as a special fund for the payment of the salaries and expenses of the fire marshal and deputies. This fund is not raised by taxation and is no part of the state's revenues as commonly understood. As well might the fund thus raised have remained in the hands of the insurance commissioner and be paid out by him upon the presentation of proper vouchers.

Hence, I am of the opinion that this fund is available without an appropriation.

Third. S. B. No. 253 provides for the appointment of a commission composed of three persons, who are to receive a salary of \$3.00 per day and mileage, and who are empowered to proceed and investigate the claims of a large number of persons for damages growing out of the overflow of the Lewistown reservoir, to report to the board of public works the amount of damages due such persons, and the expenses connected with such investigation. The act further provides that the board of public works shall pay the sums so awarded and the expenses incurred out of any moneys appropriated by the General Assembly for that purpose.

But the General Assembly failed to make an appropriation for that purpose. Hence, if the commission is appointed and awards made, the parties must depend upon the will of the next legislature for an appropriation.

Very truly,

J. M. SHEETS,
Attorney General.

PLUGGING OIL WELLS.

COLUMBUS, OHIO, May 17th, 1900.

Hon. E. G. Biddison, Chief Inspector of Mines, Columbus, Ohio.

DEAR SIR:—Your letter of May 17th, containing enclosure signed by William H. Stoker and others of Lightsville, Ohio, is at hand. In reply thereto will say I am of the opinion that the duties of your office do not require you to give any attention to the matter of the proper sealing or plugging of oil or gas wells unless such oil or gas well penetrates through coal measures. The act of April 23rd, 1898 (90 O. L., p. 237) entitled "An act to protect the mines in Ohio and the lives of the persons employed therein," makes it the duty of the chief inspector of mines, in cases where any well drilled for oil or gas shall have passed through any vein of minable coal, when such well shall have been abandoned, to see that such well is properly plugged in the manner required by said act. (See Bates R. S., Section 306-1 et seq.)

I know of no other statutory provisions requiring the state inspector of mines to take any action in reference to the proper sealing or plugging of abandoned gas or oil wells. I have not a complete copy of the law passed by the last general assembly, but do not recall any act passed by that body affecting this question.

An act passed by the general assembly February 9th, 1893 (90 O. L., p. 24) contains the general provisions of the statute relating to the plugging of abandoned oil or gas wells other than those passing through coal measures, but no duty is imposed by said act upon the office of chief inspector of mines in relation to such abandoned wells. By said act it is made the duty of the owner or operator of any well, when about to abandon the same to properly seal or plug the well; and if the owner or operator fail to comply with the provisions of this act, then it becomes the duty of the owner of the land on which such well is situated, to properly seal or plug the same; and if all the persons hereinbefore named shall fail to comply with the provisions of the act, then it becomes lawful for any person, after a written demand therefor to any of said persons whose duty it is to plug said well, to enter on the premises where such well is situated, take possession thereof, and seal or plug the well according to the provisions of said act. And the reasonable cost and expense therein shall be paid by the owner or operator of the well, and on his default, by the owner of the land; and the amount of such reasonable cost and expense becomes a lien not only upon the fixtures and machinery and lease hold interest of the owner and operator of the well, but also upon the land upon which said well is situated. And there is a further provision in the statute that any person, co-partnership or corporation violating any of the provisions of the act, shall be liable to a penalty of \$100.00, to be recovered with the cost of a suit in civil action at the instance of any resident of the state of Ohio; and the amount of said penalty when collected, goes one half into the school fund of the county in which said suit is brought, and one half to said persons at whose instance said suit shall have been brought. (See Bates' R. S. of Ohio, Sec. 4379-1 et seq.) I am,

Yours very truly,

J. E. TODD,

Assistant Attorney General.

REMOVAL OF APPOINTEES.

COLUMBUS, OHIO, May 18th, 1900.

Hon. M. D. Ratchford, Commissioner of Labor, Columbus, Ohio.

DEAR SIR:—Your communication making inquiry as to the power of removal of officers appointed by the commissioner of statistics of labor is at hand. Replying thereto I would say that the general principle is well established that the power of appointment carries with it the power of removal, except in cases where the appointment is for a definite term. In such case a removal can only be made for the causes specified in the statute. In other words, the power of removal by the appointing power does not exist unless the appointee holds his office merely at the pleasure of the appointing power.

Section 308a of the Revised Statutes provides:—

“The tenure of office for all superintendents and clerks of free public employment offices shall be two years from the date of appointment, but the commissioner of labor statistics shall have the power of removing any of such superintendents and clerks for good and sufficient cause, and all appointments and removals of such superintendents and clerks shall be made with the consent of the governor.”

It clearly appears, therefore, that superintendents appointed by the commissioner with the consent of the governor are only subject to removal for cause. The statute does not specify the particular causes which might be sufficient for a removal, but merely requires that there shall be “good and sufficient cause.”

I am of the opinion therefore that the appointees named in your communication are entitled to hold their respective offices for the period of two years from the date of their appointment, unless they should be removed for "good and sufficient cause." I do not think that the circumstance mentioned in your communication, that there was an interval of some months between the expiration of the first term of one of such appointees and his re-appointment, would have any weight. The appointment, when it was made, was for a full term, and the term would begin at the date of the appointment. The time intervening between the expiration of the former term and the date of the re-appointment, would be merely an interval that was not provided for by any appointment. I am,

Yours very truly,

J. E. TODD.

Assistant Attorney General.

CONSTRUCTION — HALLOCK CONTRACT.

COLUMBUS, OHIO, May 19th, 1900.

To the Board of Managers of the Ohio Penitentiary.

GENTLEMEN:—In compliance with your request I have examined the contract between the Board of Managers of the Ohio Penitentiary and the A. T. Hallock Co., and the papers and memorandums submitted therewith, and have reached the following conclusions in regard to the same: This contract was entered into the 5th of April, 1899, and was for a period of one year, with the privilege on the part of the company of renewal from year to year for four years, on the same terms and conditions as contained in the original contract. It appears then that this contract has expired unless the said company has taken the proper action to exercise its option of renewal. I take it that the requirement on the part of the company to obtain a renewal of this contract would be (a) notice to the Board of Managers and (b) tender of a sufficient bond. Have these requirements been complied with? I do not so understand. It seems that about the time of the expiration of this contract A. T. Hallock made a verbal request of the Board of Managers that this contract be continued for another year and assigned to the Ohio Glove Company. No formal action was taken in reference to this request by the Board of Managers. The request was an entire one, and if entitled to any consideration at all, it could not be considered notice to the Board of Managers on the part of the A. T. Hallock Company that said company desired to continue its contract with the board, but it was more properly a request that the board make a contract with the Ohio Glove Company. In this state of the facts, I do not believe that it could be claimed that the A. T. Hallock Company had given proper notice to the board that it desired to renew its contract for another year.

No bond was tendered either by the A. T. Hallock Company or the Ohio Glove Company. The statute requires the Board of Managers to award contracts for labor only upon the giving by the contractor of sufficient security to the board for the faithful performance of the contract. In other words, it is indispensable to the making of a contract that a bond should be given on the part of the contractor for the faithful performance of the contract. In the making of the original contract the statute requires that bids shall be accompanied by a bond conditioned that the bidder will comply with the terms of his bid if it be accepted. The Board of Managers could not be required to take any action or grant any privileges or rights to this company unless the company first tender a sufficient bond. In the

case of a renewal of a contract already in existence, where the option is entirely with the contractor, the act or failure to act on the part of the board can make no difference to the contractor who seeks to enforce his option to have his contract renewed. It is important, however, that every act or requirement on his part be promptly and faithfully performed, and as the Board of Managers could not possibly continue his contract except upon the condition that he furnish a sufficient bond, it is absolutely necessary that he tender to the board a sufficient bond within a reasonable time. It is not the duty of the board to ask for the bond, but it is the duty of the contractor to tender the same, and a failure to do so within a reasonable time would be fatal to his option. The bond furnished with the original contract is defective in that it does not carry a revenue stamp. It is also limited to the term of the contract, to-wit, one year, so that since the fifth day of April, 1900, this company has been operating without a renewal of its contract, and without furnishing or tendering to the board any bond for a renewal of the contract. It would certainly seem that these facts, especially when taken in connection with want of proper notice of the desire on the part of the company to renew their contract, would justify the Board of Managers in considering its contract with the A. T. Hallock Company fully terminated and at an end.

Another fact in connection with this contract leads me to doubt the authority of the Board of Managers to make such a contract, in the first instance. I refer to the fact that it provides for the labor of three hundred so-called "infirm" prisoners at a compensation which would produce for their labor, I am informed, less than 40 cents per day. By the term "infirm prisoner," I understand is meant those who are physically disabled as well as those whose term is only for one year, and who are therefore unskilled. In connection with the employment of prisoners it is provided in Section 7388-5 Revised Statutes as follows:—

"But no arrangement shall be made or entered into by the board for a longer period than one year, that will produce less than seventy cents per day for the labor of able-bodied convicts, excepting that convicts during the first year of their sentence, or those who are entirely unskilled, or disabled by disease or old age, cripples, females and minors, may be temporarily hired at less than the above rate."

This contract, considered with the provisions of renewal, is practically a five-year contract, and the question arises, has the board, under the section above quoted, authority to make a contract for that period of time, even for the labor of these so-called "infirm prisoners"? I have my serious doubts whether the board has any such power. All such prisoners as may be denominated "infirm" are included in the classification given in the latter part of the section above quoted, and the provision is that such may be "temporarily hired" at a rate that will produce less than seventy cents per day for their labor. It certainly would seem that the word "temporarily" is not consistent with a five-year contract, particularly when we take into consideration the fact that five years is the extreme limit for which the board has authority to make a contract.

Without taking into consideration the other questions presented, I am of the opinion that enough has already been said to show that this contract is no longer of any binding effect upon the Board of Managers of said penitentiary. I am,

Very truly yours,

J. E. Todd,

Assistant Attorney General.

DYNAMITING STREAMS.

COLUMBUS, OHIO, May 21st, 1900.

Hon. L. H. Reutinger, Chief Fish and Game Warden, Athens, Ohio.

DEAR SIR:—Your letter of May 19th, enclosing communication from Fred C. Ross, of Springfield, Ohio, at hand. In said communication Mr. Ross says that the county commissioners claim to have control of all streams in the county, and, therefore, have a right to authorize persons to dynamite in such streams for the purpose of raising a dead body supposed to be in such stream. I think the claim of the commissioners is a little broad. I know of no statute giving to the Board of County Commissioners control of the streams within the county. True, they are required, at times, to make certain improvements in connection with such streams, or water courses, but they are not authorized to take any action in reference to such streams or to make any improvements thereon, except upon petition signed by property owners interested in such stream. If the streams are not navigable they belong to the riparian owners, and if navigable, they belong to the public, and the commissioners have no more right or control over the streams than private individuals. But even if the claim of the commissioners were true, the control would still be subject to law, and they would have no right to authorize any unlawful use of such streams, or to authorize any person or persons to commit an act in relation to such streams, which would be in violation of law.

In the case of a dead body supposed to be in the bed of a stream, I would suppose the Board of Health would have the authority and right to make use of such means and purposes as might be necessary to raise such body to the surface. Whether the use of dynamite in such stream would have the effect of raising such body, I do not know, but I have no doubt that the Board of Health would have the right to authorize the use of dynamite for such purpose if they honestly believed it would have such an effect, and dynamite used in a stream for such purpose would be lawful, as being an act of public necessity, even though the incidental effect of such act was to kill or destroy a number of fish in such stream. Every consideration of humanity would require that a dead body should be recovered, and any reasonable means employed for such an end would, doubtless, be justified by the courts, and persons employing such means could hardly be convicted of violation of law, even though technically their act was contrary to the statute. I am,

Yours very truly,

J. E. TODD,

Assistant Attorney General.

WHETHER BILL UNSIGNED BY PRESIDENT OF SENATE IS A LAW.

COLUMBUS, OHIO, May 24, 1900.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Yours of May 21st at hand and contents noted. The question is whether House Bill No. 283, not having been signed by the presiding officer of the Senate, in the presence of the Senate, when the same was in session, became a law without his signature. The copy of the journal of the Senate is furnished this office by you, states that the bill in question "was signed by the Speaker of the House of Representatives, and returned to the Senate, whereupon the President of the Senate announced that he had signed said bill." But, upon an inspection, it appears that the act was not signed by the President of the Senate.

Article 2, Section 17, of the Constitution provides: "That the presiding officer of each House shall sign, publicly in the presence of the House over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the General Assembly." The journal of the Senate, as appears from the copy furnished this office, does not recite that the President of the Senate signed this bill, in the presence of the Senate while it was in session, and capable of transacting business. The journal does not recite, even, that the Senate was in session. Nor does it recite that the President of the Senate signed the bill. It simply recites that he "announced that he had signed said bill." This statement in the journal would not indicate either the time or place of signing the bill. It does not state the fact that the bill was signed, but merely that the President of the Senate "announced" that he had signed the bill.

Waiving that question, however, as the section of the constitution already quoted requires a bill to be authenticated by the signature of the presiding officer of each House, the bill must fail for want of that constitutional requirement. See *State against Keisewetter*, 45 O. S., 254, where the exact question was before the Supreme Court and it was held that this provision of the constitution was mandatory, and no bill became operative as a law until signed as required by this section.

Very truly yours,

J. M. SHEETS,
Attorney General.

RELEASE OF PRISONERS AND REAPPREHENSION.

COLUMBUS, OHIO, May 24, 1900.

R. H. Day, Prosecuting Attorney Stark County, Ohio, Canton, Ohio.

DEAR SIR:—Your communication at hand and contents noted. I gather from your statement that a person charged with a crime in West Virginia fled to the State of Ohio, and was there apprehended by virtue of extradition papers sent from the Governor of West Virginia, and honored by the Governor of Ohio. That habeas corpus proceedings were had before the Probate Court of Stark County, the person ordered to be held a reasonable time for the appearance of the agent to take the accused. The agent appointed to take the accused sought to appoint a substitute, and, while the prisoner was in the custody of the substitute he was set at large by writ of habeas corpus by the Probate Court of Stark County. The question which you propound is, Whether, under such circumstances, the prisoner may be reapprehended by virtue of these extradition papers, and taken without the State of Ohio to answer the criminal charge named in those papers?

The only thing that would seem to place any doubt upon that power is contained in Section 5747 of the Revised Statutes, which reads as follows: "A person who is set at large upon a writ shall not be again imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause or offense."

Owing to lack of time I am unable to give you an extended opinion, but will say that this question has been before me on other occasions and it is clearly my opinion that this statute is limited to those cases wherein the prisoner has been set at large upon the merits of the case upon which the extradition papers were founded, and not upon some technicality. There is a statute in New York, of which this is a substantial copy, and such has been the holding

of the courts of that state, but, owing to lack of time, I am unable to cite you the reference. The laws were made for the purpose of meting out substantial justice, not for the purposes of enabling criminals to go free. Consequently, it is clearly my opinion that the prisoner may be reapprehended, and taken without the state upon these extradition papers.

Yours very truly,

J. M. SHEETS,
Attorney General.

SUPERINTENDENT FREE EMPLOYMENT BUREAU.

COLUMBUS, OHIO, May 25, 1900.

Hon. M. D. Ratchford, Labor Commissioner, Columbus, Ohio.

DEAR SIR:—In your communication to this office under date of May 20 you state that the term of the superintendent of the "Free Employment Bureau" of Toledo, Ohio, will expire on the first day of September, 1900; that the salary paid said superintendent is \$1200 per year, but that the council of said city threaten to reduce the salary of said superintendent to a merely nominal sum; and you inquire if the appointment of a successor to the present superintendent, whose term would begin September 1, 1900, would prevent the council from making such a reduction in the salary.

In Section 308, Revised Statutes, are found the following provisions in relation to the appointment and salary of such superintendent:

"Said commissioner (that is, the commissioner of statistics of labor) is hereby authorized and directed immediately after the passage of this act, to organize and establish in all cities of the first class, and cities of the first and second grade of the second class in the state of Ohio, a free public employment office, and shall appoint one superintendent for each of said offices to discharge the duties herein set forth. * * *
The superintendent of each of said offices shall receive a salary to be fixed by the council of such city, payable monthly."

It thus appears that while the appointing power is in the hands of the commissioner of labor, that the right to fix the salary is in the hands of the city council.

Section 20 of Article II of the Constitution of Ohio is as follows:

"The general assembly in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

In the case of superintendents provided for in Section 308, Revised Statutes, the legislature had not fixed the compensation, but have merely given the power to the city council to fix the same, and the only limitation placed upon the power of the city council is that the compensation for such superintendents shall be a salary and payable monthly. There is quite a broad distinction between the term "compensation" as used in this section of the Constitution and the term "salary," and it is salary and not compensation, which cannot be changed during the existing term of any officer. It is clear therefore that the salary of the superintendent of the free employment bureau cannot be changed during his existing term. The only question to be decided then is, When does the term of such superintendent begin?

Section 308a provides:

"That the tenure of office for all superintendents and clerks of free employment offices shall be two years from the date of appointment."

Without referring to the decisions of our courts, which hold that the term of office does not begin until the officer has qualified and entered upon the discharge of the duties, it seems very clear that this section (308a) contemplates that the appointment for another term cannot be made until the expiration of the previous term. What I mean is, that two persons cannot be considered as holding the office of superintendent at the same time; and while the commissioner may designate who is to have the succeeding term, yet the appointment cannot in fact be made or cannot become effective until the expiration of the former term. Hence, the constitutional provisions above quoted would not operate to prevent the council from reducing the salary for the succeeding term at any time prior to the commencement of such term. I do not discuss the question, however, of the right or power of the council to reduce a salary to a merely nominal sum. The law imposes upon the council the duty to fix a salary, and if the council should refuse to obey the injunction of the statute, or should seek to evade the same by fixing a merely nominal sum, it is possible that the superintendent affected by such action on the part of the council, could recover from the city on a quantum meruit for his services. This question, however, is not presented in your communication, and hence I merely suggest the above without undertaking to give an opinion on the same.

Very truly,

J. E. Todd,
Assistant Attorney General.

BOXWELL TUITION.

COLUMBUS, OHIO, May 26, 1900.

F. W. Woods, Medina, Ohio.

DEAR SIR:—Your letter of 25th inst. at hand. In this letter you state that two pupils of a joint sub-district composed of territory in York and Lafayette Townships, said districts being under the control of the Board of Education of York Township, while said students reside in Lafayette Township and have passed the Boxwell examination, and the question arises as to which township should pay the high school tuition provided by Section 4029—1 of the Revised Statutes, as amended April 14, 1900. The provisions of the above act in relation to the payment of tuition reads as follows:

"The tuition of such successful applicant shall be paid by the board of education of the township or special district in which such applicant resides, provided there is no high school maintained or supported by the township or special district in which such pupil resides where such pupil may attend without paying tuition."

The plain provision as above quoted is, that the tuition shall be paid by the Board of Education of the township in which such applicant resides, and unless this provision would be modified by the fact that such pupil resides in a joint sub-district, the answer to your question is evident from the reading of the statute. I cannot see how the fact that a portion of the territory of the township is formed in a joint sub-district with territory in another township, could in any way release the Board of Education of the township in which such pupil resides from paying the tuition provided for in the act above quoted.

Each township is organized under the statute into a township district, and it is expected that each township should provide the means for the support of the common schools within the township. The creation of a joint sub-district in no way releases either township from this obligation, but each township is required to contribute to the expenses of the joint sub-district in proportion to the number of pupils residing in the territory in the township included in such joint sub-district, so that each township is required to provide for the expense of education of each pupil in such township. This is the general principle upon which the entire common school system rests. Each district is required to provide for the education of all the youth residing within such district.

Hence, I am very clearly of the opinion that in the case you cite, the tuition required to be paid by Section 4029-1, should be paid by the Board of Education of the township in which the pupil resides.

Very truly,

J. E. Todd,
Assistant Attorney General.

ALLOWANCE FOR CARE OF COUNTY JAIL.

COLUMBUS, OHIO, May 26th, 1900.

W. F. Wood, Medina, Ohio.

DEAR SIR:—Yours of May 25th at hand and contents noted. The facts as I gather them from your communication are, that the sheriff of your county has been allowed 50 cents per day for taking care of the county jail since April 22nd, 1896, at which time Section 7379 was repealed, taking from the sheriff the right of such allowance, and the question submitted is, whether the sheriff who was in office at the time of the repeal of the statute, was entitled to the 50 cents per day allowance until the close of his existing term? I understand from your statement that he claims that the statute could not affect him by virtue of Art. II, Sec. 20, of the Constitution, which reads as follows:

“The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

It has been held so frequently by the Supreme Court of Ohio that the term “salary” as used in the Constitution does not in any manner protect the officer from a change of fees, that I need not cite any decisions upon the subject, as you are familiar with them. Hence, it is clear that the sheriff is not protected by this provision of the Constitution, and to the extent that he received money after the repeal of the statute for the care of the jail, was an illegal allowance, and may be recovered back.

As to the sheriff elected after the repeal of this statute, of course as I understand your letter, there is no controversy, but the allowance is without authority, and can be recovered back. It is clear to me that such is the law.

Very truly,

J. M. SHEETS,
Attorney General.

CARPENTER'S SALARY BLIND ASYLUM.

COLUMBUS, OHIO, May 28th, 1900.

Hon. H. P. Crouse, Member of the Board of Trustees The Ohio Institution for the Blind, Toledo, Ohio.

DEAR SIR:—Yours of May 25th at hand and contents noted. I gather from your communication the following facts:

The sum of \$775 per year was made available, by appropriation for the carpenter employed by your board for the institution.

That the Board of Trustees fixed the salary of the carpenter at \$60 per month, and never increased it.

That the Board of Trustees received a letter dated October 31st, 1899, signed by the Hon. W. D. Guilbert and Hon. J. P. Jones, indicating a desire on their part, and that of the finance committee that Mr. Gollins, the carpenter employed, be allowed the full sum of \$775 per year.

That upon this statement Mr. Gollins drew \$120 for time already served, and without it having been allowed by action of the Board of Trustees.

Upon that state of facts this sum of \$120 was drawn from the treasury without authority of law. The mere fact that \$775 was made available for the use of the carpenter gave him no right to it, but only such part thereof as he was entitled to by virtue of the terms of his employment.

It matters not what the finance committee of the House may have desired at the time the appropriation was passed, the trustees of the institution, and the trustees only, had the power to contract with the carpenter, and say what sum he should receive; and it certainly would not be bad policy to save something out of the appropriation for the state, if the trustees could reasonably do so.

As indicated above, in my opinion, the sum of \$120 so drawn from the treasury can be recovered back.

Very truly yours,

J. M. SHEETS,
Attorney General.

NUISANCE AT ASHVILLE.

COLUMBUS, OHIO, May 29th, 1900.

Dr. C. O. Probst, Secretary Board of Health, Columbus, Ohio.

DEAR SIR:—Your communication with reference to the nuisance at Ashville, Ohio, is at hand. The statements contained in the engineer's report are silent as to whether the sewer in question was tapped by Dr. Squires pursuant to permission of the village council, or whether tapped without permission; also silent as to whether there is any sewerage system in the village. The report is also silent as to whether there is a local board of health in the village, and if there is, why it is not acting instead of the State Board. There is some difference between the powers of local and state boards of health. Hence, I am unable to determine from the facts given just who would be bound legally to stand the expense of changing the sewer referred to.

However, the important question now is not who should bear the expense of abating the nuisance complained of, but how can it be most expeditiously and effectively done. If the local authorities are of the opinion that Dr. Squires is responsible for the nuisance, and should bear the expense of the abatement, they should proceed under Section 2116 to abate the nuisance and charge the expense to his property.

If Dr. Squires is not satisfied with the action of the local authorities, he may appeal to the courts for redress. An opinion from this office would neither bind Dr. Squires nor the village of Ashville, hence, would be of no value to the board of health.

Very truly,

J. M. SHEETS,
Attorney General.

TRANSFER OF FUNDS BY COUNTY COMMISSIONERS.

COLUMBUS, OHIO, May 30th, 1900.

Columbus Ewalt, Prosecuting Attorney, Knox County, Mt. Vernon, Ohio.

DEAR SIR:—You inquire in your letter of May 29th whether the county commissioners have power, by the provisions of Section 2834, Revised Statutes, to transfer a surplus of \$1,000 in the poor fund, to that of the general county fund. In my opinion they have no such power.

Section 961 provides:

“The board of infirmity directors shall on the first Monday in March annually, certify to the county auditor the amount of money they will need for the support of the infirmity for the ensuing year, including the amount for all needful repairs at the infirmity; and the county auditor shall place the amount so certified by the infirmity directors on the tax duplicate of the county, and said infirmity directors shall have full control of said poor fund and shall be held responsible for the same.”

It is seen by this section that the poor fund is raised by tax levied by the infirmity directors, and is also completely within their control. The infirmity directors would have queer control, indeed, over the poor fund if the county commissioners, whenever they concluded there was a surplus in it, could take this fund away from them. Sections 964 and 2834 should be construed together, so as to give both an operating force. This is an old and familiar rule of construction, which needs no citation of authorities. Should Section 2834 be so construed as to give the county commissioners power to take this fund from the infirmity directors and place it into the county fund, it would render Section 964 practically nugatory. Such construction is never allowed by the courts.

Section 2834 provides:

“Whenever there is in the treasury of any city, village, hamlet, county, township or school district, any surplus of the proceeds of a special tax, or of the proceeds of a loan for a special purpose, which surplus is not needed for the purpose for which the tax was levied, or the loan made, such surplus may be transferred to the general fund by an order of the proper authorities entered on their minutes.”

It will be observed that this section does not assume to give the county commissioners power to transfer any particular fund. It provides that the “surplus may be transferred to the general fund by an order of the proper authorities entered on their minutes. The “proper authorities” to transfer the poor fund would hardly be the commissioners, for, by express enactment, they have no power or control over this fund.

Again, the poor fund of the county is not “the proceeds of a special tax,” which, by the provisions of Section 2834, above quoted, may be transferred,

The poor fund is a fund provided for by an annual levy to be used in the support of the poor, and the law providing for such levy has general operation throughout the state; while a "special tax" is raised in a particular locality for a particular purpose, and as soon as the purpose is accomplished the power to continue the levy ceases. For an example of a "special tax" see State ex rel. against Commissioners, 31 O. S., 211.

It will further be observed that the remaining provision of Section 2834 does not allow the general fund of the county to be replenished by the transfer to it from any other fund and, at the same time, make a levy for the county fund to the limit provided by law. The commissioners are not permitted to evade the statutes in that way. It is clear, by the provisions of this section, that, in no event, either by transfer of funds or otherwise, is the county permitted to raise and expend a fund beyond the limits of the levy provided for in the statute.

Even if Section 2834 were construed to authorize the transfer indicated in your letter, it is very questionable if the act would not be unconstitutional. Article 12, Section 5, of the Constitution provides

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

The levy for the poor fund was made pursuant to an express statute authorizing the same, and was raised for the support of the poor. If it could be transferred with impunity to the general county fund it would be a clear evasion, in my opinion, of this provision of the Constitution.

It is unnecessary, however, to cite authorities or discuss this question at length, as it is clear, to my mind, that under the provisions of the statutes, as they now exist, the commissioners are without authority to make the transfer suggested in your letter.

Very truly yours,

J. M. SHEETS,
Attorney General.

SAVINGS AND LOAN ASSOCIATIONS AND SAFE DEPOSIT AND TRUST COMPANIES.

COLUMBUS, OHIO, June 4th, 1900.

Hon. Charles Kinney, Secretary of State, Columbus, Ohio.

DEAR SIR:—Your communication of May 29th, in which you submit the proposed amendments to the articles of incorporation of The State Banking and Trust Company, is at hand. The question presented is "Can a corporation organized as a savings and loan association, by an amendment of its charter, be authorized to transact the business and assume the powers of a safe deposit and trust company?"

Both savings and loan associations and safe deposit and trust companies are organized under the general laws pertaining to the formation of corporations, while Chapter 16 of Title 2 R. S., contains the special provisions applicable to such corporations. Sections 3927 to 3821 inclusive relates to savings and loan associations, and Sections 3821 a to 3821 g inclusive relates to safe deposit and trust companies. An examination of the various sections of this chapter discloses that the provisions relating to safe deposit and trust companies were enacted some time after savings and loan associations had been authorized. These provisions are found in Vol. 79, O. L., p. 101 and are entitled "An act supplementary to Chapter 16, Title 2, part second of the Revised Statutes of Ohio, and to provide for the creation and regulation of safe deposit and trust companies."

It would appear from this Title that the Legislature had in mind when enacting the provisions relating to safe deposit and trust companies the creation and regulation of a new class of corporations, and not merely the granting of increased powers to corporations already in existence. This purpose is further shown by the full and careful specification contained in this act of the powers to be exercised by such safe deposit and trust company, and which are found upon examination to be widely different from the powers conferred upon savings and loan associations by the chapter to which this act is supplemental. Some of the distinctions between the powers of the two classes of corporations are as follows:

"Savings and loan associations are authorized to receive on deposit for safe keeping or investment all sums of money that may be offered for that purpose, or that may be ordered to be deposited by any court in this state having custody of money; while safe deposit and trust companies are authorized to receive on deposit for safe keeping government securities, stocks, bonds, coins, jewelry, plate, valuable books and documents and other property of every kind. Such companies are also authorized to act as agent or trustee for the purpose of registering, countersigning or transferring certificates of stock, bonds, etc., or to receive and hold moneys and property on trust or on deposit from executors, administrators, etc. Such companies may also act as executor, administrator, assignee, guardian, receiver, or trustee or in any other trust capacity and receive and take any real estate which may be the subject of any such trust, and to act as agent under any power."

It appears to me that these purposes are widely different. I take it that a deposit with a savings and loan association creates between such association and depositor the relation of debtor and creditor, while a deposit with a safe deposit and trust company of any of the property which such company is authorized to receive creates a trust relation.

In pursuance of this distinction it will be observed that the powers conferred upon a savings and loan association in relation to the investment and control of their deposits as well as their original capital, is much more liberal than the powers conferred upon a safe deposit and trust company.

Savings and loan associations may invest their funds in stocks, bonds, real estate securities, or may discount notes and bills of exchange, and may make loans to the directors or other officers of such association to an amount equal to one-half of the amount of stock owned or held by such officer; and the board of directors are authorized to prescribe the terms in which deposits shall be received and paid out and the mode of transacting, managing and conducting the affairs and business of the corporation; while the moneys and properties received in trust by safe deposit and trust companies together with the capital of such company may be loaned on, or invested only in certain prescribed securities unless by the terms of the trust some other mode of investment is prescribed; while no loan can be made either directly or indirectly to any officer or trustee of such company. Other distinctions might be pointed out but I deem these sufficient to show that the purposes and powers of the two classes of corporations are widely different. In this connection it might be stated that the act of the General Assembly passed April 16, 1900, attempts to confer upon certain savings and loan associations organized and doing business in any city of the third grade of the first class or first grade of the second class the power to also do a safety deposit and trust business. This bill however, cannot affect the question now under consideration for as I understand the State

Banking and Trust Company is organized and doing business in the City of Cleveland, Ohio, while the act above referred to applies only to the cities of Toledo and Columbus. But even if said act did apply, I would have my doubts as to its constitutionality. The purpose and powers of the two corporations being as above shown widely different, it would seem very clear that the two kinds of business could not be engaged in by the same corporation.

As above stated these corporations are formed under the general statutes relating to the creation of corporations of which Section 3235 provides, "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves except for carrying on professional business." In construing this section in the case of State, ex rel. vs. Taylor, 55 O. S., p. 61, the Supreme Court on page 67 say:

"It will be noted that the word is 'purpose' not 'purposes'. Its use implies a limitation. This limitation must have been by design. It is a most wise and reasonable one. We cannot assume that the General Assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly. Construing this section wholly by itself it will not justify the contention that a corporation organized for one purpose can be changed by amendment into a company having authority to pursue a number of differing and unrelated purposes.

Indeed the only rational deduction is the exact opposite. But the section does not stand alone. Following, under the same title, there are provisions for the incorporation of no less than fifteen different kinds of corporations, including street railway companies, and, by later enactments, the formation of electric companies for conducting electricity for light and power purposes, and to contract with municipalities for lighting streets is authorized. If it had been the design of the General Assembly, by Section 3235, to give the unlimited power contended for, why the subsequent provisions referred to? These enactments taken together, we think, support the conclusion that a corporation may, except where distinct provision is made, be organized for one main purpose, not for half a dozen. Nor is this unreasonable. It would seem to be a sufficient extension of the words of any grant to corporations to hold that they may possess such incidental powers as are necessary to carry into effect the powers expressly conferred. Nor are we without authority bearing upon the construction of Section 3235. In the State vs. Stock Company, 38 O. S., 347, it is held that this section 'must be construed as not authorizing the incorporation of insurance companies, as the organization of such companies is specially provided for in Chapters 10 and 11 of the same title.'

This case was a proceeding in mandamus to compel the Secretary of State to file and record certain amendments to the articles of incorporation of the relator by which amendments the purpose and powers of such corporation would be materially changed, thus making this case very analogous to the one under consideration. The court dismissed the petition and refused a writ of mandamus. For the same reason declared by the court in the above cited case, viz: "the change proposed would work a substantial change in the purposes of the orig-

inal organization of this company, and is not authorized by the statutes of the state," I am of the opinion that the proposed amendments to the articles of incorporation of The State Banking and Trust Company should not be filed. I am,

Very truly yours,

J. E. TODD,
Assistant Attorney General.

O. N. G. ENCAMPMENT OUTSIDE OF THE STATE.

COLUMBUS, OHIO, June 5th, 1900.

Hon. George R. Gyger, Adjutant General of Ohio, Columbus, Ohio.

DEAR SIR:—Yours of June 4th received and contents noted. The question propounded is, whether the O. N. G., or any part thereof may be authorized to hold the annual encampment required by the provisions of Section 3078, Revised Statutes, outside of the state of Ohio?

Section 3078 provides:—

"The national guard shall encamp not less than six nor more than eight days in each year; and unless the commander-in-chief prescribes the time, place and manner of assembling the troops for that purpose, the commander of each regiment, battalion, troop and battery, shall order an encampment of his command at some time during the months of May, June, July, August, September or October, upon such date as shall be approved by the commander-in-chief."

It is thus seen that this section is silent as to whether the encampment may be ordered to take place outside of the state or not. Hence, in order to determine this question resort must be had to the purpose of organizing the O. N. G. and the other provisions of the statute. Section 98, R. S., makes the governor commander-in-chief of the militia.

Section 3034 provides:—

"The active militia shall be known as the "Ohio National Guard," and may be ordered into active service by the governor to aid the civil officers to suppress or prevent riot or insurrection, or to repel or prevent invasion; and they shall, in all cases, be called into service before the unorganized militia."

Section 3079 provides:—

"The commanding officer of an encampment may fix certain bounds, not including any public road, within which no spectator shall enter without leave; and whoever intrudes within such limits, when forbidden to do so, or after entering by permission conducts himself in a disorderly manner, or whoever resists a sentry or guard, acting under orders to prevent such entry, or to prevent disorderly conduct, may be arrested by the commanding officer, or by his order, and taken before a justice of the peace of the proper township, and, upon conviction of the offense, shall be fined not more than fifty nor less than ten dollars and the costs of prosecution, and committed until such fine and costs are paid. Or, if any person shall temporarily erect any stand, booth or other structure for the purpose of exposing for sale, giving, bartering, or otherwise disposing of any spiritous

or other intoxicating liquors whatsoever, at or within a distance of one mile from any such parade or encampment, he may be put immediately under guard, and kept at the discretion of the commanding officer; and such commanding officer may turn over such person to any police officer or constable of the city, township or town wherein such duty, parade or drill, encampment or meeting is held, for examination or trial before any court of justice having jurisdiction of the place." of the peace."

