Note from the Attorney General's Office:

1910-1911 Op. Att'y Gen. No., p. 433 was overruled by 2012 Op. Att'y Gen. No. 2012-037.

V.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1910, TO JANUARY 1, 1911.

(To the Governor.)

STATE BOARD OF ARBITRATION — ELIGIBILITY OF MR. JOSEPH BISHOP TO MEMBERSHIP FULLY DISCUSSED.

July 2nd, 1910.

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

DEAR SIR: — Your communication is received in which your request an opinion on the question of Mr. Joseph Bishop's eligibility to the office of member of the State Broad of Arbitration and Conciliation, your letter reading as follows:

> "I am just advised that you are disposed not to give an opinion on the question of Mr. Joseph Bishop's eligibility to the office of member of the State Board of Arbitration and Conciliation, which he submitted to you yesterday on facts stated in writing, because you think he is not one of the officers who is entitled to ask your opinion, but that you are willing to give an opinion on my request.
>
> As the matter has already been submitted to you, and briefs filed, and you have entered upon an examination of the question, I request that you render an opinion, and will thank you to do so as promptly as you can, in view of the urgency of the case."

There seems to be a misunderstanding as to the attitude of this department in giving an opinion to Mr. Bishop, and to make the matter clear I beg to advise that it was not determined by me or the department that Mr. Bishop was not entitled to our opinion and that none would be given him until on yesterday, Friday morning, through the public press we learned for the first time that a hearing had been held before you as Governor on Thursday afternoon with the interested parties represented by their respective counsel, and that this hearing was upon the question of the eligibility of Mr. Bishop to remain as a member of this board and to sit in the proposed arbitration. We were further advised that at this hearing briefs of counsel had been submitted to you and that you expected to consider the same on yesterday, Friday. On learning these facts we consider that it would be improper for us to give to another officer in the state government an opinion bearing upon the question which was then pending before the Governor for decision. It is true that this question is one personal to Mr. Bishop, in the determination of which he would not technically be entitled to command the services of this department, but that fact was not the reason for our decision that an opinion should not be given to Mr. Bishop.

At the time of the receipt of your request for an opinion no briefs had been filed with us, nor had we entered upon any examination of the law in the case. Shortly after the receipt of your letter there came to us in the morning mail a brief, which we are informed is a copy of the brief filed by Mr. Lentz and co-counsel with you on Thursday.

Inasmuch as your request contains no statement of facts relating to Mr. Bishop's eligibility, I assume it to be your desire that I base the opinion on the

written statement submitted by Mr. Bishop on his own behalf. Mr. Bishop's statement is as follows:

> "As my qualifications as a member of the State Board of Arbitration has been called in question I desire to present the following facts and request your opinion on the subject.
>
> In 1876 I was instrumental in forming the Amalgamated Association of Iron, Steel & Tin Workers (then known as the Amalgamated Association of Iron & Steel Workers) and was chosen National President and served in that capacity for a number of years, when I retired from the office and accepted a position as mill manager and later on was employed as traveling salesman for an iron firm.
>
> When I retired from the presidency of the Association I was granted an honorary card of membership which I still hold and which will be accepted by the Amalgamated Association at any time I desire to present the same for active membership as provided by the Constitution of the Association.
>
> That at the time of my appointment I had the endorsement of local lodges and the national officers of the Association; that I was at that time and am now an honorary member of the Amalgamated Association of Iron, Steel & Tin Workers and by reason thereof attended the meetings of local lodges of the Association whenever and wherever opportunity permits and by request of the general officers I attend all the National Conventions of the Association.
>
> I desire to add to the statement handed to you yesterday the supplementary statement that at the time of my appointment as a member of the State Board of Arbitration April 12, 1893, I was an honorary member of the Amalgamated Association of Iron, Steel & Tin Workers which carries with it all the privileges of membership except voting."

Title III, Chapter 14 of the General Code provides for a State Board of Arbitration and Conciliation. The first section of this chapter, 1059 G. C., is as follows:

> "The governor, with the advice and consent of the senate, shall appoint three competent persons who shall constitute a state board of arbitration and conciliation. One of the persons so appointed shall be an employer or selected from an association representing employers of labor, *one an employe or an employe selected from a labor organization and not an employer of labor*, and the third shall be appointed upon the recommendation of the other two appointees. If the two appointees do not agree within thirty days, the third person shall be selected by the governor".

From the statement of facts submitted by Mr. Bishop I assume his eligibility to membership upon the State Board of Arbitration and Conciliation is to be determined by the construction given to the underscored words in the above quoted section, to-wit, "one an employe or an employe selected from a labor organization and not an employer of labor". The word "employe" is defined as follows:

> "Employe. A person who is employed; one who works for wages or a salary; one who is engaged in the service or is employed by another".

Standard Dictionary.

"Employe. One who is employed. It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen and laborers collectively".

Bouvier's Law Dictionary.

"Employe. Usually embraces a laborer, servant or other person occupied in an inferior position".

Anderson's Law Dictionary.

"Employe. One who is employed. The term is general, but is rarely applied either to common laborers or to the higher officers of a corporation".

Cyclopedic Law Dictionary.

The above are general definitions. The word "employe" has been defined by the courts in the determination of preference in claims in bankruptcy and insolvency courts. In the case of In re Courtland Manufacturing Company 45 N. Y. Supp. p. 631 the court defined an "employe" to be a person who works for wages or a salary, and held the word "employe" to include a traveling salesman employed on an annual salary.

A manufacturer's agent, employed to sell its goods on a contract by which the company agreed to pay the agent twenty dollars per month and five per cent on all the sales made by him, held to be an "employe" of the company within the meaning of section 3206a Revised Statutes of Ohio, and entitled to the preference on his claim therein provided. Lewis v. Cincinnati Chair Co., 6 O. C. C. Rep. 243.

These two cases cited are typical cases, the courts uniformly holding that an agent or salesman comes within the meaning of the word "employe" and is entitled to preference.

Mr. Bishop in his statement says,

> "In 1876 I was instrumental in forming the Amalgamated Association of Iron, Steel & Tin Workers (then known as the Amalgamated Association of Iron & Steel Workers) and was chosen National President and served in that capacity for a number of years, when I retired from the office and accepted a position as mill manager and later on was employed as traveling salesman for an iron firm. * * * That at the time of my appointment as member of the State Board of Arbitration April 12, 1893, I was an honorary member of the Amalgamated Association of Iron, Steel & Tin Workers which carries with it all the privileges of membership except voting".

It is clear from this statement that Mr. Bishop was a member in some capacity of the Amalgamated Association of Iron, Steel & Tin Workers at the time of his appointment as a member of the State Board of Arbitration. The statement, however, does not disclose the fact that Mr. Bishop was or was not an "employe" at the time of his appointment. If, as a matter of fact he was regularly employed and was working for wages or salary as contemplated in the definitions of the word "employe", as above set out, it is my opinion that he was eligible to the appointment. That is to say, it is not material in determining the question of eligibility as to whether or not Mr. Bishop was a member of a labor organization. Under the language used in section 1059 of the General Code, the appointee must first be an "employe", and he may or may not be "an

employe selected from a labor organization". Mr. Bishop's statement contains no fact that would raise the question as to whether or not he was at the time of his appointment an "employer of labor".

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE NORMAL SCHOOL COMMISSION — ABSTRACT OF TITLE OF CERTAIN LAND LOCATED AT KENT.

January 5th, 1911.

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

DEAR SIR: — At the request of the commission to select a site for two normal schools to be located in Northern Ohio I have examined an abstract of title to three parcels of real estate located in and near the village of Kent, Portage County, Ohio, and bounded and described as follows:

TRACT NO. ONE.

Situated in the Village of Kent, County of Portage and State of Ohio and known as being a part of Township Lot Number Thirteen (13) in Franklin Township and described as follows: Beginning at an iron pipe at the intersection of the north line of the Rootstown Road and the north line of Lot Number Thirteen (13); thence south 46 degrees 10 minutes west along the north line of the said Rootstown Road two hundred and ninety-six and one-half (296.5) feet to a marked stone; thence north 55 degrees 50 minutes east two hundred and sixty (260) feet to an iron pipe in the north line of said Lot Number Thirteen (13); thence north 86 degrees 10 minutes west along the north line of said lot number (13) three hundred and ninety-four and one-half (394.5) feet to the place of beginning, containing three-quarters of an acre of land (75) more or less.

TRACT NUMBER TWO.

Situated in the village of Kent, and also in the township of Franklin, Portage County and State of Ohio, and known as part of Township Lot Number Twenty-four (24) in the village of Kent, and also a part of Township Lot Number Twenty-three (23) in the township of Franklin described as follows, to-wit: Beginning at the intersection of the south side of Main Street and the East side of Lincoln Avenue in said village of Kent; thence south 86 degrees 10 minutes East seven hundred and thirty-four and seven-tenths (734.7) feet to the East corporation line of said village; thence East along the South side of said Main Street a distance of nine hundred and forty-five and twelve hundredths (945.12) feet to an iron stake; thence South 3 degrees 20 minutes West thirteen hundred and fourteen and two-tenths (1314.2) feet to an iron stake in the South line of Township Lot Number Twenty-three; thence North 85 degrees 10 minutes West along the South line of said Lot Twenty-three a distance of nine hundred and forty-five and twelve hundredths (945.12) feet to a point in the East corporation line of

the village of Kent which is also the Southwest corner of said Lot Number Twenty-three; thence North 86 degrees 10 minutes west along the south line of Lot Number Twenty-four (24) in the village of Kent a distance of six hundred and ninety-eight and five-tenths (698.5) feet to an iron stake set in the North side of the Rootstown road; thence North 46 degrees 10 minutes West along the North side of said Rootstown Road a distance of sixty-five feet to an iron stake in the East side of Lincoln Avenue; thence North 3 degrees 30 minutes East along the East side of said Lincoln Avenue twelve hundred and sixty-six (1,266) feet to the intersection of said Lincoln Avenue with the South side of Main Street which is the place of beginning, containing in Lot Twenty-four in the village of Kent 22.044 acres of land and in Lot Number Twenty-three in Franklin Township 28.425 acres of land more or less.

TRACT NUMBER THREE.

Situated in the Township of Franklin, County of Portage and State of Ohio, and being known as a part of Township Lot num-Fourteen (14) described as follows, to-wit: Beginning at a point in the North line of said Lot Number Fourteen (14) said point being three hundred and twenty-nine and seven-tenths (329.7) feet distant from the Northwest corner of said Lot Number Faurteen; thence South 85 degrees 10 minutes East along the North line of said Lot Number Fourteen a distance of one thousand and twelve and sixty-four hundredths (1.012.64) feet to an iron stake; thence South 4 degrees 10 minutes East seventeen hundred and forty-eight and nine-tenths (1,748.9) feet to an iron stake set in the center of the Rootstown Road; thence North 46 degrees 10 minutes West along the center of said Road seventeen hundred and seventeen and six-tenths (1,717.6) feet to an iron stake in the center of said Road; thence North 27 degrees 35 minutes East seven hundred and twenty-three and thirty-six hundredths (723.36) feet to the North line of said Lot Fourteen which is the place of beginning containing 33.834 acres of land more or less.

I am addressing this communication to you because, under the act of the general assembly providing for the establishment of these two normal schools, 101 O. L. 320, the power to purchase or to accept such tracts seems to be vested in the board of trustees hereafter to be appointed, as soon as the general assembly shall appropriate a sufficient amount of money for the erection of suitable buildings thereon. Deeds for these tracts will, of course, not be delivered until such board is appointed, and this abstract should accompany the deeds.

I assume, therefore, that you will deliver this letter to the board of trustees for the state normal school to be located in Northern Ohio as soon as the members of the same are appointed.

I do not deem it necessary to go into a detailed discussion of the history of the titles of these three tracts as disclosed by the abstract. The following are the only important defects:

1. The deed shown on page 27 of the abstract purports to convey a half interest in some three (3) acres, a portion of tract number three (3) as shown on the plat, from Newton H. Hall and Stella A. Hall, his wife, to Helen M. Wilcox. The recital in the deed is that Helen M. Wilcox is already the owner in

fee of the other remaining half interest. However, the abstract shows that Helen M. Wilcox conveyed all her interest in these three (3) acres to Anna S. Shuart, and that Anna S. Shuart conveyed all her interest to Newton H. Hall. On the face of the abstract, therefore, the grantor in the deed shown at page 27 owned the entire premises in fee before executing the said deed, and is still the owner of a half interest therein. If the abstract is erroneous it should be corrected, otherwise a quit claim deed should be obtained from Newton H. Hall and Stella A. Hall, his wife, or their successors in interest.

2. The description of a portion of Lot Number Thirteen (13) as set forth in the deed shown at page 41 of the abstract, and in the deed shown at page 43 of the abstract, and in all the other deeds abstracted and pertaining to this tract, including the deed to Jeanette K. Sawyer, the present owner, shown at page 51 of the abstract, does not correspond to the plat. The place of beginning in said deed is stated as being forty-one (41) rods west of the northeast corner of Lot Thirteen (13) on the north line of said lot. This is some twenty-two (22) feet less than the north line of said lot as shown on the plat. The abstractor, to whom I am indebted for many courtesies, states that Jeanette K. Sawyer and her predecessors in title have long been in notorious and open possession of the entire tract shown on the plat, and that no person has ever claimed to own the small corner which the description would subtract from the tract so held. While the matter is not of great importance it would be well to have affidavits showing such adverse possession of the tract in question by Jeanette K. Sawyer and Levina J. Goodrich, her predecessor in title.

The foregoing are, as above stated, the only serious defects in the title of the three tracts in question. In addition thereto permit me to point out that no examination has been made in the courts of the United States for pending suits or judgments; that no examination has been made in the records of the village of Kent for special assessments. Taxes for the year 1910 on parcels numbers two and three are unpaid and a lien thereon. Subject to the foregoing qualifications I am of the opinion that when the deed and affidavits above referred to are secured, deeds from Jeanette K. Sawyer and husband, and William Stewart Kent and wife, and Christian Meyer and wife, would convey to the State of Ohio a good and perfect title to all the premises abstracted.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Secretary of State.)

PRIMARY ELECTION LAW — NOMINATION FOR DISTRICT OFFICE — RE-CONVENING OF DELEGATES.

In re-nomination of Democratic candidate for common pleas judge of first division of seventh common pleas judicial district.

October 6th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of September 29th enclosing a certificate issued by the chairman and the secretary of the chief deputies and clerks of the boards of deputy state supervisors of elections of the counties composing the first subdivision of the seventh common pleas judicial district, and an attached copy of an agreed statement of facts. You request my opinion upon the questions thereby presented. The following is a brief statement of the facts:

> The Democratic Judicial Committee of the said subdivision on April 6, 1910, issued a call for a Democratic convention to be held at New Lexington, Ohio, on Friday, June 23, 1910, at one o'clock P. M., and made an apportionment of the delegates among the several counties composing the judicial subdivision. Thereafter, in accordance with law and the call of the committee, delegates were duly chosen by county conventions held in the various counties. On the day and at the hour prescribed in the call a very small minority of the delegates thus chosen assembled at the place named therein and, believing themselves authorized to proceed as a convention, organized and nominated a candidate for common pleas judge. Thereupon the persons thus assembled attempted to adjourn *sine die*.
>
> Upon objection to the certificate of nomination attested by the officers of this supposed convention, you as state supervisor of elections, to whom the question was referred in due course of law, rendered a decision which in part is as follows:
>
> "I am of the opinion, therefore, that twelve delegates of the hundred and seventy-six did not and could not constitute a convention for the subdistrict, and that the candidate that the said twelve attempted to select has no right on the ticket under the Democratic emblem. * * * The twelve that met had the right to adjourn to another day certain, and notify the other delegates to attend."
>
> Thereupon the same committee which had issued the previous call met on the twelfth day of August, 1910, and issued another call addressed to the delegates selected by the various county conventions commanding them to convene in the city of Marietta on Wednesday, August 1st, 1910, at 12:30 o'clock P. M. In pursuance of said second call a majority of the previously chosen delegates assembled, nominated a candidate for common pleas judge and selected a new judicial committee.
>
> Thereupon objection to the certificate of nomination of the candidate for common pleas judge, attested by the officers of this convention, was filed as provided by law, and the question as to the legality of this nomination is now before you for decision in due course as evidenced by the certificate of the chairman and secretary of the chief deputies and clerks, above referred to.

The principal question thus presented involves two subordinate questions, viz.,

1. As to the right of the controlling committee of the judicial district to issue its second call above described.

2. As to the right of the delegates selected by the various county conventions to convene in pursuance of the second call, a majority of them having disregarded the first call.

I have given these questions very careful consideration, not only because of what I assume to be the importance of a decision of the particular case, but also because, as suggested by you as state supervisor of elections in your decisions, with a copy of which you have kindly furnished me, the recently enacted primary election law has changed the common law rights of political parties and, in many instances, has abrogated well-established party customs; so that there are no precedents in this state to guide in the construction of the primary law, and indeed I have been unable to find any decisions elsewhere available for that purpose. The novelty of the question and the consciousness that my decision thereon may be used as a precedent have impelled me to exercise the greatest care in arriving at my conclusions.

The first question which you ask invites immediate consideration of the primary law as construed by the state supervisor of elections. I quote some of the pertinent provisions.

Section 4952:

> "Candidates for * * * district offices * * * shall be nominated by delegate conventions, the delegates to which have been chosen * * * as may be determined by the state or district committee respectively of the party by a majority vote thereof, and certified by it to the proper county central committees at least forty days prior to the time fixed for holding such primaries (referring to the primaries for the selection of delegates to county or district conventions) as may be determined by the controlling committee."

I pause here to remark that the provision for a certification to the several county committees refers, in my opinion, merely to the determination of the *manner* in which delegates to district conventions shall be chosen.

Section 4953:

> "* * * District committees * * * shall, by resolution, determine the representation in all conventions held to nominate candidates for office, and shall apportion the delegates throughout the * * * district. * * * Not less than forty days before the day fixed for holding the primary, such * * * district committee shall transmit a copy of its resolution of apportionment to the central committee of the proper party and to the board of elections of each county in the * * * district * * *"

Again I may state that it is my opinion that the resolution of apportionment referred to in the foregoing section need include only the apportionment itself and is not required to set forth the date of holding the district convention.

Section 4957:

> "*Delegates to county convention* shall meet in convention * * * not later than twenty days after the primary election * * *"

This section is of great importance. There is no similar provisions as to the time when district conventions may meet. On the principle that the expression of one thing is the exclusion of all others, the legislative intent not to provide by law for the time and place of holding district conventions is emphasized by reason of this provision.

Section 4962:

> "All party controlling committees * * * shall serve for two years and until their successors are selected * * *"

I desire in this connection to call attention merely to the fact that the powers and duties of party controlling committees — constituted officers in the nature of public officers by the primary election law, are not defined by law otherwise than by implication arising from the use of the word "controlling." This fact I believe to be significant, and I shall comment further thereon in the course of this opinion.

The foregoing are all the provisions of the primary election law which I deem it necessary to take into consideration in answering your question.

The action of the pretended convention being deemed illegal and nugatory as to the nomination of candidates, it is my opinion that it is equally so in all respects in which it assumed to bind the party. As suggested by you as state supervisor of elections, the delegates assembled at New Lexington *had the power to adjourn to a day certain.* This is the uniform rule with respect to the action of fewer than a quorum in a representative body in which the attendance of a quorum is required in order to render its proceedings valid. What then was the effect of the attempted adjournment sine die? Did such adjournment preclude the regularly elected delegates from convening under a call duly made at a subsequent date? In other words, did the adjournment have the effect of foreclosing the rights of the delegates not in attendance at New Lexington, and of depriving the party which those present assumed to represent of the right to rectify their erroneous action? It seems to me that the answer to these questions must be in the negative.

Taking the view of the primary election law adopted by you as state supervisor of elections, it appears that what was claimed to be a convention was in fact no convention at all in contemplation of law. Its acts bound neither the party nor the absent delegates. By adjourning itself *sine die,* it did not adjourn the convention of the *party* without day, not only because it was not the convention but also because adjournment *sine die* is an act of dignity and finality equal in this connection to the nomination of a candidate itself. A denial of the power to make the latter carries with it the repudiation of the former.

I, therefore, conclude that the mere act of adjournment *sine die* attempted by the assembly of twelve delegates was not an adjournment of the party district convention.

The question then arises as to whether or not the controlling committee of a party, having issued a call for a convention on a day certain, has exhausted its powers with respect to such convention, and whether or not the fact that fewer than a quorum might lawfully adjourn to a day certain for the purpose of securing the attendance of a lawful majority of the delegates to such convention precludes the party committee from issuing a second call on the ground that such adjournment is the exclusive method of securing such attendance. These questions suggest the significance of the failure of the primary law specifically to define the powers and duties of controlling committees, as above noted. It seems to me to be perfectly apparent that a "controlling" committee, created by and existing under the authority of statute law, must be deemed to have all

powers with respect to the government of a political party not otherwise provided for by express statute. That is to say, all powers not conferred by law upon conventions or boards of elections or other authorities with respect to the government of political parties must reside in the controlling committees whose powers are not circumscribed or defined in the statute. This is the necessary construction of the primary law. Under it controlling committees clearly have power to act for the political parties which they represent in all cases requiring action by some recognized party authority and not otherwise provided for by statute. Whenever the party has a right or privilege existing by virtue of law, and the manner in which such right shall be exercised or such privilege shall be enjoyed is not provided for by law, then, under the primary law, the controlling committee should prescribe the manner in which these things shall be done. This is not only the proper construction of our primary law, but the authority of controlling committees has been recognized wherever questioned, and an unbroken line of authority in many states from which I forbear to make citations, sustains the same.

Controlling committees are, of course, subject to party custom — the common or unwritten law of the party. It is conceivable, however, that an emergency may arise within a party presenting a question as to which there is no precedent in the party history. In such case it would be for the controlling committee to formulate a rule and to create a precedent and custom, unless the question was one of parliamentary law which should be decided by a party convention.

It is the policy of our statute to afford to political parties casting ten per cent. of the entire vote in a political sub-division, the right to make nominations in a certain manner. This right which contemplates the holding of a convention, can only be exercised by and through the action of the controlling committee in naming the time and place at which such convention will be held. This results not from any explicit provision of law, for, as has been observed, the primary law does not make it the duty of or confer the power on the controlling committee to fix such time and place. This power then being a residuary power, so to speak, may be exercised as many times and in such manner as may be necessary to secure for the political party the rights guaranteed to it by the law. Whatever might be the case if the statute expressly authorized the controlling committee to issue a call naming the time and place of holding a convention, I am clearly of the opinion that, in the absence of such provision, the power to do this is not exhausted when one call is made, but may be exercised repeatedly if need be, until a convention is legally assembled and organized.

Nor does the fact that an adjournment to a date certain might have been made by the delegates assembled at New Lexington for the purpose of securing the attendance of the other delegates, deprive the controlling committee of this power. If the few delegates who did meet had acted in this way, another question might have been presented. As it is, however, the question is simply as to which, as between the controlling committee and the twelve delegates at New Lexington, had the power to bind the political party and the other delegates; as to which, in a sense, was the agent of the Democratic party of the judicial sub-division.

The answer to this question, it seems to me, is clear. The twelve delegates had no real power to bind the party and failed to exercise the only power which they did have; the controlling committee, to all intents and purposes, is the party, its members being elected in accordance with law for the purpose of governing the party. It must be regarded as having the power necessary to provide against the loss of any of the rights or privileges of the party.

I have, therefore, reached the conclusion that the controlling committee had the power to issue the second call prescribed in the statement of facts.

In reaching this conclusion I have taken into consideration the authorities

submitted by counsel for the objector. These authorities establish the principle that where an official act or duty is enjoined upon a public tribunal and the same is once discharged, the power of the tribunal with respect to such act or duty becomes *functus officio* and can not be reconsidered or again exercised. This rule is well established but its application to the case at hand is not clear. As I have pointed out, the primary law is absolutely silent as to fixing the date of holding a district convention. The law not only does not provide when such a convention must be held, but it does not confer power upon any authority to determine this matter. Only by forced inference from the meaning of the word "controlling", as above indicated, could the controlling committee be said to have any direct or indirect authority of law to fix the date for holding the convention. Its authority rests much more firmly upon party custom than it does upon any express provision of law. It is so well known as to justify an assumption that from time immemorial the dates of partisan conventions have been fixed by controlling committees. It is very clear upon all the authorities that, in the absence of specific provisions of law relating to the government of political parties, such party customs govern, and election officers and courts are bound to take notice of them and act in accordance with them.

I have already stated that, in my opinion, the rule is that where a question relating to party government arises, which has no precedent in the party history and concerning which the statutes are silent, the controlling committee must, from the very necessities of the case, determine the question and create the precedent.

Nor is it material, as suggested by counsel for the objector that the last date at which acts of the controlling committee enumerated in the primary law could lawfully be committed had passed at the time the second call was issued. I have already pointed out that as to the things which the primary law *requires* the controlling committee to do its powers are defined by that law, but as to things concerning which the law is silent the limitations of the law do not apply.

The determination of the controlling committee as to the apportionment of delegates and the manner of choosing them must be made at least forty days prior to the date of the primary election, as provided in Sections 4952 and 4953 of the General Code, above quoted. But its determination as to the date of holding the convention may be made subsequent to the primary so far as the law is concerned, and the mere fact that the date of the convention is determined once does not prevent the committee from reconsidering its action at a subsequent date.

The second specific question involved in your general question presents at first glance a more difficult problem. With a great show of reason it is contended by objector's counsel that the delegates selected by the various county conventions having notice of the date as fixed by the controlling committee for holding the convention must, by their refusal and neglect to attend at New Lexington on said date, be deemed to have determined, each on his own part, that there should be no convention at all. Stated in another way, it is urged that the delegates under and by virtue of the primary law have acquired a certain *quasi* official status and certain powers of an official nature, among which is the nomination of a candidate for common pleas judge; that this power is the creature of the statute and reposes in each delegate a discretionary choice as to whether there shall be any candidate or not, and indeed as to whether there shall be any convention or not; that this discretionary power is as well exercised by failure to attend a convention as by attendance and voting thereat; and that the effect of such failure to attend is to discharge such power and to exclude the official convention of the delegate. On this theory the right of each delegate to attend a convention becomes *functus officio* upon his failure to attend on the date of which he has been notified.

While I have been impressed with the seeming reasonableness of this contention, full consideration impels me to reject it. In the first place it is universally conceded that when a majority of the delegates failed to respond to the first call those actually in attendance could have adjourned from day to day and procured or awaited the attendance of a quorum. This statement is made in your own decision upon the first objection, and is sustained by a uniform line of authority. But how could this be if, upon failure of a delegate to attend on the date selected in the first instance, his right to act as a delegate and thereupon terminated? It is, of course, true that if a minority convene and adjourn from day to day, the convention will be deemed to have begun on the date of the original convening, but I am satisfied that to hold that the right of a person to act as delegate to a convention is terminated by his failure to attend at the time of his first call would be inconsistent with the established right of a minority to adjourn from day to day.

It is to be observed, of course, that the delegates chosen in pursuance of the primary election law are the only delegates or individuals who may be called into convention by the controlling committee. By the primary election law these delegates are given an official status similar to that enjoyed by the controlling committee, but subordinate to such committees with respect to the time of holding their convention.

Counsel for the objector have cited certain cases in which it is held that a nominating convention having duly and legally completed its work and adjourned, can not again be convened for the re-consideration of any of the things determined at the first convention. While these cases clearly are not in point, it has occurred to me that possibly the effect of this opinion might be misconstrued were I not to point out the distinction between them and that now under consideration. If a convention or a public board or any public or *quasi* public authority acts within its jurisdiction, or legally and formally determines not to act with respect to a given matter, then such act or determination is final, and the power or right to act similiarly with respect to the same matter is *functus officio*. This is the rule illustrated in the cases in question. If, however, the act or determination is incomplete, defective or illegal and void, then the power is not discharged, but the defect or illegality may be cured by subsequent proceedings in the same matter. This is the rule applicable to the case under consideration.

The conclusion contended for by the objector can only be reached by admitting that the minority which convened at New Lexington could have adjourned to a day certain for the purpose of affording a majority of the delegates an opportunity to attend, and denying the right of the controlling committee to take such action in the absence of action by the minority of the delegates. I have already said enough to indicate that I do not believe this view is technically correct. But whatever conclusion might be reached on purely technical grounds, it appears to me that there is a very good reason for ignoring the technicalities of the case in this instance.

I have carefully examined the statement of facts submitted to me by you, and find that, while the objection originally filed against the action of the first convention charges that the same was fraudulent, this charge was virtually abandoned by the objector. It seems very clear that the action of the minority of the delegates who assembled at New Lexington was taken in good faith and in the belief that a valid nomination had been made and a new judicial committee had been lawfully selected. This belief induced them to adjourn *sine die*. It was founded upon the previous party custom,—this is disclosed by the statement of facts.

It seems to me that it would be a very great hardship and a violation of the manifest spirit and intent of the primary election law to hold that because of this mistake of law on the part of the delegates at the attempted New Lexington convention, the Democratic party in the whole subdivision should be deprived of its right to make a nomination for the office of common pleas judge, and to select a new controlling committee for the subdivision.

The circumstances are extraordinary, and because of the view above defined as to the powers of the controlling committee in extraordinary cases, I am satisfied that that committee could lawfully call the delegates together upon discovery of the legal error of those of their number who had convened at New Lexington, and that the delegates, — both those who had attended at the first meeting and those who had failed to attend, — could lawfully convene under such second call.

There is still another reason for the conclusion which I have reached. The primary election law seems to require the selection, every two years, of a controlling committee.

Section 4960 of the General Code governs this matter and provides in part as follows:

> "The controlling committee of each such voluntary political party * * * shall be * * * a district committee for each district, consisting of two members from each county or part of county in such district, to be chosen *by the delegates to the district convention* from such county."

The word "district" is defined by Section 4948 to include "any election district, circuit or other subdivision of the state comprising more than one county * * * within which an officer or officers are to be elected."

It is apparent, therefore, that a new committee could be chosen only at the district convention by the delegates from the several counties; such delegates not having met in pursuance to the call of the committee and lacking the power to meet for any purpose other than upon the call of the old committee, it must be held that any action attempted to be taken for the purpose of selecting a new controlling committee in the subdivision at the New Lexington convention, was void and of no effect.

Section 4962 of the General Code provides in part that,

> "All public controlling committees, the selection of which is herein provided for, shall serve for two years and until their successors are selected. * * *"

The plain intent of this section is that controlling committees shall be reorganized every two years; yet if the delegates do not meet at the time mentioned in the call of the committee there is no way in which this positive requirement of the statute can be carried out. In this view of the case it becomes *not only the power but the duty* of the controlling committee to re-convene the delegates when a quorum fails to attend at the date named in its first call, and when those delegates who do attend fail to adjourn to a day certain.

The contestee has called my attention to Section 5010 of the General Code which applies specifically to the procedure in case a nomination certificate is found, upon objection thereto, to be insufficient. The section provides in part as follows:

> "If a person nominated, as herein provided, die, withdraw or decline the nomination, or if a certificate of nomination is in-

> sufficient or imperfect, the vacancy thus occasioned must be filed or the defect corrected in the manner required for original nominations. * * *"

I do not believe that this section applies to a situation such as has arisen in the case now under consideration, but it does indicate a legislative intent that mere defects of form are not to deprive a political party of its privilege of making nominations. It seems to me that the facts disclosed what might, broadly speaking, be termed a formal imperfection in the first convention — taking into consideration the established party custom, and the seeming good faith of the participants in that assemblage.

For all the foregoing reasons I am of the opinion that, in law, the objection to the certificate of nomination of the Democratic candidate for common pleas judge in the first subdivision of the seventh common pleas judicial district is not well taken, and that so far as any of the facts disclosed by the agreed statement of facts are concerned, the name of that nominee should be placed upon the official baliot in each county of the subdivision as the candidate of the party for the office in question.

Very truly yours,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation — of the Worth-McK. Company disapproved.

November 16th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of November 2nd requesting my opinion as to the legality of the purpose clause of the proposed articles of incorporation of the Worth-McK. Company, which is as follows:

> "Said corporation is formed for the purpose of maintaining a registry office for the prompt and easy identification of its subscribers and the identification and recovery of their property.
>
> "Second. Of enabling its subscribers to procure at reduced rates such necessaries, supplies and services as they may need."

This purpose clause is subject to the following criticisms:

1. It distinctly mentions two separate purposes. This is prohibited by the statutes of this state as interpreted in State ex rel vs. Taylor, 55 O. S. 67.

2. Both of the purposes for which the company seeks to be incorporated are stated in vague and ambiguous language, so that it is difficult, if not impossible, to comprehend the nature of the business in which the company proposes to engage.

Very truly yours,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING.

Fee for filing articles of incorporation of the Ohio Retail Shoe Dealers' Association is two dollars.

November 15th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date enclosing the proposed articles of incorporation of the Ohio Retail Shoe Dealers' Association, a corporation not for profit, formed for the purpose of

> "fostering trade and commerce, to reform abuses in trade, to encourage wise and needful legislation, to prevent and adjust controversies and misunderstandings which may arise between its members, to establish and maintain a State Association for the transaction of the business of the association, and to form a more enlarged and friendly intercourse between merchants engaged in the retail shoe trade, and to do all things incident and necessary to promote and establish said association."

You request my opinion as to the fee which must be paid to the Secretary of State for filing these articles.

> The corporation has no capital stock. It does not appear to be "mutual in its character" within the meaning of sub-section 5 of Section 176 of the General Code. I am, therefore, of the opinion that the fee prescribed by said sub-section, towit, Two ($2.00) Dollars, should be charged for filing these articles.

Very truly yours,
U. G. DENMAN,
Attorney General.

SECRETARY OF STATE — POWER OF, TO REJECT APPLICATION FOR CERTIFICATE OF COMPLIANCE WITH LAWS OF OHIO.

Secretary of State has no discretionary power, upon compliance or otherwise, to hear and determine the question as to legality of manner in which foreign corporation applying for certificate of compliance with laws of Ohio has conducted or is conducting its business, with a view to rejecting such application.

September 5th, 1910.

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

DEAR SIR: — Your letter is received asking an opinion on the questions raised by the following papers submitted with your letter:

> 1. The application of the Keystone Watch Case Company, under the provisions of sections 178 to 182 inclusive of the General Code, marked exhibit "A."
>
> 2nd. The application of The Keystone Watch Case Company under the provisions of sections 183 to 192 inclusive, except 186 of the General Code, marked exhibit "B".

3rd. The formal protest against the qualification of The Keystone Watch Case Company to do business in this state, made on behalf of The Dueber Watch Case Manufacturing Company, by the Hon. J. B. Foraker, with the letter of J. Sagmeister, Esq., dated May 21st, 1910, marked exhibit "C".

4th. Written statement of The Keystone Watch Case Company, by its attorneys, Senator N. O. Mather and George Carlton Comstock, marked exhibit "D".

5th. The brief of The Dueber Watch Case Manufacturing Company, marked exhibit "E".

6th. The affidavit of Albert M. Dueber, President of The Dueber Watch Case Manufacturing Company, to which is attached a copy of the petition of The Dueber Watch Case Manufacturing Company, against The Keystone Watch Case Company, et al, case No. 6585, United States Circuit Court, Southern District of Ohio, Western Division, with the letter of J. Sagmeister, dated May 25th, 1910, marked exhibit "F".

Your letter also states that you have fixed and collected a fee of $50.00 on application "A" and a fee of $79.33 on application "B" and hold a draft given for above amounts of $129.33.

Since notifying the attorneys of your intention to refer the matter to me, I have received a reply brief from The Keystone Watch Case Company, also two letters dated June 20th, and 22nd, 1910, respectively, from Hon. J. B. Foraker requesting that attention be given the question of penalties against the companies.

From the information thus submitted you ask an opinion on the following questions:

1st. As to whether your department has authority in law to investigate and examine into matters outside of the written applications of The Keystone Watch Case Company, bearing on the past conduct or the proposed future conduct of said company?

2nd. If the department has authority to make such examination, what should be the scope of the examination and the nature of the finding that would warrant a refusal to grant the certificate of authority to do business authorized by the Sections of the General Code above referred to?

3rd. The request that I suggest a method of procedure for conducting the examination.

The questions presented require the application of the law permitting foreign corporations to do business in Ohio, and are included in Sections 178 to 192, inclusive of the General Code.

The following Sections and parts thereof are in point:

Sec. 178. Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing

business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations.

Sec. 179. Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon whom process against the corporation may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation.

Sec. 180. For issuing such certificate the secretary of state shall be entitled to receive from a foreign corporation the following fees: * * *

A corporation having an authorized capital stock of one million dollars, or more, fifty dollars.

Whereupon such foreign corporation shall be entitled to receive from the secretary of state the certificate provided in the second preceding section.

Sec. 181. Provides for the service of process on corporations.

Sec. 182. Whoever solicits or transacts business in this state for a foreign corporation which is subject to the provisions of the preceding four sections, before it has complied with the provisions of such sections, shall be fined not less than ten dollars nor more than five hundred dollars, or imprisoned not less than ten days nor more than six months, or both. Upon direction of the attorney general, the prosecuting attorney shall prosecute any person charged with a violation of the provisions of such sections.

Sec. 183. Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.

2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio.

Sec. 184. From the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by its property and business in this state, and shall charge and collect from

such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent. upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. Upon the payment of such fee the secretary of state shall make and deliver to such corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state.

Sec. 185. Provides for fee for increase of capital stock of foreign corporations.

Sec. 186. If a foreign corporation complies with the provisions of the preceding three sections, it shall not be subject to process of attachment under any law of this state upon the ground that it is a foreign corporation, or non-resident of the state. A foreign corporation subject to the provisions of such sections which shall neglect or refuse to comply with the requirements thereof shall forfeit and pay one thousand dollars and an additional penalty of one thousand dollars for each month that it continues to transact business in this state without complying with such sections, to be recovered by an action in the name of the state, and on collection paid into the state treasury to the credit of the general revenue fund.

Sec. 187. A foreign corporation which has violated such preceding sections shall not maintain an action in this state upon contract made by it in this state, until it has complied with the requirements of such sections and procured the requisite certificate from the secretary of state.

Sec. 188. Provides that the preceding five sections shall not apply to certain public service corporations and others excepted.

Sec. 189. On application, a foreign corporation shall have the right to be heard by the secretary of state in the matter of the determination of the proportion of its capital stock represented by property used and business done in this state.

Sec. 190. A corporation aggrieved by the decision of the secretary of state under the preceding section may, within ten days, appeal to the auditor of state, the treasurer of state and the attorney general, whose decision shall be final.

Sec. 191. On request of the secretary of state, the attorney general shall prosecute an action against a foreign corporation under the provisions of this chapter in the court of common pleas of Franklin county or in any county in which the corporation has an office or place of business. On good cause shown, the governor and secretary of state may remit the penalty or part thereof incurred by a foreign corporation under this chapter.

Sec. 192. Refers to the listing of capital stock of foreign corporations.

These sections are found in Title 3. Executive, Division 1. Elective State Officers and chapter 2. Secretary of State, of the General Code, and as shown by the title, the Secretary of State is an executive officer. Art. 3. Sec. 1, Ohio Constitution.

The duties of executive officers are mainly to cause the laws to be executed. Bouvier's Law Dictionary — Title "officer".

Under our political system the source of all public governmental authority

is inherent in the people. Art. 1, Sec. 2. Bill of Rights. And it follows that the only authority and powers belonging to the secretary of state are those given by the Constitution and Statutes, and the incidental powers fairly implied therefrom.

I find no constitutional authority covering the questions involved and must therefore look to the statutes.

Section 178 requires all foreign corporations for profit, except those corporations exempted therefrom, before transacting business in this state to procure a certificate from the secretary of state that the requirements of the law authorizing them to do business have been complied with, and until the certificate is procured no action can be maintained by a foreign corporation upon a contract made by it in the state.

Section 179 provides that before granting the certificate the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation and a statement of the amount of its capital stock, its business, the location of its principal place of business in the state and the name and location of the person upon whom process may be served as required by law.

Section 180 provides that the secretary of state, for issuing the certificate, shall receive from the corporation certain fees, and requires a corporation, having an authorized capital stock of one million dollars or more, to pay a fee of fifty dollars.

> "Whereupon such foreign corporation shall be entitled to receive from the secretary of state the certificate provided in the second preceding section."

Section 181 makes further provision for the service of process.

Section 182 fixes the penalty for non-compliance at from ten dollars to five hundred dollars, or imprisonment from ten days to six months or both, against any one soliciting or transacting business for a foreign corporation subject to the provisions of the preceding four sections, before the corporation has complied with the same, and provides that the prosecuting attorney, upon direction of the attorney general, shall prosecute any person charged with violating the provisions of such sections.

Sections 183 and 184 require every foreign corporation not exempted, owning or using a part or all of its capital stock or plant in this state, to file with the secretary of state, in such form as he may prescribe, an additional state-statement under oath containing certain facts and to pay an additional fee, for the privilege of exercising its franchise, of one-tenth of one per cent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, not less than ten dollars in any case.

> "Upon the payment of such fee the secretary of state shall make and deliver to such foreign corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state."

Section 185 provides the fee for increase of capital stock of foreign corporations qualified to do business in this state.

