that the legislature intended that it should apply to the building and repair funds of school district libraries. In fact, the failure to include these funds in this section shows an intention to exclude them. The maxim *espressio unius est exclusio alterius* is clearly applicable.

In the Opinions of the Attorney General for 1930, Vol. II, page 999, sections 4296-1, et seq., providing for the investment of moneys in the treasury of a city, which are not required for immediate use, in obligations of the city, were construed. Although these sections are a part of chapter 5, title XII, division V, subdivision II, relating to both cities and villages, it was there said:

> "There is nothing in the language of Sections 4296-1, et seq., to indicate that the Legislature contemplated that these sections should be applicable to other than cities. * * * I am, accordingly, of the view that these sections make no provision for the investment of moneys in a village treasury not required for immediate use, their application being solely to such moneys in the treasury of cities as defined in Section 3497, General Code."

In Opinions of the Attorney General for 1925, page 596, prior to the passage of sections 4296-1, et seq., giving the cities the right to invest in their own obligations, it was held that an ordinance providing for the investment of the funds of a city in the obligations of such city was invalid although section 4240 provides that the council shall have the management and control of the finances and property of the corporation. After quoting sections 4294 and 4295, providing for the deposit of money in banks, the opinion says:

> "The two sections quoted are the only ones relating to funds in the hands of the treasurer of a municipality, or his successor, under a charter government. This method of caring for the municipal fund would seem to be exclusive. * * * To permit a municipality to invest its general funds except as is specified by the statute, would impair the safety of such funds."

I am of the opinion therefore that no part of the building and repair fund provided for by section 7638, General Code, can be invested in interest bearing securities, but that such fund must be placed in depositories as provided by section 7640-1, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4104.

MEMBER OF BOARD OF EDUCATION—MAY NOT PARTICIPATE IN HIS ELECTION AS CLERK OF SUCH BOARD AND IN FIXING SALARY FOR THAT POSITION—PROCEEDINGS VALID IF HIS VOTE UNNECESSARY TO GIVE HIM MAJORITY.

SYLLABUS:

1. *Where a member of a city, exempted village, village or rural board of education is elected clerk of such board by his own vote, which was necessary to give him a majority, there is no election.*

2. *Where a member of a board of education is elected clerk of the board by*

a majority vote of the board which does not include the vote of the member so elected, the member so elected may not participate by his vote in the fixing of a salary for himself. In either case, if his vote is not necessary to his election as clerk or the passage of a resolution fixing his salary, and the result would have been the same had he not voted, his vote does not render the proceedings void.

COLUMBUS, OHIO, February 27, 1932.

HON. GWYNN SANDERS, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "The School Board of Washington Township School District, at its regular meeting, nominated two individuals for Clerk of the Board of Education, one of the persons nominated being a Member of the Board of Education and one of the persons nominated, not being a Member of the Board of Education. On the call of the roll two members voted for the man who is not a Member of the Board of Education and two of the members voted for the man nominated who was a member of the Board of Education, and the man who was a Member of the Board of Education voted for himself.
>
> Question: Is this legal, and in compliance with Section 12932 of the General Code of Ohio."

By force of Section 4747, General Code, a board of education of each city, exempted village, village and rural school district is directed to organize on the first Monday in January after the election of the members of such board, by the election from its membership of a president and vice president. It further provides that a clerk "Who may or may not be a member of the board, shall be elected."

Section 4781, General Code, authorizes a board of education to fix the compensation of its clerk and makes no distinction, so far as the fixing of this compensation is concerned, between a clerk who is a member of the board and one who is not. That the law clearly contemplates the paying of compensation to a clerk who is also a member of the board, is clearly borne out by the provisions of Section 4757 of the General Code, which prohibits a member of a board of education from having any pecuniary interest in any contract of the board, or from being employed in any manner for compensation by the board of which he is a member "except as clerk or treasurer."

Were it not for the statutory provisions noted above, it would not, in my opinion, be legal for a board of education to appoint one of its own number to a public position to which a salary or compensation from public funds attached.