It goes without saying that the militia is organized for the purpose of assisting the civil authorities in preserving peace and good order in the state, and to suppress and prevent riot and insurrection, and to repel invasion, and it is seen by the provisions of the statutes above quoted that the militia is subject to the call of the governor at any time for the purpose of performing these duties enjoined upon it. If the militia may be ordered to go into encampment beyond the limits of the state, then the commanding officer has the power to send it beyond the jurisdiction of the governor; for it is clear that no state officer has any jurisdiction beyond the territorial limits of his state. Hence, an order from the governor calling out the militia might be obeyed or not, as the several members thereof might determine for themselves. Not only that, but the laws of the State of Ohio have no extra territorial force and all legal control of the commanding officers over the militia would end at the state line, and they would be powerless to enforce a single camp regulation or punish a single infraction of the rules. The members of the several companies might go into camp or not, as they saw fit, and the commanding officers would be helpless. Discipline is a prerequisite to all military service, and there can be no discipline without authority. One of the purposes of this encampment is to discipline the National Guard and to inure it to camp duty.

Section 3079, above quoted from, provides penalties for any person coming within the bounds of the encampment without permission; also provides a penalty for erecting a stand and selling intoxicating liquors within one mile of the camp. None of these provisions could be enforced if the encampment were outside of the limits of the state.

I do not mean to intimate that the members of the O. N. G. would not upon honor be gentlemen and submit to camp discipline, even though they were outside of the state. But I point out these possible results of an encampment beyond the state simply to indicate that it was not the intention of the legislature to authorize the encampment where the whole purpose of the encampment might be defeated.

While I would gladly decide in favor of authority to select a camping ground outside of the state, viewing the law as I do, I am compelled to arrive at the opposite conclusion.

Very truly,

J. M. SHEETS,
Attorney General.

COMPENSATION OF COUNTY SCHOOL EXAMINERS.

COLUMBUS, OHIO, June 8th, 1900.

E. G. McClelland, Bowling Green, Ohio.

DEAR SIR:—The question propounded in your letter is whether the county school examiners are entitled to compensation for the commencement exercises of pupils entitled to diplomas under the provisions of the Boxwell law?

Sections 4029-1 and 4029-2 provide for the examination of such pupils; also provide that the examiners shall make provision for the holding of the county commencement therein provided for. Section 4029-4 provides that the compensation of the county examiners for their official services and the necessary contingent expenses incident to examinations and commencement shall be paid out of the county treasury in the manner provided in Section 4075 of the Revised Statutes. Section 4075 provides that the examiners shall have certain fees for their services in conducting examinations, graded in proportion to the number of persons taking the examination; also provides for the expenses incident to the procurement of stationery and room for conducting the examination.

It will be observed no where is there any rule laid down whereby their services in conducting a commencement may be computed. It will be observed that the statute does not require them to conduct the commencement exercises; simply provides that they shall procure a place and procure somebody to deliver an annual address. If they are to have pay for such services, who is to determine the amount? How is it to be computed? They are conducting no examination, hence Section 4075 cannot apply.

It has been laid down by the Supreme Court of Ohio so frequently that a public officer can ask no pay for services except where specially provided by statute, that I need not cite you any of the decisions. Hence, I unhesitatingly agree with you that they are entitled to no compensation for their services in conducting commencement exercises for two reasons: First—They are not required under the law to conduct these exercises. Second—The law makes no provision for their payment if they choose to do so.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF ABUTTING PROPERTY OWNER TO TREAT STREET
ASSESSMENT AS DEBT AND DEDUCT SAME FROM CREDITS.

COLUMBUS, OHIO, June 9, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—You seek an opinion from me as to whether the owner of abutting property upon which there is a street assessment may treat the assessment as a debt and deduct the same from his credits in making his tax returns?

The answer to this question depends upon whether the assessment upon abutting property for improvement of the street is a "legal bonafide debt" owing by the abutting lot owner within the meaning of Section 2730 Revised Statutes.

In *Exchange Bank vs. Hines*, 3 O. S., 1, it was held that the provisions of the statute permitting a person to deduct debts from credits in making his tax returns was unconstitutional. While the courts have receded from that holding, they have continually held to the proposition, that before a person can avail himself of the right to deduct debts from credits, he must come clearly within the letter of the law. Consequently in *Payne vs. Waterson*, 37 O. S., 121, the Supreme Court refused to allow debts to be deducted from investments in bonds. The right conferred by Section 2730 to deduct debts from credits is in the nature of an exemption from taxation, hence, the strict rule of construction.

"The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."

(*Ry. Co. v. Supervisors*, 93 U. S., 595.)

The above language is quoted with approval by the Supreme Court in *Lee v. Strauss*, 46 O. S., 159.

The theory upon which the deduction of debts from credits in making returns is allowed, is that for every debtor there is a corresponding creditor, and that the creditor returns his credits for taxation, hence, no property lost to the state for taxation. If a street assessment is a debt within the meaning of Section 2730 to be deducted by the abutting lot owner from his credits, then there is no corresponding creditor to return this assessment for taxation.

It was held in *Norwood v. Baker*, 172 U. S., 269—followed and approved by the Supreme Court of Ohio, in *State ex rel. vs. Miller*, L. B., vol. 43, p. 395—that,

“The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement.”

Here then the value of the abutting lot is enhanced in the market a sum, at least equal to the amount of the assessment, and if the owner is, by reason of the assessment, entitled to reduce his personal tax returns in the amount of the assessment, then in justice, there should be added to the value of the abutting lot the amount of the assessment, just as the law requires the value of a new structure to be added to the taxable value of the real estate upon which it is erected. But there is no such provision in the statute in case of street assessments.

If street assessments may be treated as debts to be deducted from credits, for stronger reasons, personal and real taxes should be regarded as debts and be deducted from credits in making tax returns, for the market value of the property of the tax payer is not enhanced in value to the amount of taxes charged against it.

If street assessments and taxes are to be treated as debts to be deducted from credits in making tax returns, then the duplicate of the state would be reduced millions of dollars without a corresponding creditor to add a dollar for taxation.

For the reasons above given, I am of the opinion that street assessments are not to be treated as debts to be deducted from credits in making tax returns.

Very truly,

J. M. SHEETS,

Attorney General.

REPAIRING CROSSINGS BY ELECTRIC RAILROADS.

COLUMBUS, OHIO, June 13, 1900.

Hon. R. S. Kayler, Railroad Commissioner, Columbus, Ohio.

DEAR SIR:—Yours of June 12th at hand and contents noted. The facts as I gather them from your letter are as follows:

The Pennsylvania Railway Company and an Electric Railway Company cross each other at grade at several places. These crossings are out of repair, so much so, as to make the running of trains at the usual rate of speed, dangerous. The Pennsylvania Railway Company is willing to proceed jointly with the Electric Railway Company, to repair these crossings, each to pay one half the expense incident thereto. The Electric Railway Company refuses to join in such repair, or pay one half of the expense thereof. The Pennsylvania Company has made complaint to you, and the question is, What are your duties and powers in the premises?

Under the provisions of Section 247 R. S., you may condemn these crossings, order the track of the Pennsylvania Company to be repaired, and also may regulate the speed of trains until this work is done. Should either the Pennsylvania Company or the Electric Railway Company desire to protect these crossings with inter-

lockers or safety devices, such interlockers or safety devices must receive your approval before they can be erected. Sections 247d, 247e, R. S.

Section 2503 provides that where the tracks of "a street railroad and a steam railroad cross each other at convenient grade, the crossing shall be made with crossing frogs of the most approved pattern and materials and kept in repair at the joint expense of the companies owning said tracks."

You may enforce the repair of the crossings in question, not because of any control you have over the operation of the Electric Railway, but because of the control you have over the steam railway by virtue of the provisions of Section 247, Revised Statutes.

If the Pennsylvania Company is thus compelled at its own expense to repair these frogs, it may in turn collect from the Electric Railway one half the expenditures incident to such repairs. *Ry. Co. v. Walker*, 45 O. S., 577.

Very truly,

J. M. SHEETS,
Attorney General.

BARNESVILLE SPREAD.

COLUMBUS, OHIO, June 13, 1900.

Hon. Joseph E. Blackburn, Dairy and Food Commissioner, Columbus, Ohio.

DEAR SIR:—Yours of June 12th, enclosing a letter from The Barnesville Canning and Packing Company, is at hand. Your inquiry requires an answer to the following question: Would a compound composed of the different fruits, sugar and glucose, but labeled, for example "Raspberry Spread", when, in fact, it is only partially composed of raspberries, violate the pure food laws of Ohio? I am of the opinion that it would be a violation of Section 4200-6 of the Revised Statutes. For the label upon this compound would lead the buyer to believe that the spread was composed of the fruit therein named, when, as a matter of fact, it would be composed of that fruit, and probably a number of other fruits in connection with sugar and glucose. The question is not necessarily whether the compound is unwholesome, but does it tend to deceive the buyer? This would clearly do so. The Supreme Court of Ohio in the case of the State against Dreher, 55 O. S., 115, in speaking of the sale of substances composed of liquid coffee and chicory under the name of "Liquid Coffee" said: "This is an offense under the statute whether the compound be deleterious or not. It is a fraud on the purchaser, and one of the purposes of the statute is to protect him against such frauds."

If the Barnesville Canning and Packing Company does not desire to place the formula upon its label it can avoid that by letting its label read something as follows: "Barnesville Spread, composed of pure fruits, sugar and glucose." But it cannot select some leading fruit as though the spread were composed of that, and say nothing about the other elements of which it is composed.

Very truly yours,

J. M. SHEETS,
Attorney General.

COSTS IN CASES OF FAILURE TO CONVICT.

COLUMBUS, OHIO, June 14, 1900.

Hon. L. H. Reutinger, Athens, Ohio.

DEAR SIR:—Yours of June 13th at hand and contents noted. The question submitted is whether or not under Section 409d of the Revised Statutes, as amended at the last session of the General Assembly, the auditors of the several counties

must issue their warrants upon the county treasury for costs in cases in which the state fails to convict? This section among other things provides:

"In all prosecutions and condemnation proceedings under the provisions of this act, no cost shall be required to be advanced, secured or paid by, or bond or undertaking required of, any person required under the law to prosecute such case; and if the defendant be acquitted, or if convicted and committed in default of payment of fine and costs, or if the property seized be released, the costs in such case shall be certified under oath to the county auditor who, after correcting the same, if found incorrect, shall issue his warrant on the county treasury in favor of the person or persons to whom such costs and fees are due, and for the amount due each person."

It is thus clear that the auditor has no discretion in the matter, but must issue his warrant on the treasury for the amount of costs due. If he does not, mandamus will lie to compel action on his part. It is not like an ordinary criminal case provided for by the general statutes of Ohio, but is specially provided for in Section 409d above quoted.

Very truly,

J. M. SHEETS,

Attorney General.

TRAVELING EXPENSES FOR INFIRMARY DIRECTORS.

COLUMBUS, OHIO, June 14, 1900.

Thomas J. Trippy, Attorney, Van Wert, Ohio.

DEAR SIR:—Your letter of June 13 at hand. In this letter you ask a construction from this office of Section 968, Revised Statutes of Ohio, as to what is included in the term, "actual traveling expenses," as used in said section. This office has heretofore rendered an opinion on this subject to the prosecuting attorney of Marion County in which this language is used: "In the absence of any judicial construction of the statute, I have no hesitancy in saying that every proper and necessary expense incurred by a member of the board of infirmary directors in the discharge of his duty, including such items as meals, horse feed, car fare or charge for other mode of conveyance are all properly included in actual traveling expenses and should be paid for by the county." There certainly can be no reason why the expense of livery hire is not as much a proper item of traveling expenses as railroad fare or any other mode of conveyance. Also, if a member of the board of infirmary directors uses his own conveyance when he might hire one and charge the expense to the county, there can be no reason why he should not be paid a reasonable charge for his own conveyance.

These should be limited, however, to such as are actually necessary in the discharge of the duties of the office, and if a member of the board can travel by rail or by any other mode of conveyance cheaper than by hiring a livery rig, or by using his own conveyance, it would doubtless be his duty to take the cheaper mode of conveyance, and he ought only be allowed such actual traveling expenses as were necessary to be incurred in the discharge of his duty.

I am, very truly yours,

J. E. Todd,

Assistant Attorney General.

RIGHT OF A PHARMACY BOARD TO ESTABLISH RULES.

COLUMBUS, OHIO, June 16, 1900.

William R. Ogier, Secretary Board of Pharmacy, Columbus, Ohio.

DEAR SIR:—In your communication of June 15 you ask this office for an opinion as to the power of the Board of Pharmacy to establish a rule that an application for examination shall be filed in the office of the Board at least five days prior to the date of the examination.

Section 4406, Revised Statutes, provides: "The Board shall have a common seal and shall formulate rules to govern its action." It is further provided in Section 4408, in substance, that before a certificate is issued by the Board authorizing an applicant to practice the profession of a pharmacist, or assistant pharmacist, the Board must be satisfied that the person presenting himself for examination is of the required age and is of the practical experience required by this section. The authority thus given in the statute to the Board to make rules, is, no doubt, sufficient to warrant the making of all reasonable rules necessary for the proper performance of the duties of the Board. Of course, such rules must be reasonable in their character and not merely arbitrary. But from the further provisions of the statutes above quoted, it would seem to be a reasonable requirement that an applicant for examination should have his application on file a sufficient time prior to such examination to enable the Board to satisfy itself as to the other conditions, such as the applicant's age, practical experience, etc. These conditions could not be ascertained by an examination, but must be ascertained by correspondence or otherwise, and, unless they are satisfactory, it would be a waste of time for the applicant to submit to an examination.

Hence, I am of the opinion that the rule referred to in your communication would be a very reasonable one, and I have no doubt that such a rule would be sustained by the courts should the question ever be presented there.

I am, very truly yours,

J. E. TODD,
Assistant Attorney General.

POWERS OF STATE BOARD OF HEALTH TO ABATE NUISANCES.

COLUMBUS, OHIO, June 18, 1900.

Hon. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Your communication of June 16, containing enclosures in reference to the condition of a stream called "Possum Run" in the city of Bellefontaine, Ohio, at hand, and you ask an opinion of this office as to whether the State Board of Health has authority in the event of the failure to act on the part of the local board of health, to take measures to abate the nuisance referred to in said enclosures.

The only statute that it is necessary to consider in this connection is a portion of Section 409—25, as follows:

"It (the State Board of Health) may also make and enforce orders in local matters, when emergency exists, and the local board of health has neglected or refused to act with sufficient promptness and efficiency, or when such board has not been established as provided in this chapter, and all necessary expenses so incurred shall be paid by the city, village or township for which services are rendered."

It will be seen from the above that the State Board of Health are only authorized to act in local matters "when emergency exists," and this only when the local board of health has failed to act or when no local board has been established.

The only question then left for consideration is, do the conditions at Bellefontaine as set out in the petition to the local board of health constitute an emergency within the meaning of the statute? I do not think so. It would appear that this so-called "Possum Run" has been made the outlet "for sewers, privy vaults, cess pools, water closets, refuse from laundries, livery stables and other matters." Doubtless this use of the stream has been one of gradual development, and the nuisance, if one exists, has been of gradual growth. It is probably not a great deal worse now than it has been for some time in the past. While it is doubtless an unfortunate condition of affairs, it is a condition which affects no one but the people of Bellefontaine, and they have allowed it to gradually increase until it is in its present condition. Under no reasonable definition of the word emergency can such a condition as this be included. Emergency is defined to be, — a sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. (Century Dictionary.) A condition of things appearing suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion. (Webster's Dictionary.)

An emergency might arise when an epidemic of a contagious disease should develop in a community and there should be no local board of health established, or the local board of health should fail to act with sufficient promptness or efficiency. Under such circumstances the State Board of Health would be authorized under the section above quoted, to make and enforce orders in local matters, but it is only when such emergencies as these arise, that they have any such authority.

The provisions of the statute in relation to the establishment of local boards of health seem to contemplate that each community should be permitted to take care of its own local affairs so long as the public health is not threatened by sudden or unforeseen emergencies, and I find nothing in the statute above quoted that would authorize the State Board of Health to interfere unless some such emergency arose, which the local board of health were either not capable of handling or failed to handle with sufficient promptness and efficiency.

If the State Board of Health had authority to make and enforce rules in all cases whenever it felt disposed so to do, the local boards would be shorn of their authority and power, and the sanitary affairs of each community would be absolutely beyond the control of the community and placed in the hands of the State Board of Health. I cannot think that such was the intention of the legislature or that such would be a reasonable construction of the statute above quoted.

I am, yours very truly,

J. E. TODD,

Assistant Attorney General.

DUTIES OF PROSECUTING ATTORNEY OF ASHLAND COUNTY
IN REGARD TO SCHOOL HOUSE IN MILTON TOWNSHIP.

COLUMBUS, OHIO, June 22, 1900.

Hon. J. W. Knaub, Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR: — Your communication of June 22, in relation to the inspection of the school house in sub-district No. 6, Milton Township, Ashland County, Ohio, and the duties of the Prosecuting Attorney in relation thereto, at hand.

Section 2572, Revised Statutes, makes it the duty of the Prosecuting Attorney, with the aid of the Sheriff, to enforce the provisions of the act in relation to inspection of public buildings, and penalties against owners or persons having control, where such building is not located within a municipal corporation; while Section 2572a provides for the inspection of such buildings by the State Inspector of Workshops and Factories, and the issuing of a certificate of such inspection, to the owner or agent having control of such building, and also to the Prosecuting Attorney of the county, in writing, of the result of such inspection, and of the fact that he refuses a certificate, and specifying his reasons, and the alterations, additions and appliances necessary to be made and furnished before a certificate will be issued; and it is thereupon made the duty of the Prosecuting Attorney, with the aid of the Sheriff, upon receiving such notification, to prohibit the use of such building for the assemblage of people until the necessary changes, alterations, and additions have been made and the Inspector's certificate has been issued. It would appear from the reading of these sections that the only duty of the State Inspector, in connection with the inspection of such buildings as are found to be in an unsafe condition, is to notify both the owner or agent having control of such building, and the Prosecuting Attorney, of the facts found upon such inspection. The further proceedings in relation to the enforcement of the orders of the Inspector and the alteration and repair of the building, are all cast upon the Prosecuting Attorney, and it is clearly declared to be his duty to prohibit the use of such building until the necessary changes and alterations have been made.

I am unable to understand why any Prosecuting Attorney should refuse or neglect to perform this duty. If, upon investigation, it develops that the Prosecuting Attorney of Ashland County wilfully refuses to perform the plain duty of his office as provided in the statutes above quoted, the office of Attorney General will be ready to co-operate with you to institute the proper proceedings either to compel the Prosecuting Attorney to perform his duty, or vacate the office.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

TRANSFER OF COUNTY FUNDS—SECTION 876.

COLUMBUS, OHIO, June 23rd, 1900.

Warren Gard, Attorney at Law, Hamilton, Ohio.

DEAR SIR:—In your communication of June 15th you ask this office for an opinion on the following questions:

First: Have the commissioners of the county the right to temporarily transfer all or a part of a fund derived from the sale of bonds to replace a bridge, to some other fund?

Second: Has the county treasurer any authority or power to make a partial distribution of the fund in his hands collected as taxes before the final distribution of taxes?

And of these in their order:

It is a constitutional provision that money raised by taxation for one purpose shall be applied to the purpose for which it was raised and no other. In other words, if money is raised by taxation for a particular fund, there is a constitutional objection to its transfer and use in any other fund. The same objection would doubtless apply to money realized from the sale of county or municipal

bonds. The money thus produced could not be transferred and used for a different purpose than the purpose for which the bonds were issued and sold.

The purpose of this constitutional provision seems to be that the taxing officers shall take the people into their confidence and advise them as to the purpose and use of the taxes they are required to pay.

This being the general and constitutional rule we only need to inquire whether there is any statutory authority for such a transfer as is suggested in your communication, and in this connection we are referred to Section 876, which reads as follows:

"The county commissioners shall have power to transfer any unexpended balances of any funds raised for the purpose of erecting public buildings, remaining in the treasury of their respective counties, to any other fund, or to any other purpose for which money is needed by such county; and in case there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the time fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed, temporarily, to such other fund as is exhausted, and reimburse such special fund out of the taxes levied for such other fund, as soon as the same are collected."

The first clause of the section above quoted relates to unexpended balances remaining in the treasury after the purpose for which such special fund was raised has been completed and authorizes the permanent transfer of such balances to some other fund. This of course can have no connection with the question under consideration. The latter clause of the section relates to a fund in the treasury that has been levied and collected for a special purpose and authorizes the temporary transfer of such fund. I take it that the words "levied and collected" mean levied and collected as taxes and that this section relates especially to money in the treasury which has been levied and collected as taxes. Can the meaning of these words be extended to include money arising from the sale of bonds? I do not think so. This section constituting an exception to the constitutional and general rule in relation to public funds should be strictly construed, and if so construed, the only fund authorized to be temporarily transferred, is the fund arising from the levying and collecting of taxes. I deem it unnecessary to cite authorities on this proposition.

As to the second question, the statutes contemplate that the county treasurer shall pay to the local treasurers on the warrant of the county auditor, moneys due such local treasurers immediately after each semi-annual settlement with the auditor. (See Sec. 1122 R. S.)

There is no statutory authority for making the distribution of money in the county treasury at any other time or in any other way. If the county treasurer makes a partial distribution of the money received as taxes before such semi-annual settlement, it would be a matter of accommodation on his part and not a proceeding that would be authorized by the statutes.

Very truly,

J. M. SHEETS,
Attorney General.

MILEAGE OF COUNTY COMMISSIONERS—SECTION 897.

COLUMBUS, OHIO, June 23rd, 1900.

Thomas J. Trippy, Attorney, Van Wert, Ohio.

DEAR SIR:—Your letter of June 19th, in relation to the fees and mileage of county commissioners, at hand. It would appear from the first clause of Section 897 that commissioners could only be allowed mileage at the rate of five cents per mile for each regular or called session, not exceeding one session each month, or twelve in any one year, and five cents per mile when traveling within their respective counties on official business. It, perhaps, is a very close question whether the provision of five cents a mile when traveling on official business within the county would include traveling to the office at the county seat. I can see no good reason why, if it becomes necessary for the commissioners to hold more than twelve meetings in one year they should not receive mileage for attending such meetings at their office the same as they would receive mileage if they traveled on official business to any other part of the county. I say I see no good reason why they should not, yet the language of the statute will hardly bear such a construction.

I have not investigated this question very closely for this reason: The state commission on fees and salaries of county officers, provided for by the last general assembly, are now engaged in the preparation of a schedule of fees which county officers will be entitled to charge; as this schedule will be out in a short time, and all county officers will be required to make their fees and compensation correspond with the schedule we deem it unnecessary to render an opinion at this time. I have no doubt, however, that you are right in your view of this statute.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

LEGAL SETTLEMENT FOR RESIDENCE.

COLUMBUS, OHIO, June 23rd, 1900.

Joseph P. Byers, Secretary Ohio State Board of Charities, Columbus, Ohio.

DEAR SIR:—Your letter of June 18th, enclosing letter of P. H. Kaiser, county solicitor of Cuyahoga county, at hand. In this letter you ask from this office a construction of Section 1493, R. S., taken in connection with the first paragraph of the preceding Section 1492. These sections read as follows:

Section 1492. "Every person shall be considered to have obtained a legal settlement in any county in this state, in which he or she, shall have 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."

Section 1493. "Any person who has a legal settlement in any county in this state shall be considered to have a legal settlement in any township or corporation therein in which he or she may reside."

I conclude that there is no difficulty in arriving at the true meaning of Section 1492. To obtain a legal settlement in a county, it is only necessary that the person should reside in the county continuously for twelve months and support himself during such time. Then by the provisions of Section 1493, a

legal settlement in a county gives to such person a legal settlement in any township or corporation in which such person may reside. It does not appear necessary from the reading of these two sections that the person should reside in one township or corporation during the entire year, but it is sufficient if he resides continuously within the county, and it is his legal settlement in the county, which operates to give him a legal settlement in any township or corporation in which he may happen to reside. Indeed, both sections of the statute seem so plain that I am at a loss to know why the question should have been presented, and if I failed to grasp the question presented by Mr. Kaiser, I shall appreciate any additional information or light he may be able to give me.

Very truly,

J. E. TODD,
Assistant Attorney General.

EMPLOYMENT OF TEACHERS IN SUB-DISTRICTS.

COLUMBUS, OHIO, June 26th, 1900.

A. E. Jacobs, Prosecuting Attorney, Jackson, Ohio.

DEAR SIR:—Yours of June 25th at hand and contents noted. The statements contained in your letter are to the effect that the directors of a sub-district in a township district duly elected a teacher and certified such election to the township clerk as required by Section 4017 of the Revised Statutes. The board of education neither confirmed nor refused to confirm this election, took no action upon the matter, but employed another teacher for that sub-district. The question submitted by you is whether the employment of this other teacher is legal?

In my opinion the board of education had no right to employ this other teacher. Section 4017, R. S., provides that when the directors of a sub-district employ a teacher the board of education of a township district must either confirm or refuse to confirm the employment. If it refuses, then the directors of the sub-district may employ another and submit that employment to the board of education for confirmation. If, however, the directors of a sub-district and the board of education of the township are unable to agree upon the employment of a teacher until the third week in August, then the board of education may take the matter out of the hands of the directors of the sub-district and employ a teacher.

Very truly,

J. M. SHEETS,
Attorney General.

COMPENSATION OF DISTRICT ASSESSORS.

COLUMBUS, OHIO, June 26th, 1900.

Warren Gard, Prosecuting Attorney, Hamilton, Ohio.

DEAR SIR:—Yours of June 25th at hand and contents noted. It appears from the statements contained in your letter that the district assessors of Butler county reported to the county auditor for duty March 1st. But owing to the fact that the maps, plats, etc., required to be furnished under the provisions of Section 2789 were not ready until March 19th, they did not commence the performance of their duties until that date. And the question now arises whether they are entitled to pay from March 1st, the date they reported for duty, or March 19th, the date upon which they commenced the performance of their duties?

Clearly they are not entitled to pay for any time not actually employed in the discharge of their duties. Section 2789 does not require the auditor to have the maps, plats, etc., ready by March 1st, but requires him to have them ready as soon thereafter as practicable. Section 2789 provides:

"Each district assessor or assistant shall be entitled to receive for each day necessarily employed in the performance of his duties, the sum of \$2.00, to be paid out of the county treasury after the same has been allowed by the commissioners."

Here by express provision of the statute they are entitled to pay for time necessarily employed in the discharge of their duties and no more. Even without such statutory provision there would be no warrant in allowing these assessors pay for any time not actually employed in the discharge of their duties.

The further question is propounded as to whether the assessors are entitled to the \$1.00 extra per day provided by the act of April 6th, 1900, from the time they commenced their duties, or only from the time the act became a law? Clearly this law cannot apply to services already rendered. If such construction were claimed for it, it would be in violation of Article II, Section 2, of the Constitution, which provides: "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."

It is questionable whether this act is not in conflict with the Constitution, but waiving that question, the right to extra compensation accrued April 6th, and the compensation is calculated from that day.

Very truly,
J. E. Todd,
Assistant Attorney General.

LEGAL SETTLEMENT.

COLUMBUS, OHIO, July 5th, 1900.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—Yours of June 29th before me asking my construction of Sections 1492 and 1493, Revised Statutes, with regard to certain facts recited by you. In answer thereto I call your attention to that which you have undoubtedly observed, that the term "legal settlement" has in Section 1492 received a statutory definition, viz: a continuous residence and self-supporting for twelve consecutive months, without relief under the poor laws. Then follows some exceptions which seem very definite and clear, and not necessary for the purpose of your question to discuss. That term "legal settlement" defines a status with regard to county lines, and not with regard to townships, except as contained in the two exceptions. Section 1493 provides:—

"Any person who has a legal settlement in any county in this state shall be considered to have a legal settlement in any township or corporation therein in which he or she may reside."

So that it would appear that it is necessary to first determine what county the person has a "legal settlement" in, before proceeding to determine in what township he or she may reside. In other words, for the purposes of this act, legal settlement is one thing and residence is another.

In the case put by you, the "legal settlement" of the party is not mooted, but the "residence" is.

In the case of *State vs. Trustees of Section 29, II Ohio*, p. 28, "the word citizen was held to mean the same as resident." "Residence and habitancy are usually synonymous." 2 Kent's Comm., 10th Ed., 574.

Residence was defined in 20 Fohnno (N. Y.), 208, as: "Personal presence in a fixed and permanent abode."

Our own Supreme Court said:—

"A person who has gained a legal settlement in a place is never in any instance held to have lost his residence by being absent, when his absence has been accompanied with the intention of returning to such place of abode." 2 O. S., 36.

The question of a "fixed and permanent abode" is therefore a question of intention.

This was again held by our Supreme Court in 12 O. S., 430.

If we were to apply these principles to the circumstances as named in your letter, we should say that the word "reside," in 1493, means more than to "abide" or "exist" in one place as distinguished from another: It involves the question of "intention." It is where one has his fixed home, from which if absent he still has an intention of returning.

There is no person but has such place of residence. If otherwise, the pauper population of Cleveland could be temporarily turned loose on the rural townships of Cuyahoga county, and thereby made township charges. But the temporary character of such change, which is a corporal change as distinguished from a change founded in intention, cannot affect the question of the residence of such a one, for "residence" must be determined by intention.

Very truly yours,

J. E. TODD,

Assistant Attorney General.

ELECTIONS SECOND REGIMENT O. N. G.

COLUMBUS, OHIO, July 5, 1900.

Hon. George R. Gyger, Adjutant General, Columbus, Ohio.

DEAR SIR:—Your communication of July 2, enclosing letter of Colonel James I. Ream, is at hand. In this letter Mr. Ream desires an opinion from this office on the question whether or not an election can be ordered to fill the vacancy presumed to exist by reason of the illegality of the election of Major Leitner of the 2nd Regiment O. N. G.

You will remember that under date of March 30 this office had the honor to render an opinion to your department to the effect that Major J. D. Leitner and Major J. G. Deeming had not been legally elected to the offices of major of the second regiment. We have no reason to believe that our opinion in this regard was erroneous. Later, under date of April 16, in an opinion given to your department on the question "as to the right of the governor on orders issued through the adjutant general where an election for an officer of the O. N. G. is shown to have been irregular to declare a vacancy in such office, revoke the commissions irregularly issued and order another election to fill such vacancy," this language was used. "Neither the governor nor adjutant general have the power to declare a vacancy or revoke a commission which has been irregularly issued. The proceeding to hold a new election to fill these offices before they have been judicially considered vacant in somewhat unusual. I am not prepared to say that such a proceeding would be illegal, but it seems

to me that it certainly would have a tendency to complicate matters. Instead of having two persons claiming the right to office you would then have four."

My notion at the time the last opinion was given was that "the proper proceedings to test the question as to the legality of the election of Majors Deeming and Leitner would be a suit in quo warranto brought by the proper officer of the state. It seems that such action has never been taken.

If we were correct in our conclusion that these officers were not legally elected, it follows that they were not entitled to receive commissions, and a commission issued to one not legally entitled to receive it, would be a nullity. Still, as intimated in my former opinion, these commissions have been issued; they are still in existence, and there is no power except the judiciary of the state that can declare them illegal.

However, I have no doubt that the military department may treat them as a nullity and consider the offices as vacant, and order a new election. Then the judicial proceeding to determine which of the two claiming the right to exercise the functions of the office is entitled to the same, can be instituted by the parties interested. The election of another candidate to the same office would doubtless precipitate the legal proceeding and thus hasten the termination of the controversy; and as the matter cannot finally be determined except by an adjudication by a court, it probably would be well for a new election to be ordered and thereby bring the matter to a focus.

Very truly yours,

J. E. TODD,
Assistant Attorney General.

TAXATION OF PROPERTY BELONGING TO SECRET SOCIETIES.

COLUMBUS, OHIO, July 5, 1900.

J. E. Powell, Attorney, New Lexington, Ohio.

DEAR SIR:—In your letter of June 15 you ask this office for a construction of Section 2732—3, Revised Statutes, as amended April 16, 1900, and particularly whether the property of subordinate lodges of the orders named in the section is subject to taxation.

This section as amended reads as follows:

"That all property, real or personal, belonging to or which may hereafter belong to any incorporated post of the Grand Army of the Republic, or Union Veterans' Union, or Grand Lodge of Free and Accepted Masons, or Grand Lodge Independent Order of Odd Fellows, or Grand Lodge Knights of Pythias, or an association for the exclusive benefit, use, and care of aged, infirm and dependent women, or religious or secret benevolent organizations, maintaining a lodge system, or incorporated association of ministers of any church, or incorporated association of traveling men, 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, such property, real or personal, and the interest or income derived therefrom, shall not be deemed taxable under any law of this state, and the trustees

of such organizations above named shall not be required to return or list the same for taxation."

The subject of taxation is included in the general grant of legislative power conferred upon the General Assembly by Section 1 of Article 2 of the Constitution of Ohio, to-wit:

"The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and a house of representatives."

Under this section of the Constitution the General Assembly is clothed with full power to legislate in respect to taxation as well as any other proper subject of legislative action, in any manner it may deem proper, unless this power is modified and restrained by other provisions of the state constitution or the constitution of the United States.

Article 12 of the state constitution contains some limitations on the powers of the General Assembly in reference to finance and taxation, and Section 2 of this article is as follows:

"Laws shall be passed, taxing by 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 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."

This section limits legislative action by prescribing the property that shall be subject to taxation and the rule by which its valuation shall be determined. The first clause of this section is comprehensive; it provides that "*all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also, all real and personal property shall be taxed.*"

The second clause of the section enumerates certain property which may by general laws be exempt, to-wit:

1. Burying grounds.
2. Public school houses.
3. Houses used exclusively for public worship.
4. Institutions of purely public charity.
5. Public property used exclusively for any public purpose.
6. Personal property to an amount not exceeding two hundred dollars for each individual.

Section 3 of Article 12 contains provisions for the taxation of property of banks.

The inflexible rule thus established by these constitutional limitations upon the legislative power over the subject of taxation is, that all property shall be taxed by a uniform rule at its true value in money, except that the specific kinds of property named in the second clause of Section 2 of Article 12 may by general law be exempted.

See 3 O. S., 1.

5 O. S., 592.

11 O. S., 638.

25 O. S., 229.

Cooley's Constitutional Limitations, p. 632, et seq.

The section of the statute under consideration seeks to exempt the property, real and personal, of certain incorporated secret and benevolent societies.

From the foregoing it will appear that the legislature is without the constitutional power to make such exemption unless the property thus sought to be exempted falls within some one of the classes of property which are enumerated in the second clause of Section 2 of Article 12.

I assume that it will not be claimed that the orders or associations named in Section 2732-3, as amended, could claim the benefit of the exemption provided for in Section 2 of Article 12 of the constitution unless it be claimed that they are "institutions of purely public charity." It may be remarked, however, that the word "public" as used in this connection refers to the "use" to which property is applied and not "ownership," i. e., it is sufficient to bring property within this exemption if it is used for purely public charity.

While I am not familiar with the plans and purposes of all the societies and associations named in the section of the statute we are considering, yet so far as I have knowledge of them, I am of the opinion that they cannot properly be considered as falling within the exemption above referred to.