Section 186 exempts a foreign corporation that has qualified to do business, from attachment on the ground that it is a foreign corporation or non-resident of the state. It also provides as follows:

"A foreign corporation subject to the provisions of such sections which shall neglect or refuse to comply with the requirements thereof shall forfeit and pay one thousand dollars and an additional penalty of one thousand dollars for each month that it continues to transact business in this state without complying with such sections, to be recovered by an action in the name of the state, and on collection paid into the state treasury to the credit of the general revenue fund."

Section 187 prohibits foreign corporations that have violated the preceding sections from maintaining actions in the state on contracts made in this state.

Section 188, exempts certain corporations from complying with the preceding five sections.

Section 189, gives foreign corporations the right to be heard by the secretary of state in determining the proportion of its capital stock represented by its property and business in Ohio.

Section 190, gives an aggrieved corporation the right to appeal from the secretary's decision.

Section 191, provides that the attorney general on request of the secretary of state shall prosecute actions against foreign corporations under this chapter, and provides where actions shall be brought and it also provides for the remission of penalties.

Section 192, provides for the listing of capital stock of corporations.

The above covers in detail the statutes applicable to the qualification of foreign corporations for profit to do business in this state, and contains all the express, implied and incidental powers conferred upon the secretary of state in such matters as provided by the statutes.

Under these statutes The Keystone Watch Case Company filed with the secretary of state its application for permission or authority to do business in the state. To this application The Dueber Watch Case Manufacturing Company, a domestic corporation, filed with the secretary of state a protest vigorously claiming that The Keystone Watch Case Company had deliberately and intentionally violated the laws of Ohio for years; that it had been doing business in Ohio without authority of law, without paying taxes due the state, owing the state taxes, and penalty for such neglect; that it is now maintaining and intends to continue to maintain unlawful and ruinous competition against this domestic corporation, wilfully violating the provisions of the Valentine Anti-trust law and the Sherman Anti-trust law; and claiming under the above statutes and under the provisions of Section 6394 of the General Code that it is the official duty of the secretary of state to refuse The Keystone Watch Case Company a certificate of authority to do business in this state.

Section 6394 is a part of the Valentine Anti-trust law and is as follows:

"A foreign corporation or foreign association exercising any of the powers, franchises or functions of a corporation in this state, violating any provisions of this chapter, *shall not have the right of,* and be prohibited from doing any business in this state. The attorney general shall enforce this provision by proceedings in quo warranto in the supreme court, or the circuit court of the county in which the defendant resides or does business, or by injunction or otherwise. The secretary of state *shall revoke* the certificate of such corporation or association theretofore authorized by him to do business in this state."

The Keystone Watch Case Company just as vigorously denies the statements made by the Dueber Watch Case Manufacturing Company, and claims that the Keystone Watch Case Company has complied with all the requirements of the above statutes and that its business is such as may be lawfully carried on by one or more corporations incorporated for such kinds of business under the laws of this state; that the secretary of state's duties in this regard are ministerial and he has *no* authority in law to refuse this company a certificate of authority to do business in this state.

The above statements clearly raise the inquiry presented, the solution of which must be determined by the statutes herein cited.

The statements thus presented by the domestic corporation and denied by the foreign corporation clearly present an issue as to the facts. An issue of law is equally as clearly presented.

In the case of State v. Harmon, 31 O. S. 250 it is held that in the distribution of powers among the various branches of government no exact rule can be laid down in all cases as to what powers may or may *not* be assigned by law to each branch, but those powers not disposed of by the constitution are vested in the general assembly. On page 259 Judge White says:

> "It is said authority to hear and determine a controversy upon the law and fact is judicial power.
>
> "That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.
>
> "The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the government as to the judiciary. Judgment and discretion are required to be exercised by all the departments."

It is the rule that statutes granting power are to be construed strictly. *Sutherland Statutory Construction, Section* 562, *etc.*

The duties required of public officers are either discretionary or ministerial. The distinction between discretionary and ministerial duties depends upon the question as to what the law is. If it involves the exercise of discretion and requires the making of an investigation and the forming of a judgment by the public officer, it is discretionary, but whenever a duty is directed by law it is ministerial. *Wyman's Administrative Law, Chapter* 5.

In the case of State v. Doyle, 40 Wis. 174, the court, in discussing the question of ministerial powers, said:

> "The power to grant a license or the power to revoke appear to be plainly and equally ministerial functions.
>
> "The secretary, upon certain facts appearing to him, is authorized to issue a license, upon certain other facts appearing to him is authorized to revoke it.
>
> "This is a common condition of ministerial duty.
>
> "In such a case the ministerial officer must exercise his personal intelligence in ascertaining the facts upon which his authority is founded, but he acts upon his peril of the fact and can in no sense be said to exercise a judicial function."

By a careful application of the ordinary rules of stautory construction I fail to find any provision in the above statutes giving you the authority to investigate and examine into matters outside of the written application bearing

on the past conduct or the proposed future conduct of The Keystone Watch Case Company, and I am therefore of the opinion that the duties to be exercised in this regard are ministerial and that the discretion to be exercised by you goes to the form and not to the merits of the case; that when a foreign corporation has complied with all the requirements of law entitling it to a certificate and has tendered the proper fee therefor, it is your duty to issue same and your refusal would call forth the writ of mandamus.

The entire absence of any procedure in the statutes for the hearing and determination of any question of law or fact similar to that raised by the Dueber Watch Case Manufacturing Company by the secretary of state supports the conclusion that it was not intended to confer upon that officer any discretion with respect to such matters, especially in view of the above stated principle, that such discretionary powers will not be presumed excepting where created by necessary implication.

I rely upon the rulings laid down in the following cases. While not exactly in point the principles therein contained are applicable:

State ex rel. v. Taylor, 55 O. S. 61;
State ex rel. v. Insurance Co., 49 O. S. 440;
State ex rel. v. Auditor of Darke County, 43 O. S. 311;
Ryan et al v. Hoffman, Auditor et al, 26 O. S. 109;
State ex rel. v. Harris et al, 17 O. S. 608;
Citizens Bank of Steubenville v. Wright, Auditor, 6 O. S. 318.

The opinion rendered makes it unnecessary to consider the second and third inquiries submitted by your letter.

Regarding the question of penalties, the statutes concerning same I believe are plain and, unless the penalties referred to have, for good cause shown, been remitted as provided by law, the collection thereof should be enforced as provided therein.

I am returning herewith the papers submitted.

Very truly yours,

W. H. MILLER,
Ass't Attorney General

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the Wentz Lumber Company disapproved.

August 2nd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of July 28th enclosing articles of incorporation of The Wentz Lumber Company and requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of buying, selling, transporting and dealing in lumber, brick, building blocks, iron, stone and other building and structural material at wholesale and retail. And as incidental to said business: 1. For the purpose of carrying on the business of building and constructing private and public buildings and other structures. 2. For the purpose of buying, leasing or otherwise acquiring all necessary land, including timber lands, clay and

shale lands and lands containing stone or other material, and conducting and maintaining manufactories, shops, kilns, railroad switches and other structures, machinery and appliances thereon, to be used and operated in connection with the business of the corporation. 3. For the purpose of doing all matters and things not inconsistent with law, to carry out fully and completely the objects and purposes of the corporation."

The purpose of "transporting" goods or materials is one which is unrelated to the business of dealing in the same. The power to transport may not be conferred upon a mercantile company as a co-ordinate power. The word "transporting" should be stricken from the articles.

All that portion of the purpose clause including and following the phrase "and as incidental to said business" should be stricken out. This department has repeatedly held that incidental powers exist without specific recital and cannot be enlarged by such recital. Some of the alleged incidental powers attempted to be conferred by the purpose clause under consideration are not properly incidental to the business of buying, selling and dealing in building materials. However, I deem it unimportant to specify them inasmuch as the settled policy of this department is to exclude recital of incidental powers.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — INCORPORATORS.

Incorporators must be natural persons.

Articles of incorporation of the Cleveland Underwriters' Fire Association disapproved.

June 24th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 21st enclosing proposed articles of incorporation of the Cleveland Underwriters' Fire Association with letter and check attached. You request my opinion as to the legality of the purpose clause and the signatures. The articles of incorporation in full, exclusive of the acknowledgment and certification of the notary, are as follows:

"These Articles of Incorporation of The Cleveland Underwriters' Fire Association,

Witnesseth, that we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form an association, for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Cleveland Underwriters' Fire Association.

Second. Said corporation is to be located at Cleveland, in Cuyahoga County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of doing a general fire insurance business in conformity with Section 5895 Ohio Statutes.

In witness whereof, we have hereunto set our hands, this 17th day of June, A. D. 1910.

L. C. Maisner & Co., by L. C. Maisner.
Gurney Bros. Co., by E. E. Gurney.
Cleveland Portrait & Frame Co., by D. E. Wick.
Otis Litho. Co., by C. A. Merills.
Klein, Lichtenstader & Co., by H. F. Klein.
The Findley Brothers Co., by R. C. Findley.
Metropolitan Mfg. Co., per H. A. Fishel.
Euclid Printing Co., by F. W. Schmidt, Prop.
Skating Scarf Co., by A. W. Sampliner.
A. T. Wood & Co., by A. T. Wood."

You inform me that Section 5895 referred to in the purpose clause is the section number in Laning's Revised Annotated Statutes of Ohio.

There are several objections to the purpose clause as above drafted. In the first place, Section 5895 Ohio Statutes is, in law, meaningless. Laning's Annotated Statutes have no official standing and if they are to be used they should, at least, be properly designated, but at all events it is not now permissible to refer either to Laning's Annotated Statutes or to Bates' Revised Statutes. The statute law of this state is now embodied in the General Code, and the proper section number of that Code should be employed if reference to the law is made by sectional number.

Section 5895, Laning, is former Section 3686 Revised Statutes, now Section 9593 General Code. This section provides for the organization of mutual protective associations. Section 9594 General Code, formerly Section 3687 Revised Statutes, Section 5896 Laning, prescribes the form of the certificate or articles of incorporation of such mutual protective associations. This section is, in part, as follows:

> "Such persons shall make and subscribe a certificate setting forth therein: * * *
>
> "3. The object of the association, which shall only be one or more of the objects set forth in the preceding section, and to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members. The kinds of property proposed to be insured and the casualties specified in such preceding section proposed to be insured against, also must be specified in such certificate."

It will be noted that the objects set forth in the preceding section are as follows:

Section 9593:

> " * * * Insuring each other against loss by fire, lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any members of such association."

In short, this section authorizes mutual protection against fire and numerous casualties, while the articles now under consideration state that the association

is "for profit" and proposes to do a "general fire insurance business" — thus evidencing an intention to engage in activities vastly different from those authorized under Section 9593 General Code.

In order that the certificate may comply with the provisions of law regulating mutual protective associations, it will be necessary to use practically the exact language of Sections 9593 and 9594 General Code in drafting the same, and because this has not been done the articles in their present form should not be filed and recorded by you.

There is another objection to the articles, however, which, of itself, would make it necessary for you to refuse to file them. They are subscribed by ten "trade names" many of which are apparently those of corporations and others of which may be partnerships. This department has frequently held that the incorporators, not only of insurance companies but of other corporations as well, must be natural persons. Indeed Section 9593 itself provides that,

> "*Any number of persons of lawful age,* not less than ten in number, residents of this state, and owning insurable property in this state, may associate themselves together, etc."

The use of the italicized language indicates clearly that the intention of the general assembly was that the incorporators of a mutual protective association should be natural persons. In this connection also permit me to point out that the articles or certificate should contain a recital not only as to the residence of the incorporators, but also as to the fact that they own insurable property in the State of Ohio.

Very truly yours,
U. G. DENMAN,
Attorney General.

ELECTIONS — JUDGE OF.

Entitled to compensation and mileage for calling and delivering election supplies.

June 24th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 22nd, enclosing letter of W. B. Gongwer, clerk of the board of deputy state supervisors and inspectors of elections of Cuyahoga county, in which he expresses a desire to be advised as to the effect, if any, of the amendment of Section 4944 General Code upon Section 5043 General Code, which specifies the compensation and mileage of election officers calling for and delivering election supplies at the instance of the board of deputy state supervisors.

The provisions of section 4944 incorporated therein by the amendment, approved May 21, 1910, are as follows:

> "Sec. 4944. * * * In registration cities having a population of three hundred thousand or more by the last preceding federal census, the judges of election, including the registrars as judges and the clerks of election, shall each be allowed and paid ten dollars for each general election and five dollars for each special election, at which they serve and no more, either from the city or county. In

all other registration cities, the judges of election, including the registrars as judges and clerks of election, shall each be allowed and paid five dollars for each election at which they serve and no more, either from the city or county" * * *.

By examination of original section 4944 it appears that the only change made therein by this amendment is the change in the amount paid judges and clerks in registration cities having a population of three hundred thousand or more, etc. The clause "and no more, either from the city or county" which concludes both of the above quoted sentences of the section was formerly found in section 4944 as well as in the amended section.

Section 5043 General Code is as follows:

"The judge of elections called by the deputy state supervisors to receive and deliver ballots, poll books tally sheets and other required papers, shall receive two dollars for such service, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom.

The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality, shall receive like compensation.

In cities where registration is required, the chairman selected at the meeting for organization shall receive one dollar for calling for the sealed package of ballots."

In my opinion section 5043 is not in any way affected by the amendment to section 4944. The services for which compensation is provided by section 5043 are not those of judges and clerks as such, but they are specific services of certain individuals, to which specific compensation is attached.

I, therefore, conclude that under the two sections as they at present exist, the election officers performing the additional services named in section 5043 General Code are entitled to extra compensation as therein provided.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — PROFESSIONAL BUSINESS.

Engineering pursuits are not "professional" within the meaning of statute relating to incorporation of companies.

Articles of incorporation of Francis J. Peck & Company disapproved.

July 6th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 29th enclosing proposed articles of incorporation of The Francis J. Peck & Company, with the request for an opinion as to the legality of the purpose clause thereof, which is as follows:

"Said corporation is formed for the purpose of carrying on the business of mining, civil and physical engineering, analytical, consulting and manufacturing chemistry, assaying and inspection of building material and all things incidental to and in connection therewith."

In my opinion the prohibition of the statute, Section 8623 General Code, against the formation of corporations for the purpose of "carrying on professional business" would not be infringed by permitting these articles to be filed. The exact meaning of the term "professional" as used in this statute is uncertain. On the one hand, lexicographers state that the term undoubtedly has at present a wider significance than that which would include only the so-called three learned professions of law, medicine and the ministry. On the other hand, however, the original significance of the word as defined by Webster expressly excluded "mechanical pursuits" from the category of the professions. As all engineering work is, in a sense, "mechanical," it would seem that the statute should not be interpreted as prohibiting corporations from being formed for the purpose of carrying on such business.

I find, however, several unrelated purposes in the articles under consideration, among which, by virtue of Section 8623 as construed in State ex rel vs. Taylor, 55 O. S. 67, the incorporators will be obliged to elect.

I should not be disposed to criticize the formation of a corporation for the carrying on of a general engineering business, although I believe well-defined distinctions are made between the business of a mining engineer, that of a civil engineer, and that of a "physical" engineer (by which I presume is meant, the business of a mechanical engineer). However, such a general engineering business if authorized is not related to the business of "analytical, consulting and manufacturing chemistry," although the exact meaning of this phrase is uncertain.

The business of "assaying" is probably one of the incidents of mining engineering or of analytical chemistry, and as such it should not be expressly set forth in the articles. The same observation may be made with regard to the power of engaging in the business of "inspection of building material."

Until the articles are so amended as to conform to the criticisms above made I advise that they be not filed or recorded.

Yours very truly,
W. H. MILLER,
First Assistant Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of Incorporation of the Trio Manufacturing Company disapproved.

March 16th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of March 15th enclosing the proposed articles of incorporation of the Trio Mfg. Company, with letter and check attached thereto.

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

"Said corporation is formed for the purpose of doing a general manufacturing business and of buying, selling, manufacturing and

dealing in all kinds of machinery and mechanical appliances, and especially for the purpose of buying, selling, manufacturing and dealing in structural iron and grill work of all kinds.

"For the purpose also of manufacturing, selling, leasing for hire and dealing in mechanical devices, machinery and articles of all kinds made and constructed under and in accordance with any and all Letters Patent of the United States or foreign countries heretofore or hereafter granted.

"For the purpose also of owning Letters Patent of the United States and of any or all foreign countries, and of acquiring rights and interests thereunder, whether territorial or otherwise, and of licensing others for hire in the practice of the inventions secured thereby, or of selling to others territorial or other rights thereunder anywhere in the United States or foreign countries, and with full power to do and for the purpose of doing all other things proper, necessary, convenient or incident to any of the objects and purposes above specifically expressed."

In my opinion the articles in their present form should not be filed.

Regarding the first phrase of said purpose clause as indicative of the purpose of the corporation, it appears that the business proposed to be conducted is that of manufacturing. This department has heretofore held that a company organized for the principal purpose of engaging in manufacturing business may be authorized to deal in the articles to be manufactured as incidental to such principal purpose. Measured by this test, the articles which authorize "buying, selling, manufacturing, and dealing in all kinds of machinery, etc." are too broad. In my opinion also the word "general" is objectionable. If it is the purpose of the incorporators to engage in the business of manufacturing machinery, mechanical appliances, structural iron and grill work, the clause should be so phrased.

The foregoing comment relates also to the second paragraph of the clause. The third paragraph should be stricken out because the power to acquire patent rights in articles to be manufactured by the company would follow as a necessary incident to the general purpose thereof, while the power to deal generally in patent rights is a separate power which can not be joined with that of engaging in the manufacturing business.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the Cranford Construction Company disapproved.

March 31st, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of March 25th enclosing for my opinion as to the validity of the purpose clause thereof, the proposed articles of incorporation of the Cranford Construction Company, with check and letter attached.

The clause in question is very long. In effect, it provides, first, that the company shall have the power to acquire and use patent rights pertaining to

processes for making concrete structures. As incidental to this purpose it is sought to acquire the power to "purchase any business and the contracts and the good will thereof, embracing any of the branches of the business above referred to; as well also, materials, machinery, plants and other property real and personal suitable or convenient for operations, uses, purposes, and business of this corporation; and to pay for such patents * * * business, good will and properties * * * in cash or in shares of full paid non-assessable stock of this corporation."

All of the foregoing precedes in the articles the statement of what I apprehend is the real intended principal purpose of the corporation, viz: "To enter into and engage in general contract business, to construct foundations of all kinds * * wells, reservoirs, sea walls and other structures and to engage in, perform and do all kinds of public, municipal or private work," etc.

Assuming that the general construction business is the principal business of the proposed company, I feel obliged to object to the entire first paragraph. The acquisition and use of patent rights pertaining to the business of concrete construction work is properly incidental to such principal business, and will attach to the principal power without express statement. As actually stated in the articles it constitutes a separate and independent purpose. So also as to the right "to license others to manufacture, employ or use any of the methods, processes and systems of said company," and to pay for the same in stock, etc. None of these powers should be expressly set forth.

The second paragraph of the articles should be amended by striking out the reference to "all kinds of public, municipal or private *work*," and the clause attempting to create the power to "enter into and perform any and all contracts * * in which any person, firm, association or corporation may lawfully engage," While the intention of the incorporators in both these respects is unobjectionable and appears by fair inference, still this use of language is very careless. It should be expressly stated that the "work" and "contracts" which the company proposes to engage in and to execute, are works and contracts of construction pertaining to the principal business of the company.

For the foregoing reasons I beg to advise that in their present form the articles be not filed or recorded by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — ACKNOWLEDGMENT — CERTIFICATION OF OFFICIAL CHARACTER OF OFFICER TAKING.

March 12th, 1910.

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

DEAR SIR: — You have referred to this department the proposed articles of incorporation of the Pinafour Toy Manufacturing Company requesting my opinion as to whether the signature of Charles C. Bow, Probate Judge in and for Stark county, Ohio, under seal of the probate court, as the officer before whom the said articles are acknowledged, is sufficient without the certificate of the clerk of courts of said county that said Charles C. Bow was at the date of said acknowledgment the probate judge in and for said county, etc.

While it is true that a seal of a court of record imports absolute authen-

ticity, nevertheless section 8626 of the General Code is not so phrased as to permit any exception to this requirement which is as follows:

> "The official character of the officer before whom articles of incorporation are acknowledged shall be certified by the clerk of the common pleas court of the county wherein the acknowledgment is taken."

There is no implication here that such certificate shall not be made in case the officer taking the acknowledgment is a judge of a court of record.

I suggest, therefore, that the articles be returned to the incorporators for the inclusion of the clerk's certificate.

Yours very truly,
U. G. DENMAN,
Attorney General.

VITAL STATISTICS — CHIEF REGISTRAR MAY COMBINE TWO OR MORE REGISTRATION DISTRICTS.

March 1st, 1910.

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

DEAR SIR: — I am in receipt of your letter of February 26th in which you submit the following for my opinion:

> In accordance with Section 200 of the General Code, the state registrar of vital statistics has combined two or more registration districts into one registration district. This is especially true in cities where, in almost every case, there have been two to six townships combined with the city, making but one registration district. Query: What fee is a registrar entitled to receive who has charge of a registration district which includes a city and other territory outside of the city?

Under Section 200 of the General Code, the state registrar has authority by him to combine two or more primary registration districts into one primary registration district and, under authority of this section, the state registrar may combine a city registration district and a township registration district into one district.

Section 230 of the General Code, which provides the fee which local registrars shall receive, is, in part, as follows:

> "Each local registrar shall be entitled to be paid the sum of twenty-five cents for each birth and each death certificate properly and completely made out and registered with him, and duly returned by him to the state registrar. *In cities,* in which the city clerk, health officer, or other official acting as local registrar, *receives a fixed salary,* in lieu of fees, he *shall be entitled to five cents* for each birth and each death certificate properly and completely made out, registered with him, and correctly copied and duly returned by him to the state registrar."

The above quoted section does not prohibit a registrar of a district, which contains a city and other territory outside of the city, from receiving twenty-five cents for reporting each birth and death occurring in his district and in territory located outside of the city.

I am of the opinion that the five cent limitation contained in the above section only applies where the birth or death occurs in a city and the registrar of such district which contains a city receives a fixed salary in lieu of all fees.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — NAME.

"The Trustee Company" approved as name of real estate corporation doing business in certain way.

April 1st, 1910.

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

DEAR SIR: — You have submitted to me the proposed articles of incorporation of The Trustee Company, requesting my opinion as to whether they may be filed under the name used.

Section 8628 of the General Code, being a portion of former section 3238 Revised Statutes provides in part that,

> "The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes. * * *."

There is also a provision in this section prohibiting the filing of articles under a name similar to that used by another corporation, but I assume that no such question is raised by the articles now submitted.

The business to be done by the company, as disclosed by an examination of its purpose clause, is in general the real estate business, but the manner of conducting such real estate business is stated in the articles to be as follows: The company is to sell certificates entitling the holders thereof to undivided interests in real property held by the company as agent or trustee for all of the investors. It is thus apparent that the name chosen is appropriate in a sense at least.

I find no statutory provision forbidding the use of the word "trustee" as a part of the name of a company doing this kind of business. It is true that the banking laws of the state provide for the organization of various kinds of "trust companies." It does not seem to me, however, that the name of this company could be said, as a matter of law, to be deceptive as tending to induce the belief that the company would be engaged in any branch of banking business.

In view of the foregoing I have no hesitancy in saying that I know of no reason why the name sought to be used by this company may not be authorized.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the B. C. R. Electric Co. disapproved.

March 26th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of March 19th enclosing proposed articles of incorporation of the B. C. R. Electric Company, with New York draft and letter attached thereto. You request my opinion as to the legality of the purpose clause set forth therein which is as follows:

> "Said corporation is formed for the purpose of carrying on and operating a general manufacture and repair business, and in that capacity to manufacture, buy, sell, make, repair, alter, let or hire and deal in and with apparatus, machinery, supplies, goods, wares, and merchandise, and all or any articles consisting or partly consisting of wood, iron, steel, manganese, copper and other materials, and materials of all kinds capable of being used in a general manufacturing business or likely to be required by customers of such a business; and in so far as the laws of the State of Ohio will permit or hereafter permit it so to do, to have one or more offices, places of business, plants or factories; to hold, purchase or otherwise acquire, to mortgage, sell or convey real or personal property, necessary, incidental or convenient to its business within or without the State of Ohio; to apply for, register, acquire and to use, hold, transfer, sell and dispose of any patent rights, and to do all things that may be necessary and incidental to the carrying out of said purpose and to exercise all the rights, powers and privileges now or hereafter conferred upon corporations organized under the provisions of law authorizing the formation of this corporation."

Without reviewing the authorities which have been set forth in previous opinions to your department, I beg to state that the word "convenient" should be stricken from the phrase authorizing the acquisition of real estate. While the whole phrase is unnecessary so far as adding anything to the powers of the company concerned, if included, it must be limited to such real estate as is necessary and incidental to the principal purpose of the corporation.

Again the clause, "to apply for, register, acquire and to use, hold, transfer, sell and dispose of any patent rights," should be stricken from the articles. As stated, this clause authorizes the exercise of a separate and independent power, viz, that of applying for and dealing in patent rights which, so far as the articles are concerned, might be exercised quite independently of the principal power of conducting a manufacturing business. The generalty and vagueness with which the articles to be manufactured and repaired are stated are also subject to criticism, and the incorporators should be required to set out more specifically the articles which they intend to manufacture and repair. In this connection the phrase, "materials of all kinds capable of being used in a general manufacturing business or likely to be required by customers of such business," should be stricken out.

For the foregoing reasons I am of the opinion that the proposed articles of incorporation should not be filed by you.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING.

Fee for filing articles of incorporation of non-mutual company not for profit $2.00.

January 13th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of January 12th enclosing proposed articles of incorporation of The Stillwater Valley Retail Merchants' Association with letter of H. O. Miles, Secretary, attached thereto. You request my opinion as to the fee chargeable for filing these articles.

The incorporators of this association desire to form a corporation not for profit under the general corporation laws of the state. The purpose clause of the corporation is consistent with this object and is as follows:

> "Said corporation is formed for the purpose of uniting the Retail Merchants of Stillwater Valley more firmly together for the common benefit of all; to evade trade abuses, to disseminate useful information, to furnish a better system of collecting accounts and encourage the observance of all legal holidays."

The letter of the secretary, however, contains the information that the association "is *mutual in character,* having no capital stock and receiving no profits."

Some confusion exists in section 148a of the Revised Statutes with respect to corporations not having a capital stock. In the fourth clause thereof, it is provided that the Secretary of State may charge,

> "for filing the articles of incorporation of any mutual insurance corporation not having a capital stock, *or of any other mutual corporation not organized strictly for benevolent or charitable purposes, and having no capital stock* * * * twenty-five dollars save and except as hereinafter provided."

The fifth paragraph provides in part that the fee

> "for filing the articles of incorporation * * of such corporations as are not organized for profit, have no capital stock and *are not mutual in their character* * * shall be two dollars."

The question is thus presented as to whether the proposed corporation is a mutual corporation or one not mutual in character. Without attempting to define these two classes of corporations, both of which are exclusive of benevolent, religious and charitable organizations as well as of insurance companies, I may state that, in my opinion the proposed articles of incorporation do not authorize the association to be created thereby to conduct its business upon the mutual plan, the letter of the secretary to the contrary notwithstanding. It seems that in the absence of any specific recital in the articles of incorporation as to the method of conducting the internal affairs of the company, the presumption would be that such internal management is non-mutual; that is to say, in such case the members of the corporation would be without authority to create *inter sese* any mutual obligations or liabilities.

From the foregoing it follows that the corporation, not being mutual in its character, is within the scope of paragraph five of section 148a of the Revised

Statutes, and that the fee chargeable for filing the articles of incorporation thereof is $2.00.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of The Magyar Federation of Lorain disapproved.

March 14th, 1910.

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

DEAR SIR: — You have submitted to this department for an opinion thereon, the proposed articles of incorporation of the Magyar Federation of Lorain, with check for $2.00 attached.

The articles purport to authorize the organization of a corporation not for profit, for the purpose of "paying death benefits to the lawful heirs of the deceased members, and promoting the welfare of the members generally."

The provision for paying death benefits authorizes the conduct of an insurance business. There is nothing in the articles of incorporation to show that the membership thereof is to be limited to any class of mechanics, etc. The business apparently contemplated by the incorporators is that permitted under favor of section 3630 R. S., section 9427 General Code, and the articles should be re-drafted so as to conform to the provisions of said section. When so re-drafted the fee chargeable for filing the articles will be $25.00.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Bridge and machinery manufacturing company may not be authorized to carry on business incidental to engineering and contract business.

Such company may not be authorized to deal generally in real estate and personal property.

Such company may not be authorized to deal generally in the assets and liabilities of kindred but not competing corporations.

Articles of incorporation of the Western Reserve Engineering Company disapproved.

February 9th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of February 8th enclosing proposed articles of incorporation of the Western Reserve Engineering Company with check for $10.00 and letter of Messrs. M. B. & H. H. Johnson attached thereto. You request my opinion as to the legality of the purpose clause of said articles.

The purpose clause in question is of great length and I deem it unnecessary to quote the same in full. The following clauses, in my judgment should be eliminated therefrom:

1. "For any other purpose which now is or may be incidental or necessary for a general engineering, contracting and manufacturing business."

This clause is objectionable for two reasons: First, the express authorization of incidental and necessary powers flowing from a valid principal purpose is superfluous. Second, the principal purpose of the corporation as expressed earlier in the purpose clause is that of manufacturing, installing and dealing in bridges and machinery — a valid purpose lawfully expressed in the articles. However, this is not an "engineering" or a "contracting" business and it is not competent for the articles to recite that the corporation shall have powers incidental to either of these businesses.

2. "And in addition thereto to procure by contract, lease, subletting or in any other manner perform such, (presumably the business above described) with any and all rights or charges and with full power to enter on and deal in or trade or manage such business as an engineer, contractor and manufacturer at any place, and under such terms and conditions as will be beneficial to or as may otherwise be determined for the interest of the company."

This clause is objectionable upon the second ground above stated, viz, that "an engineering, contracting and manufacturing" business is not a single purpose within the rule of State ex rel v. Taylor, 55 O. S. 67. The latter portion of this clause is also much too broad.

3. "And in connection therewith, *or otherwise,* own, hold, control, lease, mortgage, buy or sell any and all personal, real estate or mixed property or properties, and to take mortgages and assignments of mortgages upon the same, or otherwise contract with reference thereto, that *may be deemed* necessary or pertinent to attain the purpose of said company."

This clause must be condemned because the right to acquire real and personal property exists as an incidental power without specific recital, while the above quoted clause attempts clearly to transcend the incidental and to confer independent powers upon the corporation.

4. For similar reasons the clause, "to acquire the good will, rights and property and to undertake the whole or any part of the assets and liabilities of any firm, person, association or corporation engaged in a kindred but not competing business and to pay for the same in cash, stock of this company, or otherwise," should be eliminated.

Section 3256 Revised Statutes confers upon corporations formed under the general laws of this state authority to acquire shares of stock in other kindred but not competing corporations, and by a parity of reasoning the power to acquire the other assets of such corporations would seem to be purely incidental to the principal purpose defined by the articles under consideration. However, as above attempted to be conferred, the power is an independent one. The clause should be entirely eliminated; the corporation will lose no lawful power thereby.

The clause authorizing the designing, drafting, erecting and equipping of articles to be manufactured by the company, while possibly unnecessary, may be permitted to remain in the articles. The power thus conferred is appropriate and necessarily incidental to the principal purpose of the corporation, and as stated in the articles is clearly limited to such incidental use.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE MUTUAL LIVE STOCK INSURANCE COMPANY MUST RECITE THAT ALL OF THE SUBSCRIBERS ARE RESIDENTS OF OHIO.

Articles of incorporation of the Farmers' Mutual Live Stock Insurance Company of Hoytville, disapproved.

February 4th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of January 24th, enclosing for my endorsement the proposed articles of incorporation of The Farmers' Mutual Live Stock Insurance Company of Hoytville, Wood County, Ohio.

I regret that I cannot approve the certificate for the reason that it does not appear therefrom that all of the subscribers are residents of the State of Ohio, as required by section 3691-1 Revised Statutes of Ohio. In other respects the certificate is in strict compliance with law.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE MUTUAL RODDED FIRST INSURANCE CO., MUST CONTAIN RECITALS REQUIRED BY SECTION 3687 R. S., SEC. 9591 GENERAL CODE.

Articles of incorporation of the Northwestern Ohio Mutual Rodded Fire Insurance Company disapproved.

February 5th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of February 2nd, enclosing for my approval and endorsement the proposed articles of incorporation of the Northwestern Ohio Mutual Rodded Fire Insurance Company with letter of Newcomer & Gebhart and check for $25.00 attached thereto.

I regret that I am unable to affix my endorsement to these articles for the reason that the certificate does not state that the corporation is to have the power to enforce any contract entered into by its members by which they shall agree to be assessed specifically for incidental purposes and for payment of losses as required by section 3687 Revised Statutes of Ohio. In other respects the articles are in compliance with the law.

Yours very truly,
U. G. DENMAN,
Attorney General.

POLITICAL PARTIES — RIGHT TO NOMINATE CANDIDATES.

Political parties exceeding ten per cent. of the total vote cast in the state may nominate candidates for all district and county offices in the state, regardless of vote cast by such parties in such districts, unless such vote is large enough to

require compliance on the part of such party in such district with the primary election law.

In re Socialist Party.

April 28th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of April 27th, enclosing a letter of Mr. E. E. Adel, acting State Secretary of the Socialist Party of Ohio. You request my opinion as to the question submitted to you by Mr. Adel as follows:

> The Socialist Party cast for state officers at the last general election for such officers more than one per cent and less than ten per cent of the vote for such officers in the state, but in some of the political sub-divisions of the state, such as congressional districts, counties, etc., this party cast less than one per cent of the total vote cast for state officers in such sub-division.
>
> Query: Is the Socialist Party entitled to nominate candidates in any manner provided for in section 4992 General Code, and to have the names of such candidates so nominated placed upon the official ballot upon certificate, under section 4993, in the sub-divisions in which it did not poll one per cent of the vote cast therein for state officers?

Section 4992 General Code, provides in part as follows:

> "Except as provided by the preceding chapter of this title (relating to compulsory primaries for political parties casting ten per cent. of the vote in a sub-division) nominations of candidates *for public office* may be made as herein provided, by a convention, caucus, etc., * * * by such electors * * * representing a political party, which at the next preceding November election for state officers polled at least one per cent. of the entire vote cast in the state. One nomination may be made for each office to be filled at the following election, and, * * * the names of the candidates so nominated shall be printed on the ballots."

Section 4993 provides in part that,

> "Each certificate of nomination shall state such facts as are * * * required for its acceptance, and be signed by the proper officers of such convention, caucus, etc., * * *."

These are the only sections relating to certificates of nomination under any law other than the compulsory primary election law. The right thus conferred upon political parties casting more than one per cent. of the entire vote in the state is unqualified except as to sub-divisions in which such political parties cast ten per cent. of the entire vote in such sub-division. The sections are to be liberally construed. Inasmuch, therefore, as section 4992 confers the power to nominate "candidates for public office" under certain circumstances, it seems to me that this power extends to the nomination of any candidate in any political sub-division of the state.

Section 4996 et seq. General Code provide for the nomination of candidates by nomination papers. It is clear, however, that these sections do not impair the right of a political party to exercise its power under section 4992.

The whole scheme of legislation pertaining to the making of nominations by political parties, and the formation of the official ballot, under the Australian Ballot Law, so-called, discloses two methods of securing representation on such official ballot, viz., by certificate of nomination and by nomination papers. The former are not to be recognized, of course, unless signed by election officers in the case of primary elections, or by convention officers in the case of conventions, caucuses, etc.

Section 5004 General Code governs the filing of certificates of nomination and nomination papers. It provides that certificates of nomination for different political sub-divisions shall be filed with certain certified election officers. This section 5004 is in *pari materia* with sections 4992 and 4993, inasmuch as they both relate to the making and filing of certificates of nomination. The one section, therefore, simply strengthens the manifest meaning of the other and makes it clear that a political party casting more than one per cent. of the total vote for state officers in the state is entitled to exercise rights under section 4992 in and wih respect to any of the political sub-divisions of the state regardless of the number of votes cast by it in such sub-division.

I am of the opinion, therefore, that the status of a political party, under section 4992, is determined, both as to the state and as to any political sub-division thereof, by the percentage of votes cast by it in the state at the last general election for state officers. It is to be noted, however, that if any sub-division such political party has cast more than ten per cent of the votes cast in such sub-division, then its nominations within and for such sub-division must be made under the provisions of the compulsory primary law. In other words, the *duty* of a political party, under the compulsory primary law, is determined by its vote in the *political sub-division;* its rights, under section 4992 General Code, are to be determined by the votes cast in the *state at large* for state officers.

It follows from the foregoing that the Socialist Party having acquired the status of a political party casting more than one per cent of the entire vote cast for state officers at the last general election for such officers is entitled to have its certificates of nomination accepted in any political sub-division of the state regardless of the number of votes cast by it at such election in such sub-division, and to have its candidates for any office in the state placed upon the official ballot by virtue of such certificates of nomination, excepting as to candidates for office within such sub-divisions in which the party may have cast more than ten per cent. of the entire vote in such sub-division, in which case the action of the board of deputy state supervisors of election, under section 30 of the compulsory primary law, section 4985 General Code, will be necessary in order to place such candidates upon the official ballot in such sub-division.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE AMERICAN HOME BUILDER AND ASSURANCE ASSOCIATION DISAPPROVED.

June 1st, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of May 25th, enclosing articles of incorporation of The American Home Builder and Assurance

Association, with correspondence and check attached thereto. You request my opinion as to the legality of the purpose clause thereof which is as follows:

> "Said corporation is formed for the purpose of raising a fund on the assessment plan to assure members protection on their lives and aid them in building and acquiring their own homes."

Two purposes are discernible in this clause:

1. The conduct of a life insurance business.
2. The operation of a building and loan association.

These two powers may not be conferred upon one corporation. The articles in question should not, therefore, be accepted by you. I herewith return all the papers to you.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE PHYSICIANS' PROTECTIVE COMPANY DISSAPPROVED.

Section 8623 General Code construed, corporation may not be organized for multiplicity of purposes.

May 31st, 1910.

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

DEAR SIR:—Your communication is received with which you submit to this department the articles of incorporation of the Physicians' Protective Company, with the request for my opinion as to the legality of the purpose clause thereof. The purpose clause is as follows:

> "Said corporation is formed for the purpose of (A) aiding physicians and surgeons in the collection of their accounts; and to keep them properly advised, on request, as to those persons, who, though able to pay, are in the habit of securing professional service free of charge. (b) To aid the medical profession in the detection and elimination of illegal and fraudulent practitioners of medicine and (c) to keep the profession advised of all proposed or pending legislation that may be of interest to the profession."

In my opinion this purpose clause does not conform to the statutes of this state which prescribe the manner and purpose of corporate formation.

Section 8623 of the General Code provides that,

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

The word "purpose" in this section is designedly used in the singular number and our courts have from time to time construed this section as not allowing the corporation of a company for two or more unrelated purposes.

State ex rel vs. Taylor, 55 O. S. 61.

It follows, therefore, that a corporation may be formed for any *purpose* for which individuals may lawfully associate themselves, subject to the statutory exceptions, and in addition to this main purpose for which the company is formed such incidental powers which are necessary to the convenient prosecution of that main purpose, and which are related thereto, are, by law, implied even though they are not expressly stated in the purpose clause. Applying this rule to the purpose clause under consideration, I am unable to see that the first and second branches conform thereto.

Branch "A" is rather ambiguous. If this corporation is to have for its purpose a collecting agency, the articles should so state in plain and concise language.

Branch "B" is unrelated to Branch "A" and, therefore, does not conform to the requirement contained in section 8623 of the General Code.

Branch "C" of the purpose clause is not an incident to either Branch "A" or Branch "B", but because of its innocent purpose and prospective good it will be possible to so draft it in conjunction with Branch "A" of the purpose clause so that the two could be harmonized. This would not be the case with Branch "B".

I return herewith to you the articles of incorporation advising that you refuse to make record of the same, and for the foregoing reasons.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION OF THE FAIRFIELD GAS, LIGHT AND FUEL COMPANY DISAPPROVED.

June 16th, 1910.

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

DEAR SIR: — Your communication is received in which you submit to this department the articles of incorporation of The Fairfield Gas, Light and Fuel Company with a request for my opinion as to the legality of the purpose clause thereof. The purpose clause is as follows:

> "Said corporation is formed for the purpose of drilling for and accumulating petroleum, oil and natural gas, buying and selling oil and gas rights, privileges and leases and oil and gas, leasing oil and gas territory, constructing and operating pipe lines for marketing said oil and gas, refining and dealing in oil, mining and prospecting for coal and other minerals and doing all things incident to said business."

In my opinion this purpose clause is not drafted in accordance with the requirement contained in section 8623 of the General Code which provides that,

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

To be in conformity with the restrictions of this section these articles should recite the *purpose* for which this company is organized, and all incidental rights and privileges necessary to carry out that main purpose are implied. Acquiring oil and gas, leasing and developing the territory so acquired, and opening and

operating a coal mine for commercial purposes, are two distinct purposes and are not allowable under this section. To engage in the general business of refining and dealing in oil would be outside of the *purpose* of developing oil and gas territory and marketing the same, while the refining and disposing of the product of a territory in the development thereof might be a necessary and convenient incident to the successful prosecution thereof and therefore proper. This purpose clause is objectionable because it recites that the company is organized for more than one principal purpose, and this the law of Ohio does not sustain as is shown by the foregoing section of the General Code and by the Supreme Court's construction thereof as found in the case of State ex rel v. Taylor, 55 O. S. 61.