It is a well established principle of common law that one and the same person may not hold two public offices which are incompatible. While it is difficult to give a comprehensive and all inclusive definition of the word "incompatible" it is well settled that when the incumbent of one position is under the direction and subject to the control of the incumbent of another, the two positions are incompatible and especially if there is involved the question of the fixing of compensation by one for the other. A leading case on the subject in Ohio is the case of *State ex rel. Louthan* vs. *Taylor,* 12 O. S., 130, where it is held:

> "Where a member of the board of directors of a county infirmary

was, by said board, appointed to the office of superintendent of the county infirmary, he still continuing to hold the office of director—Held, that the duties of the two offices are incompatible and can not be held by the same person at the same time; and such appointment was, therefore, illegal and void."

To the same effect is the case of *State ex rel. Henry* vs. *Newark,* 6 N. P., 523, where it is held as stated in the headnote:

"A member of the board of health can not be appointed by the board as sanitary policeman and hold both positions at the same time. Such appointment is illegal and void and the party is not entitled to compensation for his services as such sanitary policeman."

In both of the cases mentioned, the court speaks of the two incompatible positions as public offices. A clerk of a board of education is not in all respects at least, a public officer. *Board of Education* vs. *Featherstone,* 110 O. S., 669. Be that as it may, the rule applied in the Taylor and Newark cases, supra, would no doubt, in the absence of statute, be equally applicable to the appointment of, and the fixing of compensation for, a clerk of a board of education, even though he is regarded as a mere employe of the board. The reason behind the rule is equally applicable in both cases. That is, that a public trust committed to a board or commission may not be exercised for the benefit of one of its own members.

The statutes, Sections 4747 and 4757, General Code, abrogate the common law rule so far as the appointment of a clerk and the fixing of his salary is concerned; being in derogation of the common law these statutes must be construed strictly and can not be extended beyond their plain import. They do not expressly or impliedly abrogate the common law principle relating to personal disinterestedness of a public officer in the performance of his public duties. They merely authorize a board of education to select one of its own number as clerk and pay him for his services, but they do not authorize the person so selected to participate personally in such action, in direct opposition to the principle that he may not exercise his public franchise for his private gain. This common law rule is stated by the Supreme Court of New York in *People* vs. *Thomas,* 33 Barb. N. Y., 287, as follows:

"An individual can not be the grantor and the grantee in the same warrant, which confers a public franchise. Hence, an appointment by a body, authorized by statute to appoint, of one of their own number, is a nullity. * *

It is a principle of universal application, as well as of public decency, that a public trust committed to an individual by name shall not be discharged for his own benefit, or to promote his private interest."

Following this principle the Supreme Court of Errors, of Connecticut, in *State* vs. *Goodrich,* 86 Conn., 68, 84 Atl., 99 (1912) held:

"Where a member of a city board of education was selected clerk of such board by his own vote which was necessary to give him a majority, there was no election."

See also *State* vs. *Fowler,* 66 Conn., 294; 32 Atl., 162; *McQuillen on Municipal Corporations,* 2d ed., Section 476; *Throop on Public Offices,* 611.

The principle underlying this rule was forcefully applied by the Supreme Court of Ohio to the directors of a private corporation in the case of *Briggs* vs. *Grocery Company,* 116 O. S., 343. In this case it was held that salaries and extra compensation in the nature of bonuses, that were fixed by the board of directors of a corporation for the officers of the corporation who were members of the board of directors and who participated in the fixing of the salaries and compensation were illegal, on the ground that they constituted a violation of the trust relationship between the board of directors and the stockholders of the corporation. In the course of the opinion the court said:

> "It is elementary that the relation between the officers of a corporation and the corporation is that of trustee and cestui que trust, or that of agent in matters touching his agency and his principal's property. The trustee or agent cannot have adverse interest or employment from that of his cestui que trust or principal, and the utmost good faith is required in dealings wherein the personal interest of the trustee or agent is involved."