The rule by which to determine what institutions are of purely public charity can readily be deduced from the following cases decided by the Supreme Court of Ohio.

"For the purpose of determining the public nature of the charity, it is not material through what particular forms the charity may be administered. If it is established for the use and benefit of the public, and so conducted that the public can make it available, this is all that is required."

Gerke vs. Purcell, 25 O. S., 229, 249.

"A corporation created for the sole purpose of affording an asylum for destitute men and women, and the incurable sick and blind, irrespective of their nationality or creed," is an institution of purely public charity within the meaning of Section 2 of Article 12 of the constitution.

Humphries vs. The Little Sisters of the Poor,
29 O. S., 20.

"A charitable or benevolent association which extends relief only to its own sick or 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 purpose are not exempted from taxation."

Morning Star Lodge vs. Husly, 23 O. S., 144.

These citations might be extended, but enough has been given to show that for a charity to be public its benefits must extend to the public at large; and as soon as the charity or benevolences of an institution or society is confined to a select class of persons, it ceases to be a purely public charity. As far as I am advised as to the nature and purposes of the institutions whose property is sought to be exempt by the statute under consideration, their benevolences are only extended to a particular select class, and not to the public at large. Hence, in seeking to exempt the property of such institutions from taxation, the legislature exceeded its constitutional powers.

It may seem a hardship that an institution like a secret order that cares for the indigent and needy among its own members and their families, and to that extent relieves the public from expense, should be required to pay tax

on the property devoted to such use. It is well to remember, however, that only a small portion of the property of the various secret orders is devoted to charitable uses. The great bulk of the property owned by such societies, consisting of such items as money on interest, lodge furniture and paraphenalia, lodge buildings and temples, could not by any possible construction be regarded as devoted to charitable uses, public or otherwise.

I am, very truly yours,

J. E. TODD,
Assistant Attorney General.

TAXATION BELL TELEPHONE COMPANY.

COLUMBUS, OHIO, July 5th, 1900.

Hon. W. D. Guilbert, Columbus, Ohio.

DEAR SIR:—I have examined the question presented by you for solution with reference to what sum additional, if any, the instruments owned by the American Bell Telephone Company should be placed upon the tax duplicates of the several counties of Ohio. Also how many years the auditors may go back for the purpose of correcting the returns of this company.

As to the latter question Sec. 2781-a, R. S., is the guide. They should correct the returns for the period of five years back.

It is claimed that the life of the instruments average only about four years. As that fact is peculiarly within the knowledge of the American Bell Telephone Company and the state is not in condition to disprove it, I do not doubt but the witnesses got the life of the instruments low enough. But as the life of the material of the greater part of the instruments is indefinite, and upon return to the factory is renewed and sent out again as a new instrument, I am of the opinion that if you concede the life of the instrument to be only four years, it is a very liberal concession and much to the advantage of the Telephone Company.

The contract to renew perpetually to grant exclusive use etc., is of reciprocal benefit to both The American Bell Telephone Company and The Central Union Telephone Company, hence should not be taken into account for the purpose of reducing the value of the instruments for taxation purposes.

You are not taxing the Company's instruments as though of perpetual life, but of four years. Hence, the contract to renew has no bearing upon the question. Again, if the Bell Company contracts to renew the instruments, the Central Union Company contracts also to accept and pay rental on the renewed instruments,—a contract of great value to the Bell Company. So with the contract for exclusive use. By virtue of the contract for exclusive use the Bell Company gets higher rental for a less number of instruments. If it were not for this contract for exclusive use there doubtless would be many more instruments in use in Ohio, which would add to the tax duplicate.

For the purpose of getting the same income out of a fewer number of instruments, the Bell Company enters into a contract for the exclusive use of its instruments,—thus keeping out a large number of instruments which would otherwise be subject to taxation, and then pleads that contract as a reason for reducing the taxable value of those subject to taxation.

Accepting the claim of the Bell Company as to the life of the instrument, it seems to me it would be proper to take the whole sum received as rental during the life of the instrument and get its present worth. The result thus obtained should be the taxable value of the instrument.

Mr. Chapman states in his testimony on page 66 of the record in the case of Guilbert, Auditor vs. Halliday, that the average price paid for the rental of these instruments in Franklin county, Ohio, was \$2.19 in 1897, \$2.43 in 1896, \$2.36

in 1895, and \$4.63 in 1894. Take this testimony together with "Exhibit E", p. 55-6, and "Exhibit H", p. 59, we can come to an approximate estimate as to what these instruments ought to be valued at for taxation.

The average rental paid by the Central Union Company for the years 1894, 1895, 1896 and 1897, in Franklin county, Ohio, is \$2.90.

Taking the average life of the instrument to be four years, the total rental earned would be \$11.60. This rental would be paid as follows: \$2.90 at the end of the first year; \$2.90 at the end of the second year, etc. The present worth of these sums would be \$10.35. Owing to the fact that the rental received for these instruments varies in the state from \$0.75 to \$5.00, I believe that \$10.00 would be a fair average valuation throughout the state.

I have not deducted the usual forty per cent for I have given the company the benefit of the doubt with reference to the life of the instruments, value of material in old instruments, etc., that I think it has been more than the benefit of the forty per cent deduction.

These are mere suggestions as the authority to act lies wholly with you.

Respectfully,

J. M. SHEETS,
Attorney General.

POWERS OF BOARD OF STATE CHARITIES TO REMOVE DEAF AND
DUMB INMATES FROM INFIRMARIES.

COLUMBUS, OHIO, July, 6th, 1900.

Hon. Joseph P. Byers, Secretary Ohio State Board of Charities, Columbus, Ohio.

DEAR SIR:—Your letter of June 26th, at hand and contents noted.

In this letter you ask an opinion from this office as to the powers of the Board of State Charities in reference to the removal of deaf and dumb inmates from county or city infirmaries under the provisions of the Act passed by the last Legislature and found in 94, O. L., p. 369.

Section 1 of this act is as follows:

"That any incorporated association organized for the purpose of providing a home for deaf and dumb persons may enter into a contract with the board of county infirmary directors of any county, or with the proper officers of any corporation infirmary for the care and maintenance at such home of any deaf and dumb person who may be an inmate of the said county or corporation infirmary, or who may under the laws of the state, be entitled to admission thereto. And in every such case the said county or corporation infirmary shall, during the period such person may remain in such home, pay to such association, annually, a sum equal to the per capita cost of maintaining inmates in the said county or corporation infirmary. Provided that wherever any such deaf and dumb person is maintained in any county or corporation infirmary in this state, and who, in the judgment of the board of State Charities, should be removed from such infirmary to a home organized under the provision of this section, that said board of State Charities may order the removal of said person from said infirmary to said home; and where any such person is removed on the order of said board of State Charities from an infirmary to said home then the transportation of said person to said home and his (or her) maintenance shall be paid by

the infirmary directors of said county infirmary or the proper officers of said corporation infirmary as heretofore provided in this section." (p. 369, O. L., 94).

It appears to have been the intention of the Legislature that the board of State Charities should have the power to compel the removal of inmates from a county or city infirmary and to compel the maintenance of such person by the county or city authorities at the home to which they order them removed. The first part of the section above quoted seeks to give to the county or city infirmary directors authority to contract for the support of such inmates, while the latter part of the section seeks to compel the county or city infirmary directors to support such inmates at certain institutions when, in the judgment of the board of State Charities, such inmates should be removed to such institutions. I think the legislative intent is very clear that the State Board of Charities should have the power to not only make the order for the removal of inmates from the county or city infirmaries, but also to enforce its observance. There are however, some questions in connection with this Act concerning which I am not so clear.

The Board of State Charities are only authorized to order the removal of an inmate to a "home organized under the provisions of this section." This section however, contains no provisions for the organization of a home. True, the first part of the section speaks of an "association organized for the purpose of providing a home for deaf and dumb persons." Such an association however, would be organized and incorporated under the general laws for the formation of corporations in the state, and not under the provisions of this section. Is there then, or can there be any home to which the order of the board of state charities can apply? Inasmuch as the only homes to which they can order an inmate removed is "a home organized under the provisions of this section," and, inasmuch as no homes are or can be organized under the section, it would seem that there could be no homes to which the board of state charities could order an inmate removed.

But, if it urged that the home to which it was intended such inmates should be removed is a home organized for the purpose referred to in the first part of the section, then, does it mean the homes provided by associations already organized, or those hereafter to be organized? The statute is not clear. Manifestly, a home could not be organized under the provisions of this section before the section itself was in existence. Hence, the natural inference would be that the Act was intended to relate to such homes as should hereafter be organized.

There is still another objection to be urged to this Act. It is provided in the Constitution of the State that "institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly." (Art 7, Sec. 1, Ohio Constitution.)

The state of Ohio has always been exceedingly magnanimous in her care of the unfortunates within her border. This constitutional provision may only be regarded as a fixed and settled policy of the state to provide for the various classes of unfortunates therein named in the institutions which should not only be supported by the state, but also subject to state control.

In conformity with this policy the state has at great expense provided institutions where such unfortunates should be cared for as well as enjoined upon the counties and cities of the state, the duty of providing infirmaries and other means of relief for those who could not be cared for at the state institutions. The section under consideration does violence to this policy. It seeks to compel the political subdivisions of the state to maintain one class of unfortunates at the institutions that are not fostered and supported by the state and are not subject to legislative control. If this can be done in the case of the deaf and dumb, it

can also be done with the blind, the insane or any other class of unfortunates. It is easy to see that if this policy should prevail, it would not be long until the unfortunates of the state would be cared for in private institutions entirely relieved from state control. I seriously doubt if the benevolences of the state could be thus dissipated, or in other words, doubt if the officers of the county or city can be compelled to contribute in this way to the maintenance of a private institution.

While the question is not free from difficulty, and would perhaps require judicial construction for its final determination, yet, I do not feel that I could advise your board that it has the power to compel the removal of inmates from city and county infirmaries to homes provided by private associations even though such appears to be the evident intent of the Legislature.

Very truly,

J. E. TODD,
Ass't Attorney General.

ISSUANCE OF A REFUNDING ORDER.

COLUMBUS, OHIO, July 10, 1900.

L. A. Edwards, Attorney, McArthur, Ohio.

DEAR SIR:—Your letter of July 7th at hand and contents noted. The question presented is: Does the latter clause of Section 4364-11, to-wit, "Except that it shall be, in no case, less than \$50," refer to the minimum amount of the assessment or the minimum amount of the refunding order? I think that you are entirely right in your view that it is the limitation in the amount of the assessment, and has no reference to the amount of the refunding order. By section 4364-10 the time for paying the yearly assessments in the county treasury is fixed as follows. "One-half on or before the 20th day of June, and one-half on or before the 20th day of December." Section 4364-11 makes provision for two contingencies. First, when the business is commenced after the beginning of the fiscal year, in which case assessment is to be proportionate in amount to the remainder of the year, but, in no case, less than \$25. Here the language is plain and unambiguous and evinces a legislative intent to fix a minimum assessment, no matter how short may be the time in which the business is conducted. The second contingency provided for is where the business is abandoned, in which event a refunding order is to be issued by the county auditor for the proportionate amount of said assessment, except that in no case it shall be less than \$50.

While the language is somewhat obscure, yet, I think the legislature intended, in this latter clause, to limit the amount of assessment in the same manner that they limited it in the first part of the section. It would be an absurdity, to my mind, to think of this latter clause as limiting the amount of the refunding order. If the time for which the refunding order is issued, would not amount to \$50 it would be absurd to say that the state would have to refund \$50 because that is the smallest amount for which a refunding order can be drawn.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

CHANGE OF BOUNDARY OF SUBDISTRICT AND CONVEYANCE OF PUPILS TO ANOTHER DISTRICT.

COLUMBUS, OHIO, July 20, 1900.

Oliver N. Sams, Hillsboro, Ohio.

DEAR SIR:—Yours of July 18th at hand and contents noted. The questions you submit in your letter are:

1st. Whether under Section 3921 R. S., the board of education of any township district may change the lines of the sub-districts, reduce the number and attach the territory of the districts abandoned to the adjoining sub-districts.

This section provides: "The board may, at any regular session increase or diminish the number, or change the boundary of sub-districts, or may, when in its opinion it will be for the best interest of the pupils in the sub-districts, suspend the school in such sub-districts, and shall provide for the conveyance of said pupils to such other district or districts as may be most convenient for them, the cost of such conveyance be paid out of the contingent fund of said district." It is readily seen that this section leaves to the discretion of the board of education several alternatives. One is to increase or reduce the number of sub-districts and change the boundary lines of the sub-districts. In the instance referred to by you in your letter they have reduced the number of sub-districts, and changed the boundary lines by attaching the territory abandoned to adjoining districts, having a clear right to do so under the provisions above quoted.

The second question you submit is whether under such circumstances the board of education is bound to provide conveyances for the pupils in the abandoned district? In my opinion it is not.

You will observe, by reading this section, it is only when the board of education sees fit to suspend the school in any sub-district that it shall provide for the conveyance of pupils to other districts. The board of education did not suspend the school in any sub-district within the meaning of this section. A suspension means not a permanent abandonment of a sub-district and attaching the territory to adjoining districts. Suspending school in a district is a mere temporary cessation, which may be resumed, at the pleasure of the board. In such instance, and in such only is the board required to furnish conveyance for the pupils to other districts.

In my opinion Section 4009-19 does not limit the power conferred upon the board in Section 3921, hence, has no application in this case. That section contemplates the mere temporary discontinuance of school in a sub-district until the enumeration shall come up to the required number, while section 3921 confers absolute power upon the board to increase or decrease the number of districts and change the boundary lines.

Very truly yours,

J. M. SHEETS,
Attorney General.

COMPENSATION OF SALARIED OFFICIALS AS MEMBERS OF BOARDS OF EQUALIZATION.

COLUMBUS, OHIO, July 24, 1900.

James W. Tarbell, Georgetown, Ohio.

DEAR SIR:—Your letter of July 23rd at hand and contents noted. The question submitted for opinion of this office is whether the board of county commissioners and auditor of Brown county, being upon a salary as such officers, are entitled to \$3.00 a day as members of the board of equalization as provided in the Hendley bill passed by the last General Assembly.

As suggested in your letter, while these men are acting as members of the board of equalization they are performing a duty distinct and separate from that as commissioner or auditor of the county; and as suggested in your letter, they take a separate oath as members of the board of equalization. The Hendley Bill is an enactment later than the salary bill, hence, supersedes the salary bill in so far as it may be inconsistent with it. However, I do not conceive it to be inconsistent with the salary bill, but merely provides for compensation while they are performing a different class of duties, and upon an entirely different board. They are entitled to \$3.00 per day and no more for the act referred to does not make any other or further provision, and by no manner or means can the language of this act be contorted so as to confer upon them the right to draw mileage or to pay their living expenses while engaged in the duties referred to "as expenses necessarily incurred in the performance of their respective duties."

Very truly,

J. M. SHEETS,
Attorney General.

DUTIES OF CORONERS. COMPENSATION OF DECENNIAL BOARD OF APPRAISERS.

COLUMBUS, OHIO, July 24, 1900.

Hon. F. E. Guthrie, Prosecuting Attorney of Marion County, Marion, Ohio.

DEAR SIR:— I have before me your inquiries contained in yours of the 21st inst., and answering them in their order would say:

1st query: In what cases is it proper for the coroner to hold an inquest? Your letter also cites special instances where the cause of death is apparent and seeks an application of the law to such instances, and, among others, you cite such as railroad accidents, where people die suddenly from heart disease in the presence of others, and like cases.

I infer that your communication relates to such instances where the cause of death is well known; not having been caused by violence, and where no suspicion of foul play, or death attributable to any other than natural causes might exist. And, if I am right in this supposition, of course you are familiar with the rule that would there apply, that the coroner can not act capriciously nor arbitrarily, and he may not act where there is no ground to suspicion that violence was the cause of death. But there are a class of cases, and probably contemplated in your communication, where the minds of men may differ with regard to whether or not the circumstances under which a party may have died are suspicious or otherwise.

In the case of *State ex rel. Jones vs. Bellows, et al.*, which you have undoubtedly examined found in the 15th Ohio Circuit Report, page 504 to 510, the Circuit Court of the Second Circuit go at some length into an examination of the history of the office of coroner, and the grave duties that devolve upon him, and they cite, with approval, the holdings of the Supreme Court of Pennsylvania, in the case of *Lancaster county vs. Mishler*, 100 Pa. State, 627, as follows: "That the duty of a coroner to hold an inquest rests on sound reason, and that reason is the life of the law; it is not a power to be exercised capriciously and arbitrarily, and against all reason. The object of the inquest is to seek information and obtain and secure evidence in case of death by violence, or other unknown means. If there be reasonable grounds to suppose it to be caused, it becomes the duty of the coroner to act. If there be no reasonable grounds to suspicion that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services."

You will note within Section 1221, Revised Statutes, this language: "Whose death is supposed to have been caused by violence." Your first query demands a construction of that phrase. In the case above cited the following definition is given: "Violence means the unlawful use of physical force, or other agency to cause death; it does not include mere accident or casualty." Many deaths may have been caused which, at the time of the demise of the individual, has been devoid of suspicion, and yet circumstances may surround them which would require an examination of the cause of his death, and the coroner, if he proceeds with his duties in good faith, acting not capriciously nor arbitrarily, undoubtedly should receive compensation for so doing.

In the case of *Mussey against Commissioners of Hamilton county*, Second W. L. J., 426, the Common Pleas Court, in that case held, "that the coroner has no power to hold an inquest except in cases where the cause of death is unknown." This proposition was denied by the Circuit Court in the case of *State ex rel. against Bellows*, supra, and I think the reasoning of the Circuit Court is conclusive on that point.

An inquest should not be limited to those cases where the cause of death is unknown, but, as Section 1221 Revised Statutes says: "Where death is supposed to have been caused by violence." The administration of poison is certainly within the comprehension of that definition of violence.

As near as I can come to any definite rule by which a coroner should be guided, it would be that where a person has come to his death by violence, as above defined, whether in the presence of third persons or not, and the coroner, in good faith, has reason to believe that the death was caused by violence, it is his duty to hold an inquest to ascertain the cause of the death, and also to determine whether a crime has been committed, who the perpetrator is, and to secure and preserve the evidence, to the end that justice may not be defeated.

From the above observations it will be readily seen that the coroner has no right to hold inquests in the instances suggested by you in your letter, i. e., in death resulting from railway accidents, heart disease, etc.

2nd query. What compensation shall be allowed to county commissioners acting as member of the county decennial board of equalization? The legislation upon this question, as passed by the last General Assembly, was somewhat conflicting. You will remember that there was a Senate Bill No. 309, and House Bill No. 777, introduced at the same session of the legislature, and enacted into law on the same day, to-wit, April 16th, 1900. The two acts were irreconcilable, in part. We made up a test case to have the Supreme Court construe these acts, which was entitled the *State of Ohio ex rel. Walter D. Guilbert against W. H. Halliday, Auditor of Franklin County*, No. 7119, and in deciding that case the court held that in so far as the two acts are irreconcilable, the Senate Bill No. 309 superseded House Bill No. 777, because the Senate Bill was the last bill signed. They were irreconcilable as to the personnel of the decennial boards, as to the times of the convention and adjournment of such boards, but they did not conflict upon the question of compensation, as there is no compensation provided by the Senate Bill, but there was by the House Bill, so that we are permitted to read into the bill last passed, viz., the Senate Bill, that portion of the House Bill which provided for the compensation of the members of the decennial board. The compensation of the members of such boards will be found in volume 94 Ohio Laws, page 247, 248, and is as follows: "Each member of the decennial county board, including the county auditor and the county surveyor * * * 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 * * *". And in the latter part of that section (Section 2813a) found on page 248, it is provided "And all salaries and compensation herein provided for by county or city

boards, together with all expenses necessarily incurred in the performance of their respective duties, shall be paid out of the county treasury, upon the allowance of said boards, respectively, and the provisions of Section 1341, 1345 and 1346 of the Revised Statutes shall not apply to the compensation provided for by this act."

I am of the opinion that the compensation allowed, of \$3.00 per day is compensation in addition to all expenses necessarily incurred in the performance of their duties, which, by my construction, will not include mileage, or other personal expenses, but will include all other expenses that could be appropriately classed under the expression "necessarily incurred in the performance of their respective duties."

Yours very truly,

J. M. SHEETS,

Attorney General.

LABELING PREPARED MUSTARD.

COLUMBUS, OHIO, July 25th, 1900.

Hon. J. E. Blackburn, Food Commissioner, Columbus, Ohio.

DEAR SIR:—Your letter of July 24th, enclosing letter from the J. P. Dieter Company, of Chicago, and letter from the Frank Tea and Spice Company of Cincinnati, is at hand. In this letter you ask for a construction of the pure food statutes in relation to the labels required for the products of these two companies. The J. P. Dieter Company being the manufacturers of a "prepared mustard" which, they state, is "a strictly pure prepared mustard, containing nothing but mustard seed, vinegar and aromatics," and they ask the question "if liquid or prepared mustard is composed only of mustard seed, vinegar and spices, contains no filler or adulteration, and is labeled 'prepared mustard,' with the firm name on the package, does it require any further label?"

The Frank Tea and Spice Company manufacture a vanilla flavor over the following formula:

Pure Vanilla Bean Extract.....	6%
Tonka Bean Extract.....	12%
Vanilline Extract.....	56%
Courmarine Extract.....	14%
Pr. Extract.....	8%
Rock Candy Syrup.....	4%
And a trace of Sugar coloring,	

and they inquire whether or not this formula meets the approval of your department.

In construing the pure food statutes, it is important to keep in mind the purpose or objects sought to be attained by the law. In other words, the law should be construed with reference to the mischief which the law was intended to remedy. This mischief, I take it, was of a two-fold character. First: To prevent the sale of unwholesome and deleterious food products. Second: To prevent deception in the sale of food or drugs and to enable the buyer to know just what he is purchasing.

The questions asked in the letters under consideration are to be answered with particular reference to the second of the above specified purposes or objects of the pure food statutes. Section 4200-6 defines when either a drug or food product should be deemed adulterated, but as to food products, said section contains in substance the provision that mixtures or compounds recognized as ordinary articles or ingredients of articles of food shall not be deemed adulterated,

"If each and every package sold or offered for sale be distinctly labeled as mixtures or compounds with the name and per cent. of each ingredient therein, and are not injurious to health."

Assuming that the food products under consideration are not injurious to health, it is only necessary to determine the sufficiency of the proposed labels for the same. In the case of the prepared mustard, I am of the opinion that the same is a mixture or compound, which will require a label designating it as a mixture or compound, and giving name and per cent. of each ingredient therein. The question presented by the manufacturer as to whether a "prepared mustard" "composed only of mustard seed, vinegar and spices, etc," leads to the unavoidable inference that a prepared mustard might be made which would contain other substances than those above enumerated. There evidently is no fixed standard of strength or purity for prepared mustard. This being the case, and it being a mixture composed of various substances, the only way to determine the strength or purity of the mixture is to ascertain the proportion of each ingredient used in the mixture, and the only way in which the purchaser could know the strength or purity of the article he is buying would be by having each and every package distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein.

As to the vanilla flavor the formula assumes to give the name and per cent. of each ingredient therein. An examination of this formula discloses that many of the ingredients contained in this vanilla flavor are themselves mixtures or compounds. For example, vanilline extract, coumarine extract, etc. Unless these ingredients have themselves a fixed standard of strength and purity (which I very much doubt), the formula of this vanilla flavor comes very far from disclosing the strength and purity of the product, and in my opinion, does not meet the requirements of the statute.

Approved by
J. M. SHEETS,
Attorney General.

Very truly,
J. E. TODD,
Assistant Attorney General.

COMPENSATION OF SALARIED OFFICERS OF PICKAWAY COUNTY
AS MEMBERS OF BOARD OF EQUALIZATION.

COLUMBUS, OHIO, July 25th 1900.

Irvin F. Snyder, Attorney, Circleville, Ohio.

DEAR SIR:—Yours of July 24th at hand and contents noted. Answering your first inquiry, I am of the opinion that the \$600 additional, which is allowed to the auditor of Pickaway county by virtue of the act of March 29th, 1898, is for clerk hire. While the statute is somewhat ambiguous, yet it provides that this allowance must be made by the commissioners on the third Monday of October of each year. If the auditor is to be allowed this himself at all events, there is no purpose of presenting the claim to the commissioners for allowance. It was evidently the intention of the legislature to require the auditor to present his claim to the commissioners, for clerk hire, and they were permitted to allow such sum as they found he had actually expended, not to exceed, however, \$600. This construction is borne out by the next sentence of this act, which strictly forbids any officer from receiving from any of his deputies a reward as consideration for his selecting them as such. It was the evident purpose of the legislature to cut off any secret arrangement between the auditor and his deputies for

a division of the salary to be allowed to them. In other words, the auditor's salary was intended to be \$2,900, and no more under any circumstances.

As to the second inquiry with reference to whether the commissioners, who are also on a salary, and the auditor, are entitled to three dollars per day under the provisions of the Hendley bill, passed at the last legislature, while they are employed as the county board of equalization, I have already had occasion to pass upon that question, and am of the opinion that they are entitled to such compensation. This is a separate and distinct board, created by law; the members take an oath to perform the duties as such officers, and, by positive provision of law, they are entitled to three dollars per day while thus employed. The Hendley bill being of later enactment than that of the salary bill, in so far as they may be considered inconsistent, the latter bill, of course, would supersede the former.

Yours very truly,

J. M. SHEETS,
Attorney General.

COMPENSATION FOR EXTRA TIME AS MEMBER OF BOARD OF
EQUALIZATION.

COLUMBUS, OHIO, July 25th, 1900.

John Ray, Attorney, Sandusky, Ohio.

DEAR SIR:—Yours of July 24th at hand and contents noted. The facts as contained in your letter may be epitomized as follows: The annual board of equalization of the city of Sandusky, being unable to complete its labors within the time prescribed by Section 2805 R. S., continued in session for twenty days thereafter in order to complete its work. The questions which you propound upon this state of facts are:

1st. Is this board entitled to extra compensation for the extra twenty days thus employed?

2nd. Can a tax payer legally resist the payment of taxes on any of the property added by the board after the time expired for them to adjourn, by the provisions of Section 2805, R. S.?

I am of the opinion that this board would not be entitled to compensation for the extra days thus employed. It would seem but just, however, if this time was diligently employed in the performance of their duties, that compensation should be allowed, but I will repeat, if the strict letter of the law is to be followed I do not see any remedy.

I am clearly of the opinion that a tax payer can not legally resist the payment of his taxes on property thus placed upon the duplicate by this board, after the expiration of its time to adjourn. Taxation is one of the attributes of sovereignty, and courts constantly hold in favor of the state with reference to its right to tax its subjects, and are liberal in the construction of the laws upon that subject. Furthermore, if the tax payer could enjoin the action of the board of equalization, the auditor, under the provisions of Sections 1039, 1040, 2781 and 2, and 2800 to 3 inclusive, could immediately proceed and make the proper correction, and the victory of the tax payer would thus become a barren one, and he would have the taxes to pay.

Very truly yours,

J. M. SHEETS,
Attorney General.

FILING AFFIDAVITS AND TRANSCRIPTS IN CASES OF ARREST.

COLUMBUS, OHIO, July 26th, 1900.

Emmett M. Adair, Carrollton, Ohio.

DEAR SIR:—Yours of July 25th at hand and contents noted. Under the provision of Section 6467, R. S., you undoubtedly have the right after a person has been arrested and examined before an examining magistrate and bound over to the court of common pleas, to order the transcript to be sent to the probate court and there proceed by information against the accused.

The provision in Art. I Sec. 14 of the Constitution requiring an oath or affirmation charging a crime before warrant is issued is satisfied where an affidavit has been filed before the examining magistrate upon which the accused is arrested. Of course if you should commence originally in the probate court without an affidavit having been filed, you should support your information by an affidavit. That would supply the requirements of the Constitution above referred to.

Very truly,

J. M. SHEETS,
Attorney General.

ISSUING PERMITS TO VISIT OHIO PENITENTIARY.

COLUMBUS, OHIO, July 26th, 1900.

Hon. G. K. Nash, Governor of Ohio.

DEAR SIR:—Yours asking the opinion of this office as to the power of the Governor of Ohio to issue to persons desiring to visit the Ohio penitentiary, permits to visit that institution free of charge, is at hand.

After a somewhat exhausted examination of the statutes, I find no express authority for so doing. Section 7417, R. S., provides:

“The governor, heads of departments, and members of the general assembly and such other persons as the warden may think proper, shall be admitted as visitors within the walls of the penitentiary free of charge; other visitors may be charged a reasonable sum for going through the prison, which sum shall be prescribed by the board; the warden shall procure suitable tickets, which shall be sold by the clerk, who shall keep an account of such sales, and pay the money to the warden daily; and the guard at the door of the guard-room shall receive the tickets, and also keep an account of them in a book as they are received, and return them to the warden each day before the prison is closed.”

From the above provision it will be seen that the warden is the only one who has the authority to admit visitors free; and he could refuse to honor a pass issued by the governor, if he saw fit to do so.

The effect of a pass issued by the Governor, I take it, is merely a request that the warden accord to the holder the courtesy of a visit to the institution free of charge.

Very truly,

J. M. SHEETS,
Attorney General.

POWERS OF DECENNIAL BOARDS OF EQUALIZATION.

COLUMBUS, OHIO, July 26th, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Yours of July 24th at hand. Your inquiries refer to the powers of the decennial boards of equalization, and I will answer them in their order.

1st. Can such boards make a horizontal increase in the valuations of the real estate of a township or ward, when it is found by the board that such township or ward when compared with the other townships or wards in the county or city, is correspondingly too low?

Section 2814, as amended by the Seventy-fourth General Assembly, provides, among other things, as follows: "They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value, to such price or sum as they may believe to be the true value thereof, agreeable to the rules prescribed by this title for the valuation thereof."

It is readily seen from this provision that these boards are given ample authority to raise the valuation of any or all the tracts of land in the township or ward, if, in their opinion, the district assessors' return is below the true value of the property assessed. And it follows, as a matter of course, that this increase in valuation may be horizontal, if in the opinion of the board of equalization, the facts justify it.

"2nd. "Must personal notice be given to each land owner in such township or ward, before such increase of valuation can be made, and in case of increase of individual pieces of real estate should any notice be given the owner?"

Section 2814 R. S., prior to its amendment by the Seventy-fourth General Assembly, required notice to be given to the land owner of the intention of the board to increase the valuation of his property, and opportunity given him to be heard. As this section now stands no such notice is required. And, as the statute does not require personal notice, I am of the opinion it need not be given.

The law designates the time and place where this board shall meet, and every land owner is bound to know that the valuation of his land will come under review, and that it may be raised. He thus has an opportunity to appear and learn what is being done with reference to the valuation of his land, and to be heard, if not satisfied with the action of the board.

In *Glennet against Raine*, Auditor, 30th Bull. 30, in speaking of the authority of boards of equalization, Judge Hunt says: "No provisions of the law exist requiring the board to notify the owner that it is about to take such action. The law itself is notice that the board is charged with that duty, and will perform it. The fact of the erection of new structures by the plaintiff, and the duty imposed by the law on the board to review the valuation of the assessors at the regular meeting, is all the notice the law deems necessary in the matter."

In *Hambleton against Dempsey*, 20 O., page 173, Judge Spalding, in speaking for the court, says: "It is objected that the tax payer had no notice of the action of the board, and that it nowhere appears affirmatively, that they acted upon evidence of an undervaluation of the property. The law fixes the time of meeting and the place, to-wit, the second Monday in April, annually, and at the auditor's office. This is notice to every citizen who has property, real or personal, returned for taxation."

To the same effect see also *Desty on taxation*, page 599.

3rd. "May the members of the decennial county boards of equalization be allowed their expenses incurred in the performance of their duties, in addition to the per diem provided for by Section 2813a?"

Section 2813a, R. S., provides that all expenses necessarily incurred by these boards of equalization, in the performance of their duties, shall be paid out of the county treasury. I am of the opinion that the "expenses" referred to in this section are such as books, stationery, etc., used by these boards, and such other expenses as are incident to the performance of their duties; but not their living and traveling expenses while attending upon the sessions of the boards.

4th. Is there any limitation upon the power of the decennial county and city boards of equalization to increase the aggregate valuation of the real property of the county and city above the aggregate value thereof, as returned by the assessors?"

Upon reading Section 2814, R. S., it will be observed that while these boards are not permitted to reduce the aggregate value of real property of the county below the aggregate value returned by the assessors with the additions made thereto by the auditor, there is no limit with reference to increasing the valuation; but, on the contrary, they are authorized to raise the value as placed on the lands by the assessors, to such sum as they believe to be the true value thereof. Hence, I am of the opinion that the aggregate value of the lands of a city or county, as returned by the assessors, may be increased by the boards of equalization.

5th. "Have decennial boards of equalization a right to hear witnesses if necessary, and administer oath to witnesses and complainant?"

This question, in my opinion, should be answered in the affirmative. Especially should these boards receive evidence. They are quasi judicial boards, and review the action of the assessors; this they should do intelligently and justly. They cannot do so without an understanding of the subject under charge; this understanding they can not get except by receiving any and all evidence that may assist them in arriving at a just conclusion.

Yours very truly,

J. M. SHEETS,
Attorney General.

PROBATE JUDGE SENDING A CHILD TO THE REFORMATORY.

COLUMBUS, OHIO, August 2, 1900.

Marcus Shoup, Attorney at Law, Xenia, Ohio.

DEAR SIR:—In your letter of July 31 you make some statements relative to a practice which you say obtains in your county in the matter of the commitment of children to the reform farm on the charge of "truancy" and "incorrigibility," which you say is done without any information filed by, or notice to the Prosecuting Attorney, and without any trial or legitimate hearing, all being done so quickly that even the parents of the children, in some instances, not learning of the matter until after it is all over; and you ask the opinion of this office on two questions, to-wit:

1. Where the child is charged with the offense of being a "juvenile disorderly person," or being a "truant and incorrigible," would it not be necessary, in order to give the

Probate Court jurisdiction, that an information be filed by the Prosecuting Attorney, and a trial had on the information, and the defendant given the right to make a defense, and have witnesses heard in his behalf?

2. Can a child be guilty of "truancy" when there is no school in session?

I take it that the Probate Judge assumes to act in these cases under the provisions of the compulsory education act (Section 4022—1 et seq., R. S.), and not under Section 753, which authorizes the commitment of boys guilty of an offense against the laws of the state to the Boys' Industrial Home, or Section 769, which authorizes the commitment of girls who have committed an offense punishable by fine or imprisonment, or are leading a vicious or criminal life, to the Girls' Industrial Home. I assume this for the reason that the charge of "truancy" or "incurability" is not such a charge as could be brought under either of the sections above referred to. It is, perhaps, unnecessary to state that the entire proceeding in relation to the trial and commitment of persons to the various reformatory institutions is purely statutory, and to determine the extent of the jurisdiction and power of the probate court in these matters, resort must be had to the legislative provisions, and the construction placed upon them by the courts. And this for two reasons.

1. The proceeding is in the nature of a criminal prosecution and we have no crimes in Ohio, except such as are defined by statute.

2. The probate court, being a court of limited and special jurisdiction, has only such powers as are conferred upon it by the constitution and statutes.

It is difficult to discuss intelligently these questions within the limits of a letter; but I may be able to make some suggestions which will be of use to you.

"Juvenile disorderly persons" are defined by Section 4022—4, Revised Statutes, as follows: "Every child between the ages of eight and fourteen years, and every child between the ages of fourteen and sixteen years, unable to read and write the English language, or not engaged in some regular employment, who is an habitual truant from school, or who absents himself habitually from school, or who while in attendance at any public, private or parochial school, is incorrigible, vicious or immoral in conduct, or who habitually wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a "juvenile disorderly person" and be subject to the provisions of this act."