I return herewith the articles advising that you refuse to record the same for the foregoing reasons.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE HIGHLAND OIL AND GAS COMPANY DISAPPROVED.

June 17th, 1910.

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

DEAR SIR: — Your communication is received with which you submit to this department the articles of incorporation of The Highland Oil & Gas Company with the request for my opinion as to the legality of the purpose clause thereof.

Section 3823 of the General Code (sec. 3235 R. S.) provides that,

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

An examination of the purpose clause under consideration shows clearly that it contains a plurality of purposes. This is not authorized by statute. Among the incidental rights set out in this purpose clause are the following:

> "To mine, purchase or otherwise acquire, and to sell, petroleum, natural gas and other minerals."

The mining and marketing of coal is not, in my opinion, an incident to an oil and gas company. It is a separate and distinct purpose and entirely outside of any incidental or convenient right to a proper prosecution of the function of a natural gas and oil company. The same may be said of the purchase and sale of petroleum and natural gas.

If I understand the meaning of the draftsman of this purpose clause, this company is formed for the purpose of prospecting or drilling for petroleum, oil and gas and other minerals, and for the purpose of handling through pipe lines or otherwise, refining and marketing such oil, gas and other minerals and other products thereof, and for the purpose of leasing, purchasing, acquiring and owning real estate and interests therein for the purpose aforesaid or incidental thereto.

The purchaser of stock in a corporation organized under the laws of Ohio has the right to assume that the company's assets will be invested in the prosecution of one legally authorized principal purpose and not be diverted into pur-

poses not incidental to the main purpose but into separate and distinct business interprises. The singleness of corporate enterprise is made mandatory by the aforesaid section, and it has been so construed by the supreme court of this state in the case of State ex rel v. Taylor, 55 O. S. page 61.

I return herewith the articles of incorporation and suggest that you require the same to be re-drafted so as to substantially conform to the above suggestions.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of The Grafton Manufacturing Company disapproved.

July 3rd, 1910

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 29th, enclosing proposed articles of incorporation of The Grafton Manufacturing Company with letter and check attached thereto. You request my opinion as to the legality of the purpose clause thereof which is as follows:

> "Said corporation is formed for the purpose of smelting and refining ores, metals and drosses, manufacturing and dealing in metals and metal products of all kinds, mine, mill, builders, farm, household and machinery supplies made from metal or metal products, or from metal or metal products in combination with wood or other material; also the manufacturing and dealing in of any and all articles made partly from metal and partly from wood and of galvanized, tinned, oxidized, enameled or other coated wares or articles in metal or in metal in combination with wood or other material. Also the manufacturing and dealing in all kinds of roofing and builders supplies".

Under section 10137 General Code, formerly section 3862 Revised Statutes and section 10139 General Code, formerly section 3864 Revised Statutes, corporations may be formed for the purpose of refining and purifying metals and manufacturing and dealing in metal products and products composed in part of *iron* and wood. However, these sections do not expressly or by implication authorize refining companies to be empowered to engage in manufacturing articles composed in part of wood and in part of some metal other than iron. In the absence of such authority in these sections, the general rule laid down in section 8623 General Code, which limits a corporation to a single purpose, must control.

Again, as I have heretofore advised you, a manufacturing company must specify with some degree of certainty the articles to be manufactured, and it is not sufficient to describe them simply as all articles capable of being manufactured from a given raw material. I know of no reason why this rule of certainty should not apply to corporations organized under favor of section 10137. "Manufacturing and dealing in all kinds of roofing and builders' supplies" is a purpose entirely unrelated to any of the other purposes expressed in the articles of incorporation. This clause should be stricken out entirely. Until the articles

are so amended as to meet the criticisms herein made, I advise that they should not be filed or recorded.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Article of incorporation of The Trumbull County Abstract Company disapproved.

July 3rd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 29th, enclosing proposed articles of incorporation of The Trumbull County Abstract Company with letter and check attached thereto. You request my opinion as to the legality of the purpose clause of said articles which is follows:

> "Said corporation is formed for the purpose of preparing and furnishing abstracts, statements and certificates of title to real property; doing a general business of searching public records; negotiating and making loans on real estate and notes secured by real estate mortgage for itself and as agent for others and to collect interest and principal of loans made or negotiated by it; to effect investmnets in notes and mortgages secured by real estate, to buy and sell the same, and to pledge the same as security for money loaned or intrusted to it; to own real estate as a place for carrying on its business, or as incident to the carrying on of said business; and to do any and all things necessary or incident to a general abstract, title and loaning business or to any of the foregoing purposes."

The business of "negotiating and making loans on real estate and notes secured by real estate mortgage," and that of "effecting investments in notes and mortgages secured by real estate, etc.," are separate and distinct enterprises from that of "preparing and furnishing abstracts * * * of title * * * and doing a general business of searching public records". The latter is apparently the main or principal object of the incorporators. Under section 8623 of the General Code, as construed in State ex rel v. Taylor, 55 O. S. 67, the incorporators will be obliged to elect which one of these purposes they desire to be authorized as a corporation to pursue, and until such election is made, and the articles are so drafted as to conform thereto I advise that you do not file or record them.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE LAW — APPLICATION TO VEHICLES OWNED BY MUNICIPALITY.

Motor vehicles owned by department of public safety of municipal corporation, other than fire engines, etc., expressly exempt by section 1 of the automobile law, section 6290 General Code, must be registered under said act.

February 11th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of January 28th, presenting for my opinion thereon the question as to whether an automobile used by a city fire department is exempt from registration under the provisions of the automobile law, and generally as to whether the term "fire engines" as used in section one of said law can be construed to include other fire apparatus and automobiles used by the officers and members of the city fire department.

The section under consideration is as follows:

> "* * the term "motor vehicle" as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motor bicycles, motor cycles, road rollers, traction engines, fire engines, police patrol wagons, ambulances and such vehicles as run only upon rails or tracks".

While there would seem to be some reason for excepting from the provisions of the automobile law all motor vehicles used by the department of public safety of a municipal corporation, in view of the fact that said department, generally speaking, exercises the governmental functions of the city as distinguished from its corporate functions, I do not believe that the precise language of the law will permit such a construction. It is true that a municipal corporation is not liable for injuries and damage resulting from the improper use of fire apparatuses and like public agencies. Frederick v. Columbus, 58 O. S. 538.

It is true also, in view of this principle, that one of the fundamental purposes of the automobile law would seem not to be applicable to vehicles so used. However, it cannot be said that this class of vehicles is utterly excluded from the class of objects of the legislative intent embodied in the automobile law so as to modify by implication the express language of section 1. It is much safer, therefore, to adhere to the strict wording of the section, and not to extend the term "fire engines" beyond its ordinary significance.

It is, therefore, my opinion that automobiles used by a city fire department are not exempt from registration under the provisions of the automobile law, and that no vehicles used by the department of public safety save those specifically mentioned, motor bicycles, motor cycles, fire engines, police patrol wagons and ambulances, should be regarded as excluded from the class of "motor vehicles" defined by section 1 of said law.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING — NON-CHARITABLE MUTUAL AID ASSOCIATION MUST BE $25.00.

February 9th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of February 8th, enclosing articles of incorporation of The Brotherhood of Cleveland with letter

of A. E. Bernsteen, Esq., and check for $2.00 attached thereto. You request my opinion as to the fee chargeable for filing these articles of incorporation.

The nature of the corporation in question is to be ascertained from the recital of the purpose clause which is as follows:

> "The purpose for which said corporation is formed is not for profit, it is for the mutual protection and relief of its members, to elevate their social, moral and intellectual conditions and for the payment of stipulated sums of money to the worthy and needy families, members of said association."

Paragraph 5 of section 148a of the Revised Statutes of Ohio provides that the sum of $2.00 shall be charged "for filing the articles of incorporation of corporations formed for religious, benevolent or literary purposes; or of such corporations as are not organized for profit, have no capital stock, and are not mutual in their character; or of religious or secret societies, or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, formed for the mutual protection and relief of the members thereof and their families exclusively."

The corporation in question evidently seeks classification within this section. However, the purpose clause does not clearly indicate that it is subject to such classification. If, as a matter of fact, the corporation is a religious or secret society or an association composed exclusively of any class of mechanics or other employes, etc., such facts should be set forth in the articles of incorporation. The fact that the corporation will have the power to pay stipulated sums to the members of the association excludes it from the catalogue of corporations formed for strictly religious, benevolent or literary purposes. In their present form, therefore, the articles cannot be filed under said paragraph 5.

In my opinion paragraph 4, which applies to the articles of incorporation of "any * * mutual corporation not organized strictly for benevolent or charitable purposes and having no capital stock," governs the filing of these articles, and the fee prescribed thereby, which is $25.00, should be charged therefor.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Construction company may not be authorized to conduct hotel and general store business.

Articles of incorporation of the Gates Mill Company disapproved.

February 17th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of February 12th, in which you request my opinion as to the validity of the purpose clause of the proposed articles of incorporation of the Gates Mill Company which is as follows:

> "Said corporation is formed for the purpose of constructing and maintaining buildings and appurtenances to be used for a country hotel and inn, store-rooms and offices; and of conducting and operat-

ing therein a country hotel and inn and also in connection therewith, a general merchandise store for the buying and selling of meats, groceries, country products, hardware, notions, boots and shoes and other supplies and articles exchangeable for supplies; and of acquiring by purchase or lease, and of holding, using, mortgaging and leasing all such real estate and personal property as may be necessary for carrying on such business."

The draftsman of this clause has evidently supposed that the various purposes contemplated thereby may be joined under favor of section 3884a Revised Statutes, being section 10210 of the General Code, which is in part as follows:

"A corporation organized for the *purpose of constructing and maintaining buildings* to be used for hotels, store rooms, offices, warehouses and factories may acquire by purchase or lease and hold, use, mortgage and lease all such real estate or personal property as is necessary for such purpose * * ."

This assumption, however, seems to me to be erroneous. The section in question simply authorizes a building company to acquire real estate. It does not in any way enlarge upon or modify the provisions of section 3235 Revised Statutes, section 8623 of the General Code, which, as construed in State ex rel v. Taylor, 55 O. S. 67, authorizes the formation of a corporation for a single purpose only. The single purpose contemplated by section 10210 of the General Code is that of constructing and maintaining buildings to be used for certain purposes, and the mere fact that one of those purposes is the hotel business does not authorize a building company to carry on such hotel business; much the less does it authorize such a building company to conduct both a hotel business and a general merchandise business, as has evidently been inferred because of the inclusion of the words "store rooms" in the statute above quoted.

I confess that I am unable to ascertain from an examination of these articles which of the several purposes sought to be authorized is the paramount or principal purpose desired by the incorporators. If the business of construction is proposed the clause should conclude at the first semi-colon. If the operation of a hotel is sought to be authorized the articles should state as much in ordinary and concise language. If it is desired to acquire power to operate a general merchandise store, that business should be succinctly described in the clause: but no two of the above purposes may be joined in one clause. In any event it is unnecessary, and therefore improper, to recite in the articles that the corporation shall have power to acquire such real estate and personal property as may be necessary for carrying on the principal business whatever that may be.

For the foregoing reasons I am of the opinion that the proposed articles of incorparation should not be filed by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the Terminal Warehouse Company disapproved.

February 4th, 1910.

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

DEAR SIR: — I acknowledge receipt of your letter of February 3rd, enclosing proposed articles of incorporation of the Terminal Warehouse Company with letter of Messrs. Bardwell & Hagenbuch and check for $10.00 attached thereto. You request my opinion as to the legality of the purpose clause of said articles, viz.:

> "Said corporation is formed for the purpose of engaging in, conducting and carrying on a general commission, warehouse and storage business, including the acquisition, erection, operation and maintenance of all kinds of bonded warehouses and storerooms, cold storage plants, and buying and selling, shipping, transferring, and teaming all kinds of goods and merchandise, of manufacturing and selling ice and electric current and other forms of power for producing light, heat and low temperatures, and of issuing for goods and merchandise stored with it negotiable and other warrants and receipts therefor, and in connection with the business aforesaid, and for carrying on the same, of leasing, purchasing and otherwise acquiring, holding and improving land and interests and rights therein, and of constructing, maintaining and operating thereon warehouses, store buildings, elevators, docks, depots, railroad spurs and side-tracks, switches, and any and all other kinds of buildings, erections, and improvements, including machinery, equipment and appurtenances, that may be useful or appropriate for the purpose of carrying on the business aforesaid and of doing all other things proper, necessary, convenient or incident to the purpose and powers above expressed and including especially the power to issue its bonds or other negotiable obligations, secured by mortgage, pledge or other lien upon the property owned by it".

The purpose of this corporation appears to be the carrying on of a general bonded warehouse business. With this purpose are sought to be joined the following purposes, all of which, under the rule laid down in State ex rel v. Taylor, 55 O. S. 67, must be rejected:

1. The general merchandise business. 2. The manufacture and sale of ice. 3. The manufacture and sale of electric current. 4. The manufacture and sale of other forms of power for producing light, heat and low temperatures. 5. The real estate business. 6. The construction, maintenance and operation of docks and railroad spurs.

Generally speaking, the first three lines of the purpose clause, as embodied in the original articles are unobjectionable, but the remainder should be stricken out.

I herewith return the papers sent to me.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION OF THE YOUNGSTOWN REALTY & LOAN COMPANY DISAPPROVED.

March 11th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of March 9th, enclosing proposed articles of incorporation of the Youngstown Realty & Loan Company, together with letter and check attached thereto. You invite my opinion respecting the legality of the purpose clause set forth in said articles.

The purpose disclosed thereby is that of dealing in real estate. This purpose is greatly elaborated in the articles as drafted, and the length of the purpose clause is consequently very great. Not being able to approve the articles in their present form, I shall indicate the portions of the purpose clause which are in my opinion, subject to criticism.

> 1. "of building, constructing, operating, maintaining, leasing, selling dwelling houses, apartment houses, and business blocks of all kinds and description;"

As stated, this clause authorizes a general construction business; it might be re-drafted so as to be confined to such construction, etc., as is necessarily incidental to the principal business of the company.

> 2. "For the purpose of maintaining a general real estate agency and brokers business, including the right to manage estates, to act as agent, broker or attorney-in-fact for any person or corporation."

This clause is objectionable because it describes a business not necessarily related to the principal business of dealing in real estate. "The right to manage estates, to act as agent, broker, or attorney-in-fact for any person or corporation" is not an incident of the real estate business.

> 3. "of making and obtaining loans upon real estate, improved or unimproved, and of supervising, managing, and protecting such property and loans, and all interests and claims affecting the same; of having the same insured against fire and other casualties; of investigating the credit, financial stability, solvency and sufficiency of borrowers, mortgagors, and sureties upon bonds, mortgages and undertakings."

This action is unrelated to the principal purpose of the company. It probably describes with considerable accuracy the "loan" business suggested by the name chosen by the incorporators, but the real estate business and the loan business are two separate enterprises.

> 4. "for the purpose of improving real property, wherever situated by platting same, and grading, sewering, sidewalking, paving and laying out streets through same or contracting for such improvements."

As stated, this clause would authorize the conduct of a general contracting business.

In addition to the foregoing criticisms it might be suggested that the articles should specifically state that the corporation is to expire by limitation in twenty-five years, as required by the statute.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION LAW — APPLICATION OF.

Person who sells automobiles as the agent of another is a "dealer" within the meaning of the Automobile Law.

March 28th, 1910.

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

DEAR SIR: — You have submitted to this department for opinion thereon the inquiry of H. C. Bickle, of Chardon, Ohio, as to the definition of the word "dealer" as used in the Automobile Law. The particular question presented by Mr. Bickle's letter is, whether a person who sells automobiles as the agent of one or more manufacturing companies is a dealer as therein defined.

The Automobile Law does not specifically define the term "dealer," but provides simply that manufacturers or dealers must procure certain kinds of certificates. The primary meaning of the term in question is,

> "one who deals; one who has to do or has concern with others; specifically, a trader; one whose business is to buy and sell, as a merchant, shopkeeper, or broker; as a dealer in general merchandise, or in stocks." (Standard Dictionary.)

This primary meaning is broad enough, in my opinion, to include a person who sells automobiles as the agent for another. The purpose of the law being the identification of motor vehicles, it is clear that preference should be given to that construction of any of its provisions which gives effect to apparent conditions as distinguished from facts unknown to the general public; that is to say, if a person holds himself out as a dealer in automobiles he should be regarded as such for the purposes of this act, regardless of the existence, unknown to the public, of a contract of agency between himself and some other party.

Again, it has been previously held by this department that a dealer who maintains branch offices must obtain separate certificates for each branch office. The reasoning of the former opinion is applicable to the question at hand.

I, therefore, advise that a person who sells motor cars as the agent of another is to be regarded as a dealer within the meaning of the registration act.

Yours very truly,
U. G. DENMAN,
Attorney General.

CORPORATION, FOR WHAT PURPOSE ORGANIZED.

PROFESSION — DEFINED.

Accountancy not a profession.

October 3rd, 1910.

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

DEAR SIR: — Your communication is received in which you submit to me for my official opinion thereon the inquiry of the State Board of Accountancy as follows:

> This board desires you to hold whether or not persons may be lawfully incorporated in this state for the practice of public accounting or auditing, and whether or not persons receiving the degree of Certified Public Accountant under the law providing for the State Board of Accountancy, 99 O. L. 322, are amenable to the provision contained in section 3623 General Code?"

In reply thereto I beg to advise that the Act of April 30, 1908, providing for the regulation of the practice of public accounting and for the granting of the degree of C. P. A., upon those who pass such examination, carries no provision requiring a public accountant to take such examination and secure such degree in order that they may engage in the practice of public accounting. There is no difference between a person who does take the examination and receives the degree as provided for in said act, and the person who does not take such examination, in so far as the right to do public accounting is concerned.

The statute section 8623, General Code, provides that,

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

If the certified public accountants are of such professional character as to come within the prohibitory provision of this section, then it would seem that public accountants not certified, but doing the same character of work, must also be prohibited thereby for the reason that the statute gives to the certified public accountant no exclusive rights or grants of authority in so far as public accounting is concerned. While the work of a public accountant may be more comprehensive than that of bookkeeper or the keeper of ordinary accounts, and much of the definition of "profession" as quoted and approved by the Supreme Court of the United States in the case of United States v. Laws 163 U. S., at page 266, is applicable thereto, yet it is my opinion that the legislature did not intend to professionalize public accounting within the meaning of section 8623 of the General Code for the reason, as above stated, that the act is not exclusive in its requirements. Any person, regardless of qualification, may attempt public accounting without offending against the provisions of the accountancy act. Public accounting is, therefore, not professionalized within the meaning of section 8623 General Code, and persons may lawfully associate themselves in corporate capacity for the practice thereof.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — UNIVERSAL MUTUAL AID ASSOCIATION DISAPPROVED.

April 9th, 1910.

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

DEAR SIR: — Enclosed find proposed articles of incorporation of the Universal Mutual Aid Association of Cincinnati, Ohio, together with letter and check for $2.00.

You request my opinion as to whether or not the business proposed to be conducted by the incorporators of this association, as disclosed by the proposed clause of said articles, substantially amounts to insurance.

Said purpose clause is as follows:

> "The purpose for which said corporation is formed is to assist all its members in good standing, who may become temporarily disabled by sickness, or accident from any cause not their own, and to further sociability among its members."

In my opinion this clause discloses a purpose to conduct an insurance business.

> "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."
>
> May on Insurance, section 1.

It seems to me that all the essential elements of this comprehensive definition are satisfied by the purpose clause in question. The contract is the contract of membership; the consideration is "good standing" which evidently refers to the payment of dues; the compensation is the assistance to be given, and the loss, the temporary disability caused by sickness or accident.

In addition to these evidences of the true purpose of the corporation, the title which characterizes the organization as a "mutual aid association" is suggestive of the business authorized to be conducted under section 9427 et seq., General Code.

I, therefore, conclude that the business proposed to be conducted by this organization substantially amounts to insurance.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — SUGGESTIVE THERAPEUTICS SOCIETY. DISAPPROVED.

July 14th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of July 13th, enclosing proposed articles of incorporation of the Society of Suggestive Therapeutics of Toledo, with letter, postal money order and proposed constitution and by-laws attached.

The writer of the letter, who is one of the incorporators of the association, refers to a change made in the purpose clause of the articles of incorpora-

tion. The articles of incorporation actually executed and acknowledged are the same as those heretofore rejected by me. In the "constitution and by-laws" submitted with the articles, however, the purpose of the corporation is described as follows: "the study and development of suggestive therapeutics, and the dissemination of knowledge concerning the same".

This object, being primarily educational, is permissible and is quite distinct and quite different from that recited in the articles of incorporation actually drawn up. Inasmuch, however, as the incorporators have not made this change effective by executing new articles of incorporation or amending those already executed, I advise that you should not file the articles in their present form, but should insist that the purpose clause be conformed to that in the "constitution" of the proposed society.

Yours very truly,
U. G. DENMAN,
Attorney General.

BUREAU OF VITAL STATISTICS.

State Registrar may furnish vital statistics to United States Government and retain compensation received for same.

July 6th, 1910.

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

DEAR SIR: — I am in receipt of your letter of July 1st, in which you submit the following for my opinion:

> The Director of Census, Mr. E. Dana Durand, has authorized Dr. F. L. Watkins, State Registrar, to make transcripts of the Ohio deaths for the Census Bureau of the United States. In making these transcripts Dr. Watkins has employed his own people and has advanced their salaries and the work which he has done in connection with the same has been outside of office hours. After paying for the making of the transcripts, there may be a balance left on hand, which balance the government authorizes the State Registrar, Dr. Watkins, to retain as compensation for his services in this matter.
>
> By way of further explanation, you advise that you have discussed this matter with Dr. Wilbur, who is at the head of the Vital Statistics Department of the Census Bureau at Washington, and he told you that this was considered purely a personal matter between Dr. Watkins and the Bureau at Washington, and that the compensation paid to Dr. Watkins was not considered by the Bureau at Washington to be paid to Dr. Watkins in his capacity as State Registrar and, by way of history surrounding the passage of this statute, you advise that it was not intended to preclude the state registrar of Ohio from accepting outside employment which does not interfere with his work for the state.

I beg to call your attention to an act passed May 10, 1910, and approved by the Governor on May 21st, 1910, to amend section 231 of the General Code relating to vital statistics, which is as follows:

> "Sec. 231. The state registrar shall furnish an applicant therefor

> a certified copy of the record of a birth or death registered under provisions of this chapter relating to vital statistics, for which he shall receive a fee of fifty cents, from the applicant. Such copy, when properly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. For a search of the files and records when no certified copy is made, the state registrar shall receive a fee of fifty cents from the applicant for each hour or fractional hour of time of search: Provided, that the United States Census Bureau may obtain without cost to the state, transcripts of births and deaths without payment of the fees herein prescribed."

You will note the above section provides for the payment of certain fees to the state registrar for searching the records of the Bureau of Vital Statistics and for making certified transcripts, and that section 231 of the General Code provides for the payment of such fees by the state registrar into the state treasury. It is further provided,

> "that the United States Census Bureau may obtain without cost to the state, transcripts of births and deaths without payment of the fees herein prescribed."

It is clear from this section that the legislature intended for the United States Census Bureau to obtain transcripts of births and deaths from the Ohio Bureau without charge, but that the United States Census Bureau is to pay the cost incurred in obtaining the same. The United States Census Bureau would, therefore, be permitted to employ any person to perform this work for them and the principal question to be determined in answering your inquiry is whether or not the state registrar of Ohio would be permitted to accept the position from the United States Census Bureau of making transcripts of births and deaths in Ohio.

In your letter you advise that Dr. Watkins, the State Registrar, has done all of the work for the United States Census Bureau after office hours and that at the time of appointing Dr. Watkins it was not intended to preclude him from accepting outside employment. I am, therefore, of the opinion that, as long as the employment of the state registrar by the United States Census Bureau to transcribe births and deaths for the United States, does not interfere with his duties as state registrar, he may be so employed by the government and accept the compensation which the government provides for such services.

Yours very truly,

U. G. DENMAN,

Attorney General.

CORPORATIONS, FOREIGN — QUALIFICATION FOR DOING BUSINESS IN OHIO.

Foreign corporations engaged in inter-state commerce must comply with sections 178 *to* 182, *inclusive, General Code, formerly section* 148*d Revised Statutes before doing business in Ohio.*

March 28th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of March 22nd, in which you request my opinion as to whether a foreign corporation engaging

in interstate commerce, such as a railroad, pipe line or other transportation company, must qualify under the provisions of former section 148d, now sections 178 to 182 inclusive, by procuring from the secretary of state a certificate as therein provided.

As you state, your question in another aspect relates to the extent of the effect of the exception embodied in section 188 General Code, which is a portion of former Section 148d Revised Statutes.

Section 178 General Code provides in part that,

> "Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate * * * No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

Sections 179 and 180 both relate to the certificate provided for in section 178. The first of these two sections requires that the corporations affected by section 178 shall designate agents upon whom process may be served.

Section 180 contains a schedule of fees chargeable by the secretary of state for issuing such certificates. These fees, while by computation based upon the authorized capital stock of the corporation, are still arbitrarily fixed, and do not amount to percentages of such authorized capital stock.

Section 181 General Code still relating to the same subject matter provides for the designation of another agent upon the death of the person as designated etc.

Section 182 makes it a penal offense for any person to solicit or transact business for a foreign corporation subject to the provisions of the preceding four sections before it has complied with the provisions of such sections.

Section 183 General Code provides in part that,

> "Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath.'

Section 184 General Code provides for the payment of fees to the secretary of state based upon the proportion of the capital stock of the corporation represented by its property and business in this state. Unlike section 180, this section provides a fee based directly upon a percentage of an ascertained amount.

Sections 185, 186 and 187 define the consequences of compliance with sections 183 and 184. The privileges accruing to the corporation by virtue of compliance with section 183 are clearly and succinctly stated to be immunity from attachment proceedings upon the ground that it is a foreign corporation, and the right to maintain actions in this state upon contracts made by it in this state. The penalties are visited directly upon the corporation, and not upon its agents as in cases under section 182 above referred to. It will thus be seen that the two certificates are entirely separate and distinct, creating absolutely different sets of privileges and immunities, and imposing dissimilar duties upon foreign corporations.

Section 188 which, I take it, is the section under which the precise question arises, provides that,

> "The preceding five sections shall not apply to foreign insurance, banking, savings and loan, * * * corporations, or to express, telegraph, telephone, railroad, sleeping car, transportation, or other corporations engaged in Ohio in inter-state commerce. * * *"

The exemption thus created, in terms, refers only to the second certificate above described, being that provided for in sections 183 to 187 inclusive, General Code, and formerly described by section 148, R. S. On examination of the former sections I find that the codified statutes are substantially identical in terms with them, and that by no inference under either set of sections could it be held that foreign companies doing inter-state commerce business would be exempt from compliance with that provision of the law which requires the issuance of a certificate designating a person upon whom service of process may be served. In other words, such inter-state commerce companies must comply with Section 148d R. S., section 178 General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

PRIMARY ELECTION LAWS — MANNER AND TIME OF FILING PETITION — WITHDRAWING NAME AS A CANDIDATE — EFFECT OF, FULLY DISCUSSED.

May 6th, 1910.

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

DEAR SIR: — I am in receipt of your letter of May 3rd, in which you submit the following for my opinion:

> A candidate for committeeman more than twenty days before May 17th filed with the board of elections his nomination papers, which were in regular form and in conformity to law. Shortly after the twenty day period had expired, the candidate filed with the board of elections a declination in writing in which he asked the board to withdraw his name as a candidate for committeeman. The board immediately passed a resolution accepting the declination and the same was immediately entered upon the minutes of the board. Within two days thereafter the candidate filed with the board an application in writing in which he sought to withdraw his declination and asked that the board print his name upon the official ballot. *Query:* Is the action of the board of elections, in accepting the declination, final? Or may they reconsider such action and entertain the application for re-instatement and order the name of the candidate printed upon the official ballot to be voted on May 17th?

The first proposition which your inquiry presents is, may a candidate withdraw his name as a candidate after nomination papers have been regularly filed with the board of elections?

Section 4976 of the General Code is, in part, as follows:

> "Separate tickets shall be provided for each political party entitled to participate in such primary. Such tickets shall contain the names of all persons whose names have been duly presented *and*

> *not withdrawn,* arranged under the designation of the office in alphabetical order, according to surnames, and bear the official signatures of the members of the board of deputy state supervisors. * *"

From the use of the word "withdrawn," in the above quoted portion of section 4976, it is clear that the legislature intended that after nomination papers have been filed the names may be withdrawn. In this connection I call your attention to section 4974 of the General Code, which is, in part, as follows:

> " * * If the board of deputy state supervisors find that such candidate is not an elector of the district in which he seeks to become a candidate, or that his nomination papers do not contain the requisite number of names signed by electors of such party, the board shall *withdraw* his name and it shall not be printed upon the ballot. * *"

You will note that this section also provides a manner for withdrawing names and it may be contended that "withdrawn," as used in section 4976, is limited to the withdrawals referred to in section 4974 and that the power of withdrawing names is only given to the board of elections. However, I am of the opinion that such is not the case but that the legislature, by the use of the word "withdrawn" in section 4976, contemplated a candidate, at his own instance, withdrawing his nomination papers. The seeking of the position of committeeman is not compulsory and if a candidate would not be permitted to withdraw his name as a candidate, it would in effect force him to be a candidate against his will. Merely because an elector has filed nomination papers would not afterwards preclude him from exercising his right as to whether or not he will be a candidate.

I am strengthened in the opinion that one may, at his own instance, withdraw his name as a candidate, by section 1973 of the General Code, which requires each candidate to file with his nomination papers a declaration that he will qualify as such officer if nominated and elected. I do not believe it was the intention of the legislature to require a candidate to signify his intention to qualify if elected and then not permit him to withdraw his name if he decides he does not desire to be a candidate. I am, therefore, of the opinion that an elector who has filed nomination papers may withdraw his name as a candidate.

After a candidate has withdrawn his name and his withdrawal accepted by the board, it would be impossible for him to again be in a position to be placed upon the official ballot except in the manner provided in the first instance, i. e., by nomination papers, and I am of the opinion that the board, after accepting the declination of a candidate, is without authority to reconsider an application for re-instatement or order the name of such candidate printed upon the official ballot.

I do not think it necessary for me to render an opinion upon the other two inquiries in your letter relative to the manner of re-instatement of such candidate by the board of elections, since my answer to your first inquiry is to the effect that the board is without authority to re-instate such candidate or order his name printed upon the official ballot.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — CLEVELAND HUNGARIAN AID SOCIETIES' DEATH BENEFIT FEDERATION. APPROVED.

January 4th, 1910.

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

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

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

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

1. "A mutual life insurance corporation having no capital stock."
2. "A corporation not organized for profit and not mutual in its character."

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

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

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — WESTERN RESERVE SECURITIES COMPANY — DISAPPROVED.

January 6th, 1911.

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

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

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

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

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — TOLEDO FIRE INSURANCE ASSOCIATION — DISAPPROVED.

December 29th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of December 27th, enclosing proposed articles of incorporation of The Toledo Fire Insurance Association of Toledo, Ohio, for my endorsement thereon as provided by law.

I am unable to approve and to endorse these articles of incorporation for the reason that a typographical error has evidently been made in drafting the purpose clause thereof. The company is evidently to be organized under the chapter providing for the organization of mutual protective associations for insurance upon property.

Section 9594 of the General Code, being one of the sections of that chapter, provides that the certificate to be made and subscribed by the incorporators or associates shall state among other things,

> "the object of the association, which shall only be one or more of the objects set forth in the preceding section, and to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members. The kind of property proposed to be insured, and the casualties specified in such preceding section proposed to be insured, also must be specified in such certificate."

The proposed articles of incorporation have been drawn apparently with a view to incorporating the exact language of the section so far as the same may be necessary. The draftsman, however, has, doubtless by inadvertence, left out the words "to enforce any contract", which omission not only makes nonsense of the proposed articles of incorporation but also deprives the articles of a vital element required by the statute.

Even if this manifest typographical error were corrected, however, I should

have some hesitancy about approving the articles as drawn. The kinds of property proposed to be insured which are required by the above statute to "be specified" are described in the proposed articles of incorporation as "real and personal property." I do not believe that designation of the kinds of property proposed to be insured as "real and personal" is specific; it is not such a "specification" as is required by the statute.

In my opinion it is necessary that the certificate filed by the incorporators of a mutual protective association, such as that sought to be formed under the name of the Toledo Fire Insurance Association, must state the kinds of real property and the kinds of personal property, such as residences, office buildings, household goods, merchandise, etc., proposed to be insured.

Yours very truly,
U. G. DENMAN,
Attorney General.

FOREIGN CORPORATIONS — ADMISSIONS TO OHIO — LEGALITY OF BUSINESS.

Foreign corporation authorized to exercise all the rights and privileges of ownership of stock and other corporations, may not be admitted to do business in Ohio.

In re application of the United States Investment and Securities Companies.

December 21st, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of December 17th, enclosing a copy of the certified copy of the articles of incorporation of the U. S. Investment & Securities Company, a corporation organized under the laws of South Dakota, and seeking admission to do business in this state under the provisions of sections 178 and 183 of the General Code, formerly sections 148d and 148c respectively Revised Statutes.

The application is referred to me for opinion as to whether the business or objects of the corporation as set out are such as may be lawfully carried on by a corporation organized under the laws of this state.

Section 178 of the General Code, formerly a part of Section 148d Revised Statutes, provides in part that,

> "Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively."

The articles of incorporation of the U. S. Investment & Securities Company recite that,

> "The purpose for which this corporation is formed is to have the power to hold for investment or otherwise to use, to purchase,

or otherwise acquire, to sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock, bonds, debentures, or other evidences of indebtedness created by any other corporation or corporations, wherever located, and while the owner thereof, to exercise all the rights and privileges of ownership, including the right to vote thereon.

"To pay for such stock, bonds, debentures, or other obligations of other corporations acquired by this company in cash, stock or bonds of this company or othewise.

"To aid in any manner any corporation or corporations whose stock, bonds, or other obligations are held by this company and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations.

"To acquire the property, rights, franchises and assets of every kind and the liabilities of any person, firm, association, or corporation, either wholly or partly, and to pay for the same in cash, stock or bonds of the company or otherwise.

"To enter into, make, perform and carry out contracts of every sort and kind, with any person, firm, association, corporation, private, public, or municipal, and with the Government of the United States, or any state, territory or colony thereof, or any foreign government.

"To purchase, lease or otherwise acquire any and all rights, privileges, permits, or franchises suitable or convenient in the judgment of the directors for any of the purposes of its business.

"To issue warrants, bonds, debentures, and other negotiable or transferable instruments, and secured by mortgage or otherwise for such amounts as shall from time to time seem advisable.

"To, in general, but in connection with the foregoing, carry on any other business and exercise all the powers conferred by the laws of South Dakota upon corporations, it being hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of the company."

The exact extent of the powers of the company under this very broad and general recital is immaterial. It is at least apparent that the corporation is authorized by the laws of South Dakota to acquire in its own right shares of the capital stock or other securities and evidences of indebtedness of other corporations of all kinds. The power "to exercise all the rights and privileges of ownership, including the right to vote" on the stock owned by it, is expressly conferred upon the company. It follows, as a matter of course, that this power makes it practically possible for this corporation to manage and conduct the business of other corporations.

The powers above alluded to can not be conferred upon an Ohio corporation, or upon more than one Ohio corporation. I beg to refer you in this connection to the opinion of Hon. J. M. Sheets, Attorney General, rendered March 10, 1900, to Hon. Charles Kinney, then Secretary of State, in the matter of the application of the American Clay Manufacturing Company, a foreign corporation, for a certificate entitling it to do business in Ohio. A clause similar to the clauses above quoted from the articles of incorporation of the U. S. Investment & Securities Company was under consideration in that opinion, and the conclusion which I have above expressed was reached by the attorney general, who cited in support of the same the following authorities:

Bank vs. Bank, 36 O. S. 354,
Railway Company vs. Iron Company, 46 O. S. 44,
People vs. Trust Company, 130 Ill. 268,
State ex rel vs. Standard Oil Co., 49 O. S. 137.

The objects of the incorporation of the U. S. Investment & Securities Company are all contrary to the settled public policy of the State of Ohio. I, therefore, advise you that you may not lawfully issue a certificate authorizing the U. S. Investment & Securities Company to do business in the State of Ohio.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of The Worth-McK. Company — disapproved.

December 19th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of December 16th, enclosing proposed articles of incorporation of the Worth-McK. Company as re-drafted by the incorporators thereof. You request my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of obtaining for its 'subscribers', in consideration of a yearly fee to be paid by them to this company, certain supplies and services at less than the usual rates or charges therefor, as follows, to-wit:
>
> "This company will procure from certain merchants, hospitals, professional men and others contracts 'with and *for the exclusive use* and benefit of said subscribers et al.' whereby, in consideration of a percentage of the annual receipts of said company and other benefits that will probably accrue to them by reason of increased patronage, they will agree to furnish to said subscribers et al such supplies, services, etc., at less than the usual and customary rates and charges therefor.
>
> "The business of this company will be solely to obtain said 'subscribers' and to procure the making of the above-mentioned contracts, and all other transactions will be directly between said subscribers and said merchants and others."

In my judgment this purpose clause is still too indefinite to be filed. The method of doing business is stated with some degree of certainty, but the exact kind of business to be done is still subject to conjecture. Until the articles of incorporation are amended in such fashion as to indicate the kind of "supplies and services" in which the company proposes to deal, there can even be no question as to the legality of the articles; they are simply too indefinite to be considered.

I suggest, however, that if the incorporators contemplate the doing of a business which shall, under the style of "obtaining services," amount to a pro-

fessional business, such a purpose can not, of course, be incorporated in the articles.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of The American Timber and Coal Company — disapproved.

December 13th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of December 10th, submitting for my opinion as to the legality of the purpose clause thereof, the proposed articles of incorporation of The American Timber & Coal Company. The purpose clause in question is as follows:

> "Said corporation is formed for the purpose of owning, holding, buying, selling, leasing, developing, and operating; encumber by mortgage or deed of trust, or otherwise deal in, utilize or dispose of real, personal, and mixed property; and the rights and interests in any such property, carrying timber, coal, oil, gas, or other mineral and natural products, water privileges, powers and rights and interests therein, to mortgage, lease, sell, or otherwise deal with or dispose of the same, and generally to carry on the business of land and land improvement company; to build tram-ways and railroads into the company's property for their use; to aid and assist by way of bonus, advances of money or otherwise, with or without security, coal, timber, oil, gas, and other operating companies, on any land belonging to, or sold by the herein mentioned American Timber and Coal Company, and generally to promote investment in and settlement of said lands, and to do any and all such things incidental and auxiliary thereto."

It is impossible for me to ascertain from this state what the real purpose of the company is. It appears, however, that numerous unrelated purposes, some of which are clearly illegal, are included in the clause. It appears also that if the company has any principal purpose it is that of dealing in real estate. If this is the case the articles of incorporation should show on its face that the life of the company is limited to twenty-five years (Section 8648 of the General Code.)

For the foregoing reasons I advise that you do not file or record the articles of the above named company in their present form.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — EASTERN OHIO CONSTRUCTION COMPANY — DISAPPROVED.

December 23rd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of December 20, requesting my opinion as to the validity of the purpose clause of the proposed articles of incorporation of the Eastern Ohio Construction Company, which said clause is as follows:

> "Said corporation is formed for the purpose of carrying on the general work of a construction company, such as grading, laying track, ballasting, building bridges, and doing any and all work necessary in making and preparing road beds for steam, electric and other railroads, and for constructing and fully equipping railroads for the use of either steam, electricity or other motive power, and all contract work relating thereto; also construction and contract work of every kind for cities and towns; also the construction and erection of buildings, and to own, operate all buildings, machinery and all other equipments, including real estate, necessary for conducting a general contracting business, and to construct, build, buy, sell, own, operate and maintain electric light and power plants and transmission lines, and to buy and sell electricity for light, heat and motor purposes, and to build, buy, sell, own and operate and maintain railroads operated by steam, electricity or other motor power; and to acquire by purchase or otherwise and to hold, sell, lease, mortgage or otherwise dispose of all real and personal property, including machinery, materials and goods, rights, grants, privileges, franchises, capital stock and securities of other corporations, and in general, doing construction and contract work of every kind; and doing all things necessary or convenient in the transaction of any and all of said business."

The corporation appears to be formed for the principal purpose of doing construction work. This purpose is lawful and includes many of the things specifically set forth as descriptive of the kind of construction work in which the company intends to engage. While, therefore, much of this lengthy purpose clause is, strictly speaking, superfluous, it is not for that reason improper.

The following provisions of the clause, however, are improper:

1. The recital that the company is formed to "buy, sell, operate, maintain" electric light and power plants and transmission lines. The company may lawfully construct and build such lines but may not lawfully engage in the business of operating them or buying and selling them.

2. All the latter part of the purpose clause as provided, beginning with the phrase: "To buy and sell electricity, for light, heat and motor purposes", and extending to the end of the clause as drafted. A construction company may not buy and sell electricity commercially except insofar as such an enterprise may be incidental to its principal business, nor may such a company operate a railroad. No corporation may be authorized "to acquire * * * and to hold, sell, lease, mortgage or otherwise dispose of all real and personal property" including * * * capital stock and securities of other corporations."

