1980.

PROHIBITION—POWERS AND DUTIES OF GOVERNOR UNDER SECTION 6212-34 G. C. (MILLER BILL)—PROCEDURE FOR REMOVAL OF OFFICER IN SUCH CASE.

Governor's power and duty under section 14 of Amended Senate Bill 17 (Miller Bill—section 6212-34 G. C.) and procedure in such removal.

COLUMBUS, OHIO, April 9, 1921.

HON. HARRY L. DAVIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "This is to officially request of you that your department give an opinion as to the duties and powers under section 14 of the Miller bill."

Apparently you desire to be advised generally as to the duties and powers of the governor in this matter.

Section 14 of the Miller bill—6212-34 G. C.—is as follows:

> "The governor shall have authority to remove any official for misfeasance, nonfeasance or malfeasance or wilful neglect, or failure, to enforce the laws relating to intoxicating liquors. *The governor shall cause to be filed a complaint before him against such officer and fix the time for the hearing.* Process to compel the attendance of witnesses shall be issued and served by the sheriff of the county in which such witness resides. The judgment of the governor upon the hearing provided herein shall be final. *He shall file in the office of the secretary of state a statement of all the charges made against such officer and the result of his finding thereon.*"

That part of the section which relates more specifically to the procedure is underscored. It is noted that beyond providing for the governor causing the complaint to be filed before him, fixing the time for the hearing and filing a statement of such charges and his findings thereon, the procedure is not stated in detail.

Section 38 of article 2 of the constitution, adopted in 1912, provides in part:

> "Laws shall be passed providing for the prompt removal from office upon complaint and hearing of all officers,".

With these explanatory observations, it may be stated that the first step to be taken is the filing in the office of the governor of a written statement of the alleged causes for the official's removal.

In Opinions of the Attorney-General for 1919, Vol. 2, page 1352, a form of statement is given in an opinion to your predecessor, which will be sufficient under the present act, though not formulated under it.

In this connection it is to be borne in mind that, as said by the supreme court in the Hawkins case, 44 O. S., 98,

> "The cause must be one which touches the qualifications of the officer for the office and shows that he is not a fit or proper person to perform the duties."

While the general qualifications or fitness would not be the issue upon charges under section 14, what was said in this case is pertinent to this extent, that the charges under section 14 must be such which touch the conduct of the official in connection with the laws relating to intoxicating liquors.

The second step should be to cause a copy of the statement to be served upon the official at such a time in advance of the date of the hearing as to give him reasonable opportunity to prepare his defense. In this conneciton it may be noted that no express provision is made in section 14 for such notice, but a notice is presupposed in the constitutional and statutory provisions for a "hearing" and this was the procedure in State ex rel vs. Hawkins, supra, under section 1872 R. S. (82 O. L., 102), which was likewise silent as to notice being given to the official.

The third step may be said to be the hearing itself. There is no provision for the filing of an answer by the official, but if one is tendered, it should probably be accepted, as it may be said that the provision for a hearing contemplates the admission or reception of a written answer if the official desires to present such an answer. The order and method of the hearing are not prescribed by the statute, but it may be suggested that the word "hearing," used here, should be interpreted as providing for a "full and fair opportunity to be heard in his defense," as provided in the section for removal of mayors, 4268 G. C. The governor is not bound by technical rules in the introduction and admission of evidence, as his power has been held to be governmental or administrative rather than judicial in character. It may be suggested, however, that he may well hear counsel for the official upon any point respecting the relevancy of evidence that is offered, the admission, weight and effect of the evidence being determined ultimately by the governor in accordance with his own sense of justice and fair play.

It is noted that section 14 provides for the issuance and service of process to compel the attendance of witnesses without providing specifically for the payment of fees for issuing and serving such process or such witness fees. The duty of the officers serving the process remains unaffected by failure to provide compensation, as notable instances are not wanting where duties are imposed upon officers without provision for compensation for the discharge thereof.

As said in the Hawkins case, above referred to, at page 110:

> "Official duties may, and in some instances are, imposed and required to be performed by the citizens, without any compensation whatever, where there is no constitutional provision requiring it."

As to the witness fees, it is believed that section 3011 G. C., as amended in 108 O. L., Part 2, page 1206, is pertinent. This is part of a series of sections relating to fees and costs and in part provides:

> "In all cases or *proceedings* not specified in this chapter, each person subpoenaed as a witness shall be allowed one dollar for each day's attendance, and mileage allowed in courts of record."

This section, as it read before amendment, applied only to "all cases" not specified in the chapter. There was also added in the amendment a provision that:

> "said fee shall be taxed in the bill of costs, and if incurred in a state or ordinance case, *or any proceeding before a public officer,* board or commismission, the same shall, unless otherwise provided by law, be paid out of the proper public treasury upon the certificate of the court, or officer, board or commission, conducting the proceeding."

It is believed that the provisions of this section, as amended, provide for the payment of the fees of witnesses subpoenaed in the hearing.

The fourth and last step is for the governor to file in the office of the secretary of state a statement of all the charges made against such officer and the result of his findings thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1981.

SENATE BILL NO. 125 RELATIVE TO PRESUMPTION OF DEATH ON ACCOUNT OF ABSENCE, IN ITS PRESENT FORM, UNCONSTITUTIONAL.

Senate Bill No. 125, relative to presumption of death on account of absence, and providing for the administration of the estates of absentees, is, in its present form, unconstitutional.

COLUMBUS, OHIO, April 9, 1921.

HON. A. E. CULBERT, *Secretary, Judiciary Committee of the Senate, Columbus, Ohio.*

DEAR SIR:—Your letter of March 30, 1921, with which you enclosed copy of Senate Bill No. 125, "relative to presumption of death on account of absence, and to administration of estates in such cases," and requesting an opinion as to the constitutionality of the bill should it become a law, was duly received.

Senate Bill No. 125, omitting formal parts, reads as follows:

"Sec. 10636-1. Letters testamentary or letters of administration shall be issued upon the estate of any resident of this state who has been absent from his usual place of residence, in parts unknown, for the period of seven years or more, leaving property, real or personal, owned at the time of disappearance or afterwards acquired by descent or devise. Such letters testamentary or letters of administration shall not be issued until after the giving of thirty days' notice to such absent person by publication in a newspaper published in such county and of general circulation therein, reciting the application for appointment. In any such case such absent person shall be presumed to be dead for all purposes involving the descent and distribution of property, the collection of life insurance and the settlement of the estate, whether it be a case of testacy or intestacy, and the court shall have jurisdiction over the estate of such person in the same manner and to the same extent as if known to be actually dead.

Sec. 10636-2. The property of such departed person, real or personal, and all his rights, obligations, and choses in action, shall be subject to the same liabilities, incidents, rights, management and disposal, in all respect as if such person were known to be deceased, and acts done by such administrator or executor shall be valid, effectual, and binding on such person, should he return, as if they were his own acts, and such person, his heirs or assigns shall be forever barred from asserting claim to any real or personal property formerly owned by him, purchased or acquired from, through or under the administrator or executor appointed pursuant to the provisions hereof, or from, through or under any heirs-at-law or devisee who may have acquired same after the disappearance of such person.

Sec. 10636-3. Whenever it shall be made to appear in any proceeding for