Section 4022—5 provides for the appointment of truant officers to aid in the enforcement of the act.

Section 4022—7 provides for proceedings against the parents or guardians, or other person in charge of a child, in cases of truancy.

At this point your second question may be answered by saying that "truancy," as defined by this section, only exists when the persons who come within the provisions of the act are not attending school "without lawful excuse," and certainly, if there is no school in session, that fact alone would furnish a "lawful excuse" and there could be no such thing as "truancy". While on this question of truancy, I would further say that I am nowhere able to find "truancy" made an offense which could be charged against a child. It can only be made the basis of a complaint against the parent or guardian, or other person having control of such child. The proceeding against the child is not on the charge of "truancy" but on the charge of being a "juvenile disorderly person;" and the court would be absolutely without jurisdiction to arrest and commit a child on the charge of "truancy."

The same may be said as to "incurrigibility," except as it relates to proceedings to commit infants to the City Farm School, of Cleveland, under the provisions of Chapter 8, Division 5, Title 12, Revised Statutes.

Any child committed to any county children's home, or juvenile reformatory, or to the Boys' Industrial Home, or the Girls' Industrial Home, by virtue of the provisions of Chapter 9, Title 2, Revised Statutes, on the charge of "truancy" or "incurrigibility" is illegally committed, and, I doubt not, might be released on habeas corpus. Further than that, the probate judge is vested with only special or limited jurisdiction, and would not be immune from liability for false imprisonment.

As before intimated, the only complaint that can be made against a child under the compulsory education act, is that of being a "juvenile disorderly person," and the proceedings in such a case are provided for in Section 4022-8, Revised Statutes. This section provides for complaint by the truant officer upon proof by the parents of inability to cause the child to attend school upon complaint against the parent, as provided for in the preceding section.

These statutes, being penal in their nature, call for a strict construction. When so construed it will be seen that the probate court can only have jurisdiction when the complaint is made by the truant officer. There is no authority for him to proceed upon the complaint of any one else. There is no provision for complaint by the Prosecuting Attorney or for notice either to him or to the parents of the child. This would be a serious defect in the statute were it not that this proceeding against the child as being a "juvenile disorderly person" is only authorized after proceedings have been instituted against the parent or guardian for failure to cause the child to attend school, and proof of the inability of such parent or guardian to do so.

It is provided, however, by Section 4022-11 that notice shall be given to the Board of County Visitors. This notice is to the Board, as a Board, and not to the individual members; and it is essential that the Board be present as a Board, or by committee to protect the interests of the child. That is, the Board must act either by attending the trial or by appointing a committee to attend. See 7 N. P., 409, as published in the Weekly Law Bulletin of July 30, 1900.

The manifest purpose of the compulsory education act is not to fill up the reformatory institutions of the state, but to procure the attendance of each child at school, and the penalty of commitment to a reformatory is only to be enforced after every other means have been exhausted to accomplish the purpose of the law.

In any proceeding before the probate court, or any other court, a child has the same constitutional and statutory rights that an adult would have, and any proceeding that would violate any such rights would certainly be illegal and void.

Judging from the information contained in your letter, the probate judge of your county has not only grossly misconceived the object and purpose of the law, but has also exceeded his powers and jurisdiction. If this has been done maliciously and wilfully, or for any reason except an honest desire to enforce the law, no punishment could be too severe; even to impeachment and removal from office. * * *

Yours very truly,

J. E. TODD,
Assistant Attorney General.

ABATING NUISANCE AT O. S. & S. O. HOME.

COLUMBUS, OHIO, August 3, 1900.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—The question submitted by you in your communication of July 27 is as to what steps can be taken by the State Board of Health, the township or city board of health, towards abating a nuisance caused by the discharge of sewerage from the O. S. & S. O. Home, situated in Xenia township, Greene county, Ohio, where the trustees of that institution, after due notice, neglect or refuse to take the proper steps to abate the same.

The nuisance referred to in your letter being located outside of the city of Xenia, it falls under the jurisdiction of the township board of health. Section 2121, R. S.

The State Board of Health has no jurisdiction in such cases except "when emergency exists and the local board of health has neglected or refused to act with sufficient promptness or efficiency." Section 409—25, R. S. But, as no emergency is claimed to exist, and no complaint that the local board of health is not ready and willing to act promptly, the State Board is without jurisdiction.

But, what can the township board do, is the question? Section 2128, R. S., provides: "When any building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, plumbing, or ventilation thereof is in the opinion of the board of health, in a condition dangerous to life or health, and when any building or structure is occupied or rented for living or business purposes, and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board of health may declare the same a public nuisance, and may order the same to be removed, abated, suspended, altered, or otherwise improved or purified, by the owner, agent or other person or persons having control of the same, or being responsible for the condition; and the refusal or neglect to obey said order shall be a misdemeanor, punishable as hereinafter provided. The board may also, by its officers and employes, remove, abate, suspend, alter, or otherwise improve or purify the same, and certify the cost and expense thereof to the county auditor, to be assessed against the property, and thereby made a lien upon the same, and collected as other taxes."

This, however, being a state institution, the board of health can not abate the nuisance and certify the costs to the county auditor to be collected by him as taxes.

Hence, I know of no remedy unless it be to proceed against the trustees of the institution, or others having that matter in charge, by criminal proceedings. This proceeding, however, would not abate the nuisance.

Yours very truly,

J. M. SHEETS,
Attorney General.

COMMITTING BOYS TO INDUSTRIAL SCHOOL AND PAROLING
SAME THEREFROM.

COLUMBUS, OHIO, August 6th, 1900.

C. D. Hillis, Superintendent Boys' Industrial School, Lancaster, Ohio.

DEAR SIR:—In your letter of August 3rd you ask of this office an opinion as to authority of the management of the Boys' Industrial School to refuse to receive boys committed to that institution for incorrigibility, vagrancy, loitering and

drunkenness. You further state that during the entire life of the institution boys have been received for these minor offenses.

The statutes in relation to the commitment of boys to the Industrial School are penal in their nature and require that strict construction that is applied by courts to all penal statutes. The management of that institution have no more right to receive and hold a boy unless he has been committed by virtue of some statutory authority than the management of the Ohio Penitentiary would have to receive and detain a man sentenced to that institution without having been found guilty of a crime defined by the statutes.

The general statute in relation to the admission of youth to the school is as follows:

"Section 753. Male youth not over sixteen nor under ten years of age may be committed to the Boys' Industrial School by any judge of a police court, judge of the common pleas court or probate court on conviction of any offense against the laws of the state."

Under this general section it will be readily seen that the trustees have no authority to receive a boy unless he has been convicted of "an offense against the laws of the state." The whole question is thus narrowed to the question of what is meant by an offense against the laws of the state.

It is a fundamental proposition in the criminal laws of Ohio that there are no crimes or offenses except such as are defined by the statutes, and unless a statute can be found forbidding a certain thing to be done, then the doing of that cannot be an offense against the laws of the state. In each case where a boy is committed to your institution, this question will necessarily arise: is the offense of which the boy has been convicted, made an offense against the laws of the state by statute? With these preliminary observations, I will examine briefly the offenses enumerated in your letter. And first as to vagrancy.

Sections 2108 to 2112, inclusive, empower municipal corporations to provide for the punishment of vagrants and dissolute persons. But a violation of any ordinance passed by a municipal corporation pursuant to the power conferred by these sections would not be an offense against the laws of the state, and a police judge would have no authority to commit a boy to the industrial school upon conviction of the violation of such ordinance. Section 6994 however defines vagrancy and provides a punishment therefore, thus making it an offense against the laws of the state. Hence, a boy charged with vagrancy under the terms of the statute might be committed to the Industrial School, while if the charge were made under the provisions of a municipal ordinance, he could not be so committed. Of course, if the court has no right to commit a boy to the institution, the management of the institution have no right to receive the boy and would be fully justified in a refusal to receive him.

As to the offense of incorrigibility, I nowhere find this made an offense by the statute, although I have lately had my attention called to the fact that boys were being committed to the various reformatory institutions of the state, possibly some to the Boy's Industrial School, on the charge of truancy and incorrigibility; and an opinion was recently formulated by this office to the prosecuting attorney of Greene county to the effect that truancy and incorrigibility were not offenses which could be charged against a boy or girl. These terms occur in the statutes in relation to compulsory education, Section 4022, et seq., but as used in this act they can only be made the basis of a charge against a parent or guardian or other person having charge of the child, and not against the child itself. A proceeding against a child under the compulsory education statute can only be brought on the complaint of the truant officer and on the charge of being a "juvenile, disorderly person," and a court would be absolutely without

jurisdiction to arrest and commit a child on the charge of truancy or incorrigibility. In speaking of the offense of incorrigibility, I refer exclusively to the compulsory education act, and not to the provisions of the statute in relation to the proceeding to commit infants to the City Farm School of Cleveland under the provisions of Chapter 8, Division 5, Title 12, R. S.

As to the offense of loitering and drunkenness, I am nowhere able to find any statute making either an offense against the laws of the state, except Section 6940, which makes it an offense to be found in a state of intoxication.

I trust sufficient has been said to furnish a general rule by which the managers of your institution should be guided in the admission of youth, viz: that it is only when they have been convicted of offenses defined by statute that they should be received.

You further ask in relation to the power of the management of the institution in reference to paroles. As stated in Section 752, the object of the institution is the reformation of those committed to it, and this object should be constantly kept in mind in all the dealings of the institution with those committed to its charge. Whenever this purpose is accomplished, the boys should be discharged. The statute seems to contemplate this when it provides "that all youth committed thereto shall be committed until they arrive at full age, unless sooner reformed." The management of the institution is necessarily invested with broad discretion in the management and control of the inmates, yet this discretionary power must not be used to defeat the purposes of the institution. I know of no authority for paroling boys committed to the Industrial School, nor am I able to see the necessity for such authority. A boy certainly ought not to be paroled unless he be reformed, and if his reformation is accomplished, then he ought to be discharged, and no parole is necessary. I am not able to speak understandingly as to your system of demerits and hence cannot say whether or not a boy should be released before he has cancelled all of his demerits, but I am of the opinion that a boy should not be released until the management are satisfied that his reformation is complete, irrespective of any system adopted to determine that fact. Certainly he should not be released for the reasons stated in your letter, to-wit, "on the theory that the court erred or the statement that the health of his parents is impaired by the separation from him."

Yours very truly,

J. E. TODD,

Assistant Attorney General.

MEETING PLACES OF DECENNIAL BOARD OF EQUALIZATION.

COLUMBUS, OHIO, August 7, 1900.

Hon. A. E. Jacobs, Prosecuting Attorney, Jackson, Ohio.

DEAR SIR:—Your communication of August 6th, containing the following inquiries, received.

1. Can Decennial Boards of Equalization of cities, other than county seats, meet and transact business at those cities?

2. How can such action be harmonized with Section 2815 Revised Statutes?

You are doubtless familiar with the history of the enactment of The Royer Bill, (Senate Bill No. 309), which amends Section 2815 Revised Statutes, as found in 94 O. L., 336, 337, and also of the conflict between other sections of that act, with House Bill No. 777, known as the Hendley Bill, 94 O. L., 246, 247.

Section 2815 was not amended, nor in any way changed by the Hendley Bill. In the case of State ex rel. Guilbert, Auditor, vs. Halliday, Auditor, etc., decided June 19th, 1900, the Supreme Court held:

"That the Royer Bill (S. B. No. 309) was signed by the President of the Senate and Speaker of the House after House Bill No. 777, and this being the latter enactment, supercedes H. B. 777, *in so far as the two acts are irreconcilable.*"

This decision only bears upon the question you propose indirectly. It recognizes the validity of the act which amends Section 2815, and hence your question must be answered by that Section as amended.

Turning to that amended Section, 94 O. L. 337, we find provision made for decennial boards of equalization in each city of the first and second class, which, of course, includes all cities as now classified; and provides for their appointment by the councils of the various cities, except in cities of the first grade of the first class, the six members thereof shall be appointed by the city comptroller of such city, (Cincinnati). Then immediately following the mention of the latter board, (the Cincinnati Board), occurs a direction where "said board" shall convene; and that is at the office of the county auditor; following the well known rule of construction, that,

"Where general language construed in a broad sense would lead to absurdity, it may be restrained." *People vs. Davenport*, 91 N. Y., 574.

I construe the term "said board" to refer to the board last mentioned, viz: The Cincinnati Board, and hence, it would follow that the boards in cities other than county seats are not directed, by this act, to meet at the county auditor's office, but in the absence of an express direction, to meet at any particular place, they should meet in their respective cities. I think this construction makes the section harmonious throughout, and it agrees with the practice adopted under previous decennial appraisements, and as sanctioned by the Auditor of State. At these sessions the county auditor can attend either in person or by deputy.

Yours truly,

J. M. SHEETS,
Attorney General.

EMPLOYING PROSECUTING ATTORNEY IN CIVIL CASES BY COUNTY COMMISSIONERS.

COLUMBUS, OHIO, August 7, 1900.

G. Ray Craig, Attorney at Law, Norwalk, Ohio.

DEAR SIR:—In your letter of August 3rd, you ask this office for an opinion as to the right of the county commissioners or the board of infirmity directors to employ the prosecuting attorney to appear for them in civil cases in which the county is interested and to pay him for his services in such cases.

Without entering fully upon a discussion of the statutes in relation to the duties of prosecuting attorneys and the powers of the respective boards of county commissioners and infirmity directors, I am of the opinion that it is entirely within the power of the board above referred to to employ the prosecuting attorney in cases such as those referred to in your letter and pay him for his services in such cases as they would any other attorney. And this for two reasons.

First: For any services enjoined upon the prosecuting attorney by statute as a part of the duties of his office, of course he would not be entitled to any further or additional compensation than the compensation provided for by statute for his office. But, I nowhere find it made a part of the duties of the office of prosecuting attorney to appear for the board of county commissioners or the board of infirmity directors in the courts in such civil cases as those designated in your letter. Hence, if he does so appear, he is entitled to his compensation the same as any other attorney would be.

Second: Under the general statutes empowering these boards to sue and be sued, to prosecute and defend actions in the court, they undoubtedly have the authority to employ counsel, and as there is no restriction as to what counsel shall be employed, they doubtless might employ counsel other than the prosecuting attorney. The power to employ presupposes the power to pay. If then, these boards have the power to employ counsel other than the prosecuting attorney in civil cases and pay them for their services, there could be no valid reason, why, when the prosecuting attorney is employed and renders the same services, he should not be paid the same as any other attorney.

An opinion was rendered under date of January 5th, by this office upon the request of John Ray of Sandusky, Ohio, in which there was a full citation of the statutes and authorities in relation to this subject, and the following conclusions were reached:

1. It is not made the duty of the prosecuting attorney to act for the county officers in litigation except in certain specified cases, and in each case provision is expressly made as to whether he shall receive extra compensation for such services.
2. In all other cases the officers are left free to employ such counsel as they see fit, and if they employ the prosecuting attorney, they do not employ him in his official capacity, hence, must pay him as they would any other counsel.

Very truly,

J. E. TODD,

Assistant Attorney General.

EMPLOYING MESSENGERS FOR BOARDS OF EQUALIZATION. TRANSFERRING AMOUNTS FROM ONE WARD TO ANOTHER.

COLUMBUS, OHIO, August 7, 1900.

Hon. Warren Gard, Prosecuting Attorney, Hamilton, Ohio.

DEAR SIR:—I am in receipt of yours of the 6th inst., containing inquiry as to authority of the board of decennial equalization in your city to appoint a messenger for the board if one is deemed necessary. Also asking the question, can a city board of equalization take a certain proportion of the valuation of property from one ward, and add it to another ward? or must the equalization be confined to the respective wards?

Answering the first question, I would say that no authority is given, in my view of the law, for the board of decennial equalization in your city or any other city of that class, to appoint a messenger for the board. I am aware that frequently during the sessions, the necessities of the board might demand the services of such a person, but, standing upon the letter of the law and following the usual rules of interpreting the statute especially as confined to boards of limited and special jurisdiction, I can find no authority for holding that such an appointment can be made.

Answering the second question, I would say that if it be found by the city board of equalization that the valuation of one ward is too high and that of another too low relatively, the excess of the one ward may be taken and added to another because the object of the board should be to equalize between all parts of the city, and not limit the equalization in the manner suggested. In other words, if the board find that one is relatively too high compared with others that are too low, it can treat the wards as units and take a certain amount in gross from one ward, and add the same to the other wards so as to equalize a city altogether.

Upon consultation with the auditor of state, I am informed that this agrees with the common practice adopted.

Very truly,

J. M. SHEETS,

Attorney General.

COMPENSATION OF PROBATE JUDGE FOR LETTERS OF GUARDIANSHIP AND REPORTING STATISTICS TO SECRETARY OF STATE.

COLUMBUS, OHIO, August 8, 1900.

Hon. Cary Jones, Prosecuting Attorney, London, Ohio.

GENTLEMEN:—At the earliest moment I was able to do so, I examined into the questions submitted by you as to whether the probate judge of Madison county is entitled to compensation out of the county treasury for reporting statistics to the Secretary of State upon the following subjects:

1. Reporting number of letters of administration and guardianship issued during the year.
2. Number of marriages within the county.
3. Number of insane patients sent to the hospital.
4. Number and character of misdemeanors prosecuted in his court.

Taking the questions in the inverse order, it is clear to me that the probate judge is entitled to the compensation provided in Section 1250 Revised Statutes, for furnishing statistics to the Secretary of State required by Section 1248 Revised Statutes with reference to misdemeanors prosecuted in his court.

The probate judge is ex-officio clerk of his own court; the legislature has given the probate court of Madison county jurisdiction of misdemeanors; Section 1248 Revised Statutes requires a detailed report of all criminal cases commenced within the county, and Section 1250 provides what pay the clerk shall receive for these reports. Section 546, Revised Statutes, provides in detail the fees the probate judge shall be entitled to for services peculiarly within the duties of his office, but it is silent as to what, if any fees he shall receive for reporting to the Secretary of State misdemeanors prosecuted in his court. But Section 547, R. S., provides that "for any other services not herein provided for, the same fee shall be allowed as for similar services in the common pleas of the same county." So that when the legislature enlarges the jurisdiction of the probate court so as to give it concurrent jurisdiction with the common pleas in any particular matter, this section will operate to give the probate judge the same fees that the clerk would receive under like circumstances. That being the case, the probate judge as clerk of his own court is entitled to the fees provided for in Section 1250 Revised Statutes, for making such detailed report of misdemeanors prosecuted in his court as is required by Section 1250.

As to the remaining three questions in dispute, i. e., statistics with reference to letters of guardianship, letters of administration, number of patients sent to the hospital and marriages, I am of the opinion he is not authorized to charge and receive any pay therefor. These are statistics which the Secretary of State may require or not at his discretion and the statistics thus required come exclusively within the province of the probate judge to furnish, the clerk of the common pleas court having no similar duties to perform—no letters of guardianship, letters of administration or marriage licenses to issue, nor are patients sent to the hospital from this office. Hence, we must look elsewhere than to Section 1248 and 1250 for authority to charge compensation for furnishing the Secretary of State these statistics.

In my opinion, Section 140, Revised Statutes, is the section authorizing the Secretary of State to call upon the probate judge for these statistics. If I am right in this, they must be furnished gratuitously.

That a public officer is entitled to no compensation other than that provided for in the statute, is a principle so familiar to us all that I need not cite authorities upon the subject.

Aside, however, from the provisions of Section 140, Revised Statutes, I am of the opinion that Section 1250 makes no provision for compensation similar to this sought to be charged for by the probate judge. It will be observed by reading Section 1248, Revised Statutes, that to report a case as required by that section, requires much pains taking effort on the part of the clerk. And for reporting each "case", he is entitled to 25 cents up to the number of fifty, and for each additional case, 10 cents. It is the report of "cases" only for which this section provides compensation; it does not provide compensation for "such other information as the Secretary of State requires." The cases referred to in the original act (64 O. L., p. 17), of which sections 1248 and 1250 were a part, were criminal cases and divorce cases, and it is clear to my mind that the word "cases" contained in Section 1250 refers to the class of cases mentioned in that act, and not to general information which the Secretary of State might request the clerk to furnish. That being the case, Sections 1248 and 1250 would be of no value to the probate judge in supporting his position, that he is entitled to pay for such statistics, as to number of letters of guardianship, letters of administration, marriage licenses, etc., issued by him. This information required of the probate judge is easily furnished, and requires but little labor. No exhaustive data is required as in Section 1248 respecting criminal and divorce cases. And it will hardly be presumed that the legislature would intend such liberal pay for the labor of furnishing merely the number of letters of guardianship and of administration, and marriages solemnized and patients sent to the hospital, and nothing more.

In the brief submitted, I find also the question as to whether the probate judge is entitled to fees out of the county treasury for hearing truancy cases and performing the clerical duties required of him therein. It seems to me he clearly is entitled to fees in these cases. (See Sections 759 and 4022-8.)

I do not discuss this question at length for the reason, that I do not regard it as an open question, nor was it in terms submitted to me by you.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHTS OF COUNTY COMMISSIONERS TO PURCHASE GRAVEL AND BUILD ROADS.

COLUMBUS, OHIO, August 10th, 1900.

Benjamin Meck, Prosecuting Attorney, Upper Sandusky, Ohio.

DEAR SIR:—Yours of August 9th at hand and contents noted. The question you submit is, whether under the provisions of House Bill No. 379, passed by the last General Assembly, the commissioners of any county are authorized to purchase material for the improvement of the roads of the county, and let the contract for grading the roads and placing the material thereon to the lowest responsible bidder, the county commissioners themselves furnishing the material.

Section 1 of this act gives the commissioners authority to determine what material, whether stone, gravel or brick shall be used for the improvement of the road proposed to be improved; also to appoint an engineer for the purpose of grading the road, making the plat and profile, and estimates as to the cost, etc.

Section 2 provides that "after such plans and specifications as the commissioners deem necessary are adopted, the work shall be publicly let by the county commissioners to the lowest responsible bidder, who shall enter into bond," etc.

This act in and of itself does not give the commissioners power to purchase gravel, or other material necessary for the improvement of the roads, but Section 4745-1 is ample to confer such power. In order to determine the powers:

of the commissioners with reference to the improvement of roads the whole body of the statutes conferring such powers, should be construed together. It is a familiar rule of construction that statutes in pari materia are to be construed together as having one object, and one system and policy. That being the case Section 4745-1 has to be considered as part and parcel of the act in question. Hence, it is my opinion that the commissioners may purchase material themselves, and let out the contract of grading the road and placing that material thereon.

This purchase, as you will observe by reading Sections 4745-1 to 4745-5 inclusive, is permitted to be made by private contract, or by condemnation proceedings, if unable to agree with the owner.

This power, in my opinion, ought to rest in the county commissioners, for if they were compelled to let out the contract of furnishing the material and building the roads, and should let out the contract for this construction in sections, the bids, of necessity would have to be much higher than though the material were furnished by the county, as it might involve opening a gravel bank, or opening a stone quarry, furnishing stone crushers, etc. If the commissioners act with good business judgment in the purchase of this material, it almost certainly will result in much saving to the county.

Very truly yours,

J. M. SHEETS,
Attorney General.

PARTNERSHIPS.

COLUMBUS, OHIO, August 11th, 1900.

W. H. Fuller, Attorney at Law, Wauseon, Ohio.

DEAR SIR:—Your letter of August 10th at hand. I find no provision of statute making it the duty of the prosecuting attorney to prosecute complaints filed in the probate court under Section 4364-9a. Of course, unless a statute can be found directing the prosecuting attorney to prosecute such complaints, it could not be claimed to be a part of the duties pertaining to his office.

In reference to the continuation of the business of trafficking in intoxicating liquors by the surviving partner, there is no statutory direction except that contained in Section 4364-11. This section provides for two contingencies. First. For a proportionate assessment when the business is commenced at any time after the fourth Monday of May. Second: For a refunding order when a person, corporation or co-partnership discontinues business before the termination of the assessment year. The answer to your question will depend upon whether it can be said that a partnership discontinues business upon the death of a partner. In my opinion, it does. It is an elementary principle of the law of partnerships that the death of a partner dissolves the partnership. How, then, can the partnership be said to continue after it has been dissolved? True, there are some statutory provisions authorizing a surviving partner to continue the partnership business, but I take it those statutes have no application to the case under consideration. If a certificate has been issued to a partnership and one of the partners die, the partnership is thereby dissolved and the surviving partner if he continues in the business must continue as an individual, and must necessarily have a certificate issued to him as an individual. This can be done under the provisions of the section above referred to, viz., by a refunding order to the partnership for the remainder of the assessment year, and by the payment of a proportionate assessment by the surviving partner for the new certificate.

A further reason that might be urged for the conclusion above reached is the fact that the proceeds of the refunding order belong to the partnership assets and the representative of the deceased partner is entitled to decedent's interest in the same.

Trusting the foregoing will be satisfactory, I am,

Very truly yours,

J. E. TODD,
Assistant Attorney General.

RIGHT OF PHARMACIST TO REGISTER.

COLUMBUS, OHIO, August 13th, 1900.

W. R. Ogier, Secretary Board of Pharmacy, Columbus, Ohio.

DEAR SIR:—Yours of August 13th at hand and contents noted. You desire an opinion from this office as to whether or not a registered pharmacist who is not now engaged in the practice of his profession, has a right to register for another year, pursuant to the provisions of Section 4407, of the Revised Statutes of Ohio.

This section provides: "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."

From the reading of this section it is apparent to my mind that the legislature contemplated that a pharmacist desiring to register must be actively engaged in the practice of his profession; for, if not, upon his application now before your board, he may register for the coming year; at the end of the next year he may register for another, and so on indefinitely. If such were the construction of the statutes the salutary provisions of these statutes would be wholly annulled, and thus, persons who have left the profession for many years would be allowed to return to it without an examination. By the provisions of the section just quoted it will be observed that the board must find that the applicant is entitled to a renewal certificate. If you have no discretion to look into the question as to whether he is actively engaged in his profession, it seems to me these provisions would have no meaning.

Yours very truly,

J. M. SHEETS,
Attorney General.

POWERS OF DIRECTORS OF OHIO AGRICULTURAL EXPERIMENT STATION.

COLUMBUS, OHIO, August 14th, 1900.

Charles E. Thorn, Director Ohio Agricultural Experiment Station, Wooster, Ohio.

DEAR SIR:—Yours of August 13th at hand and contents noted. You seek an answer to the question as to whether the Director of the Ohio Agricultural Experiment Station, appointed by the Board of Control, must sanction and approve all experiments and investigations proposed to be instituted by the

Board of Control; also whether the Director must approve the appointment of all subordinates and assistants appointed by the Board of Control before they are authorized to act.

In my opinion, both these questions should be answered in the negative. Section 409-2, Bates' R. S., provides: "The location, control and general management of the experiment station shall be submitted to the Board of Control." Section 409-5 R. S., provides: "The Board of Control shall locate said station, and shall appoint a competent Director, who shall have the general management and oversight of the experiments and investigations necessary to carry out the objects of the station. Said board shall also make such rules, by-laws and regulations for the government of the station and its work, and for carrying out the business and purposes of the station, as shall be necessary and proper in their judgment." The Board of Control could not have the control and general management of the experiment station as is given it by Section 409-2, above quoted, if it could not institute such investigations and experiments as in its judgment are proper for the purposes of carrying out the objects of this station. Section 409-5 R. S., above quoted, gives the Director general management and oversight of experiments and investigations necessary to carry out the objects of the station, but does not give him the power to determine what experiments and investigation shall be set on foot. That question is left to the board of Control. Of course, the Director being a member of that Board, as such member he is entitled to his vote and voice upon the subject.

As the Board of Control has power to appoint a Director, that, of necessity, carries with it power to employ such assistants as are necessary to carry on the experiments and investigations set on foot.

Sections 640 and 641 have no application to the Ohio Agricultural Experiment Station. The powers and duties of the Director are clearly defined by Sections 409-2 and 409-5, R. S., and he has no others.

Very truly yours,

J. M. SHEETS,
Attorney General.

OWNERSHIP TO OIL PRODUCED IN AND AROUND THE ST. MARYS RESERVOIR.

COLUMBUS, OHIO, August 15, 1900.

The Ohio Canal Commission, Columbus, Ohio.

GENTLEMEN:—In response to your inquiry of this date in which you desire to know whether the question of the ownership or title to the oil produced on certain leases in and around the St. Marys Reservoir was determined by the suits instituted by former Attorney General Richards in the Court of Common Pleas of Auglaize County, I desire to submit the following.

On the 16th of April, 1892, a committee appointed by joint resolution of the Ohio Legislature after an investigation of the leases and developments in and around said reservoir, made their report to the General Assembly in which they recommended that the Attorney General of the state take legal action to protect the interests of the state. The Attorney General in his report for the year 1892 at page 27 gives the report of his proceedings under these recommendations of the committee as follows:

"In accordance with this request, at the earliest date after receiving the report and evidence, I instituted the following actions in the Court of Common Pleas of Auglaize County, to determine the title of the oil produced on state

land, and to recover the amount due the state for the wrongful conversion of oil belonging to it:

No. 5367. The State of Ohio vs. The East Bank Oil Company and The Buckeye Pipe Line Company.

No. 5368. The State of Ohio vs. The Mars Oil Company and The Buckeye Pipe Line Company.

No. 5369. The State of Ohio vs. J. C. Lineman and The Buckeye Pipe Line Company.

No. 5370. The State of Ohio vs. C. H. Rudolph, M. I. Apple, J. N. Grey, W. W. Cockley, B. F. Crawford, W. H. Taylor, B. F. Fulton, A. A. Elyea and The Buckeye Pipe Line Company.

No. 5371. The State of Ohio vs. R. B. Gordon, Sr., and The Buckeye Pipe Line Company.

No. 5372. The State of Ohio vs. Chas. L. McIntire and The Buckeye Pipe Line Company.

No. 5373. The State of Ohio vs. Sol. Bamberger, T. E. Hollingsworth, Gus Bamberger, R. W. Stearns, C. N. Stearns, G. C. Stearns, Mrs. G. C. Coney, Fannie Stearns, Horace Stearns and The Buckeye Pipe Line Company.

No. 5374. The State of Ohio vs. Samuel Scott, Oliver Jay, D. W. Jay, Henry Schaffer, Frank Koehl, and The Buckeye Pipe Line Company.

No. 5379. The State of Ohio vs. Riley and Milligan John Blue, and The Buckeye Pipe Line Company.

The answers filed contained two defenses: The first set forth the lease from the state with certain pertinent facts, the second showed an award by the Canal Commission in favor of the lessees after the ownership of the oil was in dispute."

A demurrer was interposed to these defenses and the case of the State vs. J. C. Lineman et al. was submitted to Judge Day of the Court of Common Pleas of Auglaize County, this case being treated as a test case. I have not a copy of all the pleadings in these cases and am unable to give a description of the land included in the leases held by the defendants. I understand, however, that these nine cases involve thirteen separate leases. I have what purports to be a copy of the petition in the case against the East Bank Oil Company, and this petition with the answer as stated by the Attorney General would squarely raise the question as to the title to the oil produced under these leases. The following quotations from the decision of Judge Day in passing upon the case of the State vs. Lineman et al. are sufficient to indicate the scope of the decision of the court.

"* * * Oil and gas are kindred substances and are found in the underlying Trenton Rock. It was understood and agreed by the agents of the state and defendant, but not incorporated into writing, that defendant was authorized to drill and operate for gas and oil on said land, and either or both substances produced was to be the property of defendant without any further or additional payment of rental.
* * * I think in view of the situation and facts detailed in the answer, it must be held to have been the intention of the lawmakers to authorize a leasing for both oil and gas, and that a reasonable and just construction or interpretation of the section confers authority to that end upon the agents

of the state therein named. If this be correct, it follows that the lease to Lineman authorizes him to produce both gas and oil and to have and possess it to the exclusion of the claims of the state made in the petition. The fact, that under the lease in question, the state is to have a rental of three dollars per acre per annum, and no royalty is provided for, makes nothing against this view. The provision of the section as to payment of rental or otherwise for a lease is ample and would enable the agents named to stipulate either cash rental, or royalty. * * * The plaintiff not desiring to further plead, there will be judgment for the defendant on the demurrer."

I am informed by the clerk of the common pleas court of Auglaize County that judgment was entered in all of these cases substantially the same as in the case submitted to Judge Day, and that none of the cases were dismissed without prejudice.

It seems very clear, therefore, that the question of the ownership of the oil produced under these leases is *res judicata*.

Very truly,

J. E. Todd,

Assistant Attorney General.

RIGHT OF R. R. COMMISSIONER TO DECIDE AND DETERMINE SAFETY DEVICE USED AT GRADE CROSSINGS.

COLUMBUS, OHIO, August 17, 1900.

Hon. R. S. Kayler, Columbus, Ohio.

DEAR SIR:—Your inquiry just received involves an answer to the following question: "Where a railway company, either steam or electric, seeks to cross, at grade, with its tracks another railroad, has the Railroad Commissioner the right to determine that a safety device is needed at such crossing, and also what kind of device should be used, whether interlocker, derail, gates, or a combination of these devices?"

Section 247f, R. S., provides: "In case, however, one railroad company or an electric railroad company shall hereafter seek to cross at grade with its track, or tracks, the track, or tracks, of another railroad, the railroad company, or the electric railroad company, seeking to cross at grade shall be compelled to provide interlocking or other safety devices put in to the satisfaction of the said commissioner of railroads to protect such crossing, and to pay all costs of such appliance, together with the expense of putting them in. The future maintenance and operation thereof shall be equally apportioned between the two or more roads by the said commissioner of railroads and telegraphs; provided this act shall not apply to crossings of side tracks only."

From the provisions of this section it will be observed that a railway company seeking to cross, must provide a safety device for such crossing to the satisfaction of the Commissioner of Railroads—a watchman is not a safety device. The purpose of the provision requiring a safety device to be erected to the satisfaction of the Commissioner of Railroads was to enable him, upon the examination of each crossing to determine from the particular surroundings what particular device would best subserve the purposes of safety, and then enforce its erection. While the Commissioner of Railroads can not arbitrarily, and without reason, order any kind of safety device, or interlocker he may choose, regardless of the needs of the particular crossing, yet, he is given a wide discretion, and, unless that discretion is clearly abused, there is no appeal

from his decision. And, if from the peculiarities of any particular crossing, the Commissioner is of the opinion that there ought to be a combination of the devices mentioned, e. g., the derailing device and gates, the railroad companies must submit to his judgment.

Very truly yours,

J. M. SHEETS,
Attorney General.

RIGHT OF A MAGISTRATE TO REMIT FINES IN OHIO BOARD OF
PHARMACY CASES.

COLUMBUS, OHIO, August 20, 1900.

William R. Ogier, Secretary Ohio Board of Pharmacy, Columbus, Ohio.

DEAR SIR:—In your communication of August 18 you present the following statement of facts:

Upon a prosecution instituted by the Ohio Board of Pharmacy against George S. Binckley before John B. Fletcher, Mayor of the village of Kenton, Ohio, said Binckley was found guilty of a violation of Section 4405, R. S., and was fined \$20.00 and costs, and afterwards said Mayor remitted or attempted to remit said fine of \$20.00. And the question presented is, has the mayor authority to remit such fine?