Until the two clauses above specifically referred to are stricken out of the articles of incorporation, they may not, in my opinion, be lawfully filed by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Stock brokerage company may not be authorized to act as trustee of deeds of trust.

Articles of incorporation of the Public Service Securities Company disapproved.

September 15th, 1910.

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

DEAR SIRS — I beg to acknowledge receipt of your letter of September 10th, submitting for my opinion thereon the proposed articles of incorporation of the Public Service Securities Company, and direct my attention particularly to the purpose clause of said corporation, which is as follows:

> "Said corporation is formed for the purpose of buying, selling, owning, dealing and trading in stocks, bonds and other obligations (and of acting as agent or broger for the above purposes) of electric, gas, heat, water, traction and all companies engaged in supplying public utilities and public utility companies; for the purpose of acting as registrar and transfer agent of the stocks, bonds or other securities of such companies; *for the purpose of acting as trustee of the deeds of trust and mortgages and custodian of the sinking funds for the redemption of the bonds and other obligations of such companies, and for the purpose of doing all things incident to the underwriting, financing, purchase and sale of securities of public service companies.*"

The italicized portion of the above clause should be stricken out. The power to act as trustee, etc., is treated in our statutes as a banking power. See sections 9776 et seq. General Code. At any rate, the power to act as trustee under deeds of trust and mortgages is separate and distinct from that of carrying on a stock brokerage business, and the articles are, therefore, subject to the objection that they attempt to confer two separate powers upon a corporation capable of being formed for but one purpose, (State ex rel vs. Taylor, 55 O. S. 67), if not to the further objection that they attempt to confer banking power.

The power of acting as registrar and transfer agent of stocks and bonds may, in my opinion, lawfully be coupled with that of acting as agent and broker in buying and selling bonds, although it might be considered unnecessary to make specific recital of the former power.

The concluding phrase of the clause beginning with the words "and for the purpose of doing all things incident" would be proper if the word "financing were omitted therefrom.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the Secret Service Bureaus Company disapproved.

September 15th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of August 31st, submitting for my opinion thereon the proposed articles of incorporation of the Secret Service Bureaus Company, and directing my attention particularly to the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of establishing and conducting general detective bureau and agency; of carrying on every kind of business usually transacted in connection therewith or incident thereto; *of managing, superintending and operating as agent or otherwise the business of any corporation, firm or co-partnership engaged in confidential work, investigation, secret service or any other matter of a personal or general character; and to act as principal, agents, contractors, trustees or otherwise in obtaining, acquiring, delivering, notifying, aiding or protecting, and of furnishing in any lawful manner reports, information, facts, evidence, circumstances of, relating to, benefiting by, or affecting the business, capital, solvency, insolvency, credit, responsibility, risk, accident, safety, security, condition, standing or relationship of, any or all individuals, firms, associations and corporations engaged in or connected with any matter of a personal or general character of any kind whatever; and of any business, occupation, industry or employment, as may be planned or required which this corporation may think calculated directly or indirectly to effectuate said purpose; of undertaking, entering into, conducting and carrying out contracts of all kinds, pertaining to said business; of buying, owning, holding, selling, leasing and conveying or otherwise, real or personal property incident to or necessary in carrying out the full purpose of said corporation.*"

The italicized portion of the above quoted purpose clause should be omitted, as the same attempts to confer power which may not lawfully be conferred upon the corporation. The phrases included in the portion of the clause thus referred to attempt to give the corporation power to manage the business of any other firm or partnership — a power which may not be conferred upon any corporation; and the business thus to be managed is among other things "any other matter of a personal or general character," obviously a description too general to be permitted.

The power to obtain information affecting the insolvency, responsibility, etc., of individuals and firms should not be conferred as a separate power. In all probability this recital does not enlarge that which confers the power to "conduct a general detective bureau and agency" but if it does so enlarge it it attempts to confer a separate power which, under the decision in State ex rel vs. Taylor, 55 O. S. 67, may not be permitted.

The power to carry on "any business * * * which this corporation may think calculated * * * to effectuate said purpose" can not, of course, be conferred upon the corporation. A corporation may not itself be the judge of the extent of its corporate powers.

The power to enter into contracts and that to acquire and dispose of property are both incidental powers which exist without specific recital and should be omitted from the purpose clause of the articles of incorporation.

For the foregoing reasons I advise you not to file the articles of incorporation until they are so altered as to obviate the above criticisms.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the Middle States Oil Company disapproved.

October 3rd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of September 27th, submitting the proposed articles of incorporation of the Middle States Oil Company, and requesting my opinion as to the validity of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of buying, selling and dealing in oils, grease, paints and kindred products; of manufacturing grease, paints, and petroleum products of every kind and description; of holding and acquiring leasehold and other interests in real estate for drilling and operating oil and gas wells; of doing a general refining business and the doing of all things necessary and incident thereto."

The following independent purposes are disclosed by the above quoted clause:

1. Manufacturing petroleum products.
2. Conducting a mercantile business in petroleum products.
3. Producing crude petroleum.
4. Doing a general refining business.

Incorporators must elect among these various purposes. I suggest that the broadest power which may lawfully be conferred upon the company is that of refining and manufacturing petroleum products. This power will, by implication, confer the power to sell the manufactured product and to acquire the crude material.

In their present form, however, the articles should not be filed by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

POLICE JUDGE—AS CANDIDATE FOR OFFICE OF PROSECUTING ATTORNEY.

Votes cast at primary election for police judge as candidate for nomination for office of prosecuting attorney valid; votes cast at general election for such judge for office of prosecuting attorney void.

September 27th, 1910.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of September 22nd, submitting for my opinion thereon a letter addressed to you by Hon. R. K. Carlin, judge of the police court of the city of Findlay. The questions submitted by Judge Carlin are as follows:

> At the primary elections held last may the judge was nominated on the Republican ticket for the office of prosecuting attorney. No nomination certificate having been issued to him under the primary law the following questions arise under section 4826 of the General Code:
>
> 1. Was he legally nominated at the primary election for the office of prosecuting attorney?
>
> 2. May he resign as police judge at some time prior to the general election in November, 1910, and be eligible to be voted for thereat for the office of prosecuting attorney?
>
> 3. Will any votes for him for prosecuting attorney be null and void regardless of any action that may be taken by him?

Section 4826 of the General Code provides in part as follows:

> "All general elections for governor * * * judge of the supreme court * * * judge of the circuit court, judge of the common pleas court * * * judge of the probate court * * * and prosecuting attorney shall be held on the first Tuesday ofter the first Monday in November in the even numbered years. All votes for any judge for an elective office, except a judicial office, under authority of this state, given by * * * the people, shall be void."

The last provision of the section is a substantial paraphrase of the last clause of Article 4, Section 14 of the Constitution of Ohio, which is as follows:

> "The judges of the supreme court and of the court of common pleas * * * shall receive no fees or perquisites, nor hold any other office of profit or trust. * * * All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

In view of the fact that section 4826 does not itself refer to the election of police judges, and of the fact that the said section is apparently intended as a re-declaration of the provision of the constitution, it might with reason be contended that said section does not apply to police judges, and that votes cast for a police judge for an office other than a judicial office at a general election or at a primary election are valid and must be counted.

However, I am inclined to the view that the sentence in question should be given its primary meaning, and should be held to apply to police judges.

At the most, however, the section relates to general elections, and does not in any way effect the validity of votes cast at a primary election. I am clearly of the opinion, therefore, that the nomination of Judge Carlin at the primary election was valid, and that, under the primary law, it is the duty of the deputy state supervisors of elections to place his name on the official ballot, as the candidate of the Republican party for the office of prosecuting attorney at the coming general election. If the judge continues to hold his judicial position until the date of the election, votes cast for him for prosecuting attorney will be void and any subsequent action which he may take will not purge his election of its invalidity, in case he is successful at the polls. Should he, however, resign his office as police judge prior to the date of the general election, then votes cast for him thereat must be counted and must be regarded as valid.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — PROFESSIONAL BUSINESS.

Articles of incorporation of the Society of Suggestive Therapeutics of Toledo disapproved.

June 22nd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date, enclosing proposed articles of incorporation of The Society of Suggestive Therapeutics of Toledo, with letter and express money order attached. You desire my opinion as to the legality of the purpose clause which is as follows:

> "Said corporation is formed for the purpose of the development of mental forces and healing according to the law governing Suggestive Therapeutics."

In my opinion the powers sought to be acquired by this clause may not be conferred upon a corporation. While the corporation is not for profit it is, nevertheless, subject to the limitation of section 8223 General Code, which provides that,

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

Within the meaning of this section the objects of the association in question constitute "the carrying on of business" and the business thus to be carried on is clearly "professional."

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — THE DOMINION TIMBER COMPANY — PURPOSE CLAUSE — DISAPPROVED.

June 2nd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of June 1st, enclosing the proposed articles of incorporation of "The Dominion Timber Company"

with check and letter attached thereto. You request my opinion as to the legality of the purpose clause of said articles.

The length of the clause is so great that I deem it impracticable to set it forth in its entirety.

The first phrase thereof discloses that the primary object of the incorporators is to carry on four different kinds of business, viz.:

1. Dealing in timber,
2. Dealing in minerals,
3. Dealing in timber lands,
4. Dealing in mineral lands.

Upon familiar principles the incorporators must elect one of these four objects; the joinder of all or any two of them is not permissible under section 8623 General Code (State ex rel v. Taylor, 55 O. S. 67).

By a careful reading of the purpose clause and consideration of the name of the proposed company, I have formed the impression that the timber or lumber business was to be the real principal business of the company. Assuming this to be true, a further criticism of the purpose clause must be made, viz.: It attempts to authorize the business of cutting, sawing and transporting lumber, and also the manufacture of all products capable of being manufactured from wood as a raw material. Here again we have two distinct purposes and another election must be made. The company must either do a logging and saw-mill business or manufacturing business; it may not be authorized to do both.

The foregoing does not constitute the only objection to the phrase seeking to confer the power to deal in wood products. The language employed in the articles is very indefinite and on this ground alone it is subject to condemnation (See Annual Report Attorney General 1908, page 54).

The power to acquire water power and water privileges, timber lands, mill sites, railroad switches, etc., as stated in the articles might be construed to be an independent one, and this portion of the clause should be stricken out. In this connection it may be said that the power to acquire such real estate and incorporeal rights as may be necessarily or properly incidental to the principal business of any corporation exists without specific recital.

In the latter portion of the purpose clause the incorporators have sought to acquire power to hold any lands or premises which the company may deem proper or necessary to hold, and that of developing mineral lands, building, telegraph and telephone lines, etc. The criticism directed against the last portion of the clause applies as well to this one.

A corporation may not in this state be authorized to acquire and deal in the stock of "any other incorporated company or companies that may be or are engaged in like or similar business." Every corporation has the power, under section 8683 General Code, to "purchase or otherwise acquire and hold shares of stock in other *kindred but not competing* private corporations, domestic or foreign." But this is the full extent of the power which may be conferred expressly, or by implication, upon any private corporation. The statute itself is in derogation of the common law rule against monopolies and combinations, and it should be strictly construed. Indeed there are many reasons why the phrase above quoted should be stricken from the articles.

The phrase "for the purpose of doing any and all things useful and necessary in the conduct of said business, or that may be any way incident to the same" is meaningless, and should be stricken out of the articles as mere surplusage.

For convenience merely, and not with the intention of prescribing any set

form for the use of the incorporators, I venture to quote as much of the articles as drafted as may, in my opinion, be permitted to remain in the purpose clause:

> "Said corporation is formed for the purpose of acquiring by purchase, grant, concession, license or otherwise, and holding, selling, exchanging and dealing in timber * * *; for the purpose of carrying on the business of cutting and getting out logs and other timber, and manufacturing logs and other timber products, and carrying on the business of timber merchants, saw-mill owners, loggers, lumbermen, and of buying, selling, preparing for market, manipulating, importing, exporting and dealing in saw logs, timber, lumber, and wood of all kinds, * * *; for the purpose of purchasing, selling, disposing of and dealing generally in lumber * * *; for the purpose of cutting, buying, selling and dealing in timber, and manufacturing lumber * * * by every possible process, * * *."

All the rest of the purpose clause as drafted should be stricken out. Indeed the purpose of the corporation could be fully stated in even less space than as above quoted. All legal powers sought by the incorporators would then flow by implication from the single power thus defined.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — THE TWENTY MILLION EDUCATORS — PURPOSE CLAUSE — DISAPPROVED.

June 2nd, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of May 24th, enclosing proposed articles of incorporation of "The Twenty Million Educators", a corporation not for profit, together with check for Two Dollars and letter attached thereto. You request my opinion as to the legality of the purpose clause and the fee to be charged for the filing thereof.

The clause in question is as follows:

> "Said corporation is formed for the purpose of educating and advancing the members thereof, according to its aims and objects, which are as follows: To unite mutually all persons, without reference to creed or existing politics who believe in a Supreme Being, and are socially acceptable, of good moral character and will lend themselves to the study of economical conditions as embraced in the cost, production and importation of foods, grains and bread stuffs and their distribution into proper channels, avoiding their use for spirituous and malt liquors except those manufactured and dispensed by the United States government; by petition to our legislative bodies have laws enacted governing the manufacture and import of all spirituous and malt liquors and fermented wines, that are in use at the present time and such others as may be necessary for medical purposes and to dispense the same at various and convenient places throughout these United States, distributing only on the presentation of a prescription from a

regular practicing physician, and other laws to protect the consumers of milk made from the feeding of malts and glutens and other fermented foods, also the sale of cattle, swine, sheep and animals to be used for food that are not properly grain fed or are immature or diseased.

"To improve its members socially, morally and intellectually.

"To give all moral and material aid in its power to its members and those dependent upon them.

"To provide entertainments and social pleasures that will tend to elevate and bind them together in bonds of moral fellowship."

Succinctly stated the object of this corporation appears to be primarily educational and social, and although the manner in which these objects are to be attained are set forth in the above clause with minuteness which is perhaps unnecessary, I am of the opinion that, with the exception hereafter stated, the said methods are all legal and all support a single purpose rather than constituting multiple purposes. This is true in general of all the first paragraph.

The second and fourth paragraphs of the clause, while entirely superfluous, merely re-state, in general terms, the powers sought to be acquired under the first clause.

The third paragraph should be stricken out. While indefinite in its meaning it purports to confer upon the association the power to give material aid to those dependent upon its members. Under such authority it might be urged that the company would acquire the power to conduct a business substantially amounting to insurance.

Consideration of the evident objects of the corporation disclose that although the word "mutually" is used in the purpose clause, it is evidently not such a corporation as is referred to in paragraph 4 of section 176 of the General Code, and should, in my opinion, be regarded as within the catalogue of paragraph 5 of said section, and the fee for filing the articles is, therefore, in my opinion, Two Dollars.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION ACT — MOTOR VEHICLES USED FOR LIVERY PURPOSES MAY NOT USE MANUFACTURERS' LICENSE.

July 15th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of July 13th, in which you request my opinion upon the following question:

"We are in receipt of several inquiries as to whether certificates of registration and number plates issued to manufacturers of or dealers in motor vehicles, under the provisions of section 11 of the automobile law, may be used by such manufacturer or dealer for the purpose of conducting a taxicab or auto livery business in connection with his business as a manufacturer or dealer."

Without quoting any of the sections of the automobile act, and having regard to the manifest purpose and intent of the law as disclosed by all of its

provisions read together, I am clearly of the opinion that a manufacturer or dealer within the meaning of said act loses his character as such when he operates motor vehicles for hire as a liveryman. The two capacities are quite distinct. Therefore, your department should require separate registration of each motor vehicle used in such livery business even though the proprietor of the livery is also a dealer.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of the March Bros. Company disapproved.

September 17th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of September 15th, enclosing for my opinion as to the legality of the purpose clause thereof the proposed articles of incorporation of The March Brothers Company. Said purpose clause is as follows:

> "Said corporation is formed for the purpose of buying, selling and dealing in dry goods, notions, novelties, household goods and furnishings, and general merchandise, in all their varieties, at wholesale and retail by mail order or otherwise, *publishing, printing, binding and manufacturing and dealing in books, sheet music, and music books, school supplies, art novelties, pictures, decorative supplies and entertainment requisites, also, acquiring by purchase or lease, such property, both real and personal as may be deemed necessary or convenient for the aforesaid purpose, also, doing all such other things and business, as may be necessary, convenient, or incident to the main purpose of such corporation.*"

The business of "publishing, printing, binding and manufacturing" books, etc., is not a mercantile business, is wholly unrelated to such business, and the purpose of conducting such business is, therefore, separate and distinct from that of conducting a mercantile business. Under the rule announced in State ex rel vs. Taylor, 55 O. S. 67, the phrase last above quoted, being evidently subordinate to what precedes it in the articles of incorporation, must be stricken out.

As I have heretofore advised you specific recital of the incidental power to acquire property and all other incidental powers is unnecessary and superfluous, as such powers exist without such recital. I have no legal objection to the inclusion of the last two phrases of the purpose clause therein excepting upon this ground, and if the incorporators desire to retain them they may be retained.

Until the articles of incorporation are modified so as to obviate the foregoing criticisms I advise that they be not filed by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION OF THE ANDOVER HOT SPRINGS SANITORIUM AND HOTEL COMPANY DISAPPROVED.

August 19th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of August 17th, enclosing articles of incorporation of The Andover Hot Springs Sanitorium and Hotel Company, and requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of supplying baths, electrical and medical treatments and hotel accommodations to individuals; for carrying on a general sanitorium and hotel business; for acquiring, owning and holding real estate and all accessories and appliances necessary and proper to carry out the purposes herein mentioned; for constructing, owning and operating bath houses, and the equipping of same with proper appliances for supplying individuals with hot and cold baths; for constructing, purchasing, leasing or subleasing or otherwise acquiring buildings for sanitorium and hotel purposes; and equipping said buildings with electricity for light, heat, power and medical purposes, and the installation of all other necessary appliances incidental and necessary to carry on a general sanitorium and hotel business."

The power to "supply" treatments to individuals can not be conferred upon the corporation as the same contemplates the doing of a professional business.

It would appear also that a "sanitorium" business is an enterprise separate and distinct from a "hotel" business. A single corporation may not lawfully be authorized to conduct both enterprises.

Again, the power of "constructing, purchasing, leasing, subleasing or otherwise acquiring buildings for sanitorium and hotel purposes" is recited as independent and distinct from the other powers attempted to be conferred upon the corporation. In this form it permits the construction of buildings not to be used by the corporation in the conduct of its principal business, and for this reason it should be stricken out. The same criticism applies to the last phrase of the clause.

The articles should be amended so as to restrict the activities of the proposed corporation to a single lawful business, as required by the law of this state. Until such amendment is made I advise that they be not filed or recorded.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

REGISTRAR OF VITAL STATISTICS MAY NOT PAY A CERTAIN SALARY OUT OF CONTINGENT FUND APPROPRIATION.

August 24th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of August 16th, enclosing communication from Dr. F. L. Watkins, State Registrar of Vital Statistics, for an opinion upon a question by him submitted, viz.:

> Is it legal for the Bureau of Vital Statistics to employ a man to call personally upon fathers and mothers in families in which births have occurred, to secure birth certificates for children born in their family, and necessary evidence for the enforcement of the vital statistics law, and to pay the compensation and expenses of such an agent from the contingent fund of the Bureau of Vital Statistics?

I have carefully examined the provisions of the General Code relating to the establishment and organization of the Bureau of Vital Statistics, and find therein nothing which authorizes or forbids the appointment of such a person. Without quoting specifically I am of the opinion that, so far as the act respecting the Bureau of Vital Statistics and its organization is concerned, it would be perfectly proper to create such a position as that described in the request of the state registrar.

The payment of the expenses and compensation of such a person is, however, quite another matter. The constitution of this state, Article 2, Section 22, provides that,

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law * * *"

The act of March 17th, 1910, known as the Partial Appropriation Bill, provides numerous specific appropriations for clerks and assistants in the Bureau of Vital Statistics, and it also creates an appropriation for "contingent expenses."

Section 2 of said act provides in part that,

> "The moneys appropriated in the preceding section shall not be * * * paid out for purposes other than those for which said sums are specifically appropriated."

Section 3 of the act provides in part that,

> "No bills for clerk hire * * * shall be paid out of appropriations for contingent expenses."

The general appropriation bill, so-called, passed in 1910, contains provisions similar to the last two above quoted.

From all the foregoing I conclude that the compensation of an officer or employe of a state department, whether he be called a "clerk" or not, may not be paid from an appropriation for contingent expenses of such department, and that, therefore, Dr. Watkin's question must be answered in the negative.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — ELECTRIC INTERURBAN RAILWAY COMPANY MAY BE AUTHORIZED TO SUPPLY ELECTRIC POWER, LIGHT AND HEAT.

Articles of incorporation of the Ohio State Interurban and Electricity Promoting Company approved.

August 19th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of August 15th, enclosing for my opinion thereon the proposed articles of incorporation of the

Ohio State Interurban and Electricity Promoting Company. The purpose clause of said articles concerning which you inquire particularly is, in part, as follows:

> "Said corporation is formed for the purpose of making the necessary surveys, ascertaining the actual cost of construction, obtaining all needed rights of way with lands for necessary depot sites and terminals, and cause to be constructed and operated, by divisions, a standard gauge system of interurban railroads — said several divisions to be known as follows, viz: (here follow descriptions of the routes and termini of the several divisions proposed to be constructed and operated, together with a list of the counties through which said interurban railroads are to pass.)
>
> "Also for the purpose of supplying electricity for power, light, heat or fuel purposes to all or any of the above municipalities or inhabitants thereof or the inhabitants of the counties above named with authority to acquire and exercise all the rights, powers and franchises of any electric light and power company under the laws of the State of Ohio."

The following sections of the General Code seem applicable to these articles of incorporation:

Section 8625:

> " * * * If the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth,
>
> "(a) The kind of improvement intended to be constructed;
>
> "(b) Its termini and the counties in or through which it or its branches will pass."

The articles comply with this section.

> "When the lines of a road of any street railway or railroad company organized under the laws of this state are constructed, or in process of construction, and are or will be operated by electricity and connect * * * with the lines of another street railway or railroad company formed by the consolidation of companies organized under the laws of this state * * * whose lines of road * * * are * * * operated by electricity, so that cars may pass over such lines of road * * * continuously without break or interruption, such street railway or railroad company, and such consolidated street railway or railroad company, consolidate themselves * * *. Companies owning and operating competing lines of road shall not consolidate. * * * "

This and other provisions of the General Code prohibit, by implication, the incorporation of an electric railroad company for the purpose of operating parallel and competing lines of railroad. Although the routes and termini of the various divisions are not set forth in the above quoted portion of the purpose clause, I may state that I have examined the omitted portion carefully, and find that none of the divisions are parallel so that they would be otherwise competing; consequently, no question of this sort arises.

Section 9134:

"A corporation or company maintaining and operating a street railway, or a railroad operated by electricity, may lease or purchase all the property, and all the franchises, rights and privileges of any company organized for the purpose of supplying electricity * * * for power, light, heat or fuel purposes * * * in whole or in part in any municipality within this state, * * *"

Section 9136:

"A company so leasing or purchasing the property, rights and franchises of an electric light and power company * * * shall have all the rights, power and authority of the company whose property, rights and franchises are so leased and purchased."

These articles of incorporation, in my opinion, are valid under the foregoing sections. This department has previously held that corporations which are expressly authorized by statute to acquire certain rights, subsequently to their incorporation, may receive like authority in their articles of incorporation. Indeed, this principle has become a settled rule of this department in passing upon articles of incorporation. It would be idle to hold that a corporation which might lawfully purchase an electric light plant, and conduct the business of supplying electricity for light, heat and fuel purposes, might not be authorized in its own articles of incorporation to conduct such business in the first instance.

For the foregoing reasons I am of the opinion that a company organized for the purpose of operating an electric railroad company may also be authorized to supply electricity to individuals for power, light, heat or fuel purposes.

I deem it proper to state in this connection that without the words "and operated" which have been inserted in the first paragraph of the purpose clause since the submission of the articles to this department, the foregoing conclusion could not have been reached.

In my opinion also a single corporation may be authorized both to construct and to operate a railroad.

For the foregoing reasons I beg to advise that the articles of incorporation of the Ohio State Interurban and Electricity Promoting Company may be lawfully filed by you.

Yours very truly,
W. H. MILLER,
Ass't Attorney General.

ARTICLES OF INCORPORATION — SUBSTITUTION OF NEW INCORPORATOR MAY NOT BE MADE WITHOUT AMENDMENT.

November 16th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter submitting for my opinion thereon a letter from Messrs. Taber, Longbrake & O'Leary, attorneys at law, Toledo, Ohio.

The letter of these gentlemen discloses that certain articles of incorporation have been filed with you, and that subsequently to said filing and the issuance of a certified copy of the articles, as provided by law, it has been ascertained

that one of the signers of the original articles of incorporation was a minor. Assuming that this fact invalidates the articles, the attorneys desire to know whether the corporation may file amended articles of incorporation without paying an additional fee.

I have carefully examined the statutes relating to the powers and duties of the secretary of state and find therein nothing permitting the withdrawal of articles of incorporation filed with him and the substitution of other articles. The action contemplated by the incorporators of this company can, in my judgment, only be taken by filing an amendment to the articles of incorporation for which the secretary of state is entitled to a fee of twenty cents for each one hundred words, and in no case less than five dollars, under section 176 of the General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

FOREIGN CORPORATIONS—PERSON UPON WHOM SERVICE OF PROCESS MAY BE HAD—REMOVAL FROM STATE—REVOCATION OF AUTHORITY TO DO BUSINESS.

August 10, 1910.

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

DEAR SIR:—I have been handed an affidavit made by Orlando Wilcox, sent to your department setting out that the Independent Steel and Wire Company, a foreign corporation, filed a certificate under section 148d, Revised Statutes, in your office, designating Cuyahoga Falls, Summit county, Ohio, as its principal place of business, and Samuel Higgs the person upon whom service of process could be made in this state; that several months ago Samuel Higgs removed from and has absented himself from Cuyahoga Falls, Summit county, Ohio, and thereafter did not maintain an office at said place, and that said Independent Steel and Wire Company has not designated any other person upon whom process can be served, asking that you, as secretary of state, revoke the authority of said corporation to do business within this state.

At the time of handing me the affidavit, you desired to know what power you possessed, as secretary of state, to revoke the authority of this company to do business in Ohio.

In reply, I desire to say that section 181 of the General Code is, in part, as follows:

> "If a person designated by a foreign corporation as its agent within this state dies or removes from the principal place of business of the corporation within this state, the corporation, within thirty days after such death or removal, shall designate in like manner another person upon whom process may be served within this state. On failure so to do, the secretary of state shall revoke the authority of the corporation to do business within this state."

Is the duty prescribed by the statute discretionary or ministerial? The Court, in defining a ministerial duty in the case of State v. Johnson, 4 Wall (U. S.) 475 says:

> "It is a simple, definite duty arising under conditions admitted or proved to exist and imposed by law."

In the case of State v. Doyle, 40 Wis. 174, on page 188 the Court says as follows:

> "The power to grant a license or the power to revoke appear to be plainly and equally ministerial functions.
>
> "The secretary, upon certain facts appearing to him, is authorized to issue a license, and upon certain other facts appearing to him is required to revoke it. This is a common condition of ministerial duty. In such a case the ministerial officer must exercise his personal intelligence in ascertaining the fact upon which his authority is founded, but he acts upon his peril of the fact and can in no sense be said to exercise a judicial function."

Applying the principles thus set forth, I am of the opinion that the power given you in such matters is ministerial and when the facts establishing your authority exist, it is your duty to act. If the facts presented are sufficient to warrant the revocation, it can be done by placing an entry of revocation upon your records revoking the authority of the company to do business in this state.

I am herewith returning the affidavit and papers handed to me.

Yours very truly,
W. H. MILLER,
Ass't Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of The P. J. Krantz Company, disapproved.

November 25th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of November 23rd, enclosing copy of proposed articles of incorporation of The P. J. Krantz Company and requesting my opinion as to the validity of the purpose clause thereof which is as follows:

> "Buying, selling and dealing in real estate for itself and others, including the leasing and mortgaging thereof and constructing and maintaining buildings to be used for dwellings, store rooms and for business pursuits, of acting as agent for fire, marine, accident, life, burglary, robbery, boiler, surety, liability, credit guarantee, title guarantee, plate glass, sprinkler leakage and all other kinds of insurance companies, and of doing such other things as may be incident to any of the above enumerated purposes and is to exist for a period of twenty-five years."

This clause attempts to join at least two unrelated purposes, to-wit, (1) The real estate business, and (2) an insurance agency business. Such a joinder is prohibited by the rule announced by the Supreme Court in State ex rel v. Taylor, 55 O. S. 67.

I, therefore, advise you that the articles in their present form may not be filed.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — RAGAN, BROWN AND LANGE COMPANY — APPROVED.

December 5th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of November 30th, submitting for my opinion as to the legality of the purpose clause thereof the proposed articles of incorporation of the Ragan, Brown & Lange Company, with letter and check attached thereto.

Said purpose clause is as follows:

> "Said corporation is formed for the purpose of manufacturing, selling, buying and dealing in the following articles:
>
> "a. All kinds of engines and motors with couplings, belting, fittings, and connections.
>
> "b. All kinds of farm machinery and implements.
>
> "c. All kinds of building material and supplies.
>
> "d. All kinds of pumps, towers, tanks, pipes and connections for pumping and conducting water.
>
> "e. All kinds of heating systems and devices.
>
> "f. All kinds of castings and foundry products.
>
> "g. All kinds of machines for wood, iron and cement work.
>
> "h. All kinds of vehicles for road or air.
>
> "And for doing all kinds of custom work and repairs for all kinds of machines and implements."

In my opinion the mere fact that the different classes of articles to be manufactured are separately set forth in the purpose clause is not material. If the principal business of this company is manufacturing it may be authorized to manufacture different articles, so long as the articles to be manufactured are stated with reasonable definiteness.

The power of selling, buying and dealing in the articles to be manufactured should, however, be clearly and definitely stated as subsidiary to the principal purpose of manufacturing, or else excluded from the articles altogether. A manufacturing company has undoubted power to supply its customers with the articles it manufactures in order to carry out contracts made by it as a manufacturer, but the power to deal generally in certain articles in a mercantile way is quite separate and distinct from that of manufacturing the same articles, and the two purposes can not be joined in one clause.

The purpose of doing all kinds of custom work and repairs for all kinds of machines and implements, stated separately from the purpose of manufacturing, would seem to be an additional purpose, to be rejected under favor of the rule of State ex rel vs. Taylor, 55 O. S. 67. It is possible that the kind of work contemplated by this last portion of the purpose clause is properly included within the business of manufacturing. However, it may well be observed that the custom and repair work which the company seeks to do is not confined to the articles which it seeks to manufacture. In my judgment this clause should be eliminated entirely.

I advise you, therefore, that until the articles of incorporation in question have been amended so as to obviate the criticisms above made they may not be filed or recorded by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION — FORM OF BALLOT.

Primary election ballot must provide separate spaces and designations for candidates for members of controlling committees and for delegates to county convention.

April 7th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of even date herewith requesting my opinion upon the following question:

> "May the board of deputy state supervisors of elections authorize the printing of an official ballot for use at a partisan primary in such form as to place in one space the designation or heading 'For delegate to county convention and central committeeman', and direct the election officers to count the votes cast for each person whose name is printed or written under such designation, both for delegate to the convention and for county central committeeman?"

Phrased in another way this question amounts substantially to this: Is it unlawful under the primary election law for the two positions of delegate to the county convention and central committeeman to be combined for the purpose of holding the primary election required by the act of 1908?

In my opinion this is not lawful. Section 6 of the primary election law provides for the election of delegates to a county convention. Section 9 of the same act provides for the election of members of controlling committees. The two positions are throughout the law treated as separate and distinct. No where is such a combination authorized to be made.

I am, therefore of the opinion that the intent of the law clearly is to enable the partisan electors freely to express their choice for each of these two positions. It is to be presumed that the electors may desire to vote for different persons to fill them, and such a ballot as that described by you would make it impossible for an elector to exercise a free choice as to both of the positions; it would accordingly not be a valid ballot.

The question as to whether the same person may lawfully be declared elected to both these positions at the same election is not directly submitted by you, but seems to be involved in the principal inquiry.

I am of the opinion, however, that this may be lawfully done, and that the name of one person may appear upon the printed ballot, both as a candidate for the position of delegate to the county convention and as a candidate for central committeeman, and if elected to both positions he may lawfully exercise the powers pertaining to each.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — AMERICAN FORK AND HOE COMPANY.

May 18th, 1910.

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

DEAR SIR: — I am in receipt of your letter of May 13th, in which you ask to be advised whether or not the articles of incorporation of the American Fork & Hoe Company should be filed.

I beg to advise that section 8625 provides that articles of incorporation must contain the *purpose* for which the corporation is formed.

In the case of State ex rel v. Taylor, 55 O. S., at page 7, the court in construing the above statute lays particular stress upon the word "purpose," and specifically states that the word "purpose" is not "purposes," and that a corporation may not be organized having authority to pursue a number of different and unrelated purposes. The purpose clause of the American Fork & Hoe Company authorizes said corporation to

> "manufacture, buy, sell, deal in and deal with hand agricultural implements, and all other articles of merchandise manufactured from wood, steel, iron and other metals."

This much of the articles of incorporation is sufficient authority for declining to file the same. You will note it authorizes the manufacture of all articles of merchandise manufactured from wood, steel, iron and other metals, which makes the articles indefinite as covering too large a field, and includes more than one purpose.

I herewith return the articles and check enclosed for $10.00.

Yours very truly,

U. G. DENMAN,

Attorney General.

PRIMARY ELECTIONS — DECLARATION — TIME TO BE FILED.

A declaration that candidate will qualify for office if nominated and elected must be filed at least thirty days prior to date of primary and if not done such candidate not entitled to place on primary ballot.

May 4th, 1910.

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

DEAR SIR: — I am in receipt of your letter of May 3rd, in which you submit the following for my opinion:

> A number of electors of the state desire to become candidates on the primary ballots to be voted on May 17, but who did not file their declaration that they intended to qualify as such officer if nominated and elected until after the time had expired when a petition could be filed, and submit the question whether such declaration may be filed after such time. In other words, the time when a petition could be filed expired at midnight on April 27th. May declaration such as described by section 20 of the Primary Election Laws be filed on the 28th or 29th of April, or any other date at which the board of elections is willing to accept the same?

Section 4973 of the General Code in part provides that,

> "Each candidate shall file with his nomination papers a declaration that he will qualify as such officer if nominated and elected."

The answer to your inquiry depends upon the meaning and the construction to be placed upon the word "with" as used in the above quoted portion of section

4973. If "with" merely means *place* and has no reference to the *time* when such declaration must be filed, then such declaration may be filed after the date has passed for filing nomination papers. However, on the other hand, if "with" refers to *place* and *time,* or, in other words, means *accompanying* the nomination papers, then such declaration must be filed at the time required for filing nomination papers.

Construing "with" to mery refer to the *place* where the declaration is to be filed numerous questions arise, the most important of which is, when is the declaration required to be filed with the nomination papers? This may possibly be answered by saying that if the declaration is filed at any time before the official ballots are printed or ordered printed by the election board, then there will be a compliance with this provision.

I am of the opinion that this contention is wrong, for the reason that such declaration could then be filed less than fifteen days before the day for holding the primaries, and would, therefore, be filed at a date later than that in which objections are permitted to be made to nomination papers as provided in section 4974 of the General Code, but would, however, be filed before the official primary ballots are printed or ordered printed by the election board. The declaration being a condition precedent to a candidate being placed upon the primary ballots, is, therefore, a paper that an objection may be made to on account of being defective or omitted, and such a construction as the above would in effect defeat all objections which are permitted by section 4974.

Construing "with" to refer to *time* and *place*, and in effect meaning *accompanying*, it would then be necessary to file such declaration at the same *time* and *place* provided by law for filing nomination papers. Section 4970 specifies that nomination papers shall be filed with the board of deputy state supervisors at least twenty days prior to the primary. Therefore, a declaration to be filed at the same time and place as the nomination papers must be filed twenty days prior to the primaries.

I have found one case somewhat in point with the question at hand. Wilkins v. Troutner, reported in the 66th Iowa, page 557. In this case the following statute was construed:

> "Before any allowance of attorney's fees shall be made by the court, the court shall be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit shall be filed *with* the original papers, that there has been no agreement between the attorney and any other person to divide the fee."

The court held that the word "with" as used in the above statute was synonymous with "at the same time."

I am of the opinion that a candidate must file a declaration that he will qualify for the office which he seeks, if nominated and elected, at least twenty days prior to the date of the primary, and on failure to do so such person is not entitled to a place on the primary ballot. Such nomination papers would not be in apparent conformity with the provisions of the primary law, and should not be deemed to be valid.

In conclusion I beg to advise that I realize that the question which you have submitted is one of great importance, and will affect a large number of candidates, and that I have given the same very careful consideration, and I feel confident that the opinion given above is the correct construction of the statute in question.

The brief which was enclosed in your letter of above date was also given

particular attention. However, I am unable to agree with the arguments therein presented.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION LAW — SECRETARY OF STATE MAY EMPLOY PERSONS TO ENFORCE LAW.

May 4th, 1910.

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

DEAR SIR: — I am in receipt of your letter of even date herewith in which you submit the following for my opinion:

> Have I authority to employ persons, and pay their expenses from the funds collected under the automobile law, to travel throughout the state for the purpose of gathering information and investigating the operation of motor vehicles on the public highways of the state that are not registered, as provided by said law, with a view to enforcing the provisions of the same?

I beg to call your attention to section 33 of "an act to provide for the registration, identification and regulation of motor vehicles" which is in part as follows:

> "The revenues derived from the registration fees provided for herein shall be applied by the secretary of state toward defraying the expenses incident to the *carrying out and enforcement* of the provisions of this act, and any surplus thereof shall be paid by the secretary of state into the state treasury monthly * *".

The above quoted section is sufficiently broad to permit you to employ persons, and pay their expenses from funds collected under the automobile law, to travel through the state for the purpose of obtaining information and evidence for the enforcement of the provisions of the automobile act. However, it is ever to be borne in mind that the expenses of the automobile department shall not exceed in any one month the amount of money collected by said department during the same month.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — SENECA LUMBER COMPANY — DISAPPROVED.

November 29th, 1910.

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

DEAR SIR: — I beg to acknowledge receipt of your letter of November 25th, requesting my opinion as to the legality of the purpose clause of the proposed

articles of incorporation of the Seneca Lumber Company, which clause is as follows:

> "Said corporation is formed for the purpose of buying and selling timber, lumber, cement, plaster, posts, wire fence, roofing, building material and all other articles necessary to carry on a wholesale and retail business in timber, lumber, building material and hardware; manufacture all kinds of building material; purchase, rent, own and hold all necessary machinery, buildings and real estate for properly carrying on its business; take contracts for the erection and construction of all kinds of buildings; to do and perform all kinds of general contract work; borrow money whenever necessary to carry on the business and to do and perform all other things that are necessary and incident to its business."

The purpose of this company is that of buying and selling timber, lumber, cement, and the other materials and articles enumerated in the first phrase of the purpose clause, which terminates with the first semicolon. This portion of the purpose clause is all that should properly be allowed to be included therein. All the rest of it as originally drafted is subject to criticism either as illegal under the rule of State ex rel vs. Taylor, 55 O. S. 67, or as superfluous, being a recital of powers which would flow from the statement of the purpose of the corporation.

Thus the purpose of "manufacturing all kinds of building material" is an independent purpose and can not be joined with the purpose of dealing in building materials — a mercantile business. So also the purpose of "taking contracts for the erection and construction of all kinds of buildings" and "doing and performing all kinds of general contract work" refer to enterprises quite separate and distinct from that of buying and selling building material, and, under the decision above cited, must be stricken from the purpose clause.

On the other hand, the right to "purchase, rent, own and hold all necessary machinery, buildings and real estate for properly carrying on its business" and "to borrow money whenever necessary to carry on the business, and to do and perform all other things that are necessary and incident to its business", are both recitals of incidental powers. As I have previously advised you, it is improper to attempt to recite the incidental powers of a corporation in the purpose clause of its articles of incorporation. The principal purpose being defined, the powers incidental to such purpose flow by operation of law therefrom.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Auditor of State.)

STATE OFFICER NOT ENTITLED TO TRAVELING EXPENSES TO AND FROM HOME.

January 8th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> In case a state official elected or appointed maintains his home at a place other than Columbus, may his traveling expenses going to his home and returning to his office when not on official business be paid out of the state treasury, and are his personal expenses, such as room rent and boarding when in Columbus attending to the duties of his office, proper charges against the state?

In reply I beg leave to say the Constitution provides that,

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law."

Under authority of this provision of the constitution, appropriations to state officers for traveling expenses are made by the legislature. The money thus appropriated, however, may only be used for actual expenses incurred when traveling on official business. It is not the policy of the legislature, neither is power given by the constitution, to maintain an officer at the public expense during his term of office. The compensation provided such officer is intended as a remuneration to the officer for his private and personal expenses while engaged in business for the state for the reason that the discharge of the public duties incident to the office will prevent the officer from giving his time and attention to private enterprises. In other words, the officer is expected to put himself in a position to perform his official duties without expense to the state other than his salary. That is if the law requires such officer to maintain an office at the Capitol it is his duty to be in attendance at such office and his personal expense incident to such attendance is considered to be included in the compensation or salary provided by law. If, however, such officer is required in the discharge of his official duties to travel over the state, and the legislature has provided a fund for the payment of such expenses, the officer is entitled to be reimbursed for such expenses actually and necessarily incurred.