If the directors of a private corporation are to be held to such strict accountability, because of the fiduciary relationship existing between them and the stockholders of the corporation, the rule should be applied with equal vigor, at least, to public boards and officers, as the fiduciary relationship existing between public officers and boards and the public is equally, if not more, forceful than that existing between boards of directors of private corporations and the stockholders of the corporation. In R. C. L., Vol. 24, p. 579, it is stated:

> "The relation of a director to the school district is of a confidential nature. The director represents the school district and is its agent, and on this account he can not place himself in a position where his own personal interests might conflict with those of the school district which he must represent. * * As such agent or trustee the law will not permit a school officer to place himself in such an attitude toward his principal or his cestui que trust as to have his interest conflict with his duty."

The doctrine that a member of a board may not personally participate in any matter touching his private interest, as applied to both private corporations and public bodies is based on the equitable principle that when acting in a fiduciary relation he shall not be permitted to make use of that relation to benefit his personal interest.

This rule is applied independently of the question of whether there was fraud or whether there was good intention, and when the vote of the officer or member of the board is necessary to the adoption of a resolution touching matters in which he is personally interested, such resolution is void (or at least voidable as it is held in some jurisdictions) without regard to whether it was fair and honest.

But where the question of paying compensation to an officer arises and the vote of the officer to be compensated is not essential to the passing of a resolution touching the question the proceeding is not nullified by the mere fact that the officer votes for it, in the absence of a charge of bad faith on the part of the officer. In other words, where there is no charge of fraud or want of good faith on the part of the compensated officer with reference to his vote, and the

resolution would have been the same had the officer receiving the compensation not voted, his voting does not render the proceedings illegal. See *Schaffhäuser* vs. *Arnholt and Schaefer Brewing Company,* 218 Pa. St., 298; 11 Ann. Cases, 773 n.

In view of the holding of the Supreme Court in the case of *Briggs* vs. *Grocery Company, supra,* where this rule is applied to the directors of a private corporation, I believe the courts would apply it with equal vigor where the question arose in connection with matters involving public officers and boards, even in the absence of any statute on the question. In the instant matter, this common law rule is supported by the provisions of Section 12932, General Code, which prohibits a member of a board of education from acting in a matter in which he or she is personally interested and provides that anyone who does so act shall be fined not less than $25.00 nor more than $500.00 or imprisoned not more than six months or both.

In construing the provisions of this statute, it should be borne in mind that it is a penal statute, and should therefore be strictly construed. There is some force to the contention that when read in the light of the provisions of Section 4757, General Code, with which it clearly is in pari materia, it was not the intention of the legislature to prohibit a member of a board of education from participating in the election of himself as clerk of a board of education and in the fixing of a salary for that office. However, in the light of the common law rule discussed above, I am of the opinion that Section 4757, General Code, does not serve to abrogate this rule as applied to the election of a clerk of a board of education and the fixing of his salary, and that when a member of the board of education participates in such action he is acting in a matter in which he is pecuniarily interested, within the prohibition of Section 12932.

I am therefore of the opinion in specific answer to your question, that where a member of a city, exempted village, village or rural board of education is selected clerk of such board by his own vote, which was necessary to give him a majority, there is no election. I am also of the opinion that where a member of a board of education is selected clerk of the board by a majority vote of the board which does not include the vote of the member so selected, the member so selected may not participate by his vote in the fixing of a salary for himself. In either case, if his vote is not necessary to his selection as clerk or the passage of a resolution fixing his salary, and the result would have been the same had he not voted, his vote does not render the proceedings void.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4105.

FOREIGN CORPORATION—LICENSE REVOKED—REQUIRED TO AGAIN QUALIFY TO DO BUSINESS BEFORE IT CAN FILE CERTIFICATE OF VOLUNTARY SURRENDER OF LICENSE.

SYLLABUS:

A foreign corporation, whose license to do business within this state has been cancelled, by virtue of the provisions of Section 5509 *of the General Code, is required to comply with the provisions of Section* 5511 *of the General Code, and become again qualified to do business in this state before it can file the certificate of voluntary surrender of license, by virtue of the provisions of Section* 8625-20, *of the General Code.*