The fine in question was imposed by virtue of Section 4412, R. S., which reads as follows:

“If any person violates any of the provisions of Section 4405, Revised Statutes, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than twenty dollars nor more than one hundred dollars, or be imprisoned not less than twenty days nor more than one hundred days or both. * * * All fines assessed and collected under prosecutions begun or caused to be begun by the Ohio board of pharmacy, shall be paid to the treasurer thereof, and by him covered into the state treasury monthly, to be credited to the fund for the use of the Ohio board of pharmacy.”

It will be observed that the fine imposed in this case was the minimum sum provided for such an offense. In a letter from the mayor submitted with your communication, the mayor states that it has been a custom of the magistrates in that locality to remit the fines when in the judgment of the magistrate he thought the case would justify. If such be the custom, it is certainly time to ascertain upon what foundation the custom rests. In cases where the amount of the fine is fixed at the discretion of the magistrate or court, there can be no doubt that the magistrate might reduce or remit any fine imposed, but in cases where the amount is fixed by statute, in my opinion the magistrate has no jurisdiction or power to remit the same. In the case under consideration the magistrate would be clearly without power to impose originally a fine less than the minimum provided by statute. As was said by Okey, C. J., in the case of *Dillon vs. The State*, 38 O. S., 586:

“Where the accused is properly convicted, it is the duty of the presiding judge to ‘pronounce the judgment provided by law.’ If the statute provides fine and imprisonment, he is clearly without discretion to omit either as he is to fine for a less or larger sum or imprison for a shorter or longer term than that provided in the act.”

If at the time of the trial he is without authority to make the fine less than the statute requires, from what source does he afterwards obtain authority to make it less or remit it entirely? There certainly is no statutory authority for such a proceeding.

I am of the opinion, therefore, that the attempt of this magistrate to remit the fine in question was entirely unauthorized by statute.

Very truly,

J. E. TODD,
Assistant Attorney General.

RIGHT OF TOWNSHIP TRUSTEES TO APPOINT DITCH
SUPERVISORS.

COLUMBUS, OHIO, August 20th, 1900.

Edward L. Taylor, Jr., Attorney at Law, Columbus, Ohio.

DEAR SIR:—In your communication of August 17th, you ask of this office an opinion as to the effect of House Bill No. 403, passed April 13th, 1900, entitled "An act to provide for the cleaning out and keeping in repair of public ditches, drains, and water courses, and to repeal certain section therein named." The sections repealed comprise, practically all the provisions of the laws relating to cleaning out and keeping in repair both county and township ditches, and by the repeal of these sections the county commissioners and township trustees are divested of all authority and control over this subject, while the act in question seeks to create the office of Township Ditch Supervisor, and to clothe such officer with the power and duty of looking after the cleaning out and repair of ditches, drains and watercourses.

Section 1 of the act provides as follows: "That in any township in which there have been located and established county or township ditches, or in which county or township ditches may hereafter be located and established, there may, at the time and in the manner provided by law for the election of township officers, be elected a township ditch supervisor, who shall serve for a term of three years, and until his successor is elected and qualified. In case a vacancy occurs in this office, by resignation or otherwise, the township trustees shall fill such vacancy by appointment until the next annual election."

Section 13 of the act enumerates the sections repealed, and also provides that this act shall take effect and be in force from and after its passage.

This act having been passed by the Legislature after the regular election of township officers for the year 1900, it follows, of course, that no township ditch supervisors were elected at said election, and the question presented is: Does this constitute a vacancy in the office of township ditch supervisor which may be filled in any township, by appointment of the township trustees as provided in Section 1, of said act?

The trustees are empowered to appoint when a vacancy exists by "resignation or otherwise." This language is sufficiently comprehensive to empower the trustees to fill a vacancy existing before any person has been elected to the office, as well as a vacancy occurring after a person has been elected. I repeat, they would be authorized to fill a vacancy. But is there a vacancy? Two things are necessary to constitute a vacancy in office. First: There must be an office in existence. Second: There must be no one entitled to occupy it. The difficult question in this case is to determine whether or not there is an office in existence. Evidently, the act was neither skillfully drawn nor carefully considered by the Legislature. While all the provisions relating to the cleaning out and keeping in repair county and township ditches are unconditionally repealed, al-

most a full year must elapse before the act can be made effective by the election of township ditch supervisors to carry out its provisions. Not only so, but the statute, by its terms, is merely permissive—not mandatory. Note the language—“There may be elected.” So, it would seem, on the face of the statute, to be optional with each township to elect a supervisor, and thus carry out the purpose of the act or not as they choose. A consideration of the importance, both to the public health and convenience, as well as the individual welfare of those whose lands are liable to overflow, of keeping the public ditches, etc., in good working order, leads us to scrutinize this act closely to find, if possible, a way to make it effective. We would have no difficulty in doing this if the Legislature had used the word “shall” elect, instead of “may” elect. This would have made it mandatory upon each township to elect such an officer, and the office might be considered as fully created by the act. Whereas, if the statute should be construed as permissive, or one of authorization only, then the office can not be considered as existing in any township until it is determined, in some way, that that particular township should have such an officer. It certainly could not have been the intention of the Legislature that any township containing public ditches should be left without any provision for keeping such ditches in repair. Yet, such would be the effect if you consider this act as merely authorizing each township to accept its provisions or not, as they may see fit.

In considering the question of intention the title of the act may be examined. This, as before given, states the act to be “to provide for the cleaning out and keeping in repair of public ditches,” etc. If it had been the intention to make the act permissive, merely, surely more apt language might have been found to express that purpose in the title. The word “may”, however, or other words of permission or authorization, is sometimes construed as mandatory. And particularly when the public interests require such construction.

The word “may,” according to the ordinary uses of language, is a term of authorization only. It confers a power, faculty, or discretion, but does not impose a positive command. Yet there are cases, not infrequently occurring, in which it is necessary to understand that this term was used in an imperative sense, this necessity arising from the fact that the plain meaning of the Legislature, as gathered from the whole statute or from the general scope and purpose of the enactment, was to impose a positive command, instead of a mere permission. Moreover, the word must sometimes be taken as mandatory in order to sustain public or private rights. Thus it is well settled that “may”, in any statute, is to be construed as equivalent to “shall” or “must” when the public interests or rights are concerned, and when the public or third persons have a right de jure to claim that the power granted should be exercised.”

Black on Interpretation of Laws, page 155.

“The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is, in effect, peremptory.”

Sutherland on Statutory construction. Quoting from 24 Minn., 300.

“Where authority is conferred to perform an act which the public interest demands “may” is generally regarded as imperative.”

Okey, J., in R.R. Co., vs. Mowatt, 35, O. S., 287.

The act in question is certainly one in which the public interests are involved. And, from the authorities cited, the word "may" as used in the first section of this act, should be construed as mandatory, thereby creating in each township in which county or township ditches are located, the office of township ditch supervisor. This is still farther shown to have been the intent of the Legislature when it is considered that there is no authority given in the act, to any person, or body of persons in any township, to determine whether or not the act shall be made applicable to such township, or whether or not such officer shall be elected. If then, the statute creates the office of township ditch supervisor, and no person has been elected to fill said office, then, in my opinion, there is a vacancy in the office, which may be filled by appointment by the township trustees until the next regular election. The statute, by its terms, is to go into effect from and after its passage. It cannot go into effect in part, but must be effective as a whole, hence, the provision creating the office of township ditch supervisor is in effect from the passage of the act. The office being in existence, and no person authorized to occupy it, then there is a vacancy which may be filled as above shown.

While this question is one that does not properly pertain to either the office of the Attorney General or that of the Prosecuting Attorney, unless the question should be presented by the county commissioners to the Prosecuting Attorney as to their powers and duties, yet, in view of the importance of the question, and the general public interest attached thereto, I have taken the pains to investigate the matter as fully as my time would permit, with the results above stated. I am,

Yours very truly,

J. E. TODD,
Ass't Attorney General.

RIGHT OF COUNTY SURVEYOR AT END OF TERM TO COMPLETE UNFINISHED WORK.

COLUMBUS, OHIO, August 22nd, 1900.

George W. Risser, Attorney, Ottawa, Ohio.

DEAR SIR:—Your inquiry requires an answer to the question, whether the county surveyor, by virtue of the expiration of his term of office, can no longer act as the engineer in county ditch and road proceedings where he had during his term of office been appointed by the county commissioners as such, and has partially completed the work required of him by such appointment.

In my opinion he is entitled to continue to act as such engineer until the completion of the work, unless for good cause he is removed by the commissioners.

If by virtue of his office alone, the county surveyor were required to act as such engineer without any affirmative action on the part of the commissioners, and without any affirmative action on his part, in order to qualify himself for the position, then it would be clear that the successor must take up the work where the predecessor left it at the end of his term, but such is not the case in the question submitted by you. The county surveyor is not entitled to act as such engineer merely by virtue of his office. Before he can act he must receive an appointment at the hands of the commissioners; not only must he receive an appointment before he can act, but he must execute a bond conditioned for the faithful performance of his duties; Section 4494, R. S. While Section 4454, R. S., provides that the commissioners shall appoint the county surveyor as such engineer, yet it no where provides that after he has been appointed and qualified, and has accepted the position, his duties shall cease upon the expiration of his

term of office. It has been held by the courts again and again that a statute will not be so construed as to work an inconvenience unless it plainly requires such construction. If the appointment of such engineer ends with his office as surveyor, then a new appointment must be made and a new bond given by the appointee and the successor take up the work where the predecessor left it, which would, in many instances, create confusion and great inconvenience. Hence, as the statute does not provide that the appointment as engineer shall end with his official term as surveyor, there is no reason, in my judgment, why this provision should be read into the statute by interpretation.

There is still another reason that might be urged with considerable force in support of the conclusion reached in this opinion.

Before the amendment of Section 4454 and 4455, R. S. (93 O. L., 65), Section 1181 provided that "when the services of an engineer are required with respect to roads, turnpikes, ditches, etc., the county surveyor shall act as such engineer." Section 4454 provided: "If the commissioners find for the improvement they shall cause to be entered on their journal an order directing the county surveyor, or an engineer to go upon the line," etc. It will be observed, by reading these two sections, that Section 1181, in terms, required that the county surveyor should act as engineer in ditch proceedings, yet the court, in construing these two sections together, held in *Ginn vs. Commissioners*, 11 C. C., 396, that the commissioners might, in their discretion, appoint an engineer in ditch proceedings, other than the county surveyor. On March 25, 1898, Section 4454 was amended so as to read as follows: "If the commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line," etc. And section 4455 was amended so as to read as follows: "The commissioners shall, also, by their order, direct the county surveyor to make and return a schedule of all lots," etc., thus eliminating from these sections the words "or engineer." But on April 22nd, 1898, being the same session at which the amendments above referred to were made, Section 4455 was again amended so as to include the words "or engineer."

Section 4494 provides: "The commissioners shall require each surveyor or engineer appointed by them under the provisions of this chapter, to enter into a good and sufficient bond, covering all the ditches upon which he may be appointed, with surety to be approved by them, conditional for the faithful performance of his duties, in a sum to be fixed by the commissioners; and an action may be brought on such bond by any person aggrieved by a failure of the surveyor or engineer to do his duty in the name of such party, and recovery may be had for his use and benefit; but if the county surveyor shall be appointed by the commissioners, under the provisions of this chapter, he shall be liable upon his official bond for the faithful performance of his duties, and an action may be brought on such bond as aforesaid."

It is readily seen from reading Sections 4455 and 4494, and especially 4494, that it was contemplated by the legislature that the commissioners might appoint somebody other than the county surveyor to act as engineer in such proceedings. If then they still have the power to appoint a person other than the county surveyor, most assuredly the duties of such engineer would not cease upon the expiration of his term as county surveyor. If the commissioners are never to have any discretion, or can never appoint anybody except the county surveyor, why make the appointment at all? Why did not the legislature provide that the county surveyor should, by virtue of his office, perform all these duties without

an appointment by the commissioners. Power to appoint usually implies discretion in the selection of the appointee. If the legislature did not intend to permit the exercise of such discretion on the part of the commissioners it should logically have eliminated all the provisions with reference to the appointment of an engineer, and made it one of the official duties of the county surveyor to act in all such cases. It is apparent, also, that there are good reasons why the legislature should confer discretion upon the commissioners in making such appointments. The county surveyor might, by reason of other pressing business, sickness, or interest in the proceedings be unable to perform the duties required, hence if no discretion were lodged in the commissioners, it might cause embarrassment and delay.

For the reasons above suggested, notwithstanding the amendment of the statute, I am rather inclined to the opinion that the commissioners still have power to make an original appointment as such engineer, and select some person other than the county surveyor,

Yours very truly,

J. M. SHEETS,
Attorney General.

PLACING SAFETY DEVICES UPON STATIONARY BOILERS.

COLUMBUS, OHIO, August 23rd, 1900.

Hon. J. W. Knaub, Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR:—Yours of August 21st at hand and contents noted. Your inquiry requires an answer to the question as to what safety device is necessary to be placed upon stationary boilers for the purpose of sounding the alarm when the water becomes low, in order to comply with the enactment of the last general assembly requiring low water safety alarm columns to be placed upon stationary boilers.

The purpose of the enactment of this law was evidently to require a safety device to be placed upon all stationary steam boilers that would be effectual in sounding the alarm when the water becomes low, in order to reduce the danger of explosion to a minimum. The only theory upon which this law can be upheld is that any device that will subserve the purpose named will satisfy the law. No more could the legislature require the use of any particular device than it could require the use of any particular make of boiler. Hence, the only important question for you to consider is whether the device will subserve the purpose of sounding the alarm. If it does, your duties are at an end. I will say also, that in my opinion, the operators of such boilers have the discretion to purchase any make that, upon being tested, subserves the purpose of sounding the necessary alarm.

Very truly,

J. M. SHEETS,
Attorney General.

ARRESTING AND IMPRISONING A PERSON GUILTY OF VIOLATING AN ORDER OF A LOCAL BOARD OF HEALTH.

COLUMBUS, OHIO, August 24th, 1900.

C. O. Probst, M. D., Secretary State Board of Health, Columbus, Ohio:

DEAR SIR:—Your inquiry addressed to this department is before me as contained in the letter of G. Newland, member of the board of health of Alger, Ohio, relative to the imprisonment of any person found guilty of willfully omitting to obey a lawful order of a local board of health.

In answer thereto, would say, that if the accused person has not been guilty of any such offense before, and the case under consideration is for the first offense, imprisonment cannot be made part of the penalty, and in any event the accused could not be imprisoned unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a second or repeated offense. That seems to be jurisdictional before the right to imprison is permitted. I can see no objection, however, when a person continues to violate such lawful order as may be made by a local board of health, to immediately re-arrest him, because a continued violation at the time subsequent to the first violation constitutes a new offense, and under such second or repeated offense, the accused, if found guilty, may be imprisoned for any time not exceeding ninety days.

The letter of Mr. Newland is returned herewith.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF EXAMINER TO REVOKE LICENSES—CONSTITUTION-
ALITY OF CINCINNATI LAW FOR STATIONARY ENGINEERS.

COLUMBUS, OHIO, August 29th, 1900.

Hon. George M. Collier, Chief Examiner of Stationary Engineers, Columbus, Ohio.

DEAR SIR:—Your favor of the 28th inst. requesting an opinion of me upon various questions suggested therein is before me, and I will take them up in the order presented by you.

Question 1. If an engineer refuses to take out a license after being duly notified and given a reasonable opportunity to do so, do we swear out a warrant for his arrest, or do we place the matter in the hands of the prosecuting attorney of the county in which said engineer resides? In such a case do we proceed against the engineer alone, or do we make his employer or employers also liable?

By section 10 of the act of March 1st, 1900, which prescribes the duties incident to your office there is required of each district examiner appointed by you to notify every person operating a boiler or engine in such districts, not including those exempted from the operation of the law as mentioned in Section 1, to apply for a license under such act, and to give such person a reasonable opportunity to take the examination therefor, and by Section 11 of said act, which is the section that provides a penalty for non-compliance therewith, it is provided that any owner, user, or engineer who after being notified as above set forth, and who violates any of the provisions of such act shall be fined not more than \$100, nor less than \$10. The first requisite in the assessment of a penalty for disobedience or infraction of the law is that the engineer be notified, as required by Section 10. If he has been so notified and refuses or neglects, after a reasonable opportunity, to take the examination and secure the necessary license to carry on his occupation, any one may lodge a complaint against him, by filing an affidavit before a justice of the peace of any township in the county where he resides, or before any police justice, or mayor of a city wherein he may reside. The act is made operative upon owners, users or engineers. But I incline to the belief that those terms would be restricted in their application, as it is a criminal statute and should be strictly construed, and would be limited to the person or persons operating the boiler or engine. It is not compulsory

upon the prosecuting attorney of any county to appear and prosecute complaints under this act before examining magistrates unless he does so merely as an attorney, and employed for that purpose. It would be necessary, therefore, in the enforcement of the law to have the affidavit made by some one familiar with the facts, and if needed, to employ counsel to represent you.

Question 2. Will the district examiner or the chief examiner have the right to go into the engine room of an engineer whom they have found to be guilty of neglect of duty or intoxication to take his license away from him? Will it be necessary to take said engineer's license away from him in order to revoke the same?

The chief examiner, nor any district examiner appointed by you has not the express power granted to him, by statute, to take away a license from any person who has received the same. The revocation of a license can only be done after the proper hearing for the various causes set forth in Section 6 of the act, viz.: "For intoxication or other sufficient cause." It is not necessary to get corporal possession of a license that has been issued by you in order to revoke the same. The revocation of a license is a matter of finding or judgment upon proper hearing had before you or your district examiner, and such revocation does not consist in the corporal destruction of the license, but your finding or judgment, if the accused is found guilty, operates to revoke the power theretofore granted, and disqualifies him to any longer operate as an engineer, until a new license be granted him, or the finding against him be, itself, revoked.

Question 3. If an engineer takes out a license under an old ordinance granting cities and villages the authority to provide, by ordinance, for examination, regulation and licensing of stationary engineers, and said license having been dated January 1st, 1900, and the law under which power to issue such license was given to city and village councils having been repealed, can we compel such engineer to take out a state license before the expiration of said city license?

On the 30th day of January, 1885, the legislature enacted a law authorizing the council of cities and villages to provide by ordinance for the examination, regulation and licensing of stationary engineers and others. (82 O. L., 13). Under this law it is stated the council of Cincinnati passed an ordinance appointing officers to conduct examinations for, and to issue licenses to those who were qualified to receive the same. This act remained in effect from January 30th, 1885, to March 1st, 1900, and I understand, from your letter, that the ordinance of the city council of Cincinnati has not, during that time been repealed, and that city, and possibly others, have continued to license engineers. By the enactment of the law above cited (82 O. L., 13) there was granted to cities and villages, among their enumerated powers as contained in Section 1692, Revised Statutes, the further special power of providing by ordinance for the regulation and licensing of stationary engineers. This power was thus conferred upon such municipalities for the first time. By Section 13 of the act of March 1st, 1900, 94 O. L., pages 33 to 36, the act of January 30th, 1885, was expressly repealed, thereby taking away from cities and villages the power to regulate and license such engineers. Your question relates to the effect the enactment of the law of March 1st, 1900, would have upon licenses issued under the various city ordinances prior to the enactment of the last mentioned law.

Under Section 7 (94 O. L., 35) of the law in question it will be found that the holding of a license by any person issued to him under an ordinance of a municipal corporation of this state, is qualification of such person to receive

a license under the law in question without any further examination, thereby presupposing in the question the fact that the power in municipalities to further issue licenses had ceased and been determined. The law only has a prospective operation. Plainly the various village and city councils would have no power to continue after March 1st, 1900, to pass ordinances under which to examine and license engineers and others, nor would they have power to longer do so under existing ordinances passed pursuant to the law of January 30th, 1885. But the engineers that have thus been qualified by the examination provided by the city or village ordinances prior to March 1st, 1900, have paid the ordinance fee required for such license. Such license constituted their right at the time in such municipalities to carry on their business of engineer, and without it they had no such right, if the ordinance would so provide. Upon this subject the Supreme Court of Ohio have, in a number of cases which are similar in principle, held as follows: "The repealing clause affects nothing but the power to grant licenses in the future after the law became effective. It repealed the authority in the law of 1831 (being a law to regulate the liquor traffic) to grant any more licenses to retail spiritous liquors, but nothing further. There is no language employed expressive of any intention to revoke or annul the unexpired license previously granted under it. The license was a privilege, an acquired right, which during its terms was not dependent on the continuance of the law under which it had been granted. The repeal of the law would simply take away the authority to grant future licenses. It is clear that the unexpired licenses were not expressly repealed or revoked, and it is but fair to presume that if the General Assembly had intended any such thing, such intention would have been expressed and provision made for refunding the money obtained for licenses revoked."

Hearn against the State, 1st O. S., page 20.

In the question before me I find that in the act of March 1st, 1900, there is no language employed from which it may be inferred that it was the intention of the legislature to revoke or annul the unexpired licenses issued by municipal corporations, nor do I think it could be done unless provision was made for the repayment of the money which such person may have paid. "From this principle it would follow that if a dealer who was in business at the time the prohibitory restriction took effect, and who had paid his tax, and the time covered had not expired, should be prosecuted, and the defense that the law, as applied to him, was incapable of execution and therefore void, should be sustained, neither the statute nor the ordinance would be necessarily held invalid, but their operation simply restricted to the class to whom their provisions might legally apply."

State vs. Rousche, 47 O. S., 485.

See also State vs. Frame, 39 O. S., 399.

Cooley's Constitutional Limitations, 6th edition, pages 340 and 341.

Under the authorities above cited I hold that you can not compel an engineer who has received a municipal license before the act of March 1st, 1900, took effect, to take out a new license, but he would be permitted to continue under that license until the time covered thereby had expired, and then be required to submit to an examination, and obtain a license from your department.

Question 4. What bearing, if any, will the law exempting Cincinnati (House Bill No. 949, passed April 14, 1900) have on House Bill 17, being the act of March 1st, 1900? Can one city in the state be exempted in such manner?

After the passage of the act of March 1st, 1900, 94 O. L., 33 to 36, a special law was passed by the same legislature, under date of April 14th,

1900, which is entitled "An act for the protection of life and property in cities of the first grade of the first class." Having, by its subject matter, necessarily reference to the city of Cincinnati. Under Section 1 of that act the mayor of that city is authorized to appoint two examiners to examine and license stationary engineers. Provides for their giving bond and their compensation, not to exceed the sum of \$1,800 each, per annum, payable from the general fund of such city. Section 2 provides that the board of legislation shall provide by ordinance such rules and regulations for the examination and licensing of such engineers as shall be consistent with, and provide for the protection of life and property. Section 3 provides that any and all acts which conflict with this act shall not apply to cities of the first grade of the first class. Section 4 says that the act shall be in force from and after its passage.

It is plain to be seen that Cincinnati being the only city of the first grade of the first class at the time that this special law was enacted, sought to retain by such legislation the authority vested in them by the act of January 30th, 1885, but which act had been repealed by that of March 1st, 1900.

That of March 1st, 1900, under which your department operates, is in my view a law of a general nature, applying to all cities and counties alike. It provides a general method for determining the qualifications of engineers, and establishes the head of such department as a state officer.

I am well satisfied that such law is a general law, and should have and does have uniform operation throughout the state. But the act of April 14th, 1900, applying to cities of the first grade of the first class, while it deals with a subject of a general nature, yet it attempts to provide that it shall only have a local application, viz., to the city of Cincinnati, and further attempts to qualify, limit and restrict the operation of the general law first mentioned.

Article 2 of Section 6 of the Constitution of 1851 provides: "All laws of a general nature shall have a uniform operation throughout the state." Is the special act in question violative of this provision? In the case of Kelly against the State, 6 O. S., quoting from page 272, the Supreme Court of this state said: "Without undertaking to discriminate nicely or define with precision, it may be said that the character of a law as general or local depends on the character of its subject matter. If that be of a general nature, existing throughout the state, in every county, a subject matter in which all the citizens have a common interest.....then the laws which relate to and regulate it are laws of a general nature, and by virtue of the prohibition referred to, must have a uniform operation throughout the state." Such has been the approved definition of a law of a general nature. There can be no question raised but what the act of April 14th, 1900, has but a special application, and not a uniform operation throughout the state. In the case of Falk ex parte, 42 O. S., quoting from page 642, the Supreme Court again said: "Perhaps it is true that such acts (referring to a criminal act made especially applicable to Cincinnati) may be a greater evil in large cities, possibly a greater evil in Cincinnati than in any other part of the state, but the same may be truthfully said with respect to many, perhaps a majority of criminal offenses. Take the crime of arson. It is a grievous evil everywhere, and under some circumstances, a most atrocious crime. It is an evil alike in town and country, but a far greater evil in a large compact city like Cincinnati than in a small village or hamlet or a sparse rural district. But does this reason, or any other with which it may be supplemented afford any ground, in view of our constitution, for punishing arson under local law?" Many illustrations might be given, but it is sufficient to say, that if we must assume merely because Section 1924 was enacted, that the legislature had information showing that the necessity for such legislation with reference to Cincinnati was urgent, and therefore must be sustained, we would be compelled,

on the same principle, to uphold local legislation on any and every subject however general the nature and subject matter of such legislation might be. We are not willing nor are we permitted to adopt any such rule of construction; and indeed to do so would be in effect to unsay what we have deliberately said as to the mandatory character of the constitutional provision we are considering."

This is made the more applicable when we remember that the act of March 1st, 1900, has a penal section connected therewith. It is criminal in character, and to attempt any such special legislation to limit the application of that act to all other counties except Hamilton county would be violative of the principles of the constitution, which we here invoke. Without going at large into the citation of authorities upon this subject it might be pertinent to here cite in brief those which directly sustain the proposition contended for.

The State ex rel. vs. Ellet, 47 O. S., 90.

Hixon vs. Burson, 54 O. S., 470.

The State ex rel. vs. Davis, 55 O. S., 15.

The State vs. Gardner, 58 O. S., 599.

Silberman et al. vs. Hay, 59 O. S., 586.

I therefore hold that the act of April 14th, 1900, can have no effect at all in qualifying or limiting the application of the act of March 1st, 1900, under which your department operates, nor is it of any force or effect upon which to base an ordinance of any municipality for regulating and licensing stationary engineers, but that by the act of March 1st, 1900, all of that subject matter is delegated to your office and under the rules and regulations as defined by the act in question.

Therefore, as incidental to the decision of the last question suggested, I would say that the special act above referred to is, in my opinion, unconstitutional, and of no effect.

Yours very truly,

J. M. SHEETS,
Attorney General.

EXTENSION OF TIME TO CITY BOARDS OF EQUALIZATION.

COLUMBUS, OHIO, August 29, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—Your communication requires an answer to the following questions:

First: Can the time for the completion of the equalization of real property by decennial city and county boards of equalization be legally extended beyond the time required by statute for them to complete their work?

Second: If these boards continue with their labors in equalization of real property after the time named in the statute for them to close their session will have expired, will their action be legal?

Third: Is there any provision in the statute for the payment of the decennial boards of equalization of Cincinnati and Cleveland?

I can best answer the first two questions together. There is no provision for legally extending the time for the completion of the equalization of real property. But it does not necessarily follow that whatever is done by the decennial boards of equalization after the expiration of the time for them to complete their work will be illegal. If the statute limiting the time within which these boards shall complete their work is directory, then work done after the expiration of this time will be legal and binding upon the tax-payer. If, however, this statute should be construed as mandatory, then, of course, whatever is done thereafter would be void.

To determine whether this statute is directory or mandatory the purpose of its enactment must be considered. In my opinion the purpose of enacting the statute limiting the time for these boards to complete their labors was to require system, and dispatch in the performance of their duties.

The decennial state board of equalization is required to meet on the first Tuesday of December, and, in order to proceed with its labors, the returns from the county and city boards must be before it. The Auditor of State should have some time before the meeting of the state board of equalization in order to tabulate returns from the city and county boards. These considerations evidently influenced the legislature in limiting the time within which the city and county boards should complete their work. This provision was not enacted for the benefit of the taxpayer. He is not injured if the time limit is not strictly followed, hence, should not be heard to complain.

Judge Field, in speaking for the court upon this subject, in *French against Edwards*, 13 Wallace, 506, 511, says: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisition ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory."

In *Cooley on taxation*, page 215, the author, in discussing directory and mandatory provisions of the revenue law says: "No one should be at liberty to plant himself upon the nonfeasance or misfeasance of officers, under the revenue laws, which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty."

Also on page 219 the same author, in giving illustrations of directory provisions, says, "So in general the fixing of an exact time for the doing of an act is only directory, where it is not fixed for the purpose of giving the party a hearing, or for any other purpose important to him."

From the foregoing observations I am clearly of the opinion that city and county decennial boards of equalization may continue in session and in the performance of their duties after the statutory time for them to complete their work, without in any manner invalidating their action.

It does not necessarily follow from this conclusion, however, that the members will be entitled to compensation for their services beyond the time limit, as it might be presumed the legislature was of the opinion that the time given was sufficient for them to complete their labors, and any services rendered thereafter should be performed gratuitously. This is, at least, a mooted question, and I make the suggestions not with a view to give an opinion upon the subject, but in order that the city and county boards may not be misled by this opinion.

As to the third question there seems to have been an oversight in the legislature when it enacted the provision granting compensation to decennial boards of equalization. It makes complete provision for all boards "except the members of the decennial city board of a city of the first or second grade of the first class." In the same enactment, 94 O. L., 248, provision is made for clerks of these two boards of equalization, but nothing is said about compensation to the members. I have scanned the statutes as thoroughly as I have been able with a view to find general provisions for compensation to decennial boards of equalization, but am unable to

find any. It is entirely clear that the author of what is known as the Hendley Bill did not intend that the expectation of compensation on the part of these two boards should "turn to Dead sea ashes upon their lips," but such is the result.

I can not condemn too severely the very loose manner in which so many important bills have been drawn. This carelessness has resulted in no end of confusion.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF LESSEE TO REMOVE PERSONAL PROPERTY.

COLUMBUS, OHIO, September 5th, 1900.

Hon. Charles E. Perkins, Chief Engineer Board of Public Works, Columbus, Ohio.

DEAR SIR:—Your communication of September 5th at hand. In this communication you ask an opinion from this office on the following questions:

1st. What right, if any, have parties operating under authority of gas and oil leases of the form in use by this Department prior to the act of the last General Assembly in relation to oil leases, to remove all of their personal property, such as derricks, pipe lines, drive pipes, casing, tubing, and other material used in and about the construction and operation of the wells now located on their respective premises?

2nd: What right, ownership, or title, if any, have the several parties to the oil produced in and around the Grand Reservoir on property leased by the state under the form of lease mentioned above, that have not yet been judicially determined by the Court of Common Pleas of Auglaize county, Ohio?

And of these in their order:

The ownership of personal property implies the right to use and control the same in any manner the owner may deem best. This right necessarily exists unless the owner has, in some way, parted with his right of control over his property. The answer to your first question will depend, therefore, on whether or not the lessees of the leases made by the State have parted with their right to remove their property from the premises leased. This would present a separate question or fact as to each lease. Not having all the leases before me, it would, obviously, be impossible for me to answer the question positively as to each lease. I have, however, a printed form of lease made between the State of Ohio and The Manhattan Oil Company, March 12th, 1895. If this is the form of lease referred to in your question, I find no provision in it that would deprive the owner of the personal property mentioned in your question, of the right to remove the same, upon the expiration of the term of the lease. There is a provision in this printed form requiring the lessee to operate the wells drilled, if they shall prove producers, continuously until they are no longer productive of any profit. This, of course, would prevent the lessee from removing such property as was necessary for the operation of any well, so long as such well could be operated with profit. But this provision, I take it, could not exist beyond the terms of the lease, and the lease being for the term of ten years the lessee could not be required to operate the well beyond that period.

I am of the opinion, therefore, that the owner of the personal property mentioned in your question, would have the right, under the printed form of lease above referred to, to remove any and all such personal property, upon the expiration of the lease, unless there should be written in any lease a provision restricting such right.

In answer to your second question I would say that it is the opinion of this office that prior to the amendment of the statute by the last General Assembly, the

Board of Public Works, and Canal Commission, and Chief Engineer of the Board of Public Works had no authority or right to lease the lands of the state for oil. The officers of the state being without authority to lease the lands of the state for oil, the lessees under such leases acquired no right or title to the oil contained in the land leased, but the title to the same remained in the state of Ohio, and if the lessees have removed the oil and converted it to their own use they would be liable to the State of Ohio for the value of the oil so converted. Proceeding upon this theory, this office instituted proceedings against The Manhattan Oil Company to recover the value of the oil taken by said Company under the lease from the officers of the state. While this suit has not been fully determined, yet it is now conceded by the attorneys for The Manhattan Oil Company that the contention of this office is correct, and that the State of Ohio is the owner of all the oil produced by said company from the lands of the state. The only limitation upon the ownership of the state to the oil produced from the state lands under leases executed prior to the amendment of the statute by the last General Assembly, is found in the nine cases that were instituted in the Court of Common Pleas of Auglaize county, and in which the decision was adverse to the claim of the state. In these cases the question of ownership of the oil is *res adjudicata*, and so long as the lessees are operating under the terms of their lease, their right or title to the oil produced can not again be inquired into. I perceive that under this condition of affairs some of the parties now operating under leases procured prior to the amendment of the statute may be indebted to the State of Ohio for the oil produced from such leases, and that if such parties are permitted to remove their machinery and personal property from said leases that the state might be left without remedy. This fact, however, does not, in any way affect the legal principles involved, and so long as the state does not, by judicial proceedings restrain the parties operating said leases from removing their property therefrom, I am of the opinion they will have the undoubted right to remove the same as above indicated.

Yours very truly,

J. E. Todd,
Assistant Attorney General.

PAROLE OF PRISONERS.

COLUMBUS, OHIO, September 13, 1900.

Board of Managers of the Ohio Penitentiary.

GENTLEMEN:—Yours of September 13th at hand and contents noted. The question with respect to which you ask an opinion is whether a prisoner confined in the Ohio Penitentiary, who has been convicted of murder in the second degree and whose sentence has been commuted to that of man-slaughter by the Governor, is eligible to apply to your board for parole under the provisions of Section 7388-9, et seq., Revised Statutes. Section 7388-9 provides, that,

“Said Board of Managers shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned under a sentence other than for murder in the first or second degree, who may have served a minimum term provided by law for the crime for which he was convicted, * * * may be allowed to go upon parole outside of the buildings and enclosures, etc.”

It will be observed that under the statement of facts contained in your letter the prisoner is not now imprisoned under “sentence * * * for murder * * * in the second degree,” for that sentence has been commuted to that of man-slaughter, and he is now serving under the sentence for manslaughter.

The action of the Governor in commuting the sentence for murder in the second degree to that of man-slaughter, was in law a pardon of the higher offense. This pardon having been granted the prisoner stands as though he had never been convicted of murder in the second degree, but had been convicted of the crime of man-slaughter only. In *Knapp vs. Thomas*, 39 O. S., 381, Judge Okey in speaking for the court upon the effect of a pardon, says:

"It is, in effect, a reversal of judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction. Though sometimes called an act of grace and mercy, a pardon, where properly granted, is also an act of justice, supported by a wise public policy."

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender." *Ex parte, Garland*, 4 Wall., 380.

"In contemplation of law it so far blots out the offense, that afterward it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and new capacity, and rehabilitates him to that extent in his former position." *Knote vs. U. S.*, 95 U. S., 149.

"It obliterates in legal contemplation the offense itself." *Carlisle vs. U. S.*, 16 Wall., 151.

"It is to make the offender a new man." 4 Blackstone, *Comm.*, 402.