Yours very truly,
U. G. DENMAN,
Attorney General.

LANGDON LAW—CORPORATIONS NOT REQUIRED TO PAY ON CAPITAL STOCK AND GROSS EARNINGS.

June 25th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter together with the correspondence of Messrs. Blandin, Rice & Ginn, attorneys, Cleveland, Ohio, involving the construction

of the excise taxes, and requesting an opinion upon the question raised in the correspondence for the benefit of the Board of Appraisers and Assessors, is received.

The correspondence contains in substance the following statement of facts:

The Cleveland Arcade Company is a domestic corporation with a capital stock of $1,000,000. The purpose for which it is formed as shown by its articles of incorporation is as follows:

> "The purpose for which said corporation is to be formed is to purchase and lease real estate, and to erect thereon an Arcade business block, or other buildings, as may be found advantageous for investment and for renting, and all things incident thereto, for profit."

The company owns a large building rented for offices and stores, and generates its own electricity for lighting, and steam for heating purposes, a small portion of which is sold outside of the building. It has each year paid the excise tax of $1,000 upon its capital stock as required by the Willis law, and in addition thereto, it has paid the Auditor of State 1% of its gross earnings received from the sale of its light and steam so sold, thereby raising the question of double taxation, and asking relief therefrom.

All corporations are required by the statutes to pay a franchise tax for the privilege of exercising their charters in this state. The statutes known as the Cole law and included in the Langdon law have made specific provisions for the payment of this tax figured on the gross receipts of certain corporations known as public service corporations which include among others heating and lighting companies. All other corporations for which specific provisions have not been made by statute for the payment of this franchise tax are required under the Willis or Langdon law to pay an excise tax computed on its capital stock.

The company as shown above has complied with both of these requirements which amounts clearly to double taxation, and not sanctioned by the laws of this state. It also appears that the corporation was organized under the general laws for the creation of corporations which provides in section 3235, that:

> "Corporations may be formed in the manner provided in this chapter for any *purpose* for which individuals may lawfully associate themselves."

And Judge Spear, in the case of the State ex rel. against Taylor, 55 O. S. page 67, says that the use of the word "purpose" implies limitation, and further that:

> "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."

The purpose granted the company by its charter as shown in its articles of incorporation, is to erect an Arcade business block that may be found advantageous for investment and for renting, and all things incident thereto, for profit. This I do not believe gives the company the privilege conferred upon public service lighting and heating companies of manufacturing and selling light and heat, and under the ruling of Ewing, against Bank, 43 O. S. page 31, which lays down the rules that:

"A corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter."

I am, therefore, of the opinion that the manufacturing and selling of light and heat is not included within the purpose granted the company by its charter, and should be discontinued by the company and that the company should only report and pay fees on its capital stock as provided by the Willis and Langdon law. I am herewith returning to you the correspondence.

Yours very truly,
U. G. DENMAN,
Attorney General.

COMPENSATION OF COUNTY COMMISSIONERS, AUDITOR AND SURVEYOR FOR ACTING AS BOARD OF QUADRENNIAL EQUALIZATION FULLY DISCUSSED.

July 22nd, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 8th, requesting my opinion on the following question:

Section 5597, General Code:

"Each member of the quadrennial county board, including the county auditor and the county surveyor, and each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, the sum of three dollars."

Are the county commissioners entitled to the $3.00 per diem as members of the Quadrennial County Board of Equalization, in addition to their regular salary provided by section 3001, General Code?

I have before me several other inquiries involving the construction of this statute and relating to the compensation of the County Auditor and the County Surveyor as members of the Quadrennial County Board of Equalization, and for convenience I shall discuss the compensation of such officers as well as that of the County Commissioners and shall render my opinion thereon.

Section 5597, is the General Code paraphrase of section 2813a R. S. Under said section and before the adoption of the General Code it was held by the Common Pleas Court of Darke County, per Allread, J., that the salary act of 1904, applicable to County Commissioners generally, by implication repealed that provision of section 2813a, R. S. which provides a compensation for County Commissioners for services as member of the Annual County Board of Equalization. (State, ex rel, vs. Culbertson, 6 N. P. N. S., 311; affirmed by the Circuit Court without report, May term 1906.) The Supreme Court has made a similar decision in the case of State ex rel. v. Owens, No. 11862.

The reasoning of this decision, which it seems to me is absolutely correct, applies with equal force to the provision relating to compensation for services as members of the (then) Decennial County Board of Equalization. Both services were required of the County Commissioners *ex-officio*. The mere fact that

services on the decennial board is a task not required during the term of each individual who may hold the office of county commissioner does not in my opinion create a distinction, in this respect, between the effect of the salary law upon the compensation of commissioners for serving on the decennial board and that for acting as members of the annual board.

Some confusion arises because the general assembly in adopting the General Code saw fit to include the above quoted provision of section 5597, and thereby, in one view of the case *re-enacted* this provision contemporaneously with the revised county commissioners' salary law, indicating that both should be given full force and effect. This confusion is more apparent than real however, and the view thus described is in my judgment erroneous. It is a cardinal principle that the adoption of a revision or code is not presumed to change the law. It is true that where no ambiguity exists and revised sections are manifestly different from corresponding sections of the original law a change must be deemed to have taken place.

In the case under consideration however, the inconsistency present in the old law is not absent from the Code. Section 3001, General Code, still provides, as the act of 1904, originally provided, that the salary of each County Commissioner "shall be in full payment of all services rendered as such commissioner."

The question as to the joint effect of this provision and that of section 5597, applicable to County Commissioners would thus be identical with that passed upon by the Court in the case of State, ex rel. vs. Culbertson, *supra* the same ambiguity would invite the attention of the court and the same reasoning would apply.

It is therefore my opinion that County Commissioners are not entitled to the sum of three dollars ($3.00) per day in addition to their salaries for services as members of the Quadrennial County Board of Equalization.

The so-called County Officer Salary Act, 98 O. L. 89, now embodied in Chapter 1, Division 3, Title 10, Part 1, General Code, Section 2977, et seq., provides as to the officers thereby affected, including the County Auditor that:

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive * * * "

That this catalogue was intended to embrace fees and allowances otherwise payable from the county treasury as well as from private individuals is apparent from the provisions of sections 2997 and 2998, General Code, formerly section 1923, respectively of the County Officers Salary Law, which expressly permit certain allowances from the county treasury to be made to certain officers affected by the act in addition to their salaries. Neither of these sections contain any mention of the compensation of the County Auditor as a member of the Quadrennial County Board of Equalization.

The act in 98, O. L. 89, was adopted subsequently to the enactment of section 2813a R. S., substantially the same question is thereby presented with regard to the compensation of the County Auditor as a member of the Quadrennial Board of Equalization as is presented with regard to that of the County Commissioners.

I am accordingly of the opinion that the reasoning and decision in State ex rel v. Culbertson apply to the compensation of the county auditor, and that that officer as well as the county commissioners is not entitled to the $3.00 per day provided by section 5597 General Code, in addition to his annual salary.

The county surveyor is not a salaried officer. It is his duty under section 5594 to act as a member of the Quadrennial County Board of Equalization. To

the performance of that duty a specific fee, viz, the $3.00 per day provided by section 5597 as above quoted is attached. In the performance of that duty he cannot be said, in my judgment, to be "employed by the day" within the meaning of section 2822 which provides that "when employed by the day the surveyor shall receive $5.00 for each day and his necessary actual expenses * * * "

Aside from the question as to whether the surveyor could be said to be "employed" when serving as a member of the Quadrennial Board of Equalization, section 2622 must be held inapplicable because it is a statute of general application, while section 5997 is particular in its scope. As a general rule, general statutes will not repeal previously enacted particular statutes, unless the intent to effect a repeal by implication is clear. There is no such clear expression of intent to repeal existing statutes in section 1133 R. S. as amended in 1906, as are found and above quoted in the salary acts applicable to county commissioners and the county auditor. The reasoning of the case above cited does not therefore apply to the compensation of the county surveyor.

I am therefore of the opinion that the county surveyor is entitled to receive for his services as a member of the Quadrennial County Board of Equalization the sum of three dollars ($3.00) per day and that he may not receive, in addition, his usual per diem of five dollars ($5.00).

Yours very truly,
U. G. DENMAN,
Attorney General.

APPROPRIATIONS MUST BE SPECIFIC—MONEY RECOVERED BY BENEVOLENT INSTITUTION BY A SUIT—NOT APPROPRIATED.

September 14th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 12th, in which you submit the following to me for my opinion:

> House Bill No. 108 relating to the support of inmates in benevolent institutions, 101 Ohio Laws, page 158, provides in part as follows:
>
> > "All moneys received under this act by the superintendents, as herein provided, or by a suit instituted, shall be paid to the state treasurer and placed in the general revenue fund and a separate account kept thereof."
>
> The general appropriation bill for these institutions reads:
>
> > "Current expenses, receipts from clothing, miscellaneous and ———— dollars".
>
> 1. Can the money received from these sources be placed in the state treasury in the general revenue fund to the credit of the current expense appropriation of the institutions depositing it and be used by that institution in paying its current expenses as it is now using "miscellaneous receipts"?
>
> 2. Does "a separate account kept thereof" mean that the auditor of state shall keep a separate account for these items independent of the revenue fund account as kept in the ledger"?

Section 1815-4 of the General Code of Ohio is in part as follows:

> "All moneys received under this act by the superintendents, as herein provided, or by suit instituted, shall be paid to the state treasurer and placed in a general revenue fund, and *a separate account kept thereof.*"

The general assembly, by the use of the above language, seems clearly to have intended the funds collected under House Bill No. 108 should be kept separate and apart from all other funds or accounts now in the state treasury. The general assembly also made an appropriation of the "receipts from clothing" and the "miscellaneous receipts" to the various state benevolent institutions. Both of said funds being established funds or accounts prior to the passage of House Bill No. 108, and as House Bill No. 108 specifically provides that a separate account shall be kept of all moneys collected under House Bill No. 108, it is only reasonable to presume that the general assembly did not intend to make such moneys available to the state benevolent institutions by the above appropriation.

In this connection it is also to be borne in mind that the constitution provides that no money shall be drawn from the treasury except in pursuance of specific appropriation made by law.

I am, therefore, of the opinion,

First: That the money collected by the superintendents or by suit instituted under House Bill No. 108, after being placed in the separate account in the general revenue fund should not be used by the benevolent institutions in paying their current expenses as they are now using "miscellaneous receipts."

Second: That the auditor of state should keep a separate account of such funds independent of the revenue fund account as kept in the ledger.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

BOARD OF PARDONS ENTITLED TO EXPENSES — NO EXPENSE TO MEMBERS.

April 16th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication of April 14th is received in which you submit the following questions:

> 1. "Is a member of the board of pardons entitled to any compensation or allowance for expenses other than that provided by section 88 of the General Code?"
> 2. "What expenses can be paid under the provisions of section 92, General Code?"

In reply thereto I beg to say that section 88 of the General Code is as follows:

> "For the time necessarily employed in the discharge of his official duties, *each member* of the board of pardons shall receive ten dollars per day *for not exceeding seventy-five days in any year, which compensation shall include traveling, hotel and other necessary expenses*".

This section expressly authorizes a per diem of ten dollars to each member of the board of pardons for not exceeding seventy-five days in any year, which per diem shall include "traveling, hotel and other necessary expenses." In other words, each member of the board of pardons is entitled to receive, for each day actually engaged in the performance of official duties, ten dollars, and no more. No personal expenses are allowed. The member must bear his own expense.

Section 92 of the General Code provides that:

> "Each year the board of pardons shall make a report in writing to the governor containing the names of its officers and members, its proceedings and recommendations, and a detailed statement of the amount and manner of *its expenditures during the preceding year; but the amount* so expended shall not exceed eight hundred dollars in any *year*".

This section provides for the payment of the expenditures of the board of pardons and not of the individual members thereof. That is, if there be any expense incurred on behalf of the board, such expense is authorized to be paid by this section, with the limitation that the expenditure so made shall not exceed eight hundred dollars in any year.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

GIRLS' INDUSTRIAL HOME—INVESTIGATING COMMITTEE UNDER HOUSE JOINT RESOLUTION NO. 20 INVALID.

July 19th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date in which you request my opinion upon the following question is received:

> "House Joint Resolution No. 20, by Mr. Reed, provides for the appointment of a Committee to investigate the conditions at the Girls' Industrial Home.
>
> Can the expenses of this committee be paid out of the regular Legislative Committee Expense Appropriations?"

In reply thereto I beg leave to submit the following opinion: House Joint Resolution No. 20 which you append to your inquiry reads in part as follows:

> " * * * Be it further resolved that said committee shall file its report of findings, recommendations and suggested legislation with the Governor of Ohio on or before the fifteenth day of November, 1910. The Governor shall transmit such report to the first session of the 79th General Assembly."

From the above quoted provision of House Joint Resolution No. 20, it will be seen that the legislature in adopting the same contemplated and provided that the committee provided for therein should act after the adjournment of the 78th General Assembly. In the case of State ex rel Rulison v. Gayman, 11 O. C. C. n. s. 257, Judge Giffin, rendering the unanimous opinion of the circuit court, on pages 261 and 262 uses the following language:

"The right to investigate and gather information in the manner here proposed exists, if at all, as an incident of and by implication from the power to legislate conferred by the constitution. An act duly passed by the General Assembly is a complete exercise of the power to legislate; but a resolution to investigate for the purpose of further legislation, passed by the same body, is the exercise of a right incident to that power, and if the power itself be surrendered the incidental right goes with it.

When the general assembly adjourned *sine die* its purpose to use the information in aid of legislation could no longer be carried out; and while it could order the information to be transmitted to its successor, it could not form or express a purpose for nor impose its own upon its successor. The latter would use the information as it saw fit, without regard to the intention of the former.

It is the same as if no purpose were expressed, and the result is that an investigation is proposed, without any legislative purpose or any other acknowledged purpose, with authority in the committee to roam over the entire field of governmental functions and report its discoveries to the next General Assembly fresh from the people who alone have power to instruct. Such power to investigate is not conferred by the constitution in express terms nor by implication. Cushing's L. & P. of Leg. Assemblies, Section 496; In re Pac. Ry. Co. 32 Fed. 241."

This case is, therefore, authority for the proposition that the 78th General Assembly had no power to appoint this committee with power to make investigation of the conditions of the Girls' Industrial Home after such General Assembly had adjourned *sine die*. This case involved the question of the validity of a joint resolution of both houses of the General Assembly, which provided for the appointment of a committee of six, three from each house, with full power to investigate charges of corruption existing in the government of the city of Cincinnati and county of Hamilton, and directed such committee to make report to the General Assembly, from which such committee had been appointed, if in session, and if not, to the Governor for transmission to the succeeding General Assembly. The similarity between the provisions of the joint resolution in that case and House Joint Resolution No. 20 of the 78th General Assembly is apparent. This case was affirmed without report by the Supreme Court in 79 Ohio State, 444.

I am, therefore, of the opinion, under the authority of the above entitled case, that House Joint Resolution No. 20, concerning which you submit your inquiry, is invalid, and that the committee provided for therein has no power to do and perform the acts therein specified, and, therefore, that the expenses of such committee cannot lawfully be paid.

Yours very truly,
U. G. DENMAN,
Attorney General.

JURY FEES IN FELONY CASES MAY NOT BE PAID BY STATE.

December 14th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 12th, requesting my opinion upon the following question:

"Section 12375, General Code: 'In all sentences in criminal cases the court shall include therein and render a judgment against the defendant for the costs of prosecution; and if the jury has been called in the trial of the case a jury fee of six dollars shall be included in the costs.' (R. S. Sections 1330 and 6799.)

Question. Can this charge of six dollars be legally made against the defendant, and if so, can it be included in the cost bill and be made a legal charge against the state, to be paid as other fees and costs?"

This section explicitly authorizes a jury fee of six dollars to be taxed as costs, and included within the judgment for costs, against a defendant in a criminal case. I know of no reason why execution should not issue in a proper case against the property of a defendant for the satisfaction of this portion of such a judgment as well as of other portions of the judgment for costs, nor have I found any case questioning the validity of this provision.

Whether this item can be included in the cost bill to be paid by the state in a felony case is not so clear. Section 13722 General Code, provides that,

"Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on * * * requisition * * *."

Section 13724, General Code, provides that,

"If the convict is sentenced to imprisonment in the penitentiary or to death, and no property has been levied upon, the sheriff shall deliver such certified cost-bill, having accredited thereon the amount paid on costs, with the convict, to the warden of the penitentiary. * * *"

Section 13726, General Code, provides that,

"* * * the warden of the penitentiary shall allow so much of the cost-bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

Section 13727, General Code, provides that,

"Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of the costs of conviction, * * * the clerk shall so certify to the auditor of state * * *. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

It is elementary that in the ordinary signification of the word, "costs" does not include jury fees. That the jury fees are included in the costs which may be adjudged against the defendant results because of the specific provision of section 12375, General Code. If, on the other hand, such fees are to be included within the meaning of the word "costs" as used in sections 13722 et seq., above quoted, it will not be because that word naturally includes such fees but because

these sections are to be read in connection with section 12375 and the meaning of the two terms regarded as identical in both sections.

Upon careful consideration, I am of the opinion that there is no reason for holding that the word "costs" as used in section 13722 in any sense other than its natural meaning, and that there being no provision in said section for the inclusion of the jury fee in the bill of costs to be paid by the state, such fee may not be included in that bill but must be paid out of the county treasury. In so holding I follow what appears to be a uniform ruling of your office and of this department. (See Opinions of the Attorneys General of Ohio, Vol. 5, page 473.)

Yours very truly,
U. G. DENMAN,
Attorney General.

FISH AND GAME WARDENS — DEPOSIT FOR BADGES NEED NOT BE TURNED INTO STATE TREASURY.

September 22nd, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your letter of September 16th, in which you submit the following for my opinion:

> "It is the practice of the fish and game commission to furnish deputy game wardens with badges of authority. These badges were paid for out of the general expense fund. For a time these badges were furnished free to the deputy game wardens, but it was found that badges were lost and deputy game wardens retiring from the service of the Commission failed to return them. This caused the commission to require a deposit by the wardens on their entering the service, the amount so deposited being returned to them on the delivery of the badge at the expiration of their term.
>
> "Do such deposits constitute receipts within the meaning of the law which requires all receipts by state departments to be paid into the state treasury?"

I beg to call your attention to section 24 of the General Code, which is as follows:

> "On or before Monday of each week, every state officer, department, board, or commission shall pay to the treasurer of state all moneys, checks and drafts received for the state, during the preceding week, from fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed verified statement of such receipts."

The above section only applies to money received for the state when such money belongs to the state. In the case at hand the fish and game commission merely hold the deposit made by a game warden referred to in your inquiry, conditioned upon such game warden returning the badge given to him by the game commission. The entire transaction is merely a rule of the commission to insure the return of badges. When the badges are returned the game com-

mission is required to return the deposit. This transaction is in the nature of a "cash bond" and in my opinion is not money received for the state as referred to in section 24 of the General Code and that it is not necessary for the game commission to pay the same into the state treasury. I feel strengthened in this opinion by the provision of the Constitution which provides that no money may be drawn from the state treasury except in pursuance of a specific appropriation made by law. If these deposits were required to be paid into the state treasury by the game commission it would be impossible for the game commission to return the money to the deputy warden without having a specific appropriation from the legislature of this fund.

Yours very truly,
U. G. DENMAN,
Attorney General.

TOLEDO STATE HOSPITAL — STEWARD — RENT FOR RESIDENCE OF.

January 10th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "Section 653, Revised Statutes, provides 'superintendents, stewards and matrons shall reside in and devote their entire time to the interests of the institution with which they are connected'.
>
> "The trustees of the Toledo State Hospital, from lack of suitable rooms, or other reasons, provide a residence for their steward outside of the institution, and seek to have the rent of this residence paid out of the State Treasury".
>
> Query: Is the rent for such residence a proper charge against the state?

In reply I beg to say, it is the duty of the trustees of the Toledo State Hospital to provide living accommodations for the steward of the institution. I assume that if by reason of the crowded condition of the hospital no rooms can be provided for the steward that he could be housed outside of the institution. The constitution provides that,

> "No money shall be drawn from the (state) treasury except in pursuance of a specific appropriation made by law".

I am not informed as to whether or not the legislature has made any appropriation for the Toledo State Hospital out of which house rent for the steward may be paid.

Under the above quoted provision of the constitution it is my judgment that a specific appropriation for house rent would have to be made by the legislature before such rent could be paid out of the state treasury.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE OFFICERS — COMMISSION — MODE OF ISSUANCE AND FEE.

September 20th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 16th, directing my attention to the provisions of sections 138 and 139 General Code, and submitting for my opinion thereon the following questions:

> "1. What constitutes a 'state officer'?
> 2. Should every official appointed by the governor and to whom a commission is issued be considered a state officer?
> 3. Should every official appointed by the governor (except militia officers) who, for the discharge of his duty, received compensation or salary, pay a fee of Five ($5.00) Dollars to the Secretary of State for making, recording and forwarding his commission?
> 4. Should the governor or secretary of state collect the fee and deliver the commission covering appointments made by the governor?"

Sections 138 and 139 are in part as follows:

Section 138:

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

Section 139:

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

The question presented by your first three inquiries is one of considerable difficulty. The word "officer" has a primary meaning which is quite definite and certain. The ultimate test of what constitutes a public office is the delegation to the incumbent of a public function to be exercised in behalf of the state as a part of the sovereignty of the state (State vs. Jennings, 57 O. S. 415). Other incidental tests are, permanency or continuance of authority (State vs. Brennan, 49 O. S. 33); the giving of a bond; the taking of an oath of office and compensation (State vs. Halliday, 61 O. S. 171); and a title pertaining to the office as such.

All of these tests, with the exception of the first above mentioned, I have chosen to regard as incidental rather than essential, as the absence of any one of them will not deprive a position of its official character, resulting from the application of the first test.

There is another test, however, laid down by authorities, and which I regard as not only essential in its nature, generally speaking, but also decisive of the question submitted by you. The authorities all hold that an officer as such must be authorized by law to exercise functions pertaining to an office in an inde-

pendent capacity (See State ex rel vs. Jennings, supra; State ex rel vs. Brennan, supra.)

To illustrate the operation of this test permit me to refer to the duties of the First Assistant Attorney General. In many instances the first assistant attorney general exercises, under and by virtue of section 335 General Code, powers commensurate with those of the Attorney General, but he is exercising the duties and powers of the office of the attorney general, and hence can not be said to exercise any functions pertaining to the sovereignty of the state *in an independent capacity.*

From all the foregoing I am of the opinion that the first characteristic to be particularly noted in connection with the definition of the term "state officers" as employed in the section under consideration is that it refers only to *heads of departments.* Subordinate officers, however extensive their powers and whatever the source of their appointment, providing always they are subject to the direction and control of another officer in the same department, are not "state officers" within the meaning of section 138 General Code. This requirement that the powers of the office must be independently conferred is not to be construed to exclude from the definition of the term members of a state board. If the board as such is an independent tribunal and the other tests above suggested, when applicable are satisfied, its members are officers. (Barker vs. State, 69 O. S. 68.)

Your second inquiry seems to question whether or not an official who holds his office by virtue of an appointment and not by virtue of an election is a state officer within the meaning of section 138. This question is answered by the language of section 138 itself which provides that a commission shall issue upon "a legal certificate of his election *or appointment.*"

Answering your third question I beg to state that every state officer, as determined by the above suggested tests, who, for the discharge of his duty, receives any fee, compensation or salary, must pay a fee of five ($5.00) dollars to the secretary of state for the making, recording and forwarding of his commission before being entitled to receive his compensation. The language of section 139 is, it seems to me, so plain as to preclude any question as to its meaning. Whatever may be the purpose of the section its purport is clear.

Answering your fourth question I beg to state that, reading the above quoted provision of section 139 in connection with section 140, which provides in part that deputy state supervisors of elections

> "shall * * * forward * * * to the secretary of state a certificate of election of such officer together with the fee so paid"

and that,

> "Upon receipt of such certificate and fee by the secretary of state, the governor shall issue and forward the proper commission"

and that,

> "The fee so received by the secretary of state shall be paid into the state treasury to the credit of the general revenue fund",

I am of the opinion that the duty to collect the fee is imposed by law upon the secretary of state, while the duty of forwarding the commission is enjoined upon the governor, and that this rule applies as well to the issuance of commissions to appointees of the governor as to the issuance of commissions to elective officers.

Your question not being specific I have endeavored to set forth the principles by which specific questions may be determined. I am aware that laws relating to different officers present different questions and that in the last analysis

the nature of each position must be determined by itself. It is believed, however, that the foregoing will enable you to determine each of such specific questions that may arise.

Yours very truly,
U. G. DENMAN,
Attorney General.

OHIO STATE REFORMATORY — ABSTRACT OF LANDS PROPOSED TO BE PURCHASED BY.

November 19th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I herewith enclose abstract of title to lot 15 in Spring Grove Addition to the city of Mansfield, Ohio. This abstract has been submitted to me by the Ohio State Reformatory for approval.

The abstract in its present form fails to show whether or not Mary Hart, the grantor, mentioned on page 5 of the abstract, is married or single. It is to be noted that thirty years have elapsed since the time of the above conveyance, and I, therefore, do not consider this defect material. Page 6 of the abstract shows the grantee to be "Daniel Myers" while page 7 of said abstract shows the grantee to be "Daniel A. Myers." This abstract has been heretofore returned to the abstractor to see if he could not correct this defect, and from the note of the abstractor on page 7 it will be seen that it was impossible to do this. You will also note that it has been twenty-seven years since the date of this conveyance, and I, therefore, do not consider this defect material.

In approving this abstract I have also taken into consideration that, at the present time this department is acquiring a large number of lots in the Spring Grove Addition to the city of Mansfield for the Ohio State Reformatory, and it is, therefore, necessary for us, if possible, to purchase some lots in this addition before the condemnation cases come on for trial, to be used for evidence to show the value of the property in the addition, and lot fifteen (15), being one of the few lots on which we have been able to agree upon a reasonable purchase price, and as the defects which I have noted are of such long standing and undoubtedly cured by time, I recommend that you honor the voucher issued by the Ohio State Reformatory for lot fifteen (15) of the above addition.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF REVIEW — COUNTY COMMISSIONERS — AUTHORITY TO REDUCE COMPENSATION OF MEMBERS.

July 25th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

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

> "After a board of county commissioners has fixed the compensation of a board of review (section 5621 General Code) at $5.00

per day, can this board of county commissioners at a subsequent meeting, and after the Board of Review is engaged in the work, rescind their former order and fix the compensation at $3.50 per day?"

Section 5621 of the General Code provides that:

"The county commissioners shall fix the salary of the members of the board of review, which shall not be less than three dollars and fifty cents per day for each day the board is in session, and not to exceed two hundred and fifty dollars per month for the time such board is in session. Such salary shall be payable monthly out of the county treasury upon the order of said board and the warrant of the county auditor. The board shall meet in rooms provided by the county commissioners, and when in session, shall devote their entire time to the duties of their office. No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board."

On May 3rd, 1910, I advised the Bureau of Inspection and Supervision of Public Offices of your department that the power of the county commissioners under section 5621 General Code was not a continuing power, but could be exercised only once for each session of the board. That is to say, the statute refers to the compensation "for the time such board is in session," thereby indicating that the commissioners have the power to fix it as to each session. When once exercised this power is then discharged as to such session.

The Circuit Court of Montgomery County has recently adopted this view in the case of State ex rel v. Edwards (not as yet reported). In that case the court holds in addition to the foregoing, that where the commissioners at the opening of a session of the board of review have failed specifically to fix the salaries of the members for such session, they cannot fix it during the session. The salary previously fixed is presumed to apply to the current session.

From all the foregoing it follows that the answer to your question must be in the negative.

Yours very truly,
U. G. DENMAN,
Attorney General.

DOW-AIKIN LAW — PROPERTY SUBJECT TO LEVY UNDER SECTION 6078 GENERAL CODE.

August 17th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 11th, submitting for my opinion thereon the following question:

"Under the provisions of section 6078 General Code, on what particular class of property can a county treasurer legally levy? Can the levy be legally made on a piano or other articles not necessary to be used in carrying on the business?"

Section 6078 cited by you provides a method of collecting the tax levied "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor," and is as follows:

"The county treasurer * * * in case of the refusal to pay such amount so due, shall levy on the goods and chattels of such person, corporation or partnership, (engaged in such business) wherever found in such county, or on the bar, fixtures, furniture, liquors, leasehold, and other goods and chattels, used in carrying on such business. Such levy shall take precedence of all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; and no claim of property by a third person to such goods and chattels so used in carrying on such business shall avail against such levy by the treasurer. No property, of any kind, of any person, corporation or copartnership liable to pay such amount, penalty, interest and costs shall be exempt from such levy."

The provisions of the foregoing section seem plain to me. All personal property belonging to the person or corporation liable for the tax, wherever situated and regardless of its use, is subject to levy thereunder. However, only such property as is used in carrying on the business of trafficking in intoxicating liquor is subject to such levy to the exclusion of all prior liens and intervening claims. That is to say, there are really two kinds or degrees, so to speak, of levies provided for in this section; one upon the personal property of the person liable, generally, and the other upon the property used in the business.

Assuming, however, that you desire to be advised as to the meaning of the phrase "used in carrying on such business" I beg to state as my opinion thereon that the same refers to any article actually used in connection with the business, whether the same is essential or necessary to the sale of intoxicating liquor or not. That is to say, if a piano, the article specifically referred to by you, is used in a bar-room or in an establishment the principal business of which is that of trafficking in intoxicating liquors, and the use of the piano is incidental to the principal business so carried on, by way of entertaining visitors, thus affording a means of attracting to the place prospective purchasers of intoxicating liquors, then the same is "used in carrying on such business" within the meaning of section 6078, and the claim that such use was not "necessary" to the carrying on of such business would be immaterial.

Very truly yours,
W. H. MILLER,
Assistant Attorney General

QUADRENNIAL APPRAISEMENT LAW — MEMBERS OF CITY BOARDS NOT ENTITLED TO PERSONAL EXPENSES.

March 2nd, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of February 2nd, submitting for my opinion thereon the following question:

"Volume 100, page 83, section 7, Ohio Laws provides: '* * * and such incidental expenses as such board shall deem necessary shall be paid out of the county treasury in like manner * * *'

"Can 'Incidental Expenses,' as used in this connection, be held to include personal expenses, such as street car fare, meals, hack and livery hire?"

In my judgment the clause above quoted does not authorize the payment of personal expenses to the members of the city board of real estate assessors. While the phrase "incidental expenses" might be construed so broadly as to include such expenses, and while the board of appraisers has a very broad discretion under the clause in the matter of expenses, yet the principle that public officers are not permitted to receive compensation or remuneration of any kind from the public treasury, save in pursuance of specific provisions of law, operates in my judgment to restrict such a broad construction and to circumscribe the discretion of the board.

I, therefore, conclude that members of the city board of real estate assessors are not entitled to personal expenses.

Yours very truly,
U. G. DENMAN,
Attorney General.

DEPOSITORY LAW — COUNTY.

State entitled to interest on county deposits.

February 25th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication is received with which you submit to this department for an opinion thereon the inquiry of Fred H. Wolf, Prosecuting Attorney, Wauseon, Ohio, as follows:

> "Has the State of Ohio the right to demand from the various counties of a proportionate part of the interest collected on deposits made pursuant to the county depository law, 98 Ohio Laws, 274?"

In reply thereto I beg to say that the county depository act provides that the interest on the deposits shall be credited to the county on the first day of each calendar month, or at any time when the account may be closed, and at the time of crediting such interest the depositary shall notify the auditor and treasurer, each separately in writing, of the amount thereof,

> "and all such interest shall be apportioned to the several funds in proportion to the amount of interest accruing to such different funds by the county auditor, and the county auditor shall inform the treasurer, in writing, of the amount credited to each of such funds."

It must be admitted that the deposit so made under this law is in part moneys collected as result of the state levy; therefore, when the accrued interest on said deposits

> "shall be apportioned to the several funds in proportion to the amount of interest accruing on such different funds"

it is clear that part of the interest should be accredited to the fund to be remitted to the auditor of state. The question then is, does the increment follow the principal? That it does in the absence of statute or stipulation to the contrary, has been decided by the supreme court in the case of Eshelby vs. The Cincinnati Board of Education, 66 O. S. 71.

It is my opinion that, under the provisions of the depository act, the state has the right, and it is the duty of the auditor of state to demand from the various counties a proportionate part of the depository interest.

Yours very truly,
U. G. DENMAN,
Attorney General.

DECENNIAL APPRAISEMENT OF REAL PROPERTY — REAL PROPERTY.

Decennial state, county and city boards may not change aggregate value of property as listed at appraisement. R. S. 2313,, General Code, 5594, R. S. 2817, General Code 5611, R. S. 2819-1 General Code 5618. Board of Equalization may not change total appraisement.

February 16th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you submit to this department for an opinion thereon the following inquiries:

> "Has the decennial county board of equalization or the decennial city board of equalization authority to increase the aggregate value of the real property of the county or city above the aggregate value thereof, as returned by the assessors, with additions made thereto by the auditor?"
>
> "Has the decennial state board of equalization the authority to increase or decrease the aggregate value of the real property of the state, as equalized by the decennial county and city boards of equalization, and certified by the various county auditors?"
>
> "Has the decennial county board of equalization or the decennial city board of equalization, sitting as a board of revision, authority to increase or decrease the aggregate value of the real property of the county or city, above or below the aggregate of the value certified to them for consideration?"
>
> "Has the decennial county board of equalization authority in equalizing the valuation of real estate, to shift valuations from one taxing district to another, or shall they consider each separate taxing district in the adjusting of valuations?"

To state fully the relation that each of the boards of equalization inquired about bears to the others and to analyze the sections of the Revised Statutes providing for such boards and defining their duties would require an opinion of great length. I shall, therefore, confine my answer to an expression of the conclusions arrived at by such consideration.

These statutes provide a careful arrangement of details from the work of the decennial land assessor to and through these different boards, but so related that the object sought, to-wit, that an equitable valuation may be arrived at in the state, and which shall be the basis of all levies for the decade next ensuing.

Equalization and not original appraisal is the paramount purpose and design of the statutes creating these different boards. From a consideration of the statutes creating these boards, and defining their duties I think it apparent that the state board may not increase or decrease the aggregate value of the real property of the state as equalized by the decennial county and city boards

of equalization and certified by the various county auditors; that the decennial county board of equalization may not increase or decrease the aggregate value of the real property of the county above or below that certified to them for consideration; that the decennial city board of equalization while sitting as a board of revision or otherwise, may not increase or decrease the aggregate value of a city above or below the aggregate value certified to it for consideration. If this could be done the decennial appraisement, and which we have been led to think amounts to something, would become of no fixed value or guide, and the expense of obtaining the same might well be saved.

It is my opinion that in the enactment of these statutes the legislature intended that the original appraisals should stand subject to additions made thereto by the auditor of the county until subsequent appraisements might be made by a board of like authority. It, therefore, follows that your three first inquiries should be answered in the negative.

The answer to your fourth inquiry is not free from doubt because of the ambiguous language used in section 2814 Revised Statutes. It is therein provided that the auditor of the county shall lay before the decennial county board the returns made by the district assessors with the additions which he shall have made thereto, and said board shall then immediately proceed to "equalize such values." The statute specifically provides that this board shall not reduce the aggregate of the real property values thereof as returned by the assessors with additions made thereto by the auditors. The statute does not forbid the increase of the aggregate appraisal for the apparent reason that the auditor from time to time makes additions thereto. The state board does not deal with the individual owners, but deals with the towns and counties, and in equalizing values it may increase or decrease the valuation of a county or town by a certain percentum. The county decennial board in equalizing values must deal with the individual owners. The power of the county board is as wide as the county and its limitation as to the county seems to be that it must deal with the individual owners of property upon complaint and notice and not change the total appraisal of the county.

I therefore conclude that while the decennial county board of equalization has no authority to shift the values from one taxing district to another, making the district the unit, it may change the values of certain tracts of land as returned by the district assessors to such an extent that the effect will be to change the total appraisal of a district valuation as returned by the district assessor.

In the case of Davies v. Investment Co., 76 O. S., 403, in which is considered the power of boards of review of cities, the court suggested that the preceding decennial valuation shall not be changed,

> "unless such increase in value is caused by the erection of new structures not returned, or unless such increase becomes necessary in equalizing such real estate on account of omitted lands or lots restored to the tax list, new structures or additions or in correcting gross inequalities in existing values requiring a new equalization of the property so increased with other real property affected thereby".

The unusual facts in this case fully justify the court's finding. But the court evidently intended this change to be made only in correcting gross inequalities in existing values, and then to be the rare exception and not the rule.

Yours very truly,

U. G. DENMAN,
Attorney General.

COMMISSIONERS OF ROAD DISTRICT MAY NOT EMPLOY ONE OF THEIR OWN MEMBERS AS CLERK.

January 12th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Receipt is acknowledged of your letter of January 10th, enclosing a communication addressed to you by Hon. Will B. Jones, county auditor of Mahoning county. You request my opinion upon the inquiry presented by the auditor viz.:

> May the commissioners of a road district employ one of their own members as clerk at a salary by them fixed?

This department has frequently held that public policy prohibits an administrative board from appointing one of its members to a salaried position under its authority, or employing such member in a subordinate capacity at a salary to be fixed by the board.

This principle is abrogated in some cases by express statutory authority to make such appointment or employment, but in case of commissioners of road districts the statute authorizing the employment of a clerk (section 4757-6 R. S.) contains no such provision.

I therefore conclude that the employment in question may not be made.

Another question is suggested by the auditor, viz.,

> Whether it will be lawful for the board to permit one of its members to perform the services of a clerk, but to make the appointment and draw the salary vouchers in pursuance thereof in the name of his wife?

This also would be illegal, as the wife's employment in such case would be merely colorable.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

TAXATION — PROPERTY VALUATION — TAX BOARDS — POWERS DEFINED — BOARDS OF EQUALIZATION — POWERS DEFINED.

May 27th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — You inquire whether or not the provisions contained in the recently enacted "Tax Commission Act", House Bill No. 68, affect the powers of the various boards of equalization and review as defined by me in an opinion to you under date of February 16, 1910, in reply to certain inquiries made by you as follows:

> "Has the decennial county board of equalization or decennial city board of equalization authority to increase the aggregate value of the real property of the county or city above the aggregate value thereof, as returned by the assessors, with additions made thereto by the auditor?"

"Has the decennial county board of equalization or the decennial city board of equalization, sitting as a board of revision, authority to increase or decrease the aggregate value of the real property of the county or city, above or below the aggregate of the value certified to them for consideration?"

"Has the decennial county board of equalization authority in equalizing the valuation of real estate, to shift valuations from one taxing district to another, or shall they consider each separate taxing district in the adjusting of valuations?"

In reply to your inquiry I beg to advise that the Langdon tax commission act, House Bill No. 68, gives to the commission thereby created much fuller authority in matters relating to the fixing of values for taxation, and the equalization thereof, than was conferred upon the state board of equalization now abolished. For instance in section 81 of the tax commission act is found the following language:

"The commission * * * shall order a re-assessment of the real and personal property in any taxing district, when in the judgment of said commission such property has not been assessed at its true value in money, to the end that all classes of property in such taxing district shall be assessed in compliance with law. * * * It may raise or lower the assessed value of any real or personal property * * * to the end that the assessment laws of the state may be equitably administered".

"Compliance with law", as used herein, evidently means that the property shall be taxed at "its true value in money" as directed by the Ohio Constitution, section 2, Article XII.

And again in section 106,

"Each county auditor, on or before the first Monday of November, 1910, and every fourth year thereafter, shall make and transmit to the commission an abstract of the real property of each taxing district in his county, in which he shall set forth the value thereof as returned by the assessors, *with such additions as have been made* thereto."

It is evident from these and other provisions of this act that the tax commission therein created is given full power to revise and change the aggregate of any and all taxing districts in the state, and that it has the power to increase the aggregate value of the real property of the state as equalized by the quadrennial county and city boards of equalization, and certified to it by the county auditors. This being true it is pertinent to inquire if, in the enactment of this law the legislature has not construed that part of section 5598 of the General Code, which reads as follows:

"The auditor shall lay before the board all returns made by district assessors, with the additions which he shall have made thereto, and it shall then forthwith proceed to equalize such valuations so that each tract or lot shall be entered on the tax list at its true value, and for this purpose it shall observe the following rules: First, it shall raise the valuation of such tracts and lots of real property as, in its opinion, have been returned below their true value to such price or

sum as it believes to be the true value thereof, agreeably to the rules prescribed by this title for the valuation thereof * *".

Heretofore it has been contended, and I think rightly, that the decennial *county board* of equalization and city boards of review could not increase the aggregate value of the real property of the county or city above the aggregate value thereof as returned by the assessors, with additions made thereto by the auditor, except in correcting gross inequalities in existing valuations.