Under the habitual criminal act which provides that "every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, * * * shall be convicted, sentenced and imprisoned in the Ohio Penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal," it has been held that a pardon extinguishes a conviction so that it can not be considered under the provisions of this act. 37, *W. L. B.*; 382.

It is evident to my mind from the foregoing that you cannot look upon the prisoner who is now seeking parole except as a person charged with the crime of man-slaughter, and as such, he comes within the provisions of the act relating to the parole of prisoners.

Very truly yours,

J. M. SHEETS,

Attorney General.

ALLOWING STAMPS, STATIONERY, ETC., FOR THE DIFFERENT
COUNTY OFFICES.

COLUMBUS, OHIO, September 14, 1900.

C. A. Reid, Prosecuting Attorney, Washington C. H., Ohio.

DEAR SIR:—Yours of September 12th at hand and contents noted. Your inquiry goes to the question:

First: As to whether the several officers of the county may procure books, stationery and other supplies necessary for use in their respective offices and the commissioners order payment therefor out of the county treasury.

Second: As to whether the treasurer is entitled to payment for stationery and stamps used in writing to delinquents and urging the payment of their taxes due the county or state.

By the provision of Section 1284, R. S., the clerk of courts is authorized to procure books, blanks, stationery, "and all things necessary to the prompt discharge of his duty" and the county commissioners are required to allow the same upon his certificate. I am unable, however, to find any provision of statute authorizing the other county officers to do likewise, but on the contrary, the statute seems to contemplate that the commissioners shall purchase these necessary supplies for the respective offices.

As to whether stamps are a proper item to be furnished the respective officers, I am of the opinion that they are a part of the incidental expenses necessary to the proper discharge of the duties of the officers, and should be furnished and paid for out of the county treasury. It has been the custom so far as I am able to learn for each officer to purchase stamps for his office. Yet, if the law is strictly followed, I presume the commissioners should buy the stamps and furnish them to the different offices.

The treasurer in my opinion is clearly entitled to be allowed for stationery and stamps in writing to delinquent tax payers and endeavoring to enforce payment of taxes. The law requires him to make diligent effort to collect all taxes due, and if he is able to make collections in whole or in part by correspondence, I see no reason why he should not be allowed for stationery and stamps thus used.

Very truly,

J. M. SHEETS,
Attorney General.

ORGANIZATION OF SPECIAL SCHOOL DISTRICTS.

COLUMBUS, OHIO, September 19, 1900.

Hon. Robert H. Day, Canton, Ohio.

DEAR SIR:—Your letter of September 17, requesting an opinion in the matter of The New Baltimore Special School District, is at hand. We have heretofore received two similar requests presumably representing both sides of this controversy, but have declined to answer the same. However, upon your request we will give our views of the matter as fully as our press of other business will permit.

It appears from the special Act of April 14, 1900 (94 O. L., 638), that the General Assembly established a special school district out of territory taken partly from Stark and partly from Portage County, and including, with other territory, the territory formerly known and organized as the New Baltimore Special School District. I think it may be considered settled that the legislature may constitutionally do this, although the Supreme Court has been upon both sides of the question. It is specially provided in the act establishing this district that the same "shall be governed by the laws as now are or may hereafter be in force relating to special school districts except as hereinafter provided." Also that the organization of all districts existing within the territory embraced in the act are hereby abandoned and that the act shall take effect and be in force from and after its passage. The act also contains some provisions in relation to the abandonment of this special district which it is not necessary to notice.

It is apparent that some confusion exists in the minds of some of our correspondents in relation to the nature of this special district from the fact that they refer to it as a "special sub-district." Section 3885, R. S., enumerates the various kinds or classes of school districts in Ohio, to-wit:

"City districts of the first grade of the first class."

"City districts of the second grade of the first class."

"City districts of the third grade of the first class."

"City districts of the first class."

"Village districts."

"Special districts."

"Township districts."

It is thus seen that special districts are a distinct class of districts. Sub-districts are merely sub-divisions of township districts, while such a thing as a special sub-district does not exist. Each of these different classes of districts have some special provision of statute applicable to such districts while there are other and general provisions applicable to all districts. The special provisions relating to special districts are found in Section 3923 et seq., R. S. As soon as a special district comes into existence, whether created by act of legislature or in any other manner, it necessarily becomes subject to all the provisions of statute applicable to special districts. In the case under consideration the act creating the special school district provides that this district shall be subject to such provisions, but this was unnecessary. Neither was it necessary that the act should declare that the other districts included in this territory should be abandoned. This would follow as a necessary result from the incorporation of the territory into a new district. The old organization must give way: the dividing lines must be obliterated before the new district could have an existence. It follows then that it was unnecessary for the legislature to make provision in this act for the election of a school board for this district, provision having already been made by the statutes before referred to for the election of a board for special districts. The old organization having been abolished both by special enactment and by necessary operation of law, it is impossible that the old board of education of The New Baltimore Special School District should continue to have any power. It has been simply legislated out of existence. The old district has been abandoned and the board of education with it. A new district ~~has~~ been created and a new board of education provided for. "Old things have passed away and all things have become new."

I assume in this opinion that the new board of education in this district was elected in conformity with the provisions of Section 3924, R. S.

Those who have written us on this subject have referred to the act of April 16, 1900 (94 O. L., 317), as having some bearing upon this subject, but I am unable to perceive that it has anything to do with it. This is an act for the centralization of township schools and applies only to township districts. As the special district under consideration is not a township district nor in any way connected with a township district, the act has no application.

As to the fourth section of the act creating this special district and which authorizes the board of education when in its opinion it will be for the best interests of the schools, to provide for the conveyance of pupils to and from the school, the language is merely permissive, vesting the discretion with the board of education, and I know of no rule of construction which could be invoked to make it mandatory.

As to your second question in relation to the increase of compensation of township trustees in certain townships of Stark County as provided by act of the last General Assembly, permit me to say that as neither the prosecuting attorney of the county nor the Attorney General is the legal adviser of township trustees, I would suggest that if these trustees desire to know the effect of this statute upon their compensation, they should employ some good attorney and pay him for investigating the question for them.

I am, very truly yours,

J. E. TODD,
Assistant Attorney General.

EMPLOYING TAX INQUISITOR BY RETIRING OFFICERS.

COLUMBUS, OHIO, September 20, 1900.

Thomas J. Trippy, Prosecuting Attorney, Van Wert, Ohio.

DEAR SIR:—Yours of September 17 at hand and contents noted. The question submitted by you is whether two of the county commissioners and county auditor can, under the provisions of Section 1443—1, R. S., legally employ a tax inquisitor whose duties are not to commence until after the expiration of the term of one of the commissioners who votes for his employment, the other commissioner and county treasurer having voted against such employment?

In other words, can a retiring officer forestall the action of his successor and employ persons whose terms of service will not commence until after he retires from office? If a retiring officer may forestall the action of his successor and make contracts which properly belong to the successor to make, he may reach out and thus tie the hands of his successor, — mediate as well as immediate. Startling consequences would flow from such a holding, and it cannot be presumed that one officer may voluntarily assume and perform the duties which properly belong to his successor.

"Sufficient unto the day is the evil thereof." It is enough for one officer to see that his own duties are properly performed; not to reach out and undertake to perform the duties of his successor. He is not responsible for the conduct of his successor, hence, should not be permitted to perform his duties.

We are not, however, left without adjudication upon the question at issue.

Appointments by outgoing officers.—"But it has been held that where an office is to be filled by appointment by the governor, with the advice and consent of the senate, the governor and senate cannot forestall their successors by appointing a person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the governor and senators. And that an outgoing board of freeholders of a county cannot lawfully appoint a person to an office which will not become vacant during their official terms."

Throop on Public Officers, Section 92.

For the reasons above suggested, I am of the opinion that the action of the two commissioners and auditor in undertaking to employ a tax inquisitor whose term was not to commence until after the expiration of the term of one of the commissioners participating in the employment, is wholly void.

Very truly,

J. M. SHEETS,
Attorney General.

RELATION OF NORMAL SCHOOLS TO PUBLIC SCHOOLS.

COLUMBUS, OHIO, September 25th, 1900.

W. H. Fuller, Prosecuting Attorney, Wauseon, Ohio.

DEAR SIR:—Yours of September 22nd at hand and contents noted. The question for solution is whether the Fayette Normal College, which receives an annual sum of \$1,800 from the school board of Fayette special district for educating the children of the district above the grade of a grammar school is, within the meaning of the school laws of Ohio, one of the public schools of the state, which Boxwell graduates may attend, the tuition for which attendance is to be paid by the township school district from which the pupil is accredited. Clearly it is not.

The public schools of the state are those which are supported by taxation received directly from the treasury, as part of the public school funds of the state, the directors of which are elected by the people, and the schools managed according to the provisions of the statutes relating to common schools. When this test is applied to the Fayette Normal College it fails to come within the category. As I gather from your letter, this college gets none of the public funds except by virtue of a private contract between it and the board of education of Fayette special school district. The trustees of the college are not elected by the electors, nor is the college organized, controlled or managed under and by virtue of the provisions of the statutes relating to common schools.

Yours very truly,

J. M. SHEETS,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS INVESTING THEIR FUNDS IN BONDS, STOCKS, ETC.

COLUMBUS, OHIO, Oct. 10th, 1900.

Hon. Roscoe J. Mauck, Deputy Inspector of Building and Loan Associations, Columbus, Ohio.

DEAR SIR:—In your communication of October 10th, 1900, you request from this office an opinion as to whether certain clauses in Section 3, of the Building and Loan act of May 1st, 1891, grant to a building and loan association power to invest its funds other than the fund reserved for contingent losses, in bonds or stocks; also whether there are any other provisions of law authorizing such investments.

The clauses referred to in Section 3 read as follows:—

(a) Such corporation shall have power to acquire, hold encumber and convey such real estate and personal property as may be necessary for the transaction of its business, or necessary to enforce or protect its securities."

(b) "Such corporation shall have all such other powers as are necessary and proper to enable such corporation to carry out the purpose of its organization."

Building and loan associations are organized and conducted under the general laws relating to corporations, except as otherwise provided in the act above referred to. Section 1 of this act declares that "a corporation organized for the purpose of raising money to be loaned among its members shall be known in this act as a building and loan association." Section 3 of the act above referred to contains the specific enumerations of the powers of such corporations, among which are the two clauses above quoted. A careful reading of the entire section defining the powers of such associations in Ohio discloses nothing inconsistent with the purpose for which it is declared in Section 1 such associations may be formed. In this respect the statutes of Ohio simply follow the commonly accepted notions of the object or purpose of such associations.

"The primary design of building associations is, to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads—to increase the proportion of property holders among that class of the population whose slow and laborious earnings are, by reason of their pettiness, most fugitive, and generally spent before they reach a sum of sufficient magnitude to back a desire for those guarantees of good citizenship which the policy of our

law has always found in landed property." *Endlich on Building and Loan Associations*, Section 91.

"The defendant is a building and loan association. Such a body exists for the equal benefit of all its members, who are presumed to be persons whose earnings are small, and who seek to use small weekly savings in procuring suitable homesteads. Every member is presumed to become, at some time, a borrower to the extent of his interest. Building associations are not intended to enable money lenders to obtain extraordinary interest, but they are intended to help in securing homes with the aid of small incomes. They may become oppressive, and they may be conducted so as to bring hope and secure comfortable homes." 43 O. S., 373.

It is well established, both upon principle and authority, that the first use which a building and loan association must make of its money, is to supply the needs or demands of those of its members who desire to borrow, and it certainly is beyond question that so long as the members stand ready to borrow the money of the association, giving proper security therefor, the association has no right to make use of the money for any other investment.

A case might arise, however, in which an association would have money which could not be loaned among its members, and the question would then be presented whether this money should be permitted to lie idle in the treasury of the association or should be invested in interest-bearing securities or otherwise, so as to produce some profit for the association. It might be proper to remark in this connection that the power given to such associations to receive money on deposit and pay interest therefor, is specifically limited to the demands made on it by its borrowing members or depositors; i. e., such associations have no right to accumulate a fund by receiving deposits in excess of the sum needed to supply its members who desire loans. Where an association, however, has funds derived from contributions of its members, which it is unable to loan among its members, the question as to the right of the association to invest such funds in bonds, stock or other securities or forms of property, must depend entirely upon the powers granted to such associations. In so far as the clauses above quoted from Section 3 of the building association act are concerned, it is believed that they confer no powers which such associations would not have were these clauses eliminated from the statute. In other words, they merely contain a specific grant of powers which otherwise would be implied. Every corporation has "such powers as are necessary and proper to enable such corporation to carry out the purpose of its organization." And among such necessary powers would be the power "to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of its business or necessary to enforce or protect its securities." These clauses, therefore, add nothing to the powers granted such corporations. Such necessary or implied powers, however, must be exercised in connection with the purpose for which such association is incorporated, and this, as before stated, is to raise a fund to be loaned among its members. The Supreme Court of Ohio, in considering the building and loan act of May 1st, 1868, held that such associations were not authorized to use their funds in loaning the same to and purchasing and discounting notes from persons other than its members or depositors upon any terms. (29 O. S., p. 92.)

In considering this question, Gilmore, J., said:—

"The first section of the law declares the purpose of such associations incorporated under it to be "raising money to be loaned among its members and depositors of such corporation, for use in buying lots or houses, or in building or re-

pairing houses, or other purposes." The declared purposes here are plain and unmistakable. * * * There is no countenance to be given to the idea that associations incorporated under the act above referred to can be used by capitalists as instrumentalities for obtaining more than the legal rate of interest on their money by depositing it with the association, and having it used in modes foreign to the declared purposes of their organization."

In the case of the State of Ohio ex rel. vs. Oberlin Building and Loan Association, 35 O. S., 258, Okey, J., uses this language:—

"That the association has abused its corporate powers in several particulars admits of no doubt. It has refused to loan its funds to its members, and it has established such rules and regulations, and so conducted its business by dividing its funds and otherwise, as to prevent the loan of its funds to a member, under the system of competitive bidding contemplated in the statute, and provided for in the by-laws of the company. It has, indeed, loaned its funds, in many instances, to persons who were not members of the association. The illegality of such a course is clearly stated in State ex rel. vs. Greenville Building and Saving Association, 29 O. S., 92."

I find no provision of statute authorizing the use of the money of a building and loan association for any other purpose except in making loans to its members, and am of the opinion therefore, that the use of the money for the purposes you suggest, i. e., to purchase bonds, stocks, etc., would be clearly illegal, not being within the prescribed powers of building and loan associations nor included in the implied powers of such corporations. Such a use of the funds of the company would certainly have no connection with the purpose for which such associations are organized and would be even a greater abuse of corporate authority than to lend money to persons who are not members of the association, which, as shown in the opinions of the Supreme Court above quoted, is not authorized.

You further ask whether Section 4 of the Building and Loan act authorizes one building and loan association to deposit its funds in another such association. Section 4 prescribes that the board of directors shall designate a bank or banks in which the treasurer shall deposit all funds in the name of such corporation. The language appears to be unambiguous. Certainly a building and loan association is not a bank, nor is it authorized to exercise banking powers. The association making such a deposit and the association receiving such a deposit would both be guilty of an infraction of the law. This is especially clear when the further provisions of Section 4 are considered, viz., that such funds can only be withdrawn from such depository by check signed by the president and financial secretary or such other officers as the board of directors may designate, etc.

Very truly,

J. E. TODD,

Assistant Attorney General.

EXEMPTION CERTAIN PERSON FROM JURY SERVICE AND WORK
ON PUBLIC ROADS.

COLUMBUS, OHIO, Oct. 12th, 1900.

Hon. George R. Gyger, Adjutant General of Ohio, Columbus Ohio.

DEAR SIR:—Your letter of October 11th, requests of this office an opinion as to the construction to be given Sec. 5189-1, R. S. of Ohio as amended April 25th, 1898, and Sec. 3055, R. S. These statutes both relate to exemptions from jury service. Sec. 5189-1 exempts from such service active members of all military companies and batteries, together with members of fire engine companies, hook and ladder companies, etc. Prior to the amendment in 1898 this section exempted both contributing and active members of all military companies. The change made by the amendment was simply omitting the word "contributing," and confining the operation of this section in so far as military organizations are concerned to active members of such companies. Sec. 3055 however, provides for the filing of a certified list of officers, enlisted men and contributing members of military companies with the clerk of the court of the county in which such organization is located and further provides "That all such officers, enlisted men and contributing men shall, for the ensuing year or until discharged, be exempt from labor on public highways and service as jurors." This language is plain and unambiguous, and standing alone clearly exempts contributing members as well as active members of military organizations from jury service and labor on public highways.

I am unable to see that there is any connection between this section and Sec. 5189-1, which would in any way limit, or repeal the provisions of the section just quoted. Section 5189-1 exempts certain persons from jury service while Section 3055 exempts certain other persons from jury service. There is no inconsistency between the sections, so that all classes of persons named in either section must be held to be exempt from such service as provided in the section in which they are named.

Very truly,

J. E. TODD,
Ass't Attorney General

BLASTING COAL IN MINES PROMISCUOUSLY.

COLUMBUS, OHIO, October 18th, 1900.

Hon. E. G. Biddison, Columbus, Ohio.

DEAR SIR:—Yours of October 17th at hand and contents noted. The question propounded for solution is, whether under the provisions of Sec. 6871 of the Revised Statutes, and Sections 297-8-9, 300-1-2-3, and 5, you have authority to regulate the time for blasting coal in the mines.

Believing that such a regulation would be very desirable I have examined, with considerable diligence, the Statutes in question, but am sorry to say I am unable to discover the authority in these provisions.

Section 6871 provides that "whoever knowingly violates any of the provisions of Sections 297-8-9, 300-1-2-3, and 5, or does any act whereby the life or health of persons, or of the security of any mine or machinery are endangered, or any miner or other person, employed in any mine governed by the statutes," etc., "shall be fined not less than \$50, or imprisoned in the county jail not more than thirty days, or both."

It might be claimed, with some show of reason, that the promiscuous blasting throughout the entire day would endanger the life or health of the miners employed in the mines; consequently would be a violation of the provisions of

this section. But it nowhere provides that you shall take this matter up and regulate the time when the blast shall be set. Hence, an order from you upon that subject would be beyond your power, and you would have no means of enforcing it. If promiscuous blasting throughout the day is a violation of this section it becomes the duty of the prosecuting attorney of the proper county to enforce its provisions by criminal proceeding.

Yours very truly,

J. M. SHEETS,
Attorney General.

POWER TO ISSUE CERTIFICATES TO CERTAIN PERSONS.

COLUMBUS, OHIO, October 19th, 1900.

Ohio State Board of Medical Registration and Examination, Columbus, Ohio.

GENTLEMEN:—Your communication of October 9th, came duly at hand. The question suggested for solution is whether or not, under the provisions of the medical bill as passed at the last session of the Legislature, you are empowered to issue certificates, authorizing all persons who came within the provisions of the act of February 27th, 1896, to practice medicine, although they did not file their diplomas on or before the first day of July, 1900. The evident purpose of the act passed April 14th, 1900, was to exempt from examination all persons who had a right under the provisions of the act of 1896 to file their diplomas for registration, and thus be empowered to practice medicine, and, in construing those statutes, that purpose must be kept in view. It was not the design of the Legislature to cast an additional burden upon this class of persons by compelling them to take an examination. Hence, the limit of July 1st, 1900, is, in my opinion, directory and not mandatory, that is, your board may permit a person to register even after July 1st. The spirit of this act would be, in no manner, violated by such a construction, and the spirit of an act is always to be looked to in construing its provisions. Statutes which designate time within which a thing shall be done may be mandatory, or merely directory. They are almost uniformly held by the courts to be directory, if the real purpose of the statute may be carried out although not done within the time named, and the rights of no private individual are thereby jeopardized.

Judge Cooley, in his work on Constitutional Limitations, in discussing what provisions of the Statute are directory and what mandatory, says:

“Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.”

It will be observed by reading the statute in question that there are no negative words in the statute indicating the purpose of the Legislature to prohibit any person from registering after July 1st, 1900, provided he was qualified to do so before.

Yours very truly,

J. M. SHEETS,
Attorney General

STATIONERY ENGINEERS LICENSED WHO OPERATE LOW
PRESSURE BOILERS.

COLUMBUS, OHIO, October 22nd, 1900.

Hon. G. M. Collier, Columbus, Ohio.

DEAR SIR:—Yours of even date received informing me that there is an impression throughout portions of the state to the effect that I have rendered an opinion that persons operating low pressure steam boilers for the purpose of heating buildings do not come within the act requiring persons operating boilers of more than 35 horse-power to be licensed so to do; and that to correct such impression you desire from me an opinion as to whether or not this act does include such persons.

Section 1 of the act in question provides:

"That it shall be unlawful for any person to operate a steam boiler or engine in the state of Ohio, of more than thirty-five horse power, except boilers and engines under the jurisdiction of the United States, and locomotive boilers and engines, without having been duly licensed so to do as herein provided. And it shall be unlawful for any owner or user of any steam boiler or engine other than those excepted, to operate or cause to be operated, such steam boiler or engine without a duly licensed engineer in charge."

There is no other section in this act which in any manner limits the provisions of the section above quoted. Hence, it is clear that it was the purpose of the Legislature to require all persons operating steam boilers whether of low or high pressure, except thirty-five horse power boilers and under, and engines under the jurisdiction of the United States, and locomotive boilers and engines to be licensed so to do.

Yours truly,

J. M. SHEETS,
Attorney General.

MAXIMUM SCHOOL LEVY—RIGHT OF CANDIDATE TO BE PRESENT
AT COUNTING OF BALLOTS.

COLUMBUS, OHIO, Oct. 31st, 1900.

J. E. Powell, New Lexington, Ohio.

DEAR SIR:—Your letter of October 31st at hand and contents noted. You seek an opinion from this office as to whether the maximum school levy permitted by the statutes of Ohio is 8 or 10 mills. The last legislature, you will observe, passed two conflicting measures upon the subject. The first act, passed March 22nd, 1900, made the maximum levy for village and special school districts 10 mills. The one passed April 16th, 1900, makes the maximum levy for these districts 8 mills. The latter act being the subsequent act, as a matter of course prevails.

One of the clerks of the commission of schools came to see me upon the subject and said it was desirable that 10 mills be levied in many instances. I stated to him that if that was the case, the less said about the subsequent act the better, as, if I were compelled to render an opinion upon the subject, I would necessarily have to say that the subsequent act repeals by implication the former.

Your second inquiry is as to whether a candidate may, under the provisions of Section 2938 of the Revised Statutes, either be present at the counting of

votes himself or have three of his friends present, or whether, under the provisions of Section 2966-38 (Section 23 of the election laws), he and his friends must be excluded. These two sections you will observe are conflicting as Section 2966-38 expressly provides that an inspector designated by the county executive committee may be present at the counting of the votes, but, "no other person except the election officers shall be admitted to said polling place before or after the counting begins." Section 2938 was enacted April 15th, 1889, but Section 2966-38 was enacted April 18th, 1892, which, being the last enactment repeals by implication the provisions of Section 2938. Hence, it is my opinion that neither the candidate nor three of his friends are entitled to be present at the counting of ballots.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF CHIEF GAME WARDEN TO ACT AS SECRETARY OF THE
BOARD OF FISH AND GAME COMMISSIONERS.

COLUMBUS, OHIO, November 5th, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:—You request of this office an opinion as to whether the Chief Game Warden may act as secretary of the Board of Commissioners of Fish and Game, and receive for his services as such secretary a salary in addition to the maximum salary allowed by law for his services as Chief Game Warden.

Some time ago I received a letter from Mr. Buroker, one of the members of the Fish and Game Commission, asking the following questions:

1st. Is the Board of Commissioners of Fish and Game allowed a secretary at a reasonable salary?

2nd. May a member of the Board act as such secretary and receive such salary?

3rd. Can the Chief Warden act as such secretary and receive such salary over and above the maximum salary provided for such warden?

This letter came at a time when the Attorney General was absent and I was very busy with other matters, and perhaps it did not receive that full consideration which might have been given to it under other circumstances. My answers to these questions were, in substance, as follows:

1st. That the Board might employ a Secretary at a reasonable salary.

2nd. That a member of the Board could not act as such secretary, and receive a salary.

3rd. That the salary allowed the Chief Warden was to compensate him for his entire time, and the Board would not be authorized to make him any additional compensation for his services as secretary.

Upon fuller consideration, I am convinced that the answer to the last question was erroneous. At the time I answered Mr. Buroker's letter, as I now remember, I did not have the act of April 14, 1900, amending and supplementing Section 409, R. S., before me. From a consideration of the original Section 409, I reached the conclusion that the position of Chief Game Warden was not an office, in the technical sense of the term, but was merely an employment, since, under that section, it was optional with the Board whether a Chief Warden should be appointed or not, and, when appointed, his duties con-

sisted in obeying the directions of the commissioners. With this view of the statute it could make no difference whether the Chief Warden was patrolling the state to apprehend violators of the law, or planting spawn in some river bed, or keeping the records of the proceedings of the Board; he was simply working under the direction of the commissioners and fulfilling the duties of his employment, and his services were fully covered by the maximum salary allowed by law for the employment of Chief Warden. Whether this view of the statute was correct or not, it is not material now to inquire, since the act of April 14, 1900, amending Section 409, and adding supplemental Section 409a, clearly makes the position of Chief Game Warden an office, and prescribes the duties of the same.

The appointment of the Chief Game Warden is now made mandatory upon the Board, and it is specifically enjoined upon him, as the duty of his office "to enforce, within this state, all laws relating to the protection, preservation and propagation of birds, fish and game." Under the statute as it now stands the salary and compensation allowed the Chief Game Warden must be considered as compensation for the services enjoined upon him as such warden; and, if other and additional services are performed by him for the Board of Commissioners, there certainly can be no objection to his receiving additional pay for such additional services.

I do not regard the position of Secretary of the Board as an office, and hence, the question of inconsistent offices is not considered. But, even if it were an office, the two would not be inconsistent so as to make it unlawful for both to be filled by the same person. In my letter to Mr. Buroker, I did not hold that the position of Chief Warden and Secretary to the Board were inconsistent offices which could not be filled by the same person, but merely that the duties of both positions being performed under the directions of the Board were comprehended in the same general employment, and hence the maximum compensation allowed by law should be deemed sufficient to cover both.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

FILLING VACANCY—ELECTING SUCCESSOR IN OFFICE OF COUNTY SURVEYOR.

COLUMBUS, OHIO, Nov. 19th, 1900.

Irvin F. Snyder, Circleville, Ohio.

DEAR SIR:—In your letter of recent date you ask of this office an opinion as to the time when a county surveyor elected to fill a vacancy caused by the death of the incumbent should take his office. This question requires a consideration and construction of Sections 1163 and 1167, Revised Statutes of Ohio. Section 1163 provides that the term of office of a county surveyor shall be three years beginning on the first Monday of September next after his election. Section 1167 provides for the appointment of a suitable person to fill a vacancy in the office of county surveyor. In neither of these sections is there anything said about the length of time the person appointed to fill the vacancy should hold the office. This requires us to resort to Section 11 to determine that question which section is as follows:

"When an elective office becomes vacant and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy."

The first proper election in the case under consideration was the November election, 1900, at which time, as you state in your letter, a surveyor was elected to fill this vacancy.

In none of these sections does it provide that a successor shall be elected "to fill a vacancy." It follows then that a county surveyor can only be elected for a full term of three years. Just what effect it might have if it were designated on the ballots and in the notices of election that a county surveyor was to be elected to fill a vacancy I need not now determine. The statute contemplates an election for a full term. Assuming that a proper election was held and the person so elected entitled to his office for the full term of three years, such term must begin at the time fixed in the statute for the beginning of the term of county surveyor, to-wit: "The first Monday of September next after his election. Where the statute fixes a time for the beginning of the term of office, a person elected to fill such office cannot properly qualify before such time. Hence, the provision of Section 11 providing that such appointee shall hold the office until his successor is elected and qualified, means, when construed with the other sections above referred to that the appointee shall retain the office until the date fixed by law for the commencement of the term of the elected officer, which, in this case would be the first Monday of September, 1901.

Very truly,

J. E. TODD,
Assistant Attorney General.

ELECTING COUNTY RECORDER.

COLUMBUS, OHIO, November 24, 1900.

Hunter S. Armstrong, St. Clairsville, Ohio.

DEAR SIR:—Yours of November 23 at hand and contents noted. The question to which you seek an answer from this office is, whether, when a recorder has died and the vacancy been filled by appointment until the next regular election at which the successor is elected, he is elected for the full term of three years commencing on the first Monday of September following, or is he elected only for the unexpired term of the recorder whose death caused the vacancy. In my opinion he is elected for the full term of three years commencing on the first Monday of September following the election.

Section 1137, Revised Statutes, provides:

"There shall be elected triennially, in each county, a county recorder, whose term of office shall be three years, beginning on the first Monday of September next after his election."

Section 1142 provides:

"In case of a vacancy in the office of recorder, the commissioners shall appoint a suitable person to fill the vacancy, who shall give bond and take the oath of office, as prescribed for county recorders, and shall hold his office until his successor is elected and qualified."

Section 11 of the Revised Statutes provides:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of a vacancy."

From these sections it is perfectly apparent that the person appointed to fill the vacancy could not hold the office for the unexpired term, but only until the next proper election that occurred more than thirty days after the date of the appointment. This proper election was the November election. There is no provision in the law for the election or appointment of a county recorder to fill an unexpired term. By the provisions of Section 1137, when a recorder is elected, he is elected for the period of three years.

Hence, it is clear to my mind that the person elected county recorder of your county in the year 1900, will hold his office for three years commencing on the first Monday of September next.

Very truly,

J. M. SHEETS,
Attorney General.

PUBLISHING SHERIFF'S PROCLAMATION OF ELECTION.

COLUMBUS, OHIO, November 26, 1900.

Charles E. Jordan, Findlay, Ohio.

DEAR SIR:—Yours of November 24 at hand and contents noted. Your inquiry goes to the question, whether the sheriff's proclamation for an election must, under the provisions of Sections 2967 and 2977, R. S., be published more than once in a newspaper; also, as to whether that publication shall be in one paper or in two.

The construction placed upon Sections 2967 and 2977 will be the same for the reason that the two sections read substantially alike with reference to the matter in question.

Section 2967 provides:

"At least fifteen days before the time for holding the election provided for in the next section, the sheriff shall give public notice by proclamation throughout his county, of the time and place of holding such election, and the number of electors to be chosen; a copy of which shall be posted up at each of the places where elections are appointed to be held, and inserted in some newspaper published in the county, if any is published therein."

It will be observed upon reading this section that the law will be fully complied with by inserting the proclamation once. I have gone to the trouble of looking up the several provisions of the statutes of Ohio with reference to serving notice by publication, and in every instance where more than one insertion is required, the statute expressly provides how many insertions there shall be. See Sections 5050, 6419, 6445, 1695, 2864 and 5393, R. S.

As to whether the proclamation shall be published in more than one paper, it is equally clear that it must be published in two newspapers of opposite politics published at the county seat. See Section 4367, R. S.

Yours very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF SECRETARY OF STATE TO FURNISH STATIONERY TO
DECENNIAL STATE BOARD OF EQUALIZATION.

COLUMBUS, OHIO, December 4, 1900.

Hon. Charles Kinney, Secretary of State, Columbus, Ohio.

DEAR SIR:—Your inquiry with respect to whether it is your duty under the law to furnish the Decennial State Board of Equalization with stationery, is at hand.

Section 137 of the Revised Statutes provides:

“Annually, on or before the first day of November, the Secretary of State shall purchase, and cause to be delivered at his office, so much and such kinds of stationery and other articles as may be necessary for the use of the General Assembly and state officers.”

If then the members of the Decennial State Board of Equalization are “state officers” within the meaning of this provision, you are authorized to furnish them stationery while in the performance of their official duties; otherwise, not.

The legislature in enacting this statute evidently considered that that body was not composed of “state officers,” or it would not have expressly provided that the Secretary of State should furnish the “General Assembly,” as well as “state officers” with stationery. As I understand the meaning of the term “state officers,” it is those officers who are connected with the state government, which would include not only those persons who are elected by all the electors of the state, but those who are appointed to positions in the benevolent, reformatory, and penal institutions of the state.

In Section 29 of Throop on Public Officers the following definition of “state officers” will be found:

“The expression ‘state officers’ designates those only who are connected with the government of the state.”

The office of member of the Decennial State Board of Equalization is not an office created by the constitution, but by law, and the members thereof are elected not by the electors of the whole state, but in particular sub-divisions thereof, and who are, in no manner, connected with the administration of the state government; their duties being merely to equalize the valuation of the taxable property of the state.

It is also evident to my mind that the legislature did not contemplate that the Secretary of State should furnish stationery for this board, for the last general assembly not only appropriated \$51,000 for salaries and mileage of members, and salaries of clerks and other employes of this board, but also appropriated the additional sum of \$2,000 for its contingent expenses.

In view of the fact that the assembly room is provided by the state for this board, light and fuel furnished, and the salaries of all persons that this board may deem it necessary to employ, from that of janitor up, are provided for in the \$51,000 appropriation, it would be difficult to determine what the \$2,000 would be needed for, unless for stationery.

For these reasons, I am of the opinion that you are not authorized, under the law, to furnish the stationery for this board.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF BOARD OF MANAGERS OF O. P. TO ENTER INTO
CONTRACT FOR SALE OF PRODUCT.

COLUMBUS, OHIO, December 4, 1900.

Hon. W. N. Darby, Warden Ohio Penitentiary, Columbus, Ohio.

DEAR SIR:—In your communication of recent date you request of this office an opinion as to the right or power of the Board of Managers of the O. P. to enter into a contract for a term of years for the sale of a product, to-wit: coal tar, produced in the operation of the gas plant in said penitentiary.

From an examination of the statutes in relation to the control and management of the Ohio Penitentiary, I am of the opinion that the Board of Managers of said institution are without the power to make such a contract. Section 7406 of the Revised Statutes provides:

“The steward shall purchase all forage, fuel and lights and all supplies for the kitchen and hospital and make all sales for the penitentiary under the written orders of the warden and subject to such rules and regulations as the board may prescribe.”

The power to make sales of any product produced in the institution seems by this section to be taken out of the direct control of the Board of Managers and placed in the hands of the steward. In this respect the management of the Ohio Penitentiary is similar to the management of the state benevolent institutions. In each of such institutions the Board of Managers are required to appoint a steward or financial officer who gives bond to the state of Ohio, and who is charged with the financial transactions of the institution. It seems to be the legislative policy in reference to all the state institutions that purchases and sales should be made from time to time as occasion might arise by the financial officer of the institution. This power being lodged with such officer, cannot properly be exercised by the Board of Managers direct, but must be exercised in the manner and by the person authorized by the statute.

Very truly,

J. E. TODD,
Assistant Attorney General.

RIGHT TO SELL “SUGAROSE.”

COLUMBUS, OHIO, December 6, 1900.

Hon. Joseph E. Blackburn, Dairy and Food Commissioner, Columbus, Ohio.

DEAR SIR:—Yours at hand, making inquiry as to whether a combination of sugar and glucose under the name of “Sugarose” might be sold in the state of Ohio, without violating the pure food laws. In my opinion it can be. The statute upon the adulteration of food, after stating what shall be deemed an adulteration, provides that the act in question shall not apply to

“mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein, and are not injurious to health.” Section 4200—6.

It will be necessary, however, for this company which proposes to sell its product in Ohio to place a label upon it stating the per cent of sugar and per cent of glucose composing the compound.

Very truly,

J. M. SHEETS,
Attorney General.

TAXATION OF MERCHANDISE UNDER SECTION 2740.

COLUMBUS, OHIO, December 6, 1900.

C. C. Lemert, Zanesville, Ohio.

DEAR SIR:—Yours of December 5th at hand and contents noted. Your inquiry goes to the question as to whether a merchant who commences business with a stock of merchandise three days before the lien for taxes would attach in 1899 should be taxed for that year for the full value of his stock, or whether his taxes should be for the next year. As you suggest in your letter this is governed by Section 2740 of the Revised Statutes. This section provides in effect that merchants in listing their stocks for taxation are governed in the amount of taxable property returned by the average monthly value of stock that they had on hand the previous year.

It appears from this section that the taxation must be upon the stock held the previous year, not the current year. This being the case, in my opinion the merchant of whom you speak would not be required to list his property for taxation for the year 1899. In other words, taxes are paid upon what the merchant had the previous year, not what he expects to have the current year, because that he can not tell it in advance.

The same question was up for consideration before the Governor, Auditor of State and myself as a board, and we unanimously agreed upon the construction of the law as indicated herein to you.

Very truly,

J. M. SHEETS,

Attorney General.

AUTHORITY OF OIL INSPECTORS OUTSIDE OF OHIO.

COLUMBUS, OHIO, December 8, 1900.

Hon. John R. Malloy, Oil Inspector, Columbus, Ohio.

DEAR SIR:—Yours of December 12th at hand. Your inquiry goes to the question as to whether the Oil Inspectors of Ohio have authority to inspect illuminating oils outside of the state prior to their being shipped into the state for consumption.

Section 394 of the Revised Statutes provides:

“All mineral or petroleum oil, or any oil, fluid or substance which is a product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constituent element, whether manufactured within this state or not, shall be inspected as provided in this chapter, before being offered for sale or sold for consumption for illuminating purposes within the state.”

Section 395, in dividing the state into districts for inspection purposes includes “the Pittsburg district” within the second district; and, I am informed that the term “Pittsburg district” was, at the time the law was enacted, understood in the trade to mean “the territory in and about Pittsburg, Wheeling, and Parkersburg.

It is further provided in Section 395 that “the Inspectors or their deputies shall * * * when called upon for that purpose, promptly inspect all oils herein mentioned.”

Upon reading the provisions above quoted it is apparent to me that the legislature contemplated that the Oil Inspectors might be “called upon” by those desiring to sell illuminating oils in Ohio to inspect the same before being transported within the state for sale. That which the statute requires is not that the oils shall be inspected in any particular place, but that they shall be inspected before being

sold for consumption in Ohio, hence, when the inspection is had, the law is satisfied, whether that inspection takes place within or without the State. It is frequently much more convenient both to the seller and Inspectors to have the oil inspected at the distributing point rather than to go from place to place throughout the state wherever the oils may be transported for sale, and there inspect them.

From the above suggestions it is hardly necessary to add that in my opinion, the Oil Inspectors may, if called upon, go without the boundaries of the State of Ohio to inspect illuminating oils before being shipped into the state for sale, and that inspection would be a compliance with the provisions of the law.

Very truly,

J. M. SHEETS,
Attorney General.

POWERS AND DUTIES OF DECENNIAL STATE BOARD OF EQUALIZATION.

COLUMBUS, OHIO, December 12, 1900.

Hon. W. D. Guilbert, Auditor of State, Columbus, Ohio.

DEAR SIR:— In your communication of December 11th you request of this office an opinion as to certain matters touching the powers and duties of the Decennial State Board of Equalization.

The law in relation to this board, as it stood prior to the amendment of April 16th, 1900, was contained in Sections 2817, 2818, and 2819 of the Revised Statutes.

Section 2817 requires each county auditor to transmit to the Auditor of State an abstract of the real property of his county as returned by the several assessors and equalized by the local boards.

Section 2818, after providing for the election of members of the Decennial State Board, and that the State Auditor, by virtue of his office should be a member of said board, concluded as follows:

"The said board shall meet at Columbus on the first Tuesday of December, 1890, and every tenth year thereafter, and the members thereof shall each take an oath that he will, to the best of his knowledge and ability, so far as the duty devolves upon him, equalize the valuation of real property among the several counties and towns in the state, according to the rules prescribed by this table for valuing and equalizing the value of real property transmitted to him by the several county auditors. Said board shall proceed to equalize the same among the several towns and counties in the state, in the manner hereinafter prescribed.

1st. They shall add to the aggregate value of the real property of every county which they shall believe to be valued below its real value in money, such percentum in each case as will raise the same to its true value in money.

2nd. They shall deduct from the aggregate valuation of the real property of every county which they shall believe to be valued above its true value in money, such percentum in each case as will reduce the same to its true value in money.

3rd. If they shall believe that right and justice require the valuation of any town or towns in any county, or of the real property of such county, not in towns, to be raised or to be reduced without raising or reducing the other real property of such county, or reducing it in the same ratio, they may,

in every such case, add to or take from the valuation of any one or more or (of) such towns, or of the property not in towns, such percentum as they shall believe will raise or reduce the same to its true value in money.

4th. If, in their judgment, the aggregate value of all the real property of the state, as returned by the county auditors, is above or below its true value in money, they may increase or reduce it, but such increase or reduction shall not exceed twelve and one half per centum of said aggregate; provided, that if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the state; and when such increase or reduction is made, it shall be the same per cent. of the equalized valuation of every county of the state.

5th. Said board shall keep a true and full account of their proceedings and orders."

Section 2819 requires the Auditor of State to transmit to the various county auditors a statement of the changes made by the board in the valuation of the respective counties.

By the act of April 16th, 1900, Section 2818 was amended, and the original section was repealed. In the amended section a time is fixed in which the board must complete its work, and the five numbered paragraphs above quoted are entirely omitted. No further change, material to this inquiry was made in this section. These omitted paragraphs, it will be observed, contain specific directions or rules by which the board should be governed in the discharge of the duties imposed upon it.

In this state of the law, the rules governing former boards of equalization having been repealed, the question is presented whether the board is subject to any rules and regulations, or whether it may not adopt such rules concerning the nature and extent of the work to be done, as well as the proper method of doing it, as may seem to it most expedient.

Certainly as the law now stands, the statute utterly fails to prescribe any specific rules to govern the board in the discharge of its duties, and yet the board is not entirely without legislative direction. It will simply be necessary to scrutinize the statutes a little more closely to ascertain the intent of the law makers. I have no doubt that such an examination will disclose that each of the five rules (except the fourth) that were formerly included in section 2818 are still in existence; not, it is true, as specific injunctions by the legislature, but as the necessary consequence or result flowing from the other provisions of the statute. And, while the board, doubtless, may make such reasonable and needful rules as may be required to enable it to perform its work with accuracy and dispatch, yet, in so far as the purposes to be accomplished, or the results to be obtained are concerned, it must keep strictly within the limits imposed and powers granted by the statutes.

What are the duties imposed by the statutes upon this board? To equalize the valuation of the real property of the state among the counties and towns in the state. This is the duty which the statutes prescribe each member shall take an oath to perform. Note the language of Section 2818: "And the members thereof shall each take an oath that he will, to the best of his knowledge and ability, so far as the duty devolves upon him, *equalize the valuation of real property among the several counties and towns in the state*, according to the rules prescribed by this table for valuing and equalizing the value of real property transmitted to him by the several county auditors." Also the following language: "*Said board shall proceed to equalize the same among the several towns and counties in the state, in the manner hereinafter prescribed.*"

Since the rules formerly prescribed by the statutes have now been repealed, it will conduce to a better understanding of this statute if the expressions "according to the rules prescribed by this table for valuing and equalizing the value of real property" and "in the manner hereinafter prescribed" be regarded as mere surplusage, and, as such, eliminated from the statute, since there are now no "rules hereinafter prescribed" to which these expressions can apply. Has then the board any power to act? I can not understand how the repeal of rules which governed former boards could have the effect of leaving the present board without powers to perform the duties for which it was elected. Suppose these rules had never had an existence. Would then the statutes providing for the election and qualification of a board to equalize the value of the real property of the state be inoperative merely because the legislature had failed to prescribe rules by which the board should be governed? Certainly in such a case the board would have the implied power to make such rules as were needful to accomplish the objects for which it was created. This, I conceive to be the situation of the present board. The specific directions that were formerly contained in Section 2818 have been repealed, and it is the same as though they never had any existence. In so far as these repealed portions of Section 2818 consist of legislative direction to the board as to the manner of doing its work, their omission from the present law can have no further effect than to leave the board at liberty to adopt such rules as it may deem best adapted to accomplish the purposes of its creation. In so far, however, as these repealed provisions conferred additional power upon the board such repeal would necessarily limit the power of the board in those particulars.

Thus the fourth paragraph of the omitted provisions conferred upon the board the power to increase or reduce the aggregate value of all the real property of the state as returned by the county auditors within the limits of twelve and one-half per centum of said aggregate. The repeal of this provision, in my judgment, takes from the board this power. In considering the powers of the present board it is to be remembered that Sections 2817 and 2819 have not been either amended or repealed.

The first of these sections (2817) prescribes the data to be furnished by the several county auditors to the State Auditor for the use of the State Board. This data consists of "an abstract of the real property of each township in his county, in which he shall set forth"

1st. "The number of acres, exclusive of town lots, returned by the several assessors of his county, with such additions as shall have been made thereto."

2nd. "The aggregate value of such real property, other than town lots, as returned by the several assessors of his county, inclusive of such additions as shall have been made thereto under the provisions of this title."

3rd. "The aggregate value of the real property in each township of his county, as returned by the several assessors, with such additions as shall have been made thereto."

It is from this data that the board must do its work. The total of the aggregate valuation of the various counties, as returned by the county auditor, constitutes the grand aggregate of the state. This is the valuation that is to be equalized among the several towns and counties of the state.

Section 2819 sets forth the results that are to be attained by the board and transmitted by the State Auditor to the several county auditors. Note the language of this section:

"When the state board of equalization shall have completed their equalization of real property among the several counties, the Auditor of State shall transmit to each county

auditor, a statement of the per centum to be added or deducted from the valuation of the real property of his county, specifying the per centum added to or deducted from the valuation of real property of each of the several towns, and of the real property not in towns, in case an equal per centum shall not have been added or deducted from each."

It will thus be seen that the state board deals with a county and town as a *unit*. It is the aggregate valuation of these *units*, as furnished the board by the county auditors, that is to be equalized. And it is the per centum that is to be added to or deducted from this aggregate valuation of these *units* that is determined by the board and transmitted to the county auditors by the State Auditor.

This effectually disposes of the question as to whether the board can correct the valuation of individual pieces of property. Such valuation is not before the board for consideration; neither is there any provision by which the judgment of the board respecting individual pieces of property could be transmitted to the county auditor, and, by him, placed upon the duplicate. It is the aggregate valuations that the board has before it, and it is the per centum on the aggregate valuation that it is required to transmit, through the Auditor of State, to the county auditors, to be, by him, added to or deducted from the valuation of each separate piece of property in his county.

If I have succeeded in making myself understood thus far, it must now be apparent that at least the substance of the first three rules, as formerly contained in Section 2818 must still be adhered to by the board.

The first of these rules requires the board to add to the aggregate value of the real property of any county which it believes to be undervalued such a per centum as will raise it to its true valuation.

The second requires the board to deduct from the aggregate valuation of the real property of any county which it shall believe to be valued above its true value such per centum as will reduce the same to its true valuation.

The third authorizes the board, in case it shall believe that the valuation of any town or towns in any county, or the real property of such county not in towns ought to be raised or to be reduced without raising or reducing the other real property of such county, to make such additions or reductions in the valuation of any town or towns, or of the real property of any county outside of towns.

How could the results required by Section 2819 to be transmitted to the county auditors, viz: the per centum to be added or to be deducted from the aggregate value of all the real property of the county, how could such a result be reached except by following these simple and obvious rules? Hence, while these rules do not exist by special statutory command, they do exist as the logical and necessary processes to be observed by the board to obtain the results required by the other provisions of the statute, since in no other way can the aggregate valuation of the state be equalized among the towns and counties.

The importance and necessity of keeping a full and complete record of all the proceedings and orders of the board, as required by the fifth rule, is too obvious to require comment.

The fourth rule, as found in the old section (2818) empowered the board to make a horizontal increase or reduction not exceeding twelve and one-half per centum of the grand aggregate valuation of the real property of the state. Since the repeal of this clause there would seem to be no power in the board either to increase or decrease the grand aggregate. It is the valuation that is to be equalized, not the value. A *valuation* is placed upon each separate piece of property by the assessors. *These valuations* are equalized by the county and city boards of equalization. The aggregate of the *valuation* of each county is placed before the state board of equalization, and the aggregate of the separate county valuations constitute the

grand aggregate or *valuation* to be equalized by the state board among the counties and towns of the state. To equalize does not mean to increase or diminish, to add to or to take from. It only means to distribute equitably and justly. Hence, to equalize the valuation of the real property of the state means simply to make a proper distribution of the valuations before the board, and not to make any changes in such total valuation.

Perhaps a summary of the points I have sought to make in the foregoing may not be out of place.

1st. The state board of equalization deals with the aggregate valuations of counties and towns as a unit, and not with the valuation of individual pieces of property.

2nd. The data from which the board must make its computation is the valuations furnished by the county auditors, by virtue of Section 2817.

3rd. The result to be attained by the board is to equalize the grand aggregate valuation among the various counties and towns by adding to or deducting from the valuation of any county or town such a per centum as may be necessary for that purpose.

4th. That such equalization must be made without disturbing the grand aggregate of the valuation returned by the various county auditors.

5th. The board has power to make and observe all rules necessary and needful to accomplish the above objects.

These propositions have seemed to me so evident, from a consideration of the statutes, that I have refrained from citing any authorities in support of them.

Respectfully submitted,

J. E. TODD,
Assistant Attorney General.

RIGHT OF POLICE COURT OF CLEVELAND TO GRANT NEW TRIAL
TO BOYS COMMITTED TO BOYS' INDUSTRIAL HOME.

COLUMBUS, OHIO, DEC. 14th, 1900.

Hon. C. D. Hilles, Secretary Boys' Industrial School, Lancaster, Ohio.

DEAR SIR:—I am in receipt of your communication of the 13th, inst., submitting the question as to whether or not the police court of Cleveland has the power to grant a new trial in cases where boys have been committed to your institution by order of such court, and whether they should be returned for such hearing. By an examination of Section 1792 of the Revised Statutes of Ohio, I find that police courts generally possess all such powers as in like cases in the Courts of Common Pleas. I am therefore of the opinion that as incidental to such express power granted to the police court of Cleveland, the judge would have a right to make an order to have boys so committed to your institution returned for a new hearing, and it would be your duty upon any such order being delivered to you to deliver to the officer charged with such duty, the person named in the order.

Second: You further inquire if commitment papers are irregular when they fail to certify that the county visitors were notified and attended the hearing of the accused committed to your institution. My answer is, that under Section 4022-11 of the Revised Statutes "the order of commitment of a child to a state reformatory must show that the county visitors were so notified and attended the hearing." But while it is an express duty of the officer to make the order of commitment so show, I do not think it sufficient excuse for you to refuse to receive any person so committed under such irregular order of commitment any more than it would for a sheriff to refuse to receive a prisoner under a defective

mittimus. I think it your duty to accept a person so committed, but if the question is ever raised as to the irregularity of his detention, a court might hold his detention to be unlawful, upon which question, I am not now called to decide. I am,

Yours very truly,

J. M. SHEETS,
Attorney General.

DISPOSITION OF FINES COLLECTED BY FISH AND GAME COMMISSION UNDER SECTION 6966.

COLUMBUS, OHIO, December, 18th, 1900.

L. H. Reutinger, Secretary and Chief Game Warden Ohio Fish and Game Commission, Athens, Ohio.

DEAR SIR:—I have your favor of the 17th of December containing inquiry as to whether the fines collected by virtue of Section 6966 Revised Statutes of Ohio, are disposed of the same as the fines under Section 6968, Revised Statutes, that is, to go to the county fish and game fund. Upon investigation of the question proposed I find Section 6966 was passed by the General Assembly of Ohio on the 4th day of May, 1891. The second section of that act, now known as Section 6966-1, provides for the payment of the officer, and all costs out of the county treasury, so that that act itself does not contain any provision such as is contained in Section 6968, expressly providing where the fines shall go that are assessed by virtue of it.

Section 6968 was passed April 27th, 1896, and in it the significant language is used that "fines collected under *this act* shall go to the county fish and game fund." What is meant by "this act"? Certainly all that is meant is the act of April 27th, 1896, and not the act of May 4th, 1891. I can find no construction at all that would warrant me in holding that the two are parts of the same act. If the language employed by the Legislature had been that the fines collected under this *Chapter* shall go to the county fish and game fund, then it would present a different question, but we are limited to the one act, and not to the chapter.

There is also a disposition of fees provided for by Section 6968-2 which directs what fund the fees therein provided shall go to, and for what purpose they shall be used. So that when there is a provision made in Section 6966, and there are provisions made in the other sections the provisions therein made refer to the separate act, and not to the fines collected under Section 6966, it leads me to conclude that the General Assembly only meant to provide that the fines collected under 6968 should go to the county fish and game fund. I am borne out in that conclusion by the fact that Section 6966-1, as I have already said, provides for the payment of the officer and other costs.

I am, therefore, of the opinion that the disposition of fines under the act of April 27th, 1896, viz., Section 6968, does not carry with it the fines assessed under Section 6966, passed May 4th, 1891, and therefore, the same are not required to be placed to the credit of the county fish and game fund.

Yours very truly,

J. M. SHEETS,
Attorney General.

RATES FOR LEGAL ADVERTISING.—SECTION 4366.

COLUMBUS, OHIO, Dec. 21st, 1900.

Emmett N. Adair, Attorney at Law, Carrollton, Ohio.

DEAR SIR:—Your letter of December 20th, requires a construction of Section 4366 R. S. This section relates to the rates paid for legal advertising and concludes as follows:

“And in advertisements containing tabular or rule work, an additional sum of fifty per cent may be charged in addition to the foregoing rates.”

The precise question presented is whether or not the additional fifty per cent. applies to the entire advertisement or only to that portion of it which consists of tabular or rule work. It seems very clear to me that the additional price should apply to the entire advertisement. While this may not have been the intention of the Legislature, yet, the language seems to be clear and unambiguous to this effect. It should be remembered however, that the rule should not apply to any matter except that which the statute requires to be published. I speak of this because in the copy of the treasurer's notice sent with your letter, there is considerable matter in the way of recommendation and general information to the tax payers added at the bottom of the notice, which, in my judgment, the treasurer is not required to publish, and the county commissioners would be unauthorized to pay for such publication.

Section 1087 R. S., prescribes the matter that shall be contained in the treasurer's notice, and the insertion of any matter except that prescribed in this section is unauthorized. Section 4369 prescribes the manner in which such notice shall be set. That is, it should be in compact form without unnecessary spaces, blanks or head lines, etc.

By an observance of the statute in regard to legal publication, the tax payers of the state would be saved annually a large amount of money. The notice enclosed in your letter however, is very mild compared with some of the notices that I have had called to my attention from different counties of the state.

Very truly,

J. E. TODD,
Ass't Attorney General.

WHETHER MAYORS OF VILLAGES AND CITIES NOT HAVING
POLICE COURT HAVE FINAL JURISDICTION IN PROSE-
CUTION FOR VIOLATION OF PURE FOOD LAWS.

COLUMBUS, OHIO, Dec. 22nd, 1900.

Hon. J. E. Blackburn, Dairy and Food Commissioner of Ohio.

DEAR SIR:—The question upon which you seek an opinion from this office is whether Mayors of villages and cities, not having a police court, have final jurisdiction without the intervention of a jury to hear and determine any prosecution for violation, by persons not manufacturers, of the provisions of the act of May 16th, 1894, O. L., Vol. 91, p. 274.

In my opinion they have. For the violation of any of the provisions of this act by a person not a manufacturer is a misdemeanor, and no part of the punishment is imprisonment.

Sec. 1817 provides: “He (Mayor of City not having Police Court) 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; and his jurisdiction in such cases shall be co-extensive with the county."

Sec. 1824 provides: "He (Mayor of Village) shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is entitled, by the Constitution, to a trial by jury; and his jurisdiction in such cases shall be co-extensive with the county."

It is thus seen that the above provisions confer jurisdiction. The provision of Sec. 3718a in no manner limits the jurisdiction thus conferred.

It is also seen that the jurisdiction thus conferred is co-extensive with the county.

Respectfully yours,

J. M. SHEETS,
Attorney General.

IN RELATION TO TAXING FIRE INSURANCE COMPANIES.

COLUMBUS, OHIO, Dec. 27th, 1900.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—In your communication of November 30th, you submit to this office the following questions for answer:

First: Section 7 of the act of April 16th, 1900, being the Fire Marshall law, directs that "for the purpose of maintaining the department of fire marshal and paying the expenses incident thereto, every fire insurance company doing business in the state of Ohio shall pay to the superintendent of insurance, in the month of December, annually, one half of one per cent. on the gross premium receipts of such companies," etc.

Does this apply to associations organized under Section 3686, etc., of the Revised Statutes, requiring them to pay the tax prescribed in the fire marshal law?

Second: Section 2745 of the Revised Statutes directs every agency of an insurance company, incorporated by the authority of any other state or government, to make report to the county auditor of its premiums, and provides therein for the payment of taxes on premiums of 2½ per cent.

Does this section apply to—

1. Companies or associations admitted under Section 3630e;
2. To companies not organized in Ohio, but doing business under Section 3630-i;
3. Mutual companies licensed under Section 3656;
4. Associations organized under the act of April 27th, 1898, known as the Fraternal Beneficiary law?

Third: Does Section 284, providing for the publication of a certificate of compliance and filing the same with the recorder of the county in which the agency of the insurance company is established, apply to all companies and associations, life and other than life, including assessment, co-operative and fraternal beneficiary societies?

Fourth: If an association organized under Section 3630 or an association admitted to Ohio under Section 3630e, charges and collects, in advance, fixed amounts, based upon estimated losses and expenses, with a view to the same being commensurate with such future claims, but with the provision for further assessments in event such fixed charges are inadequate to meet the actual losses and expenses, is such an association required to pay taxes on such gross, fixed charges, or any tax whatever?

And of these in their order:

First: By the act of April 16th, 1900, the office of state fire marshal¹ was established and the duties and powers of such officer are prescribed. Chief among the duties of this officer is that of investigating the cause or origin of all fires and cause the arrest of any person whom he may have reason to believe is guilty of the crime of arson. It was doubtless contemplated by the legislature that the office of state fire marshal would be of benefit to insurance companies by aiding in the detection and apprehension of such persons as willfully burned their property in order to procure the insurance. And proceeding upon this theory a tax is imposed upon the benefited parties, to-wit, the insurance companies, to defray the expenses of this office. If then, we should be guided by the spirit and reason of the fire marshal law, we would have no difficulty in reaching the conclusion that every corporation doing fire insurance business in Ohio, no matter how organized, being within the protection and benefits conferred by the law, would also be included in the provision relating to the tax. But it would probably not be sufficient to charge a corporation with this tax simply because such corporation came within the reason and spirit of the law, unless it should happen that such corporation is also fairly within the terms of the statute. Recurring then to the language of the act in question, it is found to be equally comprehensive. It specifically declares that "every fire insurance company" doing business in the state of Ohio, "shall be subject to the payment of the tax." It is claimed, however, that corporations organized by virtue of Section 3686 et seq, are not included in the terms of this statute for two reasons. (a) Such corporations are called throughout the statutes associations, and not companies. (b) That the tax provided for by this act is computed upon the gross premium receipts, whereas such associations charge no premium, but derive their revenue from assessments. As to the first contention considered apart from the second, I do not regard it as having much weight. The term "company" is a general term and includes in its ordinary signification any association of individuals in a business enterprise, whether such association be in the form of a corporation or simply a partnership. Associations organized under Section 3686 are corporations, and hence fall within the popular signification of the term "company." Nor do I apprehend that the use of the term "association" in the statutes to distinguish these corporations from mutual insurance companies can have the effect to withdraw such corporations from the tax provisions of the act in question.

A far more serious question is presented in the second objection above noted. Companies organized under Section 3686 have no premium receipts on which the tax may be computed. There is such a vital distinction between premiums charged by insurance companies doing business on the mutual or stock plan and the assessments which associations organized under Section 3686 are authorized to collect, that it is impossible to harmonize the two. The term "premium," as used in the fire marshal law, must be understood in its ordinary signification, and can not include "assessments." Hence, the legislature, in providing a tax upon every insurance company to be computed upon the gross premium receipts, must be understood to have had in mind only such companies as had premium receipts. This view of the intention of the legislature may be strengthened by a consideration of the fact that companies organized under Section 3686 are always denominated associations, although this latter fact standing alone would not be sufficient to justify the conclusion that such companies are not included in the tax provision of the fire marshal law.

Second: Your second question contains four sub-divisions which will be briefly answered in order.

1. Much that has been said above in answer to your first question is applicable to the first subdivision of your second question. Section 3630e provides for admission into Ohio of companies organized under the laws of other states

to transact the business of life or accident or life and accident insurance on the assessment plan. The tax imposed upon foreign insurance companies by Section 2745 is computed upon the gross premium receipts and such assessment companies have no premium receipts, and hence, by the same reasoning announced above are not subject to the payment of this tax. As to whether such companies organized as assessment companies, but doing business in Ohio on a plan similar to that of stock companies, are liable for the payment of this tax, see answer to fourth question.

2. Section 3630-i provides for the organization of companies to do accident insurance and also provides that "The expenses of such corporations, companies or associations shall be met by fixed annual payments, payable quarterly or otherwise, or by assessment on the members." Nothing is said in this section in relation to the admission of companies organized in other states for a similar business. If, however, such companies are admitted into Ohio to do the business provided for by this section, the question as to their liability to the tax provided by Section 2745 would depend upon whether or not their chief source of revenue consists of "fixed annual payments" or "assessments on the members." (See further on this subject, answer to fourth question.)

3. The requirements of Section 3656 as to companies organized under the laws of other states are that such companies shall have the same capital cash assets, etc., that is required of domestic companies. This section contains the following provisions as to mutual fire insurance companies: "But if a company is a mutual fire insurance company, it shall have actual cash assets of the same amount and description as is required of mutual fire insurance companies of this state," etc. The requirements of domestic mutual fire insurance companies are found in Section 3634. I do not understand from a consideration of this section (3634) that a mutual fire insurance company is necessarily an assessment company. Such companies are authorized to collect premiums in advance to accumulate a surplus, and in general to transact business on practically the same plan as stock companies, except that mutual companies must provide in their policies for a contingent liability and assessment on the part of the insured of not less than three nor more than five annual cash premiums as written in the policy. Prior to the amendment of this section in 1888, the contingent liability of a policy holder in mutual companies was represented by premium notes, and this method is still permitted as to such companies as did not elect to change their plan. There seems therefore, to be but little practical difference, so far as the matter of raising funds with which to conduct the business is concerned between stock companies and mutual companies. Indeed, mutual companies having net assets amounting to \$200,000 are authorized by Section 3650 to issue policies on the stock plan. Under such plan of insurance the chief source of revenue does not consist of assessments to pay specific losses, and hence is not assessment insurance. There is a manifest distinction between this plan of insurance in which assessments are only made upon the contingency that the regular annual payments are insufficient to meet the losses and operating expenses of the company, and the plan whereby the chief source of revenue is derived from assessments to cover specific losses made after the losses have occurred. For a more extended discussion of the distinction between the two classes of insurance as authorized by the Ohio Statutes, sec. 42 O. S., 555, and 58, O. S. I.

I am of the opinion therefore that mutual fire insurance companies admitted to do business in Ohio by virtue of Section 3656 are liable to be taxed under Section 2745.

In this connection naturally arises the question whether such mutual companies, both foreign and domestic, are liable to the tax under the fire marshal law. While this question is not specifically presented in your communication, yet

it has been under consideration in conferences held with representatives of such insurance companies, and I have therefore given it some consideration and have reached the conclusion that that all such companies are liable to the tax imposed by the act of April 16th, 1900, and known as the fire marshal law.

4. Section 1 of the fraternal beneficiary law contains the following provisions: "Such associations shall be governed by this act and shall be exempt from the provisions of the insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein." This language clearly exempts such associations not only from the operation of Section 2745, but from all other insurance laws except the act of April 27, 1896. You doubtless are aware of this provision of the statute, hence I can only construe your question as a challenge of the validity of such provision. Before the constitutionality of this provision could become material to the present inquiry, however, it would be necessary to determine that the nature of the business done by these associations is of such a character as would subject them to the tax prescribed by Section 2745; i. e., whether these associations are authorized to transact business on the assessment plan or otherwise. I think an examination of the act of April 27th, 1896, will disclose that the chief source of revenue of such associations is to be derived from post mortem assessments, and hence such associations are to be classed as assessment associations, and not liable to the tax prescribed by Section 2745.

Third: Section 284 provides that every insurance company doing business in this state shall publish in every county in which it has an agent a certificate showing that it has complied with the law. The language employed in this section is certainly comprehensive enough to include all companies, associations, life and other than life doing an insurance business. Unless some authority can be found withdrawing certain companies from the operation of this statute, all such companies must be held to be included therein. The only authority for making such withdrawal that I know of is that in relation to fraternal beneficiary associations. Section 1 of the act of April 27th, 1896, exempts such associations from the operation of all insurance laws. So long as that provision is regarded as a valid law, such associations must be held exempt from this as well as all other provisions of the statute respecting insurance companies.

Fourth: Your fourth question implies that associations organized as assessment associations, admitted to Ohio as assessment associations, are in reality doing business upon the mutual or stock plan. The nature of the business which may be transacted by an Ohio corporation must necessarily be determined by the charter of such corporation. In the case of *Ohio ex rel. vs. Life Insurance Company*, 58 O. S., 1, in speaking of the statutes of Ohio in relation to insurance companies, Judge Bradbury, delivering the opinion of the court, uses this language:

"These statutes divide life insurance companies other than fraternal into two classes, into one of which it places those companies that have a capital stock, or at least capital, and into the other class, such as do not have either capital stock or capital. The general powers of the former class are granted by Section 3587, Revised Statutes. The things that may be done by the latter class are set forth in Section 3630, Revised Statutes. * * *

"The powers of a company belonging to the first class are unlimited as to the individuals it may insure, but are limited to insuring on the mutual or stock plan. A company or association belonging to the second class can only insure the life of a member of the company, and its business must

be transacted on the assessment plan. * * *

"The companies that compose the first of the class are empowered to transact business on the mutual or stock plan, the other only on the assessment plan. There may be some other minor distinctions between the two classes, but these are the chief ones. The two classes together seem to cover the entire field of general life insurance, and we think in respect to Ohio companies, this field was designedly divided by the legislature between these two classes, and that the inference to be drawn from this legislation is that the portion assigned to each was intended for its exclusive occupation. And therefore an Ohio life insurance company must confine its transactions to such methods of insurance as pertains to the class to which it belongs."

As to what constitutes insurance on the assessment plan, in the same case, the court say:

"To bring a life insurance company into the class that transacts business on the assessment plan within the purview of our statutes, its chief source of revenue should be post mortem assessments to pay specific losses. This view of the matter was in substance taken by this court in *State ex rel. vs. Monitor Fire Association*, 42 O. S., 555. The court held that an annual deposit paid in advance based on the hazards of the risk, and without reference to an amount necessary to pay losses, that may occur during the year, is in fact a premium paid for carrying the risk, and not a specific assessment authorized by the statute.

"The question there related to the transaction of fire insurance, but the reasoning by which this court reached the conclusion announced in that case would seem to apply equally to the question as to what constitutes insurance on the assessment plan in life insurance."

It seems clear from the foregoing that a company which charges and collects in advance fixed amounts based upon estimated losses and expenses, and with a view to the same being commensurate with such future claims, but with the provision for further assessments, in event such fixed charges are inadequate to meet the actual losses and expenses, is not conducting its business on the assessment plan. These fixed charges constitute the principle source of revenue, and the right to make assessments is but rarely resorted to. Never in fact, except in the contingency that the fixed charges are inadequate to meet the losses and expenses.

Having thus divided the field of insurance into two classes, provision was made by Section 2745 for the taxation of companies doing business on the mutual stock plan, but no provision has been made for taxing companies doing business on the assessment plan. If an assessment company has invaded the field of insurance reserved for mutual and stock companies, the proper remedy would seem to be not to endeavor to impose a tax, but to require such companies to conform their business to the provisions of the statute under which they are incorporated.

In relation to companies admitted under Section 3630-e, the true test as to whether or not such companies are subject to taxation must be the nature of the business which such companies propose to transact in Ohio. If their business is on the assessment plan as contemplated by the Ohio Statutes, then such companies should be admitted under Section 3630-e, and would not be subject

to the tax provided for by Section 2745. But if the business of such company is on the mutual or stock plan; if they propose to make fixed annual charges based upon estimated losses, then such companies are not eligible to admission under Section 3630-e, but in order to be legally entitled to transact their business in Ohio, must comply with the provisions of Sections 3604 and 3605, Revised Statutes.

This question was fully determined in the case of *Ohio ex rel. vs. Life Insurance Company*, 58 O. S., 1, where it was held that neither the National Life Association of Hartford nor the Mutual Insurance Company of Detroit, were entitled to a license under Section 3630-e because the business they proposed to transact was not on the assessment plan within the meaning of this section. Such companies would be liable for the tax provided for by Section 2745.

J. E. TODD,
Assistant Attorney General.

LIABILITY OF COUNTY FOR SUPPORT OF CHILD.

COLUMBUS, OHIO, Dec. 28th, 1900.

J. E. Powell, Prosecuting Attorney, New Lexington, Ohio.

DEAR SIR:—Yours of December 27th at hand and contents noted. The question presented for solution is which county, Perry or Fairfield, should take charge of a child and afford it relief, whose residence was that of Fairfield county up until sixteen months ago, but who, with its parents, moved to Perry county, and there has resided ever since.

It appears from your statement of facts that within six months from the time the family removed from Fairfield to Perry county it became necessary to afford it relief, but that the trustees did not serve notice upon the county infirmity directors of Fairfield county within twenty days after they discovered the legal residence of the family, but did serve notice some time later, probably three months.

Section 1492 R. S. requires that notice shall be served upon the county in which a pauper has a legal residence within twenty days from the time that knowledge of such legal residence is brought to the officers affording the relief. This is necessary in order to charge the county in which the pauper has a legal residence, with the expense of returning the pauper and supporting him. This not having been done in this instance, in my opinion Fairfield county was not bound to assume the responsibility of supporting this family or paying the expenses incident thereto, and as the family has a residence for sixteen months in Perry county, the child now has a legal residence therein, and should be supported by Perry county.

Very truly yours,

J. M. SHEETS,
Attorney General.

POWER OF TOWNSHIP TRUSTEES, ACTING AS BOARD OF HEALTH, TO BORROW MONEY IN EMERGENCIES.

COLUMBUS, OHIO, Dec. 28th, 1900.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—Your inquiry with regard to the powers of township trustees when acting as boards of health, to borrow money in emergencies, such as to suppress contagious diseases, etc., is before me, for answer.

Section 2121 of the Revised Statutes grants to the trustees of townships the same powers and duties as boards of health have in cities and villages conferred by the same chapter. So it becomes essential to inquire what powers are conferred upon boards of health and councils in cities and villages in this regard. Section 2148 provides that in cities and villages the boards of health and council may, when they deem it necessary, in case of any epidemic or threatened epidemic, borrow any amount of money necessary until such times as the next levy and collections may be made; interest thereon not to exceed six per cent.