The legislature is presumed to have had this section in mind in the enactment of the law under consideration, and that it has construed said section 5598 of the General Code as giving the quadrennial county boards of equalization power to increase the aggregate value of the real property of the county, is to my mind clearly apparent, and for this reason if the quadrennial county and municipal boards of equalization and review have not the power to so increase the aggregate values in their respective jurisdictions, while the said tax commission, having the power to review the work of such boards, is given the express power to increase the aggregate values thereof, the effect would be that the said tax commission would be revising and changing the aggregates as certified to it by the various county auditors after equalization by county and municipal boards when the said boards would have been denied the right to exercise their discretion as to what the aggregate so changed by the tax commission should have been. City boards of review have like powers and for the same reasons. It would be a poor construction of these statutes to hold that the county and municipal boards of equalization and review are denied the right to fix the aggregate values in counties and municipalities, and in the next sentence to say that if the county and municipal boards do not fix the aggregate so that the property therein shall be assessed "in compliance with law" the said tax commission shall increase the aggregate over and above that certified to it by the various county auditors so as to make it conform with the law relating to the assessing of property for taxation purposes.

The aggregates of the counties and municipalities as fixed by the respective boards of equalization therein, being subject to review and change by the said tax commission, the legislature properly provided that they be given full authority to list the property therein and to fix its value so as to represent their best official judgment as to whether it is in compliance with law. Then the state tax commission reviews that judgment.

In other words, as I construe the legislative intent in the enactment of this commission law, it has given to these various boards full authority to increase the aggregate of the real property within their respective jurisdictions as returned to them, when in their judgment those who assess the property in the first instance fail to assess it as directed by the constitution of the state. It follows, therefore, that, in my opinion, your first and second inquiries, as above set out, should now be answered in the affirmative.

As to your third inquiry, I see no reason for changing my answer thereto as given to you under date of February 16th, 1910, which was that the decennial, now quadrennial county boards of equalization and quadrennial city boards of review, have authority in equalizing the valuation of real estate to increase the values thereof as fixed by the taxing district assessors, but this increase must be made by considering each separate tract of land as owned by individuals.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Bureau of Inspection and Supervision of Public Offices.)

SOLICITOR — SPECIAL COUNSEL IN CONDEMNATION PROCEEDINGS — MANNER OF PAYING.

August 1st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have requested my opinion as to the following question:

> No appropriation having been made by a city council to the city solicitor for special counsel, may the solicitor employ an attorney-at-law in proceedings for the appropriation of real property necessary for a public improvement, to be paid for out of the proceeds of bonds issued by the city, and may the compensation of such attorney-at-law be paid out of the proceeds of such bonds as a part of the cost of the improvement?

I have carefully examined the provisions of the General Code relating to the appropriation of property, the borrowing of money, and the department of the city solicitor, and fail to find therein any provision either expressly or by implication, authorizing the payment of an employe of the solicitor out of the proceeds of a bond issue.

It is perfectly competent for council to levy and appropriate funds for the use of the city solicitor in the employment of special counsel; but the city solicitor has no power to expend any portion of the proceeds of the bond issue for a public improvement.

Both the letter and the spirit of the municipal code oppose the payment of city employes out of the proceeds of a bond issue. I refer you to the opinion of the Attorney General, addressed to your department under date of May 14, 1906, wherein it was held that the compensation of a civil engineer regularly employed by the department of public service might not be paid out of the proceeds of a special assessment, but that the compensation of such an engineer specially employed for that particular improvement could be included in and paid out of the assessment. The case of legal counsel is quite different. Former section 2284 R. S., now section 3896 General Code expressly authorizes the payment of "the expense of the preliminary and other surveys," out of the proceeds of the assessment and the issue of bonds made to meet the same. The expression of one thing is the exclusion of all others, and fees of special counsel being omitted from the catalogue contained in section 3896 General Code, it follows that they may not be paid out of the proceeds of an assessment. Attorney fees are not to be regarded as a part of the "costs and expenses of the proceeding," within the meaning of said section 3896. Both the word "cost" and the word "expense" have a recognized legal meaning, and neither is broad enough to include compensation of legal counsel.

I, therefore, conclude that the compensation of special counsel employed by the city solicitor in condemnation proceedings in connection with a public improvement, may not be paid out of the proceeds of a bond issue or a special assessment levied to pay for such improvement, and if council has not appropriated any sum for special counsel to the use of the city solicitor, the compensation of an attorney employed by him may not be paid out of the city treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

SINKING FUND TRUSTEES — MANNER OF APPOINTMENT — COMMON PLEAS COURT.

City and village boards of education have not authority to designate sinking fund commissioners of such city and village to be sinking fund commissioners of school district, but common pleas judge may.

July 30th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of July 20th is received in which you request my opinion upon the following questions:

> "Sec. 7614, G. C., provides that in city and village school districts, the board of commissioners of the sinking fund of the city or village may be the board of commissioners of the sinking fund of the school district.
>
> 1. Have boards of education in city and village districts the authority to designate the sinking fund commissioners of such cities and villages to be the sinking fund commissioners of the respective school districts?
>
> 2. Has the court of common pleas the authority to appoint such city or village boards instead of five electors as provided in the same section?
>
> 3. If no action has been taken to appoint either the city or village board or a commission composed of five electors, shall the city or village board act ex-officio and take charge of the sinking funds of their respective school districts?"

In reply thereto I beg leave to submit the following opinion:

Section 7614 of the General Code reads in part as follows:

> "The board of education of every school district shall provide a sinking fund for the extinguishment of all its bonded indebtedness, which fund shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of .....' (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district; such commissioners shall serve without compensation and give such bond as the board of education requires and approves."

Under the general powers given by the school code to all boards of education to make all necessary provisions for the welfare of the schools within their jurisdiction, it might seem at first thought that it is within the power of city and village boards of education to provide by proper resolution that the board of commissioners of the sinking fund of such city or village shall be the board of commissioners of the sinking fund of the city or village school district, but section 7614 of the General Code, quoted above, is a section applying to a particular matter, viz., the matter of the appointment of a board of sinking fund

commissioners for the city or village district. The power of making the appointment is by this section conferred upon the court of common pleas of the county in which the district is chiefly located, and the language thereof provides that the board of sinking fund commissioners for a city or village district "shall be composed of five electors thereof and be appointed by the common pleas court of the county in which such district is chiefly located, except that in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district."

This language does not expressly confer upon the board of education any power to appoint these commissioners of the sinking fund, but, on the other hand, does expressly confer upon the common pleas court the power to appoint five electors thereof *"except that in city or village districts the board of the city or village may be the board of the school district."* That is, this language, as it seems to me, confers the power upon the court of common pleas to appoint either five electors of the district, or in lieu thereof the members of the board of sinking fund trustees of the city or village in which the school district is chiefly located.

I am of opinion therefore that boards of education in city and village districts do not have the authority in and by themselves to designate the sinking fund trusteees or commissioners of such cities and villages to be the sinking fund commissioners of the school district. If it is desired that the sinking fund trustees of the city or village act as the sinking fund commissioners of the school district a proper proceeding would be for the board of education to obtain the consent of such city or village sinking fund trustees to act as the school district sinking fund commissioners, present such consent to the judge of the court of common pleas in the county with a request to the judge by the board of education to appoint such sinking fund trustees as the board of sinking fund commissioners of the school district. The court could then make such appointment and show the proceedings on the records of the court under the title of "In the matter of the appointment of sinking fund commissioners of the ....." (inserting the name of the district).

I am also of opinion that the court of common pleas might appoint the city or village board of sinking fund trustees in lieu of five directors without the consent of the board of education.

As to your third question I am of the opinion that the sinking fund trustees of the city or village may not act ex-officio as the sinking fund commissioners of the school district except through appointment by the court of common pleas.

Yours very truly,

U. G. DENMAN,
Attorney General.

"OTHER EXPENSES" AS USED IN SECTIONS 7827 AND 7828 G. C. CONSTRUED.

July 19th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your letter of July 8th is received in which you request my opinion upon the following statement of facts:

> A teacher of Clermont county was tried for immoral conduct under authority of sections 7827 and 7828 of the General Code by the

county board of examiners of that county, and acquitted by a vote of two to one.

What, if any, witness fees may be lawfully included in the "other expenses" of the trial and certified to the county auditor by the board to be paid out of the county treasury?

In reply thereto I beg leave to submit the following opinion: Sections 7827 and 7828 of the General Code read as follows:

> Sec. 7827. "No certificate shall be issued to any person who is less than eighteen years of age. If at any time the recipient of a certificate be found intemperate, immoral, incompetent or negligent, the examiners, or any two of them, may revoke the certificate; but such revocation shall not prevent a teacher from receiving pay for services previously rendered. Before any hearing is had by a board of examiners on the question of the revocation of a teacher's certificate, the charges against the teacher must be reduced to writing and placed upon the records of the board. He shall be notified in writing as to the nature of the charges and the time set for the hearing, such notice to be served personally or at his residence; and be entitled to produce witnesses and defend himself. The examining board may send for witnesses and examine them on oath or affirmation which may be administered by any member of the board touching the matter under investigation".
>
> Sec. 7828. "The fees and per diem of examiners for conducting such investigation at three dollars a day each and other expenses of such trial shall be certified to the county auditor by the clerk and president of the examining board and be paid out of the county treasury upon the order of the auditor".

The above quoted provisions of section 7828 of the General Code leave it in the discretion of the board of county examiners to fix what "other expenses of such trial" shall be by them certified to the county auditor and paid out of the county treasury, and I am of the opinion that such discretion, when reasonably exercised, cannot be controlled. It is clear, therefore, that such board by virtue of these two sections might lawfully pay mileage and fees to witnesses called by it, and it does not seem to me that the determination of the board to pay reasonable mileage and fees to witnesses produced by the teacher in a case like the one which is presented in your inquiry, where, upon a full hearing, the teacher charged with immoral conduct was completely exonerated of such charges by the board, would be an unreasonable exercise of the discretion vested in it in regard thereto by section 7828. Such a procedure on the part of the board of county examiners would at least seem eminently just and in line with the statutes of this state governing court costs, and making such costs follow the judgment.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—MAY ENTER INTO CONTRACT FOR WATER AND ELECTRIC LIGHTS, BUT MUST BE COMPETITIVE BIDDING.

November 30th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have submitted to me for an opinion thereon inquiries directed to you by the auditor of the city of Warren, as follows:

> "Has a municipal corporation the right to contract with a private corporation to furnish water for fire protection, etc., to said municipality, without inviting competitive bids by advertising?"
>
> "Has a municipal corporation the right to contract with a private corporation to furnish light for the streets, avenues, etc., within the municipality, without inviting competitive bidding by advertising?"

These two questions may be considered together. The answer to both of them is, in my opinion, in the negative. Section 3809 of the General Code, formerly a portion of Section 45 M. C., provides in effect that contracts of both of these sorts, together with other contracts of a similar nature, may be authorized "for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract * * *". While such contracts are, by the provision above cited and quoted, exempted from the requirement that the auditor shall issue a certificate that the money is in the treasury, etc., there is no provision in the General Code exempting them from any requirement that competitive bids be invited by advertising. The sole question is, therefore, as to whether these contracts are such contracts as are required to be entered into after competitive bidding.

Section 4328 of the General Code, formerly a portion of section 143 M. C., provides in part as follows:

> "The director of public service may make any contract * * * under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the directors * * * shall make written contract with the lowest and best bidder after advertisement * * *"

By section 4324 of the General Code it is provided that,

> "The director of public service shall manage and supervise all public works and undertakings of the city except as otherwise provided by law * * *"

It is not "otherwise provided by law" with respect to the management and supervision of contracts with private corporations to furnish water and electric current for the use of the city; and section 3809 above quoted, by necessary inference, prohibits a city council from making such a contract itself.

I am, therefore, clearly of the opinion that such contracts are "within the

department of public service." It follows, therefore, that they must be executed in accordance with the provisions of sections 4328 et seq. of the General Code.

In so holding I have taken into consideration the fact that section 9324 of the General Code, formerly section 3551 Revised Statutes, authorizes

> "The municipal authority of any city or village * * * in which a gas or water company is organized"
>
> "contract with such company for lighting or supplying with water the streets * * * and public places in such city or village * * *"

While this section confers power to contract with a water company, it does not prescribe the manner in which such contract shall be entered into, and, in my judgment, it must be read in connection with section 4328; nor does it prescribe what shall be the "municipal authority", and in this connection it must be read together with section 4324 of the General Code.

There is no corresponding provision relating to electric lighting contracts.

From all the foregoing I am of the opinion that contracts between a municipal corporation and a private corporation in furnishing water and electricity for public uses to such municipal corporations, may not be entered into unless competitive bids are solicited by advertising. I assume, of course, that all such contracts would involve the expenditure of more than five hundred dollars.

Yours very truly,

U. G. DENMAN,

Attorney General.

MATTHEWS VS. DELAWARE—EFFECT OF ON SECTIONS 6801a and 3718a REVISED STATUTES AND SECTION 1397, 13423 GENERAL CODE.

November 30th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 28th, in which you request me to supplement my opinion of June 24th, addressed to your department relating to the effect of the decision of the supreme court in the case of Matthews vs. Delaware by answering the following questions:

> 1. "Section 6801a, R. S. (now section 12385, G. C.) provides that the sheriff or other officer transporting a person to such workhouse shall have the following fees therefor: 6 cents per mile for himself going and returning, 5 cents per mile for transporting each convict and 5 cents per mile, going and coming, for the services of each guard, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners. May the chief of police, if he transports a person to the workhouse, legally receive this compensation?
>
> 2. "Section 1397 G. C. provides that sheriffs, deputy sheriffs, constables and other police officers shall enforce the fish and game laws and for this purpose they shall have the power conferred upon the wardens and receive like fees for similar services. Section 1394 provides that wardens shall be entitled to receive the same fees as

sheriffs are allowed for like services in criminal cases. May a chief of police legally receive fees for these services, if rendered by him?

3. "Section 3718a R. S., provided that in certain prosecutions named in the section in pursuing or arresting any defendant and in subpoenaing the witnesses, the jurisdiction or powers of the constable or other court officer acting in such capacity in all such cases should be the same as that of the sheriff of the county in criminal cases in the common pleas court and that he should receive the same fees therefor as are allowed said sheriffs. In the codification of this section, that part of the section referring to the jurisdiction of justices of the peace was made a part of Chapter 1, Title 2, and numbered as Section 13423. The balance of the section constitutes Chapter 3 of the same title and is numbered as sections 13432 to 13440, inclusive. Section 13436 provides that in pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court and he shall receive like fees therefor. It is further provided by section 13439 that the fees in such cases shall be paid out of the county treasury on the warrant of the county auditor. Having in view section 13432 G. C., in what cases may the chief of police charge and receive his fees upon the warrant of the county auditor out of the county treasury under the last two sections named? Does this provision of the General Code in any way affect the law as laid down by the supreme court in the case of Matthews vs. the City of Delaware, cited in your opinion above referred to?"

With respect to your first question I beg to refer you to the opinion of June 24th above mentioned where it is pointed out that the two unreported cases of Portsmouth vs. Millstead and Matthews vs. Delaware are to be distinguished on the following ground:

The former holds in effect that a city may not recover from a chief of police fees collected by him in state cases and retained for his own use; the latter decides that a chief of police who has collected the fees in state cases and turned them into the city treasury may not recover them from the city treasury because neither the chief himself nor the city are entitled to any such fees. I also endeavored to point out in the opinion that the two cases were capable of being reconciled on the express decision of the circuit court in the later case to the effect that there is no authority for taxing costs in the name of the chief of police in state cases. This is true as a general principle, subject, as I shall hereinafter point out, to certain exceptions.

It is apparent from the statement of your first question that the fees of the chief of police receivable under section 12385 of the General Code, are not costs. These are fees payable out of the county treasury for a certain service rendered the county. Under the decision of the supreme court in the Portsmouth case these fees, if properly chargeable by the chief of police, would not be payable into the county treasury. The Delaware case does not apply to such fees, as they are not to be taxed as costs. In my opinion the chief of police, if he performs the services referred to in section 12385 of the General Code, is entitled to receive and retain for his own use the fees therein provided for.

Section 1397 of the General Code, cited in the statement of your second question, provides as follows:

"Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of

> birds, fish and game, and for this purpose they shall have the power conferred upon the wardens, and receive like fees for similar services. * * *"

In my opinion a chief of police is a "police officer" within the meaning of section 1397, and if he *personally* performs services as game warden he is entitled to such compensation as may be provided by law. The fees of the wardens are provided for by section 1394 of the General Code as follows:

> "* * * each warden shall be entitled to receive the same fees as sheriffs are allowed for like services in criminal cases."

Section 2845 of the General Code provides the schedule of the fees of the sheriff in all cases.

The costs in such cases are not exactly defined, but by section 1404 of the General Code they are required to be paid out of the county treasury in case the defendant is acquitted or convicted in default of payment of fine and costs. It is elementary, however, that fees of officers serving process in a criminal case are costs therein, and where the word "costs" in the statute providing for the taxation of costs in a criminal case is not defined, its meaning will be presumed to embrace such fees.

I am, therefore, of the opinion that a mayor exercising jurisdiction under the fish and game laws may lawfully tax costs in the name of the chief of police if the latter personally renders the services exacted of a warden under said law. Such a case is an exception to the general rule laid down in Matthews vs. Delaware, but it forms no exception to the rule of Portsmouth vs. Millstead, and, under favor of that case, the chief of police would be entitled to obtain such fees for his own use.

Section 13432 cited by you in the statement of your third question, provides in part as follows:

> "In prosecutions before a justice, police judge, or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate * * * shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

Section 13433 provides in effect that the clerk shall draw names for the use of the magistrate in empaneling a jury.

Section 13436, being under the same chapter with section 13432 and clearly *in pari materia* therewith, provides in part that,

> "* * * the constable, chief of police * * * or other court officer, shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

As pointed out by you, the chapter containing these sections, being Chapter 3 of Title 2, Part 3 of the General Code, was all originally a part of section 3718a Revised Statutes, and the remainder of section 3718a is now found in section 13423 of the General Code, which is a part of Chapter 1 of the same title.

Said section 13423 provides in part as follows:

> "Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all

cases of violation of any law relating to" (here follows a catalogue of some thirteen separate classes of police regulations.)

Section 13422 *in pari materia* with section 13423, provides in part that,

"A justice of the peace shall * * * have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, * * * to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself * * * and * * * to inquire into the complaint, and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance * * *"

All the sections above quoted must, in my judgment, be read in connection with section 13511, being a part of Chapter 6 of the title above quoted, the heading of which is "Arrest, Examination and Bail," which said section provides in part as follows:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused * * * If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, *waive* a jury and submit to be tried by the magistrate, he may render final judgment."

Reading all these sections together, which is necessary in view of the fact that they all relate to the same subject matter, it appears that the ordinary criminal jurisdiction of a magistrate is to inquire into a complaint and to discharge or bind over the defendant; and that the magistrate has final jurisdiction to hear and determine the case in two classes of cases only:

1. Those enumerated in section 13423.
2. When the accused in writing waives a trial by jury and submits to be tried by him, unless Chapter 3 of the title "Criminal Procedure" consisting of section 13432 above quoted and succeeding sections appears as a separate grant of jurisdiction to such magistrates.

In my opinion, this is not the case, and sections 13432 et seq. relate merely to the prosecutions which a magistrate is authorized to hear and determine under section 13423 of the General Code.

I base my opinion upon the following points:

1. Under section 13511 above quoted a magistrate has no general jurisdiction to hear and determine a criminal case of any kind *unless a jury be waived.* If section 13426 et seq. were intended to be of general operation, then they would be inconsistent with section 13511, for they provide for a jury to be empaneled by the magistrate himself. Such a construction of the several sections involved is not to be favored, but all of them must be read together and reconciled if possible.

2. As pointed out by you, sections 13432 et seq. and section 13423 were all originally a part of section 3718a of the General Code. For the reason above suggested there is at least a doubt as to whether section 13432 should not be held to relate to the cases mentioned in section 13423. That is to say, on the face of the General Code an ambiguity appears. As I have previously held in opinions to your department such an ambiguity may be resolved by reference

to the pre-existing law. Such reference in this case establishes the fact above referred to, viz.: that the two provisions were originally a part of the single section.

3. The introductory clause of section 13432 is, "in *prosecutions* before justice, police judge or mayor" certain things shall be done. Standing by itself this, in my opinion, refers to a matter which may be heard and determined; that is to say, of which the magistrate has final jurisdiction.

4. None of the sections beginning with section 13432 in terms relate to the jurisdiction of the magistrate, or to his power to sentence. They simply relate to procedure which necessarily could only be had in a court having final jurisdiction. Such magistrates as are mentioned in the sections being of inferior jurisdiction their jurisdiction in a specific instance will not be presumed or implied by inference.

For all the foregoing reasons I am of the opinion that sections 13432 et seq. of the General Code are to be read in connection with section 13423, and that the original jurisdiction of a magistrate is still confined to the cases and to certain other cases, such as fish and game cases.

Inasmuch as section 13436 which provides that the chief of police among other officers may receive certain fees "in such prosecutions" is to be read in connection with section 13432, I am of the opinion that it is only in the cases last above mentioned that it applies. In such cases, however, I am of the opinion that a chief of police is entitled to receive and retain fees earned by him.

Section 13439 of the General Code, *in pari materia* with section 13436 above quoted, is almost identical in its provisions with section 1404 relating to fish and game cases. The same conclusion based upon the same reasoning follows with respect to such fish and game cases, and with respect to the cases mentioned in section 13423 of the General Code. In other words, the chief of police is entitled to fees earned by him in such cases, and the mayor has authority to tax such fees. Such cases, together with the fish and game cases, constitute exceptions to the general rule laid down in Matthews vs. Delaware.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — STREETS — MANNER OF VACATING IN 1895.

July 22nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have submitted to this department for an opinion thereon the following question:

> "In 1898 an ordinance was passed by council for the vacation of a certain street in the city of Newark. The ordinance of vacation was published in a daily newspaper of general circulation in the city for three consecutive days.
>
> Query: How often did an ordinance of such a nature have to be published in 1898 to comply with the provisions of law and would a publication three days in succession be in compliance with the law? State number of section and wording of same.

2. In 1898 how many signatures did it require for the vacation of a street and must the parties signing said petition own property on street?"

The statutes in force in 1898 respecting the vacation of streets by council were sections 2652 to 2654 inclusive, Revised Statutes. The first section as amended, 90 O. L. 350, provided that,

> "The council of any city or village, on petition by any person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated * * * may upon hearing and upon being satisfied that there is good cause for such * * * vacation * * that it will not be detrimental to the general interest, and that the same should be made, *declare by ordinance* such street or alley vacated * *".

Section 2653 provided that,

> "No street or alley shall be vacated * * * unless notice of the pendency and prayer of the petition be given by publishing the same in some newspaper * * for six consecutive weeks preceding action on such petition * *; and action thereon shall take place within three months after the completion of the notice".

I understand your first question to refer not to the publication of this notice of the pendency of the petition, but to the publication of the ordinance as such. This opinion is, therefore, not to be construed as in any way applicable to such preliminary publication. In answer to your first question I beg to call your attention to the fact that the action of council under said section 2652 R. S., had to be taken by ordinance. At that time section 1695 R. S., constituted the only statutory provision regulating the publication of ordinances, which provided in part as follows:

> "Ordinances of a general nature, or providing for improvements shall be published in some newspaper of general circulation in the corporation, if a daily, twice * * before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice".

The foregoing are the only statutes in force in the year 1898 applicable to the publication of vacation ordinances.

It is clear, therefore, that a publication three days in succession while not in strict compliance with the law — being excessive — would not invalidate the proceeding.

Answering your second question, it will be noted that the section requires the signature of only one person to the petition and the property owned by the signer need not abut directly on the street — it need only be in the "immediate vicinity" thereof.

Yours very truly,
U. G. DENMAN,
Attorney General.

FEES—JUSTICE OF THE PEACE AND CONSTABLE.

May not tax trial fee for preliminary hearing.

November 17th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 21st, in which you request my opinion as to the following question:

> May a justice of the peace and a constable respectively tax a fee of one dollar, the former for sitting in a trial and the latter for attending a trial in criminal cases wherein the defendant is bound over to the grand jury?

The section prescribing the fees of justices of the peace is section 1746, General Code, which provides in part that,

> "* * * justices of the peace for the services named, when rendered may receive the following fees: * * * as sitting in the trial of a case, civil or criminal, where a defense is interposed, whether tried to a justice or to a jury, one dollar; * * *"

Section 3347, General Code, provides as to the fees of constables in part as follows:

> "For services rendered * * * constables shall be entitled to receive the following fees: * * * each day's attendance before a justice of the peace on criminal trial, one dollar; * * *"

Both these sections raise the question as to whether a preliminary examination by a justice of the peace with a view to determining whether or not a prisoner shall be bound over to the grand jury is a "trial."

In my opinion such a proceeding does not constitute a trial and such fees are not chargeable either by the justice of the peace or by the constable.

Section 13511, General Code, regulates the procedure in such case and provides as follows:

> "When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is a probable cause to believe the accused guilty, he shall order him to enter into a recognizance * * * for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing * * * waive a jury and submit to be *tried* by the magistrate, he may render final judgment."

As it is indicated from the use of the word "tried" in the last sentence of the above quoted provision this section itself discloses the fact that a preliminary examination is not regarded as a "trial." No proceeding in any

court is properly termed a "trial" unless the court has final jurisdiction to hear and determine the same.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF REVIEW — COMPENSATION — COUNTY COMMISSIONERS TO FIX FOR ONE SESSION.

June 10th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following inquiry:

> Section 5621 of the General Code requires the county commissioners to fix the salary of the members of the board of review within certain limitations therein prescribed.
>
> *Query:* When the county commissioners have, in compliance with this provision fixed the salaries of the members of the board, for what period of time does the resolution fixing the compensation extend?

In reply I beg to say section 5621 of the General Code is as follows:

> "The county commissioners shall fix the salary of members of the board of review, which shall not be less than three dollars and fifty cents per day for each day the board is in session, and not to exceed two hundred and fifty dollars per month for the time such board is in session. Such salary shall be payable monthly out of the county treasury upon the order of such board and the warrant of the county auditor. The board shall meet in rooms provided by the county commissioners, and when in session, shall devote their entire time to the duties of their office. No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board."

It will be observed that this section requires the county commissioners to fix a per diem compensation of not less than $3.50 per day *for each day the board is in session,* and not to exceed $250.00 per month *for the time such board is in session.* In other words, the compensation is fixed for the *session.*

I am, therefore, of the opinion that it is the duty of the county commissioners to fix the compensation for each annual session of the board.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY SALARY LAW NOT RETRO-ACTIVE.

June 9th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following inquiry:

> "In the month of November, 1906, the Fee Commission composed of the Auditor of State, Secretary of State and Attorney General so construed sections 1069 and 1117 Revised Statutes as to hold that the compensation accruing to the various county auditors and county treasurers under said sections 1069 and 1117 Revised Statutes for the six months' periods beginning October 15, 1906 and September 3, 1906, respectively, based upon the grand tax duplicate, should be pro rated between said county auditors and county treasurers and the fee funds as provided by the County Salary Law effective January 1st, 1907, as the time served by said officers under the fee system was to the time served under said salary law. Within the past year the Common Pleas Court of Hamilton County has rendered a decision in which it is held that the treasurer and auditor were entitled to the fees accruing upon all taxes actually collected prior to the first day of January, 1907, and that the fees upon taxes collected after the first day of January should be accounted for to their respective fee fund.
>
> "We are advised that the Common Pleas Court of Darke County has rendered a decision upon the same question to the effect that auditors and treasurers are entitled to all of the fees accruing upon collections of taxes at the December collection without regard as to whether the same were collected before or after the first day of January.
>
> "Query: What is the proper construction of said sections?"

In reply I beg to say that, in my judgment, the decision of the Hamilton County court is correct and is the one that should be followed by your Bureau, so long as the county auditors and treasurers were acting under the fee system they were entitled to receive for personal benefit all of the fees provided in sections 1069 and 1117 Revised Statutes. The County Officers' Salary Law did not go into operation until the first day of January, 1907, and could not be retro-active. In other words, there were no fee funds and these officers were not bound by the salary law until the first day of January, 1907, and they were each and all personally entitled to all the fees provided by law up until that time.

In answer to your inquiry as to whether or not settlements made in accordance with the ruling of the Fee Commission are now subject to re-adjustment, I am inclined to the view that in all cases where re-adjustments can be made that the officers are entitled to receive compensation in accordance with the decision of the Hamilton County case. I am not informed as to whether or not funds are now available in the county treasuries from which payment could be made to such officers as are entitled to receive additional compensation.

Very truly yours,

U. G. DENMAN,

Attorney General.

QUADRENNIAL EQUALIZATION — CLERICAL ASSISTANTS.

County auditor may appoint necessary clerks for quadrennial county board of equalization.

City board of review acting as quadrennial board of equalization may not employ more than six clerks and six messengers.

November 18th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of recent date requesting my opinion upon the following:

> "May section 5578 General Code be construed in connection with section 5581 General Code, so as to authorize the auditor to appoint the necessary clerks for the quadrennial county board of equalization in the manner in which he is required to do by the latter section?
>
> "If clerks may not be legally appointed in this manner, may the commissioners appoint clerks and assistants under the provisions of section 2409 General Code, and assign them to perform services in connection with the quadrennial county board of equalization?
>
> "If neither of these sections authorize the appointment of clerks how may the clerks, which seem to be very essential, particularly in the large counties, be legally employed?
>
> "Old section 2813 Revised Statutes provided for appointments in the larger counties but no such provision seems to be included in the corresponding section of the General Code.
>
> "May section 5579 General Code, in connection with section 5581 General Code, be construed to authorize the auditor or the City Board of Review to employ clerks for the City Board of Review in addition to the number authorized by section 5622 General Code, said additional clerks to be used in connection with the equalization of real estate required by the last sentence of section 5624?"

Section 5579 General Code provides in part as follows:

> "All powers and duties conferred by law upon county auditors and county boards of equalization * * * relating to decennial *and other* equalizations of real property, are hereby made applicable and extended to the equalization of quadrennial appraisements of real estate."

Section 5581 General Code relates to the powers and duties of the county auditor as a member of the *annual* county board of equalization, and it provides in part as follows:

> "The auditor shall appoint such messengers and clerks as the board deem necessary, who shall receive not to exceed three dollars per day * * * which shall be paid out of the county treasury."

Section 2409 General Code referred to by you, provides as follows:

> "If such board (of county commissioners) finds it necessary for the clerk to devote his entire time to the discharge of the duties of

such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required *by law and by the board.*"

Section 5622 General Code provides in part as follows:

"The board of review may employ a chief clerk, and appoint such other clerks, not exceeding six, and such messengers, not exceeding six, as it may deem necessary, and fix their compensation * * * Such incidental expenses as the board deems necessary shall be paid * * *"

Section 5624 General Code provides in part as follows:

"Boards of review, within and for their respective municipalities, shall have all the powers and perform all the duties provided by law for all other municipal boards of equalization and revision * * * At the conclusion of the quadrennial appraisement of real property in such municipal corporation, the board of review therein shall sit as a board for the equalization of the value of such real property."

In the first place I beg to state that, in my opinion, section 2409 General Code does not authorize the appointment of a clerk and assistants for the quadrennial county board of equalization. Said section authorizes the appointment of such a clerk and such assistants for the purpose of taking the place of the county auditor as clerk of the board of commissioners and for no other purpose. The power of the board of commissioners to prescribe the duties of the clerk, as provided in section 2409, is, in my opinion, limited to matters of a clerical nature in connection with the powers and duties of the county commissioners as such.

The power of the county auditor under section 5581 might be considered to be a power "conferred by law upon him," relating to "an equalization of real property" within the meaning of section 5579. Said section 5579 was section 10 of the act known as the "Quadrennial Appraisement Act," 100 O. L. 81, and its purpose was to provide for quadrennial appraisements of real estate and equalizations thereof, which purpose the general assembly sought to attain without amending existing statutes except in so far as the same might be repugnant with the provisions of the act (see first sentence of said section 10.) The language of the above quoted provision of said section 10 indicates clearly that the general assembly intended that the most ample machinery of equalization afforded under any existing statutes should be employed in making the quadrennial equalization. For this reason, therefore, I do not regard as significant the omission from the catalogue of powers of the quadrennial county board as such, of sections 5594 et seq. General Code, of the power to employ clerks.

It will be borne in mind that said sections 5594 et seq., at the time of the enactment of the quadrennial appraisement act, related to the *decennial* county board of equalization. Said decennial county board of equalization was never formally abolished by the general assembly, but its abolition resulted merely by force of the adoption of the enactment of said act of 1909. The verbal changes in sections 5594 et seq., were made by the General Assembly, in adopting the General Code, with a view to conforming the same to the intent expressed by the enactment of the quadrennial appraisement law.

It will be observed that the powers and duties to be exercised in the equalization of quadrennial appraisements of real estate are those not only relating to decennial equalizations, but also those relating to "other equalizations" of real property. It is, therefore, to be concluded from all the foregoing that each of the boards and officers enumerated in section 5579 have all the power with respect to the equalization of quadrennial appraisements that they have or could have with respect to any other equalization. The county auditor's authority under section 5581 is limited to the appointment of such clerks as the annual county board of eequalization shall deem necessary. However, this is equivalent to a provision that the annual county board of equalization has the power to determine the necessity of employing clerks to assist it in the performance of its duties. This is one of the powers "conferred by law upon county * * * boards of equalization" and by section 5579 "it is made applicable and extended to the equalization of quadrennial appraisements of real estate." Inasmuch as the power exists it is, in my opinion, to be exercised by the quadrennial county board of equalization, for the reason above suggested in spite of the omission of a recital of such power from sections 5594 et seq.

It is, therefore, my opinion that the quadrennial county board of equalization has the power to determine the necessity of appointing messengers and clerks and that the county auditor has the power upon such determination to appoint such messengers and clerks, and that such messengers and clerks so appointed may be paid as provided in section 5581 General Code.

I have reached the foregoing conclusion conscious of the difficulty presented therein, but relying upon the principle that statutes providing machinery for taxation and enacted for the purpose of securing efficient enforcement of the laws pertaining thereto, are to be liberally construed to effect the object thereof. If the general assembly had undertaken to amend the sections relating to the decennial county board at the time it enacted the quadrennial appraisement law, a different conclusion would have to be reached.

The above reasoning does not apply with equal force to the second question suggested by you. The express provision of section 5622 above quoted seems to me to preclude the construction that boards of review have the power to determine the number of clerks which will be necessary to assist them in the performance of their duties.

I am of the opinion, therefore, that boards of review have no power to determine that more than six clerks and six messengers shall be necessary, and that all the assistants and messengers employed in the office of a board of review must be appointed by the board and not by the county auditor.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

CHIEF OF POLICE—FEES IN STATE CASES.

As a general rule fees may not be taxed in the name of a chief of police in state cases in the mayor's court.

June 24th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:— I beg to acknowledge receipt of your letter of June 14th, requesting my opinion upon the following question:

"What, if any, are the legal fees of chief of police on warrant to arrest in state cases in cities where there is no regular police court, but such proceedings are held before the mayor? We are seeking an interpretation of the Supreme Court decisions in the cases of Millstead vs. the City of Portsmouth, Ohio, and Matthews vs. the City of Delaware."

Unfortunately, neither of the decisions of the supreme court referred to by you is reported, and we are left in the dark as to the exact reasons which moved the court to these two decisions. Both of these cases were heard by a full bench of the supreme court, but the decision of affirmance in each case was reached by the concurrence of three justices only. It is apparent, therefore, that the supreme court has in reality not passed upon the exact question presented by you, unless a categorical answer, either affirmative or negative, thereto was necessary to a decision in one or both of the cases.

In order to compare the two decisions with a view to ascertaining their effect, therefore, an analysis of the decisions of the circuit courts in each of these two cases is necessary.

The first decision in point of time, and that which was first affirmed by the supreme court, is that of the circuit court of Scioto County in the case of Portsmouth vs. Millstead and Baucus, which is reported in the 8 C. C., N. S., 114.

The other and later case, that of Matthews vs. Delaware, has not, so far as I have been able to find, been reported, but I have before me the decision of the majority of the circuit court of Delaware County concurred in by Taggart and Shields, J. J., and the dissenting opinion of Donahue, J., as the same are set forth in the printed briefs of counsel filed in the supreme court therein.

For the sake of ascertaining exactly what the courts have held in these two cases, I deem it best to quote extensively from these decisions. The opinion of Jones, J., in the Portsmouth case contains *inter alia* the following language:

"* * * the action was brought (by the city of Portsmouth) against Baucus for fees * * * drawn by him as chief of police, * * * the ordinance * * * provides a salary of $1,200 per annum in full yearly payment for services performed by him in his 'official capacity as such chief and ex-official constable, and all the fees heretofore pertaining to said office, i. e., that of city marshal, shall be paid weekly into the city treasury.'

"The common pleas court sustained a demurrer to the amended petition in each case.

"Counsel for the mayor (and chief) denies the power of the general assembly to delegate to city councils the authority to legislate upon subjects that are non-municipal; it is insisted that municipal corporations may pass ordinances touching subjects only that are clearly of local and municipal character, but that fees in state cases not being of such character, the power of legislation and control thereof is reserved in the state. * * *

"This * * * might well raise the *quaere* whether such authority and control over fees in state criminal cases can be delegated to municipal councils. But whether it can be so delegated, it is not necessary for us to decide.

"Assuming that such power of delegation does exist, then the question arises whether it has been conferred?

"* * * Section 126 of the Municipal Code provides that,

> 'Council shall fix the salaries of all officers, clerks, employes of the city government, except as otherwise provided in this act, and, except as otherwise provided in this act, *all fees pertaining to any office* shall be paid into the city treasury.'
>
> "When the legislature provided for all fees 'pertaining to any office' shall be paid into the city treasury, did it intend more than the fees pertaining to the office of the mayor (and chief) and such as arose from duties purely municipal?"
>
> "The city council, by the terms of its ordinance, resolved any doubt in its favor by * * * providing that his salary should be in full for all the services and duties performed by him in his official capacity as mayor of the city, judge of the police court and ex-officio justice of the peace, etc. * * *"
>
> "* * * Section 129 of the Code * * * clothes him with municipal duties only; and it is fairly inferable that the legislature, in revising the statutes giving him compensation, intended such compensation for municipal duties solely."
>
> "The state fixes and controls the amount and character of fees in state cases, and has delegated to municipal councils authority to fix fees for violation of its municipal laws. The scheme of legislation recognizes the distinction between the jurisdiction, powers and duties of the mayor, and such as he exercises as an ex-officio justice of the peace." * * *
>
> "It would seem, therefore, that sections 126, 128 and 129 of the Municipal Code, sought to deal only with municipal organizations, municipal duties and municipal fees; and that 'all fees pertaining to any office' * * * refers to municipal fees or such that may be fixed and controlled by municipal authority."
>
> "What has been said above applies to the case of the city against James A. Baucus, as chief of police, except that the chief of police is more strongly entrenched behind an ordinance which only required the fees 'pertaining to said office, i. e., *that of city marshal*' to be paid into the city treasury."

Although the reasoning of the learned judge is not entirely clear to me, it has always been my opinion, as it was that of my predecessor, that the court meant to place its decision in the case upon the right of the chief of police, not only to retain fees which had been paid to him, but also to have the marshal's fees for services of process, etc., taxed in his name as chief of police. The language above quoted can support no other conclusion. I am informed that, acting upon the advice of this department, following the unreported affirmance of this decision by the supreme court, your department has ruled uniformly throughout the state that such fees should be taxed in the name of the chief of police and that he would be entitled to receive and retain them when paid for his own use.

I have gone thus into detail in consideration of the Portsmouth case because of the reasoning of the circuit court of Delaware County in the Delaware case, from which permit me to quote, again at some length:

> "* * * The action in the court of Common Pleas was one in which the defendant in error (the chief of police) sought to recover from the city of Delaware the sum of $541.61, the amount of fees which he claims had been assessed and collected and turned into the treasury of the city of Delaware, being costs which had been assessed

in cases of the State of Ohio against various defendants in the mayor's court of the city of Delaware * * *"

"The plaintiff, as chief of police, seeks to recover from the city certain fees which were taxed and collected in his name for the service of processes and writs which were issued to him by the mayor in the city of Delaware in what are known as state cases. From the record we learn that these fees were collected from various parties, and with the knowledge and acquiesence of the plaintiff, were turned into the treasury of the city of Delaware. The question in the case is: 'Can he now recover these fees?'"

"In the enactment of the Municipal Code in the year 1902, the office of marshal in cities in the State of Ohio was abolished and instead thereof the office of the chief of police was created. Instead of being an office for a fixed term and elected by the people, it was an office which was to be filled by appointment by the mayor."

"* * * The chief of police in cities having a police court, by the enactment of the legislature, were to receive like fees as constables and sheriffs in the probate court and before justices of the peace. The marshal of a village, in executing processes issued to him by the mayor of the village, was likewise to receive the same fees as are taxed for a constable executing process of a justice of the peace, *but there is no section of the statute which, in express terms, directs the payment to a chief of police fees for the executing of any process* issued to him by the mayor of a city * * *"

"As the majority of this court view the case, there was no right or authority for so taxing costs or collecting the same; and there was no right or authority for the plaintiff, as chief of police, receiving the same. But as these costs and fees are in the city treasury, the plaintiff must recover by the strength of his right to the same, rather than by showing that the city of Delaware has no right to hold and retain the same."

"Our attention is called to the cases of the city of Portsmouth against Millstead and Baucus, 8 C. C., N. S. page 115. We think those cases were properly determined but not decisive of this case. These cases simply decide the question that the chief of police, *having received these fees or costs taxed and collected in his favor, the city of Portsmouth can not recover the same from him.* If the plaintiff herein had collected these fees and the city of Delaware was seeking to recover the same, we would be clearly of the opinion that no cause of action existed in its favor, and that it would not recover the fees. So, likewise, we are of the opinion that these costs, so collected and in the treasury of the city of Delaware, whether there rightfully or wrongfully, give no right of action, to the plaintiff herein, even though they were taxed as costs and paid by the several parties, for there is no law or authority for so taxing and collecting the same from the several parties from whom they were collected."