Power is thereby fully given, in my opinion, to township boards of health to borrow money. It is not so much a question of power that is troublesome as the question of method by which that power shall be exercised. This power then, in my opinion, can only be exercised by selling bonds of the township for the purpose of raising the money needed for sanitary objects. This is governed by Sections 2835 and 2836. I find there that it will require an advertisement and proceedings in the regular way, either by general or special election, to pass upon the question to issue bonds for such purpose. But it may be observed that under Section 409-25 the State Board may make and enforce orders in local matters when an emergency exists, and the local board has failed or refused to act with sufficient promptness and efficiency. This gives the state board power to proceed without any delay. But that section further provides that all expenses so incurred shall be paid by the city, village or township for which such services were rendered. Your board can thus proceed in this emergency without any delay to make all needful orders in regard thereto to abate any infections or contagious diseases and certify back to the township the amounts of bills incurred in the prosecution of such work. The treasurer will then have to proceed in the way marked out by the above sections to pay for the indebtedness created.

Very truly,
 J. M. SHEETS,
 Attorney General.

MONEY COLLECTED FROM COMPANIES HAVING CONTRACTS WITH THE BOARD OF MANAGERS OF THE OHIO PENITENTIARY; AND PENALTY OF \$1000.00 COLLECTED FROM THE AMERICAN SUGAR REFINING CO.

The E. B. Lanman Co. in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
February 12	\$ 1,396 90	February 12	\$ 1,396 90
March 5	643 10	March 5	643 10
April 25	1,415 30	April 25	1,415 30
June 27	2,807 45	June 27	2,807 45
November 15	1,738 65	November 15	1,738 65
Total	\$ 8,001 40	Total	\$ 8,001 40

The Columbus Chair Co. in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
January 10	\$ 1,268 03	January 10	\$ 1,268 03
February 15	1,178 95	February 15	1,178 95
April 23	1,238 30	April 23	1,238 30
May 15	1,141 50	May 15	1,141 50
May 31	3,149 59	May 31	3,149 59
September 11	1,033 90	September 11	1,033 90
October 9	1,015 00	October 9	1,015 00
November 3	1,174 47	November 3	1,174 47
December 5	1,101 30	December 5	1,101 30
Total	\$12,301 04	Total	\$12,301 04

The Columbus Bolt Works in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
January 31	\$ 3,476 04	January 31	\$ 3,476 04
March 1	3,342 58	March 1	3,342 58
March 30	3,407 50	March 30	3,407 50
April 23	3,659 16	April 23	3,659 16
May 29	3,348 57	May 29	3,348 57
July 2	3,931 60	July 2	3,931 60
July 31	1,133 60	July 31	1,133 60
August 30	2,921 93	August 30	2,921 93
October 2	3,545 02	October 3	3,545 02
November 10	3,344 24	November 10	3,344 24
November 20	3,457 73	November 20	3,457 73
Total	\$35,567 97	Total	\$35,567 97

C. S. Reynolds & Co. in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
February 7	\$938 85	February 7	\$938 85
March 10	994 85	March 13	994 85
April 24	866 50	April 24	866 50
May 23	850 90	May 23	850 90
June 23	869 00	June 23	869 00
July 24	846 30	July 24	846 30
August 28	888 65	August 28	888 65
October 1	875 50	October 1	875 50
November 3	895 75	November 3	895 75
November 15	914 42	November 15	914 42
December 31	692 65	December 31	692 65
Total	\$ 9,633 37	Total	\$ 9,633 37

The Geo. B. Sprague Cigar Co. in account with the Attorney General.

Cash received from the above company:

1900.	Amount.
January 26	\$ 1,160 58
February 14	1,226 83
April 23	1,123 10
April 23	1,308 05
June 14	1,229 96
July 18	1,295 79
August 17	1,318 58
September 4	1,341 75
October 29	1,555 13
November 13	2,615 41
Total	\$14,175 18

Cash received from above company drafted into State Treasury:

1900.	Amount.
January 26	\$ 1,160 58
February 14	1,226 83
April 23	2,431 15
June 14	1,229 96
July 18	1,295 79
August 17	1,318 58
September 4	1,341 75
October 29	1,555 13
November 13	2,615 41
Total	\$14,175 18

Brown, Hinman & Huntington in account with the Attorney General.

Cash received from the above company:

1900.	Amount.
January 30	\$ 4,560 20
February 15	2,204 30
April 7	4,695 65
May 3	2,237 85
June 21	4,880 85
August 9	2,403 80
November 13	6,468 00
December 23	1,976 35
Total	\$29,427 00

Cash received from above company drafted into State Treasury:

1900.	Amount.
January 30	\$ 4,560 20
February 15	2,204 30
April 9	4,695 65
May 3	2,237 85
June 21	4,880 85
August 9	2,403 80
November 13	6,468 00
December 29	1,976 35
Total	\$29,427 00

The P. Hayden Saddlery Hardware Co. in account with the Attorney General.

Cash received from the above company:

1900.	Amount.
January 30	\$ 1,947 40
February 28	1,990 85
March 31	2,182 75
April 27	1,913 60
June 30	1,961 80
July 31	2,047 55
August 30	2,138 35
October 3	1,826 90
October 31	1,981 45
November 30	1,819 30
December 31	1,963 90
Total	\$21,773 85

Cash received from above company drafted into State Treasury:

1900.	Amount.
January 30	\$ 1,947 40
February 28	1,990 85
March 31	2,182 75
April 27	1,913 60
June 30	1,961 80
July 31	2,047 55
August 30	2,138 35
October 3	1,826 90
October 31	1,981 45
November 30	1,819 30
December 31	1,963 90
Total	\$21,773 85

The E. D. Howard Co. in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
February 19	\$ 668 42	February 19	\$ 668 42
June 1	1,212 50	June 1	1,212 50
August 27	3,380 00	August 27	3,380 00
Total	\$ 5,260 92	Total	\$ 5,260 92

The National Broom Co. in account with the Attorney General.

Cash received from the above company:		Cash received from above company drafted into State Treasury:	
1900.	Amount.	1900.	Amount.
September 7	\$ 357 96	September 7	\$ 357 96
October 8	764 98	October 8	764 98
November 14	777 17	November 14	777 17
December 23	800 76	December 29	800 76
Total	\$ 2,700 87	Total	\$ 2,700 87

October 3. Penalty collected from The American Sugar Refining Co	\$ 1,000 00	October 3	\$ 1,000 00
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SUMMARY.

Total amount collected:

The Geo. B. Sprague Cigar Co.....	\$ 14,175 18
Brown, Hinman & Huntington Co.....	29,427 00
The P. Hayden Saddlery Hardware Co.....	21,773 85
The E. D. Howard Co.....	5,260 92
The National Broom Co.....	2,700 87
The E. B. Lanman Co.....	8,001 40
The Columbus Chair Co.....	12,301 04
The Columbus Bolt Works.....	35,567 97
C. S. Reynolds & Co.....	9,633 37
The American Sugar Refining Co.—Penalty.....	1,000 00

Total

\$ 139,841 60

Amount drafted into treasury:

The Geo. B. Sprague Cigar Co.....	\$ 14,175 18
Brown, Hinman & Huntington Co.....	29,427 00
The P. Hayden Saddlery Hardware Co.....	21,773 85
The E. D. Howard Co.....	5,260 92
The National Broom Co.....	2,700 87
The E. B. Lanman Co.....	8,001 40
The Columbus Chair Co.....	12,301 04
The Columbus Bolt Works.....	35,567 97
C. S. Reynolds & Co.....	9,633 37
The American Sugar Refining Co.....	1,000 00

Total

\$ 139,841 60

CIVIL CASES PENDING JANUARY 1st, 1900.

IN THE SUPREME COURT OF OHIO.

(No. 6000.)

The State ex rel. Attorney General v. The Capital City Dairy Company, a corporation, etc.

In quo warranto. To oust defendant from State for manufacturing and selling colored oleomargarine. April 10, 1900, writ of ouster allowed. Messrs. Beardsley and Junk appointed trustees. Defendant prosecuted error to the Supreme Court of the U. S. where the case is now pending.

The State ex rel. The Attorney General v. The Buckeye Mutual Insurance Company of Shelby.

In quo warranto. Judgment of ouster.

William N. Hahn and Edward Mansfield appointed trustees.

Awaiting report of trustees.

(No. 6787.)

The State of Ohio ex rel. Attorney General v. The Tontine Surety Co.

Suit in quo warranto. (See list of cases disposed of.)

(No. 6788.)

The State of Ohio ex rel. Attorney General, v. The Diamond Contract Company.

Suit in quo warranto. (See list of cases disposed of.)

(No. 6510.)

The State of Ohio ex rel. Attorney General v. The Cincinnati, Hamilton and Dayton Railway Company.

Quo warranto. Involving question of legality of Central Passenger Association.

(No. 6678.)

The State of Ohio ex rel. Attorney General, v. Continental Tobacco Company.

Quo warranto. To oust defendant under Anti-trust law.

Demurrer of defendants sustained to 2nd cause of action.

Pending on first cause of action.

(No. 6122.)

E. R. Edson and L. K. Buntain v. Wm. N. Crangle et al.

Suit to recover damages for fish nets destroyed by game warden. Error to Circuit Court of Cuyahoga county.

(No. 5583.)

The State ex rel. The Attorney General v. The Cincinnati, Hamilton and Dayton Railway Company.

In quo warranto. To oust the defendant from occupying and using canal lands and canal basins in Dayton and Hamilton, for the purpose of maintaining thereon switches, side-tracks and other improvements. Geo. B. Warrington appointed Master Commissioner to take testimony.

(No. 2736.)

The State ex rel. Attorney General v. The Manufacturers' Mutual Fire Insurance Company of Columbus, Ohio.

Judgment of ouster June 22, 1897.

Awaiting report of trustees.

(No. 2740.)

The State ex rel. Attorney General v. The Ohio Manufacturers' Mutual Fire Insurance Company of Columbus, Ohio.

In quo warranto. Judgment of ouster June 22, 1897.

Awaiting report of trustees.

(No. 2294.)

The State ex rel. The Attorney General v. The Standard Oil Company.

Information in contempt, for failure to obey the former order of the Supreme Court to dissolve the trust entered into and maintained by defendants at the time of the bringing of the original proceedings.

(No. 6334.)

The State ex rel. The Attorney General v. The Akron Underwriters' Association.

In quo warranto. To oust defendants from doing business in Ohio.

(No. 6346.)

The State ex rel. W. D. Guilbert, Auditor of State, v. Albert E. Aiken, Auditor of Cuyahoga County.

Mandamus. To compel defendant to place omitted property on the tax duplicate. Re-hearing allowed.

(No. 6331.)

The State ex rel. Attorney General v. The Buckeye Pipe Line Company.

Demurrer of State to second defense sustained. Reported.

(No. 6349.)

The State ex rel. Attorney General v. The Solar Refining Company.

Demurrer to second defense sustained. Reported.

(No. 6416.)

The State of Ohio ex. rel. Attorney General v. The Standard Oil Company of Ohio.

Demurrer to second defense sustained. Reported.

(No. 6350.)

The State ex rel. Attorney General v. The Ohio Oil Company.

Suit in quo warranto. To compel the defendant to show cause why it should not be ousted from doing business in the State of Ohio.

Demurrer to second defense sustained. Reported.

(No. 6386.)

The State ex rel. Attorney General v. The C., C., C. & St. L. Ry. Co.

In quo warranto. To oust the defendant from canal lands in Warren and Butler counties.

(No. 5912.)

The State ex rel. The Attorney General v. The Mutual Home and Savings Association of Franklin, Ohio.

In quo warranto. To compel defendant to surrender its charter.

(No. 6724.)

The State of Ohio ex rel. v. Joseph W. Dusenbury.

Quo warranto.

(No. 6513.)

The State of Ohio ex rel. Attorney General, v. The Interstate Savings Investment Company.

Quo warranto. Suit to oust.

(No. 6781.)

The State of Ohio ex rel. Attorney General, v. The Franklin Savings and Loan Association, of Franklin, Ohio.

Suit in quo warranto.

(No. 3609.)

The State of Ohio ex rel. Attorney General, v. The Crescent Building and Loan Association of Toledo, Ohio.

Suit in quo warranto.

(No. 6511.)

The State of Ohio ex rel. Attorney General, v. The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

Quo warranto. Involving question of legality of Central Passenger Association.

CIVIL CASES PENDING JANUARY 1st, 1900, IN THE
U. S. CIRCUIT COURT OF APPEALS.

SIXTH DISTRICT.

The Mercantile National Bank of Cleveland, Ohio v. R. S. Hubbard as Treasurer of Cuyahoga county.

The above case was decided by the Hon. W. H. Taft, Circuit Judge at the June Session, 1899, of the Circuit Court, held in Cleveland, Ohio, in favor of the defendant. From that decision the plaintiff appealed to the United States Court of Appeals, and at the October term, to-wit, on December 10th, 1900, that Court reversed the decision of the Circuit Court, from which decision the defendant has taken an appeal to the Supreme Court of the United States; citation being returnable January 23rd, 1901.

CIVIL CASES PENDING JANUARY 1st, 1900, IN THE
CIRCUIT COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Mercantile National Bank of Cleveland, Ohio, v. Marcellus A. Lander, as Treasurer of Cuyahoga county.

The above action is one of twelve of a similar nature instituted by the national banks of Cleveland, Ohio, against the Treasurer of Cuyahoga county, to enjoin him from the collection of taxes which were placed upon the duplicate by the Auditor of Cuyahoga county, levied on certain amounts which had been deducted by some of the banks from the valuation of its shares; the banks claiming the right to deduct their debts from the value of their bank shares for the stockholders in fixing the amount upon which taxes should be levied. Under the direction of the State Auditor the County Auditor charged the taxes at the usual rate upon these various amounts so deducted, for the years 1894, 1895 and 1896. The banks began actions in equity and secured injunctions against the treasurer collecting the various amounts; the answers of the treasurer have been filed in each of the several cases, and are still pending in the above Court.

In this class of cases, as in the others involving taxation of bank shares, this office was called into the cases by the County Solicitor of Cuyahoga county to assist in the preparation and trial of the cases, because of the amounts involved in which the State is interested.

CIVIL CASES PENDING JANUARY 1st, 1900.

IN THE CIRCUIT COURTS OF OHIO.

FRANKLIN COUNTY.

The State ex rel. Attorney General v. The Findlay Building and Loan Association, of Findlay, Ohio.

In quo warranto. To oust the association from doing business in Ohio.

(No. 1446.)

The State ex rel. Attorney General v. The Union Dairy Company.

In quo warranto. To oust the defendant from doing business in the State of Ohio.

(No. 1620.)

The State of Ohio ex rel. Attorney General, v. The Baltimore and Ohio Railroad Company.

Action in ejectment from State land.

(No. 1640.)

The State of Ohio ex rel. Attorney General, v. The Colonial Investment Company.

Quo warranto.

(No. 1643.)

The State of Ohio ex rel. Attorney General v. The Lake Shore Building and Loan Company.

Quo warranto. Judgment of ouster Sept. 17, 1900. F. L. Taft and Edmund Hitchens appointed trustees.

(No. 1665.)

The State of Ohio ex rel. Attorney General, v. The Lucas County Manufacturers' Mutual Insurance Association.

Quo warranto.

(No. 1569.)

The State of Ohio ex rel. Attorney General, v. The Cleveland and Sandusky Brewing Company.

Quo warranto. Suit to oust.

The State of Ohio ex rel. Attorney General, v. The New Pittsburgh Coal Company.

Quo warranto.

CUYAHOGA COUNTY.

(No. 2406)

The State of Ohio v. The Cleveland and Sandusky Brewing Company.

Action under Section 7, anti-trust law.

The State of Ohio ex rel. Attorney General, v. Patrick J. McKenney.

Action to oust defendant from office of county commissioner.

GREENE COUNTY.

The State of Ohio ex rel. Attorney General, v. The Rapid Transit Company.

Judgment of Circuit Court in favor of defendants. Pending on error in Supreme Court of Ohio.

LUCAS COUNTY.

The State of Ohio ex rel. Attorney General, v. The Manufacturers' Railway Company.

Quo warranto.

MEIGS COUNTY.

The State of Ohio ex rel. Attorney General, v. The National Salt Company.

Quo warranto. Suit under anti-trust law.

MONTGOMERY COUNTY.

The State of Ohio ex rel. v. The Dayton Traction Company and The Cincinnati and Miami Valley Traction Company.

Suit to test right of defendant to use of public ways. Judgment of C. C. Finding for defendant. Petition in error filed in Supreme Court of Ohio being No. 6869.

State of Ohio ex rel. Attorney General, v. The Centennial Club et al.

Suit in quo warranto.

PREBLE COUNTY

Edmond S. Dye v. John Foran et al.

Escheat of lands.

SANDUSKY COUNTY.

The State of Ohio ex rel. Attorney General v. The Toledo, Fremont and Norwalk Railway Company.

Quo warranto.

CIVIL CASES PENDING JANUARY 1st, 1900.

IN THE COMMON PLEAS COURTS OF OHIO.

FRANKLIN COUNTY.

Streets Western Stable Car Line v. W. D. Guilbert, Auditor of State.

To restrain the defendant from adding a penalty to the taxes assessed against the plaintiff for property owned and used by plaintiff in Ohio during the year 1897, under the act of March 30, 1896 (92 O. L., 89).

March 12, 1900, judgment for defendant in common pleas court and now pending in Circuit Court of Franklin county.

W. S. Matthews, Superintendent of Insurance v. The Guarantors Liability and Indemnity Company.

Petition to appoint receiver to wind up defendant's business in Ohio.

M. R. Patterson, receiver. Awaiting final report of receiver.

(No. 36,718.)

The State ex rel. Watson A. France v. Asa S. Bushnell, Governor of Ohio, and F. S. Monnett, Attorney General.

In mandamus. To compel the defendant to sign a pretended bill of exceptions to their action in sustaining the action of the State Board of Medical Registration and Examination, in refusing to grant the relator a certificate to practice medicine in Ohio. Argued and submitted.

(No. 34,938.)

The State ex rel. Hosea W. Libby v. The Ohio State Board of Medical Registration and Examination.

Action in mandamus to compel defendant to issue him a certificate to practice medicine in Ohio. Petition of relator dismissed in Common Pleas Court. Pending on error in C. C. of Franklin Co. Ohio.

(No. 38,667.)

Merchants' and Manufacturers' National Bank v. The Board of Trustees of Ohio State University.

Action to recover on mortgage given by construction company.

(No. 38,917.)

The Fultonham Brick and Tile Company v. The Columbus Construction Company, Trustees of Ohio State University et al.

Suit to recover \$1,950.89 on contract.

No. 40,216.

D. H. Everett v. E. G. Coffin.

Appeal from Justice Roach.

No. 40,129.

The State of Ohio v. The Manhattan Oil Company.

Suit to recover damages for oil wrongfully taken from State land.

BUTLER COUNTY.

No. 19,003.

The State of Ohio v. George H. Sebald et al.

This action was originally brought in the Common Pleas Court to quiet the title of the State to its canal property in Middletown, known as the "Middletown Basin." The Common Pleas Court sustained a demurrer to the petition, and the State not desiring to plead further, the action was dismissed. From this judgment the State prosecuted error to the Circuit Court. The Circuit Court reversed the Common Pleas and overruled demurrer, remanding case to Common Pleas Court for trial, where the case is now pending.

CUYAHOGA COUNTY.

No. 64,478.

The State of Ohio v. Frank Schlund.

Action to quiet title to certain canal lands.

HAMILTON COUNTY.

No. 112,378.

The State of Ohio v. Joseph Fettig.

No. 112,491.

The State of Ohio v. Stephen Hauser, Sr.

No. 113,862.

The State of Ohio v. The Cincinnati Tin and Japan Company.

Trial had in Court of Common Pleas. Judgment for defendant. State filed petition in error in C. C. of Hamilton county Aug: 1, 1900.

No. 113,861.

The State of Ohio v. The Cincinnati Ice Company.

No. 113,860.

The State of Ohio v. The Victor Safe and Lock Company.

No. 112,463.

The State of Ohio v. William Proctor et al.

Suits to quiet title of State in certain lands in Cincinnati.

MONTGOMERY COUNTY.

No. 20,224.

The State of Ohio v. Cyrus H. Baldwin.

Action to recover possession of real estate, part of canal system.

No. 19,040.

The State of Ohio v. Versa E. Gregg.

Same as 20,224.

No. 20,518.

The State of Ohio v. C. A. Wright.

Same as 20,224.

No. 20,520.

The State of Ohio v. Samuel Wagoner.

Same as 20,224.

The State of Ohio v. Christ S. Kellner.

Same as 20,224.

No. 20,519.

The State of Ohio v. Frank Saup.

Same as 20,224.

PERRY COUNTY.

No. 3746.

State of Ohio v. Jonathan Bope.

Action for recovery of real estate.

No. 3745.

State of Ohio v. John Shell.

Action for recovery of real estate.

Judgment for defendant now pending on error in Circuit Court of Perry county.

ROSS COUNTY.

The State of Ohio v. W. P. Bowers.

Action to quiet title to certain canal lands.

TUSCARAWAS COUNTY.

No. 6421.

Ernest C. Crater v. Philip Neighbor et al.

Action in partition; being an action on a conveyance made by the Canal Commission to one Adam M. Beers, a defendant, and claiming an abandonment of the canal basin described in the petition.

Demurrer for Adam Beers sustained. Exception taken by plaintiff to Circuit Court where demurrer was sustained. Case remanded to Common Pleas Court.

CIVIL ACTIONS COMMENCED DURING THE YEAR
WITH WHICH THE ATTORNEY GENERAL
IS CONNECTED EITHER IN THE
PROSECUTION OR DEFENSE.

IN THE SUPREME COURT.

(No. 6912.)

The State of Ohio ex rel. Attorney General v. H. C. Speidel et al.
In quo warranto. Action to oust Speidel as Sheriff of Clermont
county.

(No. 6942.)

The State of Ohio ex rel. The Interstate Savings Investment Com-
pany, v. William S. Matthews and Dwight Harrison.

Mandamus. Action to compel Insurance Commissioner to issue
license permitting Relator to do business in the State of Ohio.

(No. 6951.)

The State of Ohio ex rel. Attorney General, v. The Mt. Hope Col-
lege Company.

In quo warranto. Judgment of ouster and W. G. Wells and J.
A. Martin appointed trustees to wind up the affairs of the Institution.
Pending. Awaiting report of trustees.

Action to forfeit charter of defendant.

(No. 6971.)

The State of Ohio ex rel. Attorney General, v. The Home Co-
operative Union, a Corporation.

In quo warranto.

Action to forfeit charter of defendant.

Lem P. Harris v. W. D. Guilbert, Auditor of State.

Mandamus. Mandamus to Compel Auditor of State to issue war-
rant to the Secretary of the Ohio Centennial Commission.

(No. 7022.)

In the matter of the Application of Gilbert D. Preston for a Writ of
Habeas Corpus.

Action to test constitutionality of the Anti-Screen Law.

(No. 7119.)

The State of Ohio ex rel. W. D. Guilbert, Auditor of the State of
Ohio v. Wm. H. Halliday, Auditor of Franklin county, Ohio.

Mandamus. Action to compel Auditor of Franklin county to fol-
low the provisions enacted in the Royer Bill.

The State of Ohio ex rel. Attorney General v. The Federal Gas and Fuel Company.

Quo warranto. Action to oust defendant company from occupying State lands.

(No. 7256.)

The State of Ohio ex rel. Attorney General v. The Interstate Savings and Investment Company.

In quo warranto. Pending. Action to oust defendant company from doing business in Ohio.

(No. 7234.)

The State of Ohio ex rel. Edward F. Hall, v. Charles Kinney, Secretary of State.

Mandamus. To compel Secretary of State to appoint the Relator a deputy state supervisor of elections.

(No. 7235.)

The State of Ohio ex rel. C. E. Wood v. Charles Kinney, Secretary of State et al.

Mandamus. To compel Secretary of State to appoint the Relator a deputy state supervisor of elections.

(No. 7257.)

The State of Ohio ex rel. Albert E. Culbert, v. Charles Kinney, Secretary of State et al.

Mandamus. To compel Secretary of State to appoint the Relator a deputy state supervisor of elections.

(No. 7302.)

The State of Ohio ex rel. Attorney General, v. John B. Morris et al.

In quo warranto. Action to oust defendants from acting as Board of Revision in the City of Cincinnati.

The State of Ohio ex rel. The Union Savings Bank and Trust Co. v. W. S. Matthews as Superintendent of Insurance.

In Madamus.

(No. 7161.)

The State of Ohio ex rel. Attorney General, v. John J. Sullivan, Joseph F. Meader et al, Board of Supervisors of the City of Cincinnati.

In quo warranto. Action to oust defendants from serving as Board of Supervision in the City of Cincinnati.

IN THE U. S. CIRCUIT COURT.

SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Maria F. Thomas v. George Folsom, The Ohio State University and The State of Ohio.

In equity. Pending. Action to recover real estate willed to the State of Ohio in trust for the Ohio State University.

IN THE CIRCUIT COURTS.

FRANKLIN COUNTY.

The State of Ohio ex rel. Attorney General, v. The Ewing Coal and Salt Co.

In quo warranto. Action to forfeit charter for non-user.

BUTLER COUNTY.

The State of Ohio ex rel. Attorney General, v. Conrad M. Semler.

In quo warranto. Action to oust defendant from position as member of Board of Control for violation of the Garfield Corrupt Practice Act.

IN THE COMMON PLEAS COURTS.

FRANKLIN COUNTY.

James Kennedy v. E. G. Coffin.

Action for damages against Warden O. P. for false imprisonment. Pending.

The State of Ohio v. Wm. A. Proctor and James N. Gamble et al.

Petition for possession of canal lands. Pending.

MERCER COUNTY.

The State of Ohio v. John T. Montgomery and Wm. M. Stitt.

Ejectment proceedings. Pending.

CUYAHOGA COUNTY.

Adella Rawlinson v. The Cleveland Life Insurance Company, W. Howell as Assignee of the Cleveland Life Insurance Company, and Wm. S. Matthews as Superintendent of Insurance of the State of Ohio.

Mandamus in Court of Common Pleas of Cuyahoga county, Ohio. Action to recover against the defendant company and to enforce claim against securities deposited with the Superintendent of Insurance of the State of Ohio.

PERRY COUNTY.

John Shell v. Westbrook Still.

Before E. M. Braddock, a Justice of the Peace of Perry County. Judgment for plaintiff. Pending on error in the Common Pleas Court of Perry county. Action in forcible entry and detainer.

LIST OF CASES DISPOSED OF DURING THE
YEAR 1900.

IN THE SUPREME COURT OF OHIO.

(No. 6787.)

The State of Ohio ex rel. Attorney General, v. The Tontine Surety Company.

Suit in quo warranto. April 10, 1900, judgment of ouster from doing business in Ohio. Case reported.

(No. 6788.)

The State of Ohio ex rel. Attorney General v. The Diamond Contract Company.

Suit in quo warranto. April 10th, 1900, judgment of ouster from doing business in Ohio.

(No. 6122.)

E. R. Edson and L. K. Buntain v. Wm. N. Crangle et al.

Suits to recover damages for fish nets destroyed by game warden. The law under which the above nets were seized was held unconstitutional. Judgment of lower court affirmed.

(No. 2736.)

The State ex rel. Attorney General v. The Manufacturers' Mutual Fire Insurance Company of Columbus, Ohio.

In quo warranto. Judgment of ouster June 22nd, 1897.

(No. 2740.)

The State of Ohio ex rel. Attorney General v. The Ohio Manufacturers' Mutual Fire Insurance Company of Columbus, Ohio.

In quo warranto. Judgment of ouster June 22, 1897.

(No. 2294.)

The State ex rel. Attorney General v. The Standard Oil Company.

Information in contempt for failure to obey the former order of the Supreme Court, to dissolve the trust entered into and maintained by defendants at the time of the bringing of the original proceedings. December 11, 1900, proceedings in contempt dismissed at the cost of the Relator.

(No. 6334.)

The State ex rel. The Attorney General, v. The Akron Underwriters' Association.

In quo warranto. To oust defendants from doing business in Ohio, June term, 1900, writ of ouster allowed Messrs. Kohler & Berry of Akron, Ohio, appointed trustees, final report of trustees filed and approved.

(No. 6386.)

The State ex rel. Attorney General, v. The C. C. C. & St. L. Ry. Co.

In quo warranto. To oust defendant from coal lands in Warren and Butler counties. May 2, 1900, judgment in favor of plaintiff. Judgment for costs against defendant.

(No. 6724.)

The State of Ohio ex rel. v. Joseph W. Dusenbury.

Quo warranto. Dismissed by Relator.

(No. 6513.)

The State of Ohio ex rel. Attorney General, v. The Interstate Savings Investment Company.

Quo warranto. Suit to oust. Feb. 20, 1900, petition dismissed on the authority of No. 6942.

(No. 6678.)

The State of Ohio ex rel. v. Continental Tobacco Company.

Quo warranto. Dec. 20, 1900. Dismissed by Relator.

(No. 6331.)

The State of Ohio ex rel. v. The Buckeye Pipe Line Co.

Quo warranto. Dec. 20, 1900. Dismissed by the Relator.

(No. 6349.)

The State of Ohio ex rel. v. The Solar Refining Company.

Quo warranto. Dec. 20, 1900. Dismissed by the Relator.

(No. 6416.)

The State of Ohio ex rel. v. The Standard Oil Company of Ohio.

Quo warranto. Dec. 20, 1900. Dismissed by the relator.

(No. 6350.)

The State of Ohio ex rel. v. The Ohio Oil Co.

Quo warranto. Dec. 20, 1900. Dismissed by the Relator.

(No. 6912.)

The State of Ohio ex rel. v. H. C. Speidel et al.

In quo warranto. Judgment of ouster.

(No. 6942.)

The State of Ohio ex rel. v. The Interstate Savings Investment Co. v. William S. Matthews and Dwight Harrison.

Mandamus. Peremptory writ allowed.

(No. 6951.)

The State of Ohio ex rel. v. The Mt. Hope College Co.
In quo warranto. Judgment of ouster.

(No. 6971.)

The State of Ohio ex rel. v. The Home Co-operative Union.
In Quo warranto. Judgment of ouster.

Lem P. Harris v. W. D. Guilbert.

Mandamus. Peremptory writ refused. Petition dismissed.

(No. 7022.)

In the matter of the application of Gilbert D. Preston for a writ of
habeas corpus.

Judgment of Court setting at large the relator and holding law to
be unconstitutional.

(No. 7119.)

The State of Ohio ex rel. W. D. Guilbert v. Wm. H. Halliday.
Mandamus. Peremptory writ awarded.

The State of Ohio ex rel. v. The Federal Gas and Fuel Co.
Quo warranto. Dismissed by Relator.

(No. 7234.)

The State of Ohio ex rel. Edward F. Hall v. Charles Kinney.
Mandamus. Dismissed by Plaintiff.

(No. 7235.)

The State of Ohio ex rel. C. E. Wood v. Charles Kinney.
Mandamus. Dismissed by Plaintiff.

(No. 7257.)

The State of Ohio ex rel. Albert E. Culbert v. Charles Kinney.
Mandamus. Peremptory writ allowed.

(No. 7302.)

The State of Ohio ex rel. v. John Morris et al.
In quo warranto. Demurrer to petition overruled, and judgment
of ouster.

(No. 7161.)

The State of Ohio ex rel. v. John J. Sullivan et al.
In quo warranto. Petition dismissed at costs of Relator.

CASES DISPOSED OF DURING THE YEAR 1900.

IN THE CIRCUIT COURTS OF OHIO.

FRANKLIN COUNTY.

(No. 1640.)

The State of Ohio ex rel. Attorney General v. The Colonial Investment Company.

Quo warranto. Judgment of ouster February 13, 1900.

The State of Ohio ex rel. Attorney General v. The New Pittsburg Coal Company.

Quo warranto. February 1900, dismissed for want of jurisdiction.

The State ex rel. Attorney General v. The Findlay Building and Loan Association, of Findlay, Ohio.

In quo warranto. To oust the association from doing business in Ohio.

There being a cause pending in the Court of Common Pleas of Hancock county, Ohio, seeking the same relief prayed for in this action, this action was, by the Circuit Court dismissed October 18th, 1899.

(No. 1569.)

The State of Ohio ex rel. Attorney General, v. The Cleveland and Sandusky Brewing Co.

Dismissed by Relator.

CUYAHOGA COUNTY.

(No. 2406.)

The State of Ohio v. The Cleveland and Sandusky Brewing Co.

Dismissed by Relator.

(No. 2464.)

The State of Ohio ex rel. v. Patrick J. McKenney.

To oust defendant from office of county commissioner. Dismissed January 8, 1900, at costs of relator.

LUCAS COUNTY

The State of Ohio ex rel. Attorney General, v. The Manufacturers' Railway Company.

Quo warranto. Dismissed at the request of the Attorney General.

ATTORNEY GENERAL.

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SANDUSKY COUNTY.

The State of Ohio ex rel. Attorney General, v. The Toledo Fremont and Norwalk Railway Company.

Quo warranto. Petition dismissed.

MONTGOMERY COUNTY.

(No. 436.)

The State of Ohio ex rel. v. The Centennial Club et al.

Suit in quo warranto. Judgment of ouster rendered at the December term 1899, at the costs of the defendants.

CASES DISPOSED OF DURING THE YEAR 1900.

IN THE COURTS OF COMMON PLEAS OF OHIO.

HAMILTON COUNTY.

(No. 112,378.)

The State of Ohio v. Joseph Fettig.

Judgment rendered for plaintiff as prayed for in the petition.

(No. 112,491.)

The State of Ohio v. Stephen Hauser, Sr.

Judgment in favor of the State of Ohio. Costs against the defendant.

(No. 113,861.)

The State of Ohio v. The Cincinnati Ice Company.

Settled by agreement because of grant made by the General Assembly, as contained in volume 85 Ohio Laws page 299. Judgment for defendant.

(No. 113,860.)

The State of Ohio v. The Victor Safe and Lock Company.

Case dismissed by plaintiff.

No. 112,463.

The State of Ohio v. Wm. A. Proctor et al.

June 11, 1900, dismissed without prejudice, and began the same case in the Court of Common Pleas of Franklin county, where it is now pending.

BUTLER COUNTY

(No. 19,003.)

The State of Ohio v. George H. Sebald et al.

This action was originally brought in the Common Pleas Court to quiet the title of the State to its canal property in Middletown, known as the "Middletown Basin." The Common Pleas Court sustained a demurrer to the petition, and the State not desiring to plead further, the action was dismissed. From this judgment the State prosecuted error to the Circuit Court. The Circuit Court reversed the Common Pleas and overruled demurrer, remanding case to Common Pleas Court for trial. Upon hearing the Court of Common Pleas of Butler county, Ohio, rendered judgment quieting title of the defendants as against the claims of the State to all the premises in question except the

following: "Reserving to the State of Ohio a berme bank 12.12 feet in with measured entirely from the east water line of the Miami and Erie canal and extending across the full width of the west end of lot 1146, as the same is known and designated by the renumbering of lots and lands in said city of Middletown."

MONTGOMERY COUNTY

(No. 19,040.)

The State of Ohio v. Versa E. Gregg.

Judgment for plaintiff as prayed for in the petition.

(No. 20,518.)

The State of Ohio v. C. A. Wright.

November term, 1900, trial had; judgment in favor of plaintiff as prayed for in the petition.

(No. 20,520.)

The State of Ohio v. Samuel Wagoner.

November 23, 1900, judgment for plaintiff as prayed for in the petition.