"It will, perhaps, be urged that * * * processes issuing out of the mayor's court are to be directed to the chief of police or their police officer, and that, when he is called on to perform these duties, there is at least an implication that he should receive compensation therefor. But it has been repeatedly held that, where services for the benefit of the party are required by law and no provision for its payment is made, it must be regarded as gratuitous and no claim for compensation can be enforced."

The dissenting opinion of Donahue, J., is very interesting and able, but it adds nothing to the reasoning of the circuit court of Scioto county as embodied in the opinion of Jones, J., above quoted.

For the sake of brevity I merely abstract the reasoning of Judge Donahue. He urges that a schedule of fees is fixed for the service of process in civil cases in state cases by constables; that the chief of police is ex-officio a canstable; and that he must perform the duties of that officer when called upon by the mayor in such cases; that, therefore, the whole scheme of legislation evidences a legislative intent that the chief of police shall receive constable's fees for performing constable's services. In concluding his opinion he says,

> "If it could be maintained that the salary of a chief of police is intended as payment for all of these services, then there would be some reason in the contention, *but when the supreme court has forever set at rest* that the salary of a police officer, fixed by a city council, means only his salary for his services to the city * * * and is not intended to cover fees for civil cases or fees for state cases, then it follows, unless fees are allowed as they are allowed to constables, a chief of police receives no compensation whatever therefor.
>
> "I am willing to concede that a literal interpretation of the language might lead to such a conclusion, but I think that any such literal interpretation * * * is not the interpretation that these officers are entitled to have of the laws pertaining to that subjec * * *"

Unfortunately for Judge Donahue's reliance upon that court, the supreme court, by its ultimate decision in the Delaware case, tended to disturb his conviction that it had previously "forever set at rest" the principal question mooted therein.

It will be noted from the opinion of the majority of the Delaware circuit court that it distinguishes the Portsmouth case, and does not attempt to overrule it. But in so doing it will be observed the court was obliged to place the decision of the Scioto circuit court upon grounds totally different from those actually stated by that court. The circuit court of Scioto county, in other words, held that the chief of police was entitled to have fees taxed in his name, and that the fees belong to him when collected. The Delaware circuit court, on the other hand, holds that fees for service of process cannot be even taxed in the name of the chief of police, and that neither the chief of police nor the city treasurer is entitled to them; from which it follows, as a matter of course, that neither of these parties can sue and recover such fees from other having them in possession. Between these two views is a third, which, apparently, is the only alternative which the circuit court of Scioto county had in mind, viz., that *the fees may lawfully be taxed* in the name of the chief of police, but that when taxed and collected by him they must be paid into the city treasury under section 126 Municipal Code. The supreme court, as above stated, has, without report, affirmed both of these decisions; as pointed out by the Delaware circuit court, it could have affirmed the decision of the Scioto court upon grounds other than those upon which that court based its decision, and entirely consistent with the position later taken by the Delaware court.

I am mindful of the inconvenience which will result from a reversal, at this time, of the previous ruling of your department. I am, nevertheless, of the opinion that the better reasoning is embodied in the decision of the circuit

court of Delaware county in the case of Matthews v. Delaware, which, succinctly stated, is as follows:

The statutes provide for the taxing of fees *in the name of the chief of police* in cities having a police court; they are absolutely silent as to the taxation of fees or the right of the chief thereto in cities not having a police court. Therefore, the mayor though he has power to direct the chief to serve process issued by him, has no power to tax any fees for such service as costs against defendants or litigants in his court.

Not only am I satisfied that the better reasoning supports the view of the Delaware circuit court, but I have reached the conclusion that that view should be adopted for other reasons.

In the first place, the decision of the Delaware circuit court is that last affirmed by the supreme court, and even if the supreme court could be said to have reversed itself thereby, the later decision, in point of time, would, on familiar principles, control.

In the second place, the supreme court, in affirming the decision of the Delaware case, must be deemed so to have decided upon one of two grounds, viz., either that the fees should not have been taxed at all, or that if taxed and collected they should have been paid into the city treasury. But it had previously, by its decision in the Portsmouth case, held that the city treasury was not entitled to such fees. By taking the first of the two possible alternative views above stated, then the two decisions of the supreme court may be reconciled just as is pointed out by the circuit court of Delaware county in distinguishing the Portsmouth case.

I, therefore, advise your Bureau, in the future to hold that where fees have been taxed and collected in the name of the chief of police in cities not having a police court, such fees should be charged against the authority having them in possession, whether the same be the mayor or the city treasurer, and in favor of the persons or public agencies from whom such costs have been collected.

Very truly yours,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—BRIDGE CONTRACT—MANNER OF PUBLISHING NOTICES TO CONTRACTORS—FULLY DISCUSSED.

November 29th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 12th, in which you request my opinion as to whether the publication of notices to contractors given by county commissioners in inviting competitive bids for the erection of a bridge or bridge sub-structures is governed by section 2352 of the General Code, or by section 6252 of the General Code, or by both sections.

Section 6252 of the General Code is included with a number of other general sections in the chapter on "Legal Advertising," being Chapter 18 of Title 2, Part 1, which title is denominated "Police Regulations." This chapter consists of some seven sections, five of which relate to the charges which may lawfully be exacted by newspapers in publishing legal notices and advertise-

ments, and to the form in which such notice shall be published. Sections 6252 and 6253, however, relate to the manner or extent of giving certain notices required by law to be given, thus section 6252 provides that,

> "A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, *bridge and pike notices, notice to contractors,* and such other advertisement of general interest to the taxpayers as the auditor, treasurer probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. * * *"

This section is clearly general in its nature. In other instances I have held that its effect is cumulative, so that of another statute requires publication of one of the notices enumerated in this section to be made in one newspaper only, this section supplements such other section by requiring publication to be made in two newspapers.

Upon careful examination of this section, however, it is clear to me that the general assembly did not intend its effect to be more than cumulative. It is not intended to make this section amendatory, or to effect through its agency a repeal of any other section relating to specific subject matter included within its general scope. This is clear because the publication required by section 6252 is not exactly defined. The requirement is merely that it be made "in two nwspapers of opposite politics published at the county seat." The time of publication or the number of insertions to be made are not prescribed by this section.

The other section referred to by you, section 2352 of the General Code, is a part of what is known as the public buildings act. It provides in part as follows:

> "When plans * * * specifications and estimates are so made and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such * * * bridge or bridge sub-structure, * * * and a contract based on such proposals will be awarded. If there is only one paper published in the county it shall be published in such paper. The notice shall be published weekly for four consecutive weeks next preceding the date named for making the contract * * *"

This section, as may be seen at a glance, is specific and particular. It relates to one notice and one only instead of being a general provision relating to all notices. If it were possible to superimpose, so to speak, section 6252 upon section 2352, and make the provisions of the two sections cumulative, that, in my judgment, should be done. However, I am of the opinion that it is impossible to reconcile the two sections, and that section 2352 governs. I have reached this conclusion because I am of the opinion that it is not the intention of section 6252 that publication of a given notice be made in more than two newspapers, and in referring to its provisions as cumulative, I desire that I not be understood as holding that the publication of two newspapers required by section 6252 may be made in addition to some publication authorized or required by some other section. So also the plain requirement of section 2352 of the General Code is that the publication therein authorized shall be made in two newspapers and in two only. It is impossible, therefore, to get from the

two sections read together a meaning that will authorize publication in more than two newspapers.

The two newspapers described in section 6252 are not the two newspapers described in section 2352, although by accident or coincidence they may be the same in a given instance. The essential characteristic of the newspapers described in section 6252 is that they be of opposite politics and published at the county seat; that of the newspapers described in section 2352 is that they be the two having the largest circulation in the county and published therein.

I am of the opinion that section 2352 does not confer any discretion upon the county commissioners, but that they must ascertain what two newspapers published in the county have, in point of fact, the largest circulation in the county, and that having ascertained this fact they must act in accordance therewith. The object of the section is to have the notice inserted in the two newspapers which have the largest circulation regardless of politics and regardless of whether or not they are published at the county seat.

From all the foregoing I am of the opinion that section 2352, the particular section, governs the publication of notice to contractors inviting bids for the construction of county bridges to the exclusion of section 5262 of the General Code, the general section applying in part to the same subject matter. I have not ascertained which of these two sections was last enacted, inasmuch as the rule of statutory construction is that a general statute inconsistent with a prior particular statute is not deemed to effect an implied repeal of such particular statute. So that even though section 6252 of the General Code, in its original form, had been enacted after section 2352 of the General Code, in its original form, no implied repeal of the latter would have been effected thereby.

I am, therefore, of the opinion that in giving notice to contractors for the construction of a county bridge, the county commissioners are required to advertise in the two newspapers published in the county which have the largest circulation therein, regardless of the politics of such newspapers, and regardless also of whether or not they are published at the county seat.

Yours very truly,
U. G. DENMAN,
Attorney General.

SEARCH AND SEIZURE LAW — EMPLOYMENT OF SECRET SERVICE OFFICER.

Secret service officer employed under section 19 of the Search and Seizure Law, section 6139 of the General Code must be within department of safety; mayor may not pay such officer personally and himself be recompensed out of municipal treasury.

Supplementary to opinion February 23rd.

March 2nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have again submitted to me the letter of Hon. Charles F. Leeper, mayor of Marietta, concerning which I recently wrote an opinion to you with the additional information not disclosed by said letter to the effect that the secret service officer concerned in the inquiry is one employed under favor of section 19 of the so-called Search and Seizure Law, section 4364-30zf Revised Statutes, section 6139 General Code.

You desire to be advised as to whether the provisions of this section create an exception to the general rule laid down in the previous opinion and particularly as to whether said section authorizes the method of payment which the mayor desires to carry into effect. Section 6139 General Code provides in part that,

> "* * * council may use any part of the funds, collected for the violation of the local option law, for hiring detectives or secret service officers to secure the enforcement of such law, and may appropriate not more than one hundred dollars annually from the general revenue fund for enforcing the local option law when there are no funds available from such fines so collected."

In enacting this section the general assembly has not seen fit expressly to amend any of the provisions of the Municipal Code. An implied amendment can not be construed unless there is an irreconcilable inconsistency between the later and the earlier provision, or unless one provision has reference to a special subject matter and the legislative intention to create an exception to the general law is clearly ascertained.

There is certainly no inconsistency between the act now under consideration and the provisions of the Municipal Code. The Search and Seizure Law is a special provision and, as far as it goes, it will on this account take precedence over the provisions of the Municipal Code. However, it is my opinion that the above quoted section does not authorize council to employ the secret service officer nor to delegate the employment of such secret service officer to any other municipal officer or department. Examining its language closely it will be noted that the only subject matter which it purports to regulate is that of the management and expenditure of certain funds. Council has general power over the expenditure of funds in the city treasury. Here is a fund, however, arising from a peculiar source, and here is an object somewhat outside of the ordinary objects for which the municipality must provide financially. The section then authorizes council to appropriate such fund, or in the absence thereof, to appropriate from the general revenue fund a certain sum which is to be expended for a certain purpose. There is no provision regarding the manner of such expenditure; there is no direct authority to council to make the employment in question. I am accordingly of the opinion that it was not the intention of the general assembly that the detective or secret service officer should be employed under favor of section 19 of the Search and Seizure Act, in any manner other than that prescribed by the civil service statutes.

In the same connection permit me again to remark that in any event the mayor may not employ any person in the public service in his private capacity, and in turn be himself recompensed by the city in his official capacity. This would violate cardinal principles of public policy as well as express provisions of law.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—OFFICERS INTERESTED IN CONTRACTS.

Superintendent of municipal water works plant is not an officer of the municipality within the meaning of section 6976 R. S.

Officer or employe of city may in his private capacity sell supplies and material to person doing contract work for the city unless he has an actual interest in said contract.

January 4th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department for an opinion thereon the following questions:

> 1. Is the superintendent of a waterworks plant owned and operated by a city an officer or employe of said city within the meaning of section 6976 R. S.; the same question is presented regarding the clerk or secretary of the board of public service.
>
> 2. Is it legal for an officer or employe of a city who is also engaged in private business to sell, in his private capacity, supplies and material to a firm or individual doing contract work for the city?

Replying to your first question I beg to state that section 6976 R. S., provides as follows:

> "An officer or member of the council of any municipal corporation * * * who is interested directly or indirectly in the profits of any contract * * * for the corporation * * * during the term for which he was elected or appointed or for one year thereafter shall be fined * * *."

As indicated in your question this section distinguishes between *officers* and *employes,* and its penal provisions do not apply to, nor does it in its civil aspect affect municipal employes. The distinction thus drawn in the section under consideration is one which is fundamental in the law of public officers.

> "A public office differs in material particulars from a public employment, for as was said by Chief Justice Marshal, 'although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform service without becoming an officer'." (U. S. v. Maurice, 2 Brock 96).
>
> "'We apprehend that the term 'office,' said the judges of the supreme court of Maine, implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; * * * the power thus delegated and may be a portion belonging sometimes to one of the three great departments and sometimes to anotherffi still it is a legal power which may be rightfully exercised, and in its effect it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his

principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law * *."

"The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public: — that some portion of the sovereignty * * *, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer."

Mechem on Public Officers, sections 2 and 4.

This test, — the delegation of sovereign power and the independence of superior authority in the exercise of such power — is now universally recognized as the ultimate one in the determination of questions of this sort. In applying it to the inquiry presented by you, consideration of the statutes relating to the department of public service, and particularly to the positions enumerated in your question becomes necessary.

Section 138 M. C., prior to its amendment by the Paine law provides in part that,

"In every city there shall be a department of public service *which shall be administered* by three or five directors * *"

Section 139 M. C., formerly provided that,

"The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act."

Section 141 provided that,

"The directors of public service *shall have the management* of all municipal water * * plants."

Original section 142 of the code from which I shall not quote, regulated the procedure of the board of public service in letting contracts, and its provisions were specifically made applicable to "any expenditure within said department."

Section 144 relating to similar matters provided in part that,

"No liability shall be created against the city as to any matters under the supervision of said departments except by its (the board of public service's) express authority."

That section also provided that,

"The directors of public service shall keep a record of their proceedings, a copy of which, certified by the clerk of the department, shall be competent evidence in all courts."

This last provision seems to recognize the existence of the position of clerk of the department, but it is to be noted that it does not in terms create such a position.

Section 145 M. C., before its amendment was directly applicable to the question at hand. It provided as follows:

> "The directors of public service may employ such superintendents, inspectors, engineers, harbor masters, clerks, laborers, and other persons, as may be necessary for the execution of the powers and duties of this department, and may establish such sub-departments for the administration of affairs under said directors as may be deemed proper. The compensation and bonds of all persons appointed or employed by the department of public service shall be fixed by said directors, and no person shall be removed except for cause satisfactory to said directors, or a majority of them."

The foregoing are all the provisions in the code relating to the department of public service and the management of the city water-works. It will clearly appear therefrom that the only officers concerned with the management of city water-works are the directors of public service. The acts of all superintendents, clerks, secretaries, etc., in that department are, in law, the acts of the board.

Accordingly I am of the opinion that the superintendent of a city water-works is not an officer within the meaning of section 6976 R. S., nor is the clerk or secretary of the board of public service an officer within the meaning of said section.

Your second question involves a consideration not only of section 6976, but also of other sections of the statute and the Municipal Code, viz., section 6969 R. S., sections 45, 120, 144 M. C. I shall not encumber this letter with a full quotation of said sections. Suffice it to say that all of them prohibit various officers and employes of municipal corporations from being interested directly or indirectly in any contract with the municipality. Different qualifications and limitations are imposed in different sections regarding the contracts in which it is unlawful to have an interest, but in all of the sections the nature and extent of the *interest* prohibited is substantially the same. It is upon the meaning of this word as qualified by the phrase "direct or indirect" that an answer to your question depends.

The kinds of classes of "interests" are to be distinguished, viz., interest in law and interest in fact. An interest in law may be said to be one arising out of a legal relation existing between the contractor and the officer, unless the contractor is the officer himself, in which case, of course, the question as to the existence of an "interest" does not arise. Instances of such relations constituting interest in law are, stockholder of a contracting corporation, (Grand Island Gas Co. v. West, 28 Neb. 852; Winans v. Crane, 36 N. J. L. 394; Milford v. Water Co. 124 Pa. St. Co. Ct. 1; Terry v. Gleason, 21 Misc. 368; Foster v. Cape May, 60 N. J. L., 78), officers of such corporation (Bellaire Goblet Co. v. Findlay, 5 C. C. 418), member of a partnership with which the municipality has contracted (McIlhenney v. Superior, 32 Neb. 744).

But a general partnership relation between the officer and contractor does not amount to an interest where the contractor undertakes the work in his individual capacity disassociated from the partnership (Mooreland v. Passaic, 63 N. J. L. 208). An interest in fact is one which does not arise *ipso facto* out of the existence of any relation between the officer and the contractor, but which is made to appear by competent evidence. Thus an officer may have no fixed connection with the contractor, but it may appear that nevertheless he had an interest in the contract; in such a case it would be necessary to show that he actually profited in a liberal sense or expected to profit from the contract. Further to

illustrate the distinction, it may be said that the existence of any one of the ordinary domestic relations between the officer and contractor does not *per se* constitute an interest in law. Thus the relation of husband and wife, or connection by consanguinity or affinity is insufficient. (Carson v. Lebanon 153 Ind. 567). So also with regard to the relations of master and servant, principal and agent, employer and employe, etc. (State ex rel v. Rickards, 28 L. R. A. 298). In such cases, however, courts will scrutinize the circumstances with great care. Their attitude being apparently that while the admitted facts do not raise any presumption, still they afford a reasonable inference of the existence of an interest in fact. It will be necessary to prove something more than that the relation existed in order to establish a violation of the common law or of a statute similar to those under consideration.

Applying the foregoing authorities and principles to the case presented by you, it appears that the relation of the parties do not establish an interest in law. At the most they create a slight inference as to the existence of an interest in fact. Such an interest in fact would, however, not be established without additional facts, such as that the firm actually contracting had simply a colorable existence, or that such firm had secured the contract with the city upon the promise that it should purchase all its supplies from the officer in its private capacity or, that the officer had direct charge and control of the contract on behalf of the city with power to condemn material, change specifications, etc.

I conclude, therefore not that it is *legal* in all cases for an officer or employe of the city engaged in private business to sell supplies or materials in his private capacity to a firm or individual doing contract work for the city, but that such a state of facts does not of itself embody an *illegal* act; other circumstances must exist in order to constitute a violation of law.

Yours very truly,
U. G. DENMAN,
Attorney General.

MEMBER OF BOARD OF CIVIL SERVICE COMMISSIONERS MAY NOT ACT AS CLERK OF SAID BOARD AND RECEIVE SALARY THEREFOR.

March 29th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Replying to your letter of March 24th, enclosing that of Mr. W. C. Christian addressed to your department in which he requests a ruling as to whether a member of the board of civil service commissioners may act as clerk of said board and receive salary for serving in such capacity, I beg to state that, in my opinion, this may not lawfully be done.

Section 4478 General Code, being section 157 of the Paine Law, so-called, 99 O. L. 565, provides that,

> "They (the members of the civil service commission) shall hold no other positions in the public service, excepting in the schools and libraries."

Standing alone, this provision would prohibit a member of the board from acting as clerk. However, there is a general principle of public policy that, unless specifically authorized by law, a member of an administrative board may not be

appointed by it to a salaried position under its authority. This principle serves to strengthen the conclusion deducible from the express language of the statute.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE JUDGE — ALLOWANCE FOR SERVICES IN CRIMINAL CASES.

Probate judge not entitled to allowance for services in criminal cases under section 13460 General Code.

March 17th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of February 22nd, enclosing a communication addressed to you by Hon. Chas. F. Schaber, Probate Judge, Crawford County, in which he points out the fact that the words, "the probate judge shall be paid for services in criminal cases such sum as the county commissioners shall allow" as embodied in former section 6470 Revised Statutes, now section 13460 General Code, retained therein by the special committee of the general assembly after the same had been left out by the codifying commission. It is suggested that this action is significant as evincing a legislative interpretation of the effect of the county officers' salary law different from that reached by this department in an opinion under date of July 15th, 1907, Annual Report, page 254.

Judge Schaber also calls attention to section 548 of the Revised Statutes, present section 1604 General Code, which provides that,

> "The costs in criminal proceedings taxed and adjudged in favor of the state shall, when collected by the probate judge, be paid into the county treasury * * *"

So far as the provisions of section 1604 General Code are concerned, the same are not in any way inconsistent with the ruling heretofore made by this department. The requirement that moneys be paid into the county treasury does not conflict with the one that the same moneys be paid into a specific fund in said treasury.

The corrections of the committee of fourteen do not, in my judgment, have any weight. They simply leave the law at is was before. Even had the committee recommended these corrections with a view to changing the law their adoption by the general assembly could not have this effect. It is an elementary principle of statutory construction that the revision and consolidation of the statute laws of a commonwealth so as to construct a code is not regarded as original legislation. To ascertain the meaning of ambiguous phrases therein, resort must be had to the original acts.

Lewis' Sutherland Statutory Construction, sections 450-451.

It must be conceded that with the county salary law and the provision now under discussion, both included in the code, there is an ambiguity which must be explained by reference to the former acts. Upon a review of the former

opinion I am inclined to adhere to it. Accordingly, I am of the opinion that the probate judge is not entitled to any allowance for services in criminal cases.

Very truly yours,
U. G. DENMAN,
Attorney General.

CLERK OF COUNCIL — ASSISTANTS — IMPROVEMENT NOTICES.

When council provides assistants to city clerk for purpose of serving improvement notices, other persons may not be paid from city treasury for performing such services.

September 22nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have submitted to this department for an opinion thereon an ordinance of the council of the city of Toledo passed March 19, 1906, Vol. 13, page 164, authorizing and directing the clerk of council to employ two additional clerks, and making it the duty of such additional clerks to serve improvement notices and prepare necessary descriptions for the use of the assessing committees. In connection with this ordinance you inform me that much of the work thus specifically imposed upon the officers and employes thus created and provided for has been done by other parties who have been paid for doing it. The question is thus raised as to the legality of such payments, from the public treasury.

It was perfectly competent for council, under section 118 M. C. to provide for assistants to the clerk, and it was proper and legal for such assistants under section 52 M. C. to serve the notices. As to the doing of the clerical work, this, of course, could be delegated by council to these two assistants. Some question might be raised as to the legality of the provision authorizing the clerk of council to employ these additional clerks inasmuch as section 118 M. C., provides that "the members of council shall * * elect * * such other employes of council as may be necessary and shall fix their duties, bonds and compensation".

The action of council is at least subject to criticism in this respect. Having directed the employment of the clerks, however, and having prescribed their duties it is clear that neither the said clerks nor the clerk of council himself has any authority to delegate the duties of such special clerks to any other assistants or clerks without further action by council. If, therefore, as you state, the improvement notices have since the enactment of this ordinance been served by various individuals and such individuals have been paid upon the voucher of the clerk for such services then, in my judgment, such payments were illegal and the clerk together with the recipients of such illegal payments may be held accountable therefor.

Yours very truly,
U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY — ALLOWANCE OF SALARY BY COURT.

The common pleas court may make allowance to prosecuting attorney under section 2923 General Code for services rendered under section 2921; salary law in section 3003 not in conflict.

May 11th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following inquiry:

> Section 2923, General Code, provides that the court shall allow the prosecuting attorney reasonable compensation for his services and proper expenses incurred for all services rendered under the provision of section 2921, General Code.
>
> Section 3003, General Code, fixes the salary of prosecuting attorneys and contains this provision:
>
> > "Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment of all services required by law to be rendered in an official capacity in behalf of the county or its officers, whether in criminal or civil matters."
>
> *Query:* May an allowance be legally made by the court to the prosecuting attorney under section 2923, General Code, above cited, for services rendered in accordance with the provisions of section 2921, General Code, or does the salary provided in section 3003, General Code, cover such services?

In reply I beg to say this department has heretofore advised your bureau that the salary provided in the Conroy law, now section 3003, General Code, covers all the services to be rendered by the prosecuting attorney in his official capacity and that a prosecuting attorney is not authorized to receive any additional compensation for services rendered under section 1277, Revised Statutes. This opinion was rendered, however, before the adoption of the General Code. The section authorizing the court to allow the prosecuting attorney reasonable compensation for his services and proper expenses incurred for all services rendered under the provisions of section 1277, Revised Statutes, has been re-enacted in the General Code and is now section 2921 thereof. The result is that the General Code now contains both provisions, i. e., a salary to be paid monthly based upon the population of the county, which salary "shall be in full for all services required by law to be rendered in an official capacity" (section 3003), and a compensation to be allowed by the court for services rendered under the provisions of section 2921, General Code, (section 2923). Both of these sections were re-enacted by the legislature at the same time, therefore the rule of priority, upon which the former opinion was based, cannot apply; they are both in the Code and are to be given equal effect so far as time is concerned. Section 3003 provides a fixed salary and forbids, generally, a prosecuting attorney from receiving any other compensation, while section 2923 relates to a specific service and expressly authorizes the court to allow compensation therefor. That is, the legislature, by the enactment of Section 2923, General Code, has taken the particular service, therein mentioned, out of the general provision contained in section 3003, General Code, and provided an additional compensation for the performance of such service.

I am, therefore, of the opinion that a court may legally make an allowance to a prosecuting attorney for services rendered under Section 2921, General Code. It is my judgment, however, that the incorporation of section 2923 into the General Code was an oversight on the part of the General Assembly; certainly the legislature did not intend, by the adoption of the Code, to depart from the policy now generally established of paying fixed salaries to county officers, which salaries are to cover all official service.

Yours very truly,
U. G. DENMAN,
Attorney General.

TAXATION — QUADRENNIAL EQUALIZATION — COMPENSATION OF QUADRENNIAL ASSESSOR.

Complaints against valuations fixed by quadrennial board of equalization may be filed on or before the fifteenth day of April next following the completion of its work.

Quadrennial assessor may be paid for work actually done by him prior to receipt of papers from county auditor.

August 3rd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of July 26th, submitting for my opinion thereon the following questions:

> "Sec. 5596 provides that complaints against any valuation may be filed with the auditor of the county on or before the 15th day of April next following the completion of the work of the quadrennial county board of equalization. The last sentence of said section provides that such complaints shall be filed on or before the 15th day of May next following. Sec. 5600 referring to the same matter, provides that complaints may be filed with the county auditor and if such complaint has been filed on or before April 15 thereafter against any valuation of a quadrennial board, he shall notify the members of the board to meet and sit as a board of revision. Under these apparently conflicting provisions, what is the latest date for the filing of complaints against the valuation of real estate?
>
> If a real estate assessor, being notified by the county auditor to report at his office to receive the necessary books, plats and lists of property owners on January 6, failed to report and receive such supplies until January 27th, may he upon the completion of the work of assessing the real estate legally receive compensation for the time between January 6 and January 27th under the claim that he was performing services as assessor during that time?"

As you suggest, section 5596 contains two absolutely repugnant provisions. It is therefore ambiguous on its face. It purports to be a revision and codification of 2813a R. S. It is an established principal of statutory construction that ambiguous provisions of a *code* enacted for the purpose of revision may be

construed by reference to pre-existing law. Section 2813a R. S. is in part as follows:

> "* * * the auditor shall immediately thereafter, give ten days' public notice by advertisement in one or more newspapers, that the equalization has been completed, and that complaints against any valuation may be filed with the auditor of the county on or before the fifteenth day of April next following and will be heard by the board of revision, stating in the notice the time and place of the meeting of said board, *except that in cities of the first and second class such complaints shall be filed* on or before the fifteenth day of May next following.

It is obvious, upon comparison of this section with section 5596 General Code, that the last sentence of 5596 crept into the Code by mistake and should have been left out entirely. In the old law it was an exception applicable to certain localities only and was unconstitutional. It is my opinion, therefore, that complaints to be heard by the board of revision against valuations fixed or confirmed by the board of equalization must be filed on or before the 15th day of April next following the completion of the work of equalization.

Answering your second question, I beg to state that under section 3367, General Code, assessors of real estate are required to file bonds with the county auditor within ten days after receiving notice from the auditor so to do. Clearly such assessors are not entitled to compensation before having filed such bond.

Section 3368, General Code, provides that salary of each township assessor shall be fixed by the commissioners and paid upon the allowance of the commissioner. The authority is thus vested in the commissioner to determine, in the first instance, the fact as to the amount of work done by the assessor in the performance of his official duties.

Section 5548, General Code, formerly section 4 of the Quadrennial Appraisement Law, provides that the delivery by the auditor to the assessor all abstracts, maps and descriptions.

Section 5553, General Code, provides in part that,

> "An assessor, from the maps and description furnished him by the county auditor *and other sources of information,* shall make a correct and pertient description of each tract and lot of real property in his district * * *"

Although the question is not free from difficulty, I am of the opinion that the last section above quoted and the related sections, do not clearly show a legislative intent that the work of the assessors shall all be based upon the abstracts, plats and descriptions of the auditor. On the contrary, it seems that the assessor, in seeking "other sources of information" may be said to be employed in the performance of his official duties. I am, therefore, unable to advise as a matter of law that county commissioners should refuse to allow compensation to a real estate assessor for work done before receipt by him of the plats and descriptions furnished by the county auditor. Commissioners should, however, in allowing the assessor's bill for compensation, carefully inquire into the nature and extent of the alleged services performed by him before receiving such papers.

Yours very truly,

W. H. MILLER,

First Assistant Attorney General.

TUBERCULOSIS HOSPITAL — DISTRICT — TAX LEVY FOR, MAY BE MADE AT JUNE MEETING OF COMMISSIONERS ONLY.

August 18th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of August 11th, submitting for my opinion thereon the following question:

> "Under the act for establishing District Tuberculosis Hospitals, 100 O. L. 86, are the commissioners of a county comprised in the district authorized to make the tax levy and issue the bonds specified in section 2 of the act, at any time? Or are they restricted, in making the levy, to the June session as required by section 5630 General Code, with reference to levies for general and building purposes, and thereby prevented from issuing the bonds in anticipation of such levy until after that time?
>
> "To state the question more specifically —
>
> "If the county commissioners desire at this time to make a levy to be collected upon the tax duplicate of 1911 (it being too late for the 1910 duplicate) and issue bonds at this time in anticipation of such levy, may they legally do so? Or are they required to wait until their next June session to take such action?"

Section 3148 General Code provides in part that,

> "* * * The commissioners of any two or more counties not to exceed five may form themselves into a joint board for the purpose of establishing and maintaining a district (tuberculosis) hospital * * * and may provide the necessary funds for the purchase of a site and the erection of the necessary buildings thereon, in the manner and for the purposes hereinbefore provided."

The reference therein is to section 3141 General Code, formerly section 2 of the act referred to by you, which provides as follows:

> "When, in any county, funds are not available to carry out these provisions, the commissioners shall levy for that purpose, and set aside a sum necessary, which shall not be used for any other purpose, and they may issue and sell the bonds of the county in anticipation of such levy."

Section 5630 General Code also cited by you provides that,

> "The commissioners of any county, at their June session, annually, may levy not to exceed three mills on each dollar valuation of taxable property within the county, *for county purposes* other than for roads, bridges, county buildings, sites therefor, and the purchase of lands for infirmary purposes. For the purpose of building county buildings, purchasing sites therefor * * * they may levy not to exceed two mills on such valuation."

This section, in my judgment, governs a levy for the purpose of erecting a joint or district tuberculosis hospital unless the same is otherwise provided for.

Section 5627 General Code seems to have some application to the question which provides in part that,

> "The county commissioners at their March or June session, annually, shall determine the amount to be raised for * * * public buildings * * *"

The general policy of our laws respecting the levying of taxes by county commissioners, as evinced by the provisions of sections 5627 et seq. General Code, is that all formal levies shall be made at the times specified therein.

In my opinion these general statutes should be held applicable to all levies unless laws authorizing particular levies expressly provide otherwise. Indeed the general assembly must be deemed to have intended that these statutes should apply when it enacted the tuberculosis hospital act, for in section 2 referred to by you is found the following, (section 3140 General Code):

> "* * * the provisions of law requiring commissioners to submit the question of the policy of building such building to the voters of the county shall not apply thereto."

The provisions thus referred to are a portion of the chapter in which sections 5627 and 5630 General Code are found.

I deem it proper to state that, in my opinion, co-operation on the part of a county in the construction of a district tuberculosis hospital is a "county purpose" within the meaning of section 5630.

It is, of course, apparent that an issue of bonds under favor of section 3141 General Code can not be made until the commissioners have made the levy provided for thereby.

It is, therefore, my opinion that the levy made by the county commissioners for the purpose of aiding in the construction of a district tuberculosis hospital can only be made at the June meeting, and that bonds for the same purpose can not be issued until after such levy is made.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

MUNICIPALITIES MAY NOT SELL BONDS TO FIREMEN'S PENSION FUND WITHOUT COMPETITIVE BIDDING.

February 7th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — We have your letter of February 3rd, in which you ask the opinion of this department on the following:

> "The trustees of the firemen's pension fund of the city of Toledo, Ohio, desire the privilege of accepting bonds issued by said city without going into the market and purchasing same at competitive bid. Has the council of the city of Toledo, Ohio, or other official of said city the authority to make sale to said trustees at par and accrued interest, without offering said bonds to be issued at competitive bid?"

The council of a city has no authority to offer its bonds to any body, board or officer without competitive bidding except to the board of sinking fund trustees. If the board of sinking fund trustees refuse to purchase the bonds the city must then advertise the same for sale according to the statute providing for such advertisement. The most that could be done by the trustees of the firemen's pension fund in such a case as the one mentioned above in your question would be to acquire the bonds through the trustees of the sinking fund.

Yours very truly,
U. G. DENMAN,
Attorney General.

MANNER OF PUBLISHING "NOTICES TO CONTRACTORS" AND "NOTICE OF THE ASSESSMENT" — FULLY DISCUSSED.

February 17th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following inquiry:

> Sections 4670-15 and 4670-16 Revised Statutes relating to road improvements provide that the "notice to contractors" and the "notice of the assessment" shall be published in some newspaper printed in the county and of general circulation therein.
>
> Section 4367 Revised Statutes provides that the "notice to contractors" and "advertisements of general interest to taxpayers * * shall be published in two newspapers of opposite politics".
>
> *Query:* Does the above quoted provision of section 4367 supplement the quoted provisions of sections 4670-15 and 4670-16?

In reply I beg to say, following the reasoning of the supreme court in the case of the Vindicator Printing Co. v. The State, 68 O. S. 366, it is my opinion that the provisions of sections 4670-15, 4670-16 and 4367 are to be construed in *pari materia.* That is notice to contractors, as provided in section 4670-15 should be printed for at least four weeks, and the notice of the assessment as provided in section 4670-16 should be published for three weeks, and that both notices should be published in two newspapers of opposite politics.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

TOWNSHIP TRUSTEES — NOT LIABLE FOR CARE OF SMALLPOX PATIENT FOUND IN TOWNSHIP IN ABSENCE OF NOTICE TO TAKE CHARGE OF CASE.

April 14th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received with which you enclose a letter of Walter A. Kerin, Clerk of Springfield township, Clark County, Ohio, containing the following statement of facts:

A tramp by the name of Samuel Smith, while passing through the township of Springfield became ill, and upon examination, he was found to be suffering from a case of smallpox. The health officer of the city of Springfield was notified, who in turn called the attention of the county commissioners of Clark county to the matter, and the commissioners instructed the health officer of the city of Springfield to take charge of the case, which was done, and the patient was treated in the pest house at Springfield from November 25th, 1909, to December 23rd, 1909, at an expense of $305.64. The trustees of the township wherein the tramp was found to be so afflicted, are now asked to pay this bill, and refuse upon the ground that they were not notified of the case of smallpox, nor did they have an opportunity to take charge of the case.

In reply thereto I beg to say that, in my opinion, the trustees are right in their refusal to pay this bill out of the township treasury. If the trustees of Springfield township had been notified, upon the discovery of this case of smallpox within the township for which they were elected and are serving, it would have been their duty to have taken charge of the tramp patient and treated him at the expense of the township. The township trustees are, by virtue of their office, the board of health of the township and are paid a salary for their services. They doubtless have their township health officer and physician. Therefore, if the township board of health had been notified in the first instance, according to the provisions contained in the "poor laws of Ohio", it would have been their duty to have taken charge of the patient, and doubtless could have treated the same for a much less sum of money than was subsequently incurred at the pest house in Springfield for such treatment.. The commissioners of the county were not called upon to take charge of the case, and they should have notified the township trustees, but having failed to comply with the law providing for notice to township trustees, or township boards of health, in such cases, and taking charge of the case themselves, they absolved the township trustees from legal liability for the payment of the bill.

I herewith return the letter of Mr. Kerin with bills attached.

Yours very truly,

U. G. DENMAN,

Attorney General.

COUNTY COMMISSIONERS — AUTHORITY TO EMPLOY PERSONS UNDER SECTION 845 TO ASSIST SURVEYOR.

May 19th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following inquiry:

"Section 1183, Revised Statutes, enacted by the General Assembly April 2nd, 1906, (98 O. L. 247), provides that an aggregate sum shall be fixed by the commissioners to be expended for all employes in the county surveyor's office.

"Section 1166, (98 O. L. 245), provides that the county sur-

veyors shall perform all the duties that are now or may hereafter be authorized by law to be done by any civil engineer or surveyor with respect to roads, ditches and other county improvements.

"Section 845, Revised Statutes, (97 O. L. 304), makes provision for the employment of engineers when, on account of the amount of work to be performed, the county surveyor is unable to care for the same, such appointments, however, are to be made upon the written request of the county surveyor. This section was amended in 99 O. L., 337, but no change was made in this provision.

"After the enactment of section 1183, (98 O. L. 245), were the commissioners authorized under the provisions of section 845 to employ engineers, assistant engineers, rodmen and inspectors in addition to the employes of the surveyor's office provided for in said section 1183?"

In reply I beg to say:

Section 1183, Revised Statutes, provides generally for the compensation of assistants, deputies, clerks, etc., in the county surveyor's office, and such assistants, deputies, and clerks are to be paid out of an aggregate sum to be fixed by the board of county commissioners. The provision in section 845, Revised Statutes, whereby the county commissioners are authorized to employ a competent engineer, and assistant engineers, rodmen and inspectors, when, by reason of the amount of work to be performed, they shall deem the same necessary, and whereby such commissioners are authorized to fix the compensation and order the same paid out of the county treasury, is, in my judgment, to be regarded as an additional power granted to said commissioners. That is to say, section 1183 provides a method of compensation for the expenses of the surveyor's office generally, while the provision contained in section 845 is to cover outside work, where, by reason of the amount of work to be performed, the county surveyor's regular office force can not take care of the same. I am of the opinion that there is no conflict in the two sections, and that both are to be regarded and given full force and effect.

Very truly yours,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS. NEWSPAPER — ORDINANCE, RESOLUTIONS — PUBLICATION OF.

Newspaper, what is general circulation and political party. Municipal Code, Sec. 124. *Revised Statutes,* 1536-69.

February 2nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

What constitutes a newspaper of a "political party" and of "general circulation in the municipality," within the meaning of section 1536-69 Revised Statutes (Sec 124 M. C.), and are the Cleve-

land Recorder and the Commercial Bulletin, published at Cleveland, Ohio, or either of them, such papers within the meaning of said section? Said papers do not go into the homes of the city of Clevelend or vicinity, nor are they sold from the news stands, or on the streets, except perhaps an occasional copy in these various places. They are purchased almost wholly by lawyers, or other persons interested in the proceedings of the courts or county offices.

In reply thereto I beg to say that inasmuch as the legislature has not defined with particularity what constitutes such a newspaper as you inquire about there is left a wide scope for honest differences of opinion as to what these terms imply.

This section has been contrued as to what constitutes a paper of a political party by the Circuit Court of Franklin county, Ohio, in the case of the Ohio State Journal v. Brown, 19 Ohio Circuit Court Reports, at page 325, the court holding that,

> "A newspaper to be of a political party, within the meaning of the statute, must profess to be so or be so known. It is not sufficient that it has, while professing to be an independent newspaper, supported a political party
>
> "A newspaper professing to be of a political party, or one so known, may be independent in the sense that it does not advocate all of the measures of its party, and yet be of the party, for its conduct may be owing to its judgment, or the want of it, and not to its want of faith; and an independent newspaper may advocate all of the measures of a party and support all of its candidates, and yet be not of the party, for its support of the party is to be attributed to its discretion, and not to its allegiance."

From this statement by the court, I am of the opinion that a newspaper, in order to be such party paper as is contemplated by the statute, must, in good faith, proclaim its allegiance to a certain political party, and subject to its judgment, consistently advocate the principles for which such political party, to which it professes its allegiance and support, stands.

The phrase "of general circulation in the municipality" is without judicial definition in this state. The controlling purpose of the legislature in the enactment of this statute is to give due notice and publicity to the citizenship of a municipality of the municipal ordinances and resolutions required by law to be published. It is therefore apparent that the newspaper of the widest circulation and most generally read within the municipality would be the best medium for the communication of such information. But the statute provides for competitive bidding. So that in addition to the primary object sought, to-wit, publicity, there is also the question of cost of publication to be considered in the letting of the contract.

In the opinion of the circuit court of Franklin county in the case of the City of Columbus, Ohio v. John T. Barr, Clerk, etc., 27 Ohio Circuit Court Reports, 268, in which case this section of the Revised Statutes was being considered, the court makes the following pertinent observations:

> "The purpose of the legisiature was to provide for the widest publicity of the public acts of the municipal council, under a general law. It is common knowledge that this purpose would be best subserved as a general rule, by publication in the newspaper of opposite

> party politics, for the reason that when applied to all municipalities, they are the local papers that generally reach the most people. The independent newspaper as a rule is confined to the larger cities. It may best subserve the purpose of the statute in a few cities, but it is the exception that must fail under a general law.
>
> "The legislature did not undertake to cheapen the publication by competition. The competitive bidding resorted to in this case, is the policy of the city, and, as is expressed in the ordinance providing for the same, is not to be used to annul the statute. It may be that this interpretation opens the door to political aggrandizement, but it still remains that extended publicity is the governing purpose of the statute, and must be kept to the fore when seeking to discover the legislative intent. No useful public purpose could be subserved by holding that this language should receive a more liberal construction, unless it be that it would provide competition, but that must yield if it would narrow publicity."

From this expression of the court and what precedes it in this opinion it is logical to conclude that a newspaper, to meet the requirements of this act, must in reality be the good faith advocate of the principles of one of the political parties upon which this government is founded and through the agency of which its affairs are administered, and be, in addition, a paper of "general circulation." A newspaper of "general circulation" may be defined as one published for the dissemination of local or telegraphic news and intelligence of a *general character,* having a bona fide subscription list of paying subscribers. In my opinion a newspaper devoted to the interests or published for the entertainment of a particular class, profession, trade, calling, race or denomination or any number thereof is not a newspaper of general circulation within the meaning of this statute.

The fourth and fifth definitions given by Webster of the word "general," as an adjective, are as follows: "Common to many, or the greatest number; widely spread; prevalent; extensive, though not universal; as, 'Adam, our general sire.' Milton." "Common" denotes primarily that in which many share; and hence that which is often met with." "General is stronger denoting that which pertains to a majority of the individuals which compose a genus or whole." "Universal, that which pertains to all without exception." "To be able to read and write is so common in this country that we may pronounce it 'general,' though by no means 'universal'."

Definitions of the word "general" found in the Century Dictionary are strikingly similar to the above quoted.

So far as I am able to find the only judicial definition of the phrase of "general circulation," as applied to a newspaper, is to be found in the case of Koen v. State of Nebraska, 35 Neb. 676. The definition:

> "It is not necessary that the newspaper circulate to any considerable extent, if at all, out of this state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published, and have a general circulation."

In reading this definition in connection with the present question it must not be forgotten that the Ohio Statute uses the phrase "in such municipality." But from this opinion it is perfectly clear that a newspaper may circulate in a municipality and not have a general circulation. Furthermore, what would amount to a general circulation in a city of ten thousand inhabitants might fall far short

of being a paper of general circulation in a city of over three hundred thousand inhabitants.

From a careful consideration of this question I am inclined to the opinion that neither the Cleveland Recorder, as evidenced by copy published under date of January 5th, 1910, nor the Commercial Bulletin, as evidenced by copy published under date of December 16, 1909, is a paper of a "political party" or of "general circulation" within the meaning of the act under consideration; but I am reluctant to pass finally on the question in the absence of full information as to the character and circulation of the papers from season to season. This information of fact can best, and more properly, be obtained by the council of the municipality wherein these questions are presented.

I, therefore, suggest that you advise the council of the city of Cleveland, or its committee, or the council of any municipality within this state considering this question, to apply the law as herein construed, to the facts as they may find them.

Yours very truly
U. G. DENMAN,
Attorney General.

COUNTY RECORDER — WITNESS FEES NEED NOT BE TURNED INTO FEE FUND — REQUIRED TO MAKE ACTUAL COUNT OF WORDS FOR RECORD.

February 17th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received in which you submit the following questions:

> 1. When a county recorder is subpoenaed to produce a record of his office in court, are the witness fees received by him required to be paid into his fee fund?
>
> 2. Are county recorders required to count the number of words in an instrument presented for record, or may they legally charge for an estimated number?

In reply I beg to say in answer to your first inquiry that the witness fees received by a county recorder under subpoena belong personally to the recorder, and he is not required to pay the same into his fee fund.

Second. Under the recorder's fee bill the fees are fixed at so many cents "for every one hundred words actually written, typewritten or printed on the records". It follows therefore that in order to determine the exact fee the actual number of words in the instrument presented for record must be counted.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

AUDITOR, COUNTY — COMPUTATION OF FEES DUE UNDER OLD LAW ON JANUARY 1, 1907.

October 6th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIR: — You have submitted to this office for an opinion thereon the following questions, arising out of my opinion addressed to you under date of June 9th, 1910:

> How should the graded percentages under section 1069 upon the settlement of February, 1907, be computed and divided as between the auditor in person and the fee fund of his office?
>
> The following answers are suggested:
>
> 1. The whole amount of moneys collected must be subjected to the computation of the percentages provided for in the statute, as follows: the first ten thousand ($10,000) dollars is to be multiplied by two and one-half per cent., the next ten thousand ($10,000) dollars by one and one-half per cent., and so on until the amount collected prior to January 1st, 1907, is exhausted for the purpose of such computation. All of such fees thus ascertained are then to be paid to the county auditor personally. The remainder of the fund if collected subsequently to January 1st, 1907, is to be used for computing the amount payable under the lower percentages.
>
> 2. The whole amount collected is to be subjected to the computation of the percentages and the aggregate amount of fees thus ascertained is to be divided between the auditor and the fee fund of his office in the proportion ascertained by the relative amounts collected before and after January 1, 1907."

In my opinion the second of the above suggested methods is preferable. The case referred to in my former opinion as the "Hamilton County case" is that of State ex rel vs. Richardson, 7 O. L., R., 269. The material portion of the opinion of the court is as follows:

> "This general assembly had to draw the line somewhere, did it at the date of January 1st, 1907, intending evidently that these defendants should have their full percentage of the fees according to the collections of December 20, 1906, and that their salaries should begin on January 1st, 1907, * * * and that any percentages arising from collections during January and February, 1907, until the books were closed should go into the proper county fee fund."

On careful consideration of the above quotation I am of the opinion that it does not decide the question now submitted. It merely decides that the proportional amount of fees to which the auditor is personally entitled is that fixed with relation to the amount collected instead of with relation to the time elapsed.

The question then relates to the joint effect of section 1069 and the county officers' salary law. The former section provided in part as follows:

> "The county auditor * * * shall be allowed the following percentages on *all* moneys collected by the county treasurer on the grand

> duplicate of the county * * * to-wit: on the first ten thousand ($10,000) dollars two and one-half (2½) per cent; on the next ten thousand ($10,000) dollars one and one-half (1½) per cent., etc."

The county officers' salary law, so-called, is silent as to the question now involved, simply providing that each of the officers thereby effected should receive a certain stated salary in lieu of all fees, and that "this act shall take effect January 1, 1907."

Under section 1069 the computation by which the amount of fees was to be ascertained was to be made at the date of settlement. The section was left in force and the fees had to be and were computed in February, 1907, just as in previous years. The amount of fees payable to the office of county auditor and determinable at the February settlement of 1907 was unchanged and unaffected by the enactment of the salary law.

The first of the answers suggested in your query assumes that the two and one-half (2½) per cent. attaches to the ten thousand ($10,000) dollars *first collected.* This is erroneous. The reference to the "first ten thousand dollars" and the "next ten thousand dollars," etc., is an example of a familiar legislative practice in fixing fees and compensation. Thus the county salary law itself provides that,

> "Each auditor shall receive one hundred ($100) dollars for each one thousand of the first fifteen thousand of the population in the county."

This does not mean the first fifteen thousand persons enumerated at the census or the first fifteen thousand persons born in the county or anything of the sort. It means simply that of the total population of the county fifteen thousand shall be set aside for the purpose of computing a portion of the auditor's salary.

I am of the opinion, therefore, that at the time of the settlement in February, 1907, the total amount collected on the grand duplicate should have been divided as provided in section 1069, and the percentages computed upon such divisions irrespective of the time when such moneys were collected, but that, following the Hamilton County case above cited, the total amount of such fees should have been divided proportionately between the auditor and his fee fund upon the basis of collections made before and after January 1st, 1907.

Very truly yours,
U. G. DENMAN,
Attorney General.

LONGWORTH BOND ACT—BONDS CONSIDERED IN ARRIVING AT LIMITATION.

General bonds of a city issued subsequent to 1902 *upon the approval of electors are to be considered in arriving at four per cent. limitation contained in Longworth Bond Act.*

July 7th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 14th, requesting my opinion upon the following question:

> "Are general bonds of a city issued subsequent to 1902 (the date of the passage of the Longworth Act) upon the approval of the electors of the corporation, to be considered in arriving at the 4% limitation contained in the Longworth Act?"

I am informed that you are aware that I have already expressed a view upon this question in an opinion addressed to Hon. Hanby R. Jones, Solicitor for the village of Westerville, and that your present request is for the purpose of obtaining a re-consideration of the question and a fuller statement of the reasons for the conclusion which I reach thereon.

The problem is one of statutory construction. The sections concerned in the inquiry are sections 3939, 3940, 3941, 3942, 3943, 3944, 3945, 3946, General Code, all being portions of what was formerly known as the "Longworth Bond Act," section 2835 and 2835b, Revised Statutes. The particular phrase requiring interpretation is that embodied in section 3945, General Code, viz., "such limitations of one per cent and four per cent hereinbefore prescribed *shall not affect* bonds lawfully issued for such purposes upon the approval of the electors of the corporation."

There are but two possible meanings of this, and for the sake of convenience I shall state them:

1. Issues of bonds, upon the approval of the electors of the corporation, shall not be counted in arriving at the limitations of one per cent and four per cent.

2. The limitations of the statute, once reached, shall not impair the validity of a subsequent issue of bonds upon the approval of the electors.

It is quite evident that the meaning of this isolated phrase which constitutes only a part of a larger scheme of legislation, can not be accurately ascertained without considering related sections. It may be helpful, however, first to examine it alone with a view to ascertaining whether or not either of the above suggested meanings is a natural and primary meaning of the phrase. For if the clause has a definite primary meaning that meaning is of great weight in arriving at an ultimate conclusion, and the definition of such primary meaning might even foreclose further investigation.

The grammatical construction of the single sentence of this clause is simple. Having regard to that construction it is apparent that the word "limitations" is the subject, and the word "bonds" the object of the principal verb. That is to say, the first of these words appears in the sentence in an active capacity, the second in a passive sense; the "limitations" are not to act in a certain way upon the "bonds" not the "bonds" upon the 'limitations." So far as this construction is of significance, it may be said, it seems to me, to indicate the second meaning above defined. For if the question were whether or not certain bond issues were to be counted in determining whether or not a certain limitation had been reached, it would have been more proper grammatically to have reversed the relationship of these two nouns and to have made the section read as follows:

> "Bonds lawfully issued for such purposes upon the approval of the electors shall not affect such limitations of one per cent and four per cent hereinbefore prescribed."

The meaning of the verb must also be ascertained. In its transitive use "affect" means to "act upon; produce an effect or a change upon; influence, move or touch * * * (Century Dictionary). The idea of *change* is fun-

damental in this meaning. Substituting this meaning in the sentence as above outlined, we have the following:

> "Limitations of one per cent and four per cent shall not make any change in bonds issued upon the approval of the electors."

Manifestly the general assembly, by the use of this language, intended to guard against a change in the status of bonds issued or to be issued upon the approval of the electors by reason of the "limitations" referred to. Thus the conclusion becomes stronger that, standing by itself, the meaning of this clause is the second of the two meanings hereinbefore defined, rather than the first.

This section alone, however, really has no meaning. It is full of relative words, and their antecedents must be determined before its exact significance can be defined. In short, the whole so-called "Longworth Act," or, at least, so much of it as precedes section 3945 must be considered.

The following quotations are pertinent:

Section 3939:

> " * * * The council of a municipal corporation * * * may issue and sell bonds * * * for any of the following specific purposes:"
>
> (Here follow twenty-seven specific purposes for which bonds may be issued.)

Section 3940:

> "* * * The total bonded indebtedness created in any one fiscal year under the authority of the preceding section by municipal corporation shall not exceed *one per cent* of the total value of all property in such municipal corporation as listed and assessed for taxation, except as hereafter provided in this chapter."

Section 3941:

> "When such council * * * deems it necessary in any one fiscal year to issue bonds for all or any of the purposes so authorized in any amount greater than one per cent of the total value of all the property in such municipal corporation * * * it shall submit the question of issuing bonds in excess of such one per cent to a vote of the qualified electors of the municipal corporation * * *"

Section 3942:

> "The net indebtedness incurred by a municipal corporation for such purposes shall never exceed *four per cent* of the total value of all the property in such corporation * * * unless the excess of such amount is authorized by vote of the qualified electors * * *"

Section 3943:

> "To ascertain the net indebtedness incurred, allowance shall be made *only* for the amount held in the sinking fund for the redemtption of bonds then lawfully issued for such purposes. * * *"

The foregoing were all portions of former section 2835, R. S.

Section 3945 above quoted, and the construction of which is directly involved in your inquiry, was formerly a portion of section 2835b, R. S. The remainder of said former section 2835b is now incorporated in section 3946, General Code, and, in part, is as follows:

> "Bonds to be paid for by assessments * * * bonds issued for the purpose of constructing, improving and extending water works when the income from such water works is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds * * * and bonds issued prior to April 29, 1902, shall not *be considered in ascertaining such limitations.*"

Former section 2837 R. S., now section 3948 et seq. General Code, provides in effect that whenever a contemplated issue of bonds will cause the limitations of one and four per cent. to be exceeded, the question of issuing such bonds shall be submitted to vote of the electors. It is such bond issues, and only such that could be made "for such purposes upon the approval of the electors of the corporation," within the meaning of section 3945. That is to say, no bonds could be issued under the "Longworth Act" so-called, upon the approval of the electors except such bonds as the issue of which would cause the limitations of one or four per cent. to be exceeded. This is clear, not only because there is no other mention in any of the related statutes of bonds to be issued by a vote of the people, but also because the power to issue bonds under section 3939 is, in the first instance, vested in the council.

Examination of these related sections for the purpose of arriving at the exact meaning of section 3945 leads to conflicting results. As I have stated, I am satisfied that, standing by itself, — and it can not stand by itself, — this section seems to mean that the limitations of one per cent. and four per cent. shall not impair the validity of bonds issued by a vote of the people. Now section 3946, which is more directly in *pari materia* with section 3945, so to speak, than any of the other related sections, having been a part of the same section of the Revised Statutes, tends to sustain this conclusion. It provides that certain kinds of bonds "shall not be considered in ascertaining" the limitations of one per cent. and four per cent. The legislature in adopting the General Code must be deemed to have intended to clear up ambiguities and harmonize conflicting sections. It would seem, therefore, that, in pursuance of such an intent, the legislature would have used this same language in section 3945, if it had considered that said section 3945 possessed a meaning similar to that of section 3946. So far then I am confirmed in my conclusion that section 3945 does not mean that bonds issued upon the approval of the electors shall not be considered in arriving at the limitations of one per cent. and four per cent. prescribed by the "Longworth Act."

The joint effect of all the considerations to which I have heretofore alluded is, however, neutralized by another not yet mentioned. As above stated, bonds are to be issued under the "Longworth Act" upon the approval of the electors only when such issue will cause the limitations of one per cent. and four per cent. to be exceeded. Furthermore, sections 3941 and 3942, as above quoted, indicate by necessary implication that when bonds are issued by a vote of the people in an amount which will cause the total indebtedness assumed in one year, or the net indebtedness outstanding at a given time, to exceed one or the other of these limitations, such issue so made is valid notwithstanding such limitations. True, the statutes do not so explicitly state; but they can mean nothing else.

Bonds issued upon the approval of the electors being valid under the law as it would be were section 3945 omitted, then, that section would be meaningless and superfluous if it were given the second meaning above defined, and to which all the other guides of statutory interpretation to be found in the section itself and the related sections point. It is a cardinal principle of statutory construction, that every word of a statute is to be given a meaning, if possible. The application of this principle, therefore, tends to upset the conclusions already reached, and to indicate the first of the above defined meanings of section 3945.

Upon careful study I have been unable to make any choice as between the two possible meanings of section 3945 General Code from a consideration of this section and the related sections as they now appear. That is to say, I have reached the conclusion that there is an ambiguity in the General Code sections embodying the "Longworth Act", and particularly in section 3945. That being the case, the sections of the Revised Statutes must be examined with a view to solving the ambiguity.

> "The general rule is perfectly well settled that where a statute of doubtful meaning and susceptible on its face of two constructions, the court may look to prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it to determine its proper construction. * * * The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to *to solve,* but not to *create,* an ambiguity. * * * If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. * * *"
>
> Rathbone vs. Hamilton, 175 U. S. 414, cited and quoted in Lewis' Sutherland Statutory Construction, section 450.

Former section 2835 as amended 100 O. L. 53, was different in no material respect from the sections into which it is sub-divided in the General Code, section 3939 to section 3944 inclusive. Section 2835b, however, was somewhat different from its codified sections:

> "Provided further that the limitations of one per cent. and four per cent. prescribed in section 2835, Revised Statutes, shall not be construed as affecting bonds issued under authority of said section 2835 upon the approval of the electors of the corporation, nor shall bonds which are to be paid for by assessments specially levied upon abutting property, nor bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due, nor any bonds issued prior to the passage of section 2835 Revised Statutes, as amended April 20, 1902, be deemed as subject to the provisions and limitations of said section, or be considered in arriving at the limitations therein provided."

As will be observed, the two principal differences between this section and sections 3945 and 3946 General Code are as follows:

1. Section 3945 uses the language,

> "such limitation * * * shall not affect bonds issued * * * upon the approval of the electors * * *"

while section 2835b is in the form of a proviso as follows:

> "Provided further that the limitations * * * *shall not be construed as affecting* bonds issued * * * upon the approval of the electors * * *"

This language is much weaker, in my opinion, than the language of section 3945, and yet it amounts substantially to the same thing.

2. Section 3946 provides that the bonds enumerated therein, "shall not be considered in ascertaining the limitations", while that portion of section 2835b provides that such bonds shall not *"be deemed as subject to the provisions and limitations of said section,* or be considered in arriving at the limitations therein provided." In the code the italicized portion of the above quotation is omitted apparently as superfluous.

While further comparison of the original and codified sections is interesting, I have been unable thereby to satisfy myself as to the main object of my investigation. The ambiguity still remains in the original section 2835b by comparison with its companion section 2835, although perhaps less puzzling on account of the somewhat equivocal language of the first clause thereof. It becomes necessary, therefore, to trace the development of this statute still further toward its origin.

Section 2835b as it existed at the time of the enactment of the General Code was last amended March 22, 1906, 98 O. L. 66. The original section was incorporated in the Revised Statutes by the Act of April 27, 1904, 97 O. L. 516-520. Accordingly, there have been but two changes in the language of this section since its original enactment. I quote original section 2835b in full:

> "Provided, further, that the limitations of one per cent. and four per cent. prescribed in section 2835 R. S. shall not be construed as affecting bonds issued under authority of said section 2835 upon the approval of the electors of the corporation; nor shall bonds which are to be paid for by assessments specially levied upon abutting property, be deemed as subject to the provisions of said section."

It will be seen by comparison that the amendment of 1906 added nothing to the first clause of section 2835b; that it substituted a comma for a semicolon after the word "corporation" at the end of said first clause, and that it augmented the catalogue of the second clause and added the words "or be considered in arriving at the limitations therein provided." Examination of original section 2835b and comparison of it with the amendment of 1906 leads to the conclusion that the sub-division of said section into two sections by the General Code is proper; that is to say, that portion of the section which concludes with the word "corporation" is grammatically separate and distinct from the rest of the original section. Therefore, the amendment of 1906 which added to the last clause the phrase "be considered in arriving at the limitations therein provided" did not change the meaning of the first clause of the section.

The "Longworth Act," so-called, in its original form was passed in 1902 and section 2835b was supplementary thereto. It is in the form of a proviso, and, at first glance, would appear to have been designed to amend the original act. As already stated, the legislature is not presumed to have passed a mean-

ingless law which adds nothing to the body of the law already in existence. That this is a rule of statutory construction is conceded. Furthermore, the natural function of the proviso is to restrict the operation of general language in the body of an act, and it is reasonable to assume that this may have been the legislative intent in enacting any such provision.

See section 351 et seq. Lewis' Sutherland Statutory Construction.

If then it is fairly inferable from the form of the original enactment of section 2835b that the general assembly intended to change the then existing Longworth Act or to limit or restrict its general language so as to exclude certain things from the broadest meaning thereof, then that interpretation of said section 2835b must be adopted which will actually effect such a change or restriction. In other words, if the legislature intended to change the law we must adopt the first construction of section 2835b R. S., section 3945 General Code, above suggested, which is, in effect, that bonds issued upon the approval of the electors are not to be counted in arriving at the limitations of one and four per cent. prescribed in the body of the Longworth Act.

I know of no rule of statutory construction by which it could be ascertained from the original form of section 2835b, standing alone, or in relation to the previously existing law, just what the legislative intent in so supplementing the Longworth Act was. It is not enough to say that the general assembly must have intended to restrict or to change the existing law. There is no such rule, or rather, the rule is that in the absence of evidence to the contrary, this must have been the legislative intent. But this presumption does not preclude inquiry into all the circumstances surrounding the passage of the supplementary act, of which a court could take judicial notice.

The question being as to the purpose of the legislature, the title of the act may be looked to to ascertain such purpose.

Lewis' Statutory Construction, sections 339 to 340.

Section 2835b was originally given legal force by virtue of section 3 of the Act of April 27, 1904, 97 O. L. 516. The title of said act is as follows:

> "An Act to amend sections 26, 98, 104, 110, 112, 114 and 216 and to supplement sections 43, 95 and 111 of an act entitled 'An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith,' passed October 22nd, 1902, and supplementing section 2835 of the Revised Statutes of Ohio, *to make definite said sections* and to provide for the more economical administration of municipal affairs."

Here we have, in my judgment, an expression of the legislative intent embodied in the first clause of section 2835b, now section 3945 General Code. It is to "make definite" the Longworth Act, which, it will be borne in mind, nowhere explicitly stated that bonds issued upon the approval of the electors under the Longworth Act shall not be impaired as to their validity by the fact that the limitations of one per cent. and four per cent. have been reached. In other words, this statute was evidently inserted in the law for the purpose of rendering certain a provision of the existing law deemed by the general assembly to be uncertain; and the fact that the uncertainty supposed to have existed in the original statute is not apparent at this time, does not change the nature of the supplementary act. We have here an instance of legislative interpretation, designed

not to change the law or, necessarily, to restrict the meaning of the existing law, but merely to explain it and make it clear. The fact that this is ascertained to have been the legislative intent overcomes the presumption that the legislature intended to change the law; it sets at naught the fact that section 2835b, construed according to its better grammatical sense, added nothing to the existing law, and did not change the meaning of the latter. Accordingly, we are free to interpret said section, and its successor in the General Code, according to their natural meaning.

Having regard, therefore, to the express intent of the general assembly in enacting section 2835b, and to the natural meaning of the first clause of said section, as carried into the General Code in section 3945, I am of the opinion that the second of the above defined interpretations thereof should be chosen and followed. That is to say, the fact that the limitations of one per cent. and four per cent. have been reached by a municipality, does not preclude it from issuing further bonds upon the approval of the electors as provided in the Longworth Act. From the foregoing it follows, as a matter of course, that bonds issued upon the approval of the electors *are to be counted* in ascertaining the limitations of one per cent. and four per cent. in sections 3940 and 3942 respectively General Code.

In this connection permit me to call attention to my opinion of June 29, 1910, relating to the same subject. In preparing that opinion, which related primarily to the meaning of the General Code sections above discussed, I came to the conclusion that there was a difference between such sections and the corresponding sections of the Revised Statutes. Upon. fuller consideration of this and the related questions as above discussed, I am of the opinion that the statement of the opinion of June 29th to the effect that the General Code sections have effected a change in the law with respect to the main question under consideration in that opinion, was erroneous. So far as I have been able to ascertain there never has been a time since the original enactment of the Longworth act in 1902 when bonds issued upon the approval of the electors of a city under said act were not to be counted in arriving at the limitation of 4% therein provided for.

Yours very truly
U. G. DENMAN,
Attorney General.

VILLAGE TRUSTEES OF PUBLIC AFFAIRS NEED NOT FURNISH FREE ELECTRIC CURRENT TO PUBLIC SCHOOL BUILDINGS.

June 4th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of May 28th, in which you request my opinion as to whether trustees of public affairs of villages controlling municipal electric light plants are required to furnish free service to public school buildings.

Section 205, Municipal Code, now section 4357 of the General Code, provides in part that:

> "In each village in which * * an electric light plant * * is situated, * * council shall establish * * a board of trustees of public affairs for the village * *."

The same section of the Municipal Code, now section 4361 of the General Code, provides that:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks * *."

In its original form, this section enumerated many sections of the Revised Statutes, particularly sections 2409 and 2417 R. S.

Original section 2409 R. S., thus adopted by the Municipal Code of 1902 and by section 205 thereof as amended 98 O. L. 252, was very lengthy; the first sentence thereof was general in its application and fixed the compensation and the duties in general of trustees of waterworks. Then followed a very long sentence in the form of a proviso, in part as follows:

> "Provided, that in all villages situate in counties containing cities of the first grade of the first class and in all cities of the fourth grade of the second class owning and operating in connection with its waterworks an electric light plant * *, it shall be the duty of such trustees in addition to the duties above mentioned, to manage * * such plant. * *; and all the provisions of this chapter relating to the powers, duties * * of the trustees of the waterworks shall, so far as applicable, control *such trustees* in the management of such electric light plant."

Among the duties of trustees of waterworks thus referred to was that imposed by section 2417 R. S. also expressly adopted by old section 205 M. C., viz: that the trustees should supply *water* free of charge for the use of public school buildings.

It will be seen that, so to speak, by force of a construction upon a construction, the trustees of waterworks referred to in the latter portion of section 2409 R. S. would have to furnish electricity free of charge for the use of school buildings. However, the provisions quoted by you from section 2409 R. S., which require waterworks trustees to be governed, with respect to an electric light plant, by the laws relating to waterworks, is part of a special law undoubtedly within the purview of the decisions of the Supreme Court condemning such classification of municipalities. That is to say, it was not all waterworks trustees who were to be governed as to electric light plants by the provisions relating to waterworks, but only those "in all villages situate in counties containing cities of the first grade of the first class, etc." In my judgment, all the second sentence of section 2409 R. S. is, and since 1902 has been, unconstitutional and the phrase "such trustees," as used in the last clause thereof, must, by grammatical construction, refer not to all trustees but merely to trustees in certain municipalities. Therefore the provision quoted by you, being unconstitutional, is of no effect.

It will be noticed that the General Assembly, in enacting the General Code, adopted this view and left out of section 2409 R. S. the entire second sentence. (See section 3956, General Code).

Section 2409 being thus eliminated, there is no provision defining the duties of trustees of public affairs with respect to electric light plants, save that above quoted from section 205 M. C., as codified. The joint effect of said section 205 and said section 2417, (Section 3936, General Code), leaving out old section 2409 R. S., does not operate to make it the duty of trustees of public affairs to fur-

nish electricity to any of the consumers mentioned in old section 2417 free of charge.

It is, therefore, my opinion that trustees of public affairs are not required by any law now in force, or which has been in force and effect since 1902, to furnish electric currents free of charge to public school buildings.

Yours very truly

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — EXPENSES OF OFFICERS AND EMPLOYES — SUPPLEMENTARY TO OPINION OF OCTOBER 9th.

October 13th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have submitted to this department for an opinion thereon letter of Hon. Hiland B. Wright, Auditor of the City of Cleveland, in which he states that, under direction and appointment of the mayor of that city, the general superintendent of charities and correction, the director of public service, and the secretary to the mayor, attended the convention of the League of American Municipalities held at St. Paul, Minnesota, in August, 1910, as delegates thereto, and that bills for the expenses incurred by them have been presented to the auditor for payment.

The auditor calls my attention to my opinion of April 9th addressed to Hon. Newton D. Baker, in which the general principle applicable to the legality of expenses of this sort are discussed, and states that he has so far refused, under authority of said opinion, to pay the bills. On the other hand, I am informed that the bills themselves were incurred in supposed conformity to the opinion. It thus appears that either the mayor or the city auditor has misconstrued my opinion of April 9th above referred to. How such a misconstruction could arise I am unable to understand. It is true that, referring to an incident mentioned in the letter of the city solicitor to me at that time, I did use the following language:

> "In your letter you refer to an instance in which knowledge, acquired by an employe of the water works department of the city of Cleveland at a convention of some sort, was very beneficial to the city and enabled it to save a large sum of money in the construction of a municipal utility then under way. Inasmuch as you have mentioned this fact and because I realize that, in the business-like management of a city's affairs, every means of saving money should be looked upon with favor, I beg to suggest the circumstances under which, in my opinion, municipal directors and employes of their departments, under proper orders may, legitimately, incur expense of this kind. Take the case referred to by you as an example. There was an existing municipal undertaking presenting a perplexing problem. The question was specific and expert advice on the precise point was necessary. The city was justified in obtaining this advice in the cheapest manner. If it was known that papers and discussions relating to this problem were to be presented and conducted at a convention of this sort, then any municipal director or employe might lawfully attend the conven-

> tion for the specific purpose of listening to and engaging in such discussion with an ultimate view to using the knowledge thus acquired in the solution of the exact problem then pending."

However, the last sentence of the above quoted excerpt from my opinion must be read in connection with its context. Whatever the sentence may mean standing alone, it is clear that, in connection with what precedes it, it does not mean that whenever the program of a proposed convention of municipal officers discloses that questions of interest to the officers of a city are to be discussed at such convention, such officers may lawfully attend and be reimbursed for their expenses. It does mean, however, — and its meaning I think is fairly clear from the first portion of the above question — that when a city department is engaged in a specific undertaking requiring expert knowledge for which it would otherwise be obliged to employ expert assistants, such as engineers, etc., and it appears that, by sending its own employes or officers to a convention where such problems are to be discussed, the information thus needed may be acquired, and used immediately in the undertaking then under way, the expenses of such employes are properly payable from the city treasury. But to hold that because the program of the convention presents matters of interest to city officers, such officers may lawfully attend at the city's expense, would be to let down the bars entirely.

For the sake of clearness permit me to state as to the nature of the municipal undertaking which will give rise to the right to attend a convention, that,

1. It must be under way — in existence — and not merely contemplated or anticipated.

2. It must require expert knowledge of the kind usually obtained by the city by independent employment outside of its regular force of officers and employes.

3. *The problem must be specific* — officers and employes can not be sent for the mere purpose of informing themselves generally as to a subject.

You have exhibited to me the letters of the mayor of Cleveland addressed to the three officers in question and directing them to attend the convention at St. Paul. These letters mention no such municipal undertaking as that above described as giving rise to a necessity for the attendance of the officers at the convention. It, therefore, appears, as between the mayor and the city auditor, that the former has misconstrued my opinion, and that unless some problem more specific and otherwise more nearly conforming to the test above defined, than those referred to by the mayor actually existed in each of the three departments represented by the three officers in question at the time of their visit to St. Paul, and unless further their visit was for the purpose of applying the information there to be gathered to the solution of such specific problem, their expenses should not be paid from the city treasury.

In addition to the foregoing permit me to call attention to that portion of the opinion of April 9th which holds that,

> "Even in cases wherein the city may send its employes on trips of this kind, the expenses incident thereto should have been authorized to be paid in the *salary ordinance* passed by council; otherwise the compensation provided would be deemed to reimburse the employe."

The auditor's letter does not state whether or not the ordinance providing for the salary of the secretary to the mayor — for instance — authorizes him to

be reimbursed for his necessary expenses incurred in traveling outside of the city. If it does not so provide then this fact alone, in my judgment, would be sufficient to render it unlawful to pay his expenses out of the city treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE JUDGE — ALLOWANCE FORMERLY PAYABLE FOR CRIMINAL SERVICES MUST BE PREDICATED UPON SERVICE ACTUALLY RENDERED.

October 25th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of October 19th, requesting my opinion on the following question:

> "Under section 6470 of the Revised Statutes, prior to the adoption of the General Code and prior to the enactment of the county officers' salary law, were the county commissioners authorized to make an annual allowance to the probate judge for his services in criminal cases, regardless of the amount of services rendered in such cases, i. e., might the allowance have been made from year to year, even though in some of the years no services whatever in criminal cases were rendered by the probate judge?"

Section 6470 Revised Statutes was as follows:

> "The judges of said probate courts shall be paid for their services in criminal cases such sums as the commissioners of said counties may allow, which sums shall be paid out of the county treasury of said county respectively, and said probate judges shall not receive any compensation by way of fees in any criminal business of which they have jurisdiction * * *."

Under this section while the measure and amount of the compensation of the probate judge in lieu of his fees in criminal cases was a question for the determination of the county commissioners, and their decision in the matter was not subject to review, yet in my opinion the commissioners were without authority to act at all unless the judge actually rendered services in criminal cases. In counties in which the probate court did not exercise criminal jurisdiction, or in which its jurisdiction was not actually exercised during a given year, the judge of such court would not be entitled under this section to any compensation whatever. The clear intent of the section was that the compensation should attach to and be payable for services rendered.

Yours very truly

U. G. DENMAN,
Attorney General.

CITY TREASURER — DEPOSIT OF FUNDS.

Bank in which city treasurer deposits moneys without proceeding under city depository law liable to city for all profits derived from such funds regardless of agreement to pay stipulated rate of interest, such deposit not rendered illegal by fact that treasurer is interested in bank.

October 18th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have referred to me for an opinion thereon a letter of one of your examiners which submits the following question:

> "In a city where there is no depository commission, the treasurer being under bond for funds in his custody, he placing the funds of the city as he sees fit and holding securities from each bank for his own protection, is it legal to have funds and receive depository interest thereon, in banks in which the city auditor and city treasurer are interested?"

The action described in the question of the examiner was evidently taken under section 135 M. C., now incorporated without substantial change in section 4294 General Code, which provides in part as follows:

> "Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn. All profits arising from such deposit or deposits shall inure to the benefit of the funds. * *"

As I have heretofore advised your department in an opinion relating to the examination of the accounts of the city of Newark, the banks receiving deposits of money under this section are not permitted to derive any profit therefrom as against the city. If the moneys so deposited are held by the banks as separate and distinct funds in their possession, then all interest or profits directly traceable to such funds must be accounted for to the city. On the other hand, if the bank commingles such funds with its general funds, such an act of conversion renders it liable to pay the legal rate of interest to the city.

From all the foregoing it appears that the banks could have no substantial interest in such a deposit if the law were strictly complied with. The question of the examiner, however, discloses that certain interest was paid to the city for the use of these funds. A more difficult question is thereby presented. It might be urged that the receipt of such stipulated sums at a given rate of interest by the city officers would preclude the city from recovering the full extent of the profits. Such a position, however is untenable. The statute provides in so many words that *all profits* shall inure to the benefit of the funds, and no officer of the city government is vested with authority to accept on behalf of the city less than all of the profits. In other words, in cities having no depository commission the treasurer cannot legally contract for a stipulated rate of interest for the use of city moneys by banks in which they are deposited under this provi-

sion of the statute, but he must hold all such banks to a strict accounting for either the entire profits derived by them or in case the funds have been commingled with the funds of the bank, for the legal rate of interest.

It follows, therefore, that the city has not received the interest to which it is entitled under the law, and that the banks are liable for the difference. However, the deposits themselves were legal. Inasmuch as under the law the banks were not permitted to derive profits from the deposits thus made, I do not believe they could be said to have any such interest in the funds deposited with them as would render the deposits illegal by virtue of the fact that city officers were stockholders in such banks. Nor can such a deposit of city money be regarded as an "expenditure" within the meaning of section 45 M. C., present section 3808 General Code. In fact it seems reasonably clear to me that the relation between the bank and the treasurer under section 4294 General Code, and the prior provision of the Municipal Code can scarcely be deemed contractual. It is a trust relation created by the statute itself and with respect to which the attempted contract of the city treasurer is without effect.

Inasmuch, therefore, as the banks in question cannot be said in law to have any interest in the funds deposited with them, it follows that such deposits were not rendered illegal by the fact that city officers, including the treasurer himself, were stockholders therein.

Yours very truly

U. G. DENMAN,
Attorney General.

TALESMAN — FEES OF.

November 10th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of October 28th, requesting my opinion upon the following question:

> Section 3008 G. C., fixes the compensation to be paid to jurors. Under this section, is a person who is summoned from the bystanders as a talesman, who fails to qualify as such, entitled to any compensation?"

Section 3008 General Code provides as follows:

> "Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat."

Section 11431 General Code provides for the summoning of talesmen, and section 11434 General Code provides for the procedure in such cases and is as follows:

> "When it is necessary to summon talesmen, the court, on the motion of either party, shall select them, and cause to be issued imme-

diately a venire for as many persons having the qualifications of a juror as, in the opinion of the court, may be necessary, which persons shall be required to appear forthwith, or at such times as may be fixed by the court; but no person known to be in or about the court house shall be selected without the consent of both parties".

It is to be observed that obedience to the summons of the court is compulsory and constitutes what might be termed a service. I am of the opinion that a person whose name appears in the summons or venire issued by the court under section 11434, and who upon being served with the same appears in court as commanded therein is a "juror selected by the court as talesman" within the meaning of section 3008 and is entitled to $2.00 whether he actually qualifies and serves on the jury or not. It is to be observed, however, that only persons possessing "the qualifications of a juror" may lawfully be summoned by the court in this manner. This phrase, however, refers not to qualification for a particular case, but to qualification in general.

Yours very truly,

U. G. DENMAN,
Attorney General.

INFIRMARY DIRECTOR—HORSE FEED MAY BE INCLUDED IN TRAVELING EXPENSES.

November 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter in which you request my opinion as to whether an infirmary director may legally charge against the county the expense of feeding his horse while in attendance upon regular or special meetings of the board, and in the discharge of any other duties devolving upon him.

Section 3002 of the General Code provides that each infirmary director shall be allowed "his actual traveling expenses, subject to the approval of the county commissioners". If, in order to attend a regular or special meeting of the board of infirmary directors, or to discharge any other duty devolving upon him in his official capacity, a member of the board of infirmary directors is compelled to travel and chooses to do so by using his horse or team, and is obliged thereby to purchase horse feed or to board his horse while away from his home, the expense of the same would, in my opinion, be a "traveling expense" within the meaning of section 3002. The county commissioners have general oversight with respect to expenses of infirmary directors; and if the latter are unreasonably incurred the commissioners should refuse to allow the bills. As a matter of law, however, the expense incurred in the manner above described is lawful and should be allowed.

Yours very truly,

U. G. DENMAN,
Attorney General.

DELINQUENT TAXES — COLLECTION.

Costs made in action by tax collector payable out of judgment.

November 15th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of recent date, in which you request my opinion upon the following question:

> If a tax collector employed by the county treasurer, under authority of section 2672 of the General Code, brings action as provided in sections 2667 et seq., should the court costs made therein be included within the judgment, or should they be paid by the collector himself?

Section 2672 of the General Code provides in part that,

> "When lands * * * have become forfeited to the state by reason of the unpaid taxes thereon, the county treasurer may contract with a suitable person to collect the taxes * * * thereon at a compensation * * * not to exceed twenty-five per cent. of the amount collected * * * payable therefrom. * * * The expenses of collection under contract shall be borne by the person so contracting, who may proceed under this and the preceding sections, or as otherwise provided by law."

The reference to the "preceding sections" is evidently to sections 2667 et seq. which provide in part as follows:

Section 2667:

> "When taxes * * * are not paid within the time prescribed by law, the county treasurer * * * may * * * enforce the lien of such taxes * * * and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas in the county, without regard to the amount claimed, in the same way mortgage liens are enforced. * * *"

Section 2670:

> "Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and *costs,* for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale *the costs shall be first paid,* next the judgment for taxes and assessments, and the balance shall be distributed according to law. * * *"

From all the foregoing sections it is apparent that the owner of real property is liable for the costs made in the action, and that the amount of the same must be adjudged against him. In addition to the taxes, assessments and penalties, and not, as you in your letter seem to indicate, *to be deducted* from the judgment for taxes, assessments and penalties.

Section 2670 in providing for an order of distribution recognizes the possibility of a sale at less than the amount of such judgment for costs, taxes, assessments and penalties. In such case, under the section, the costs are preferred and are to be paid in full out of the proceeds of sale regardless of the fact that the amount of money made for taxes, assessments and penalties may be thereby diminished.

The costs being in the nature of a specific and preferred claim against the fund created by the sale of the real estate in an action under section 2670, it is clear that they can not be regarded as "expenses of collection" to be paid by the tax collector under section 2672. If the costs be regarded as in any sense "expenses of collection", they are such expenses as must be borne by the delinquent owner, and the quoted provision of section 2672 would not be sufficient to reverse this rule.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY AUDITOR — ALLOWANCE FOR CLERK HIRE ON ACCOUNT OF APPRAISEMENT OF REAL PROPERTY.

November 15th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of recent date, submitting for my opinion thereon the following question:

> "During what years may the allowance to the county auditor for additional clerk hire, under former section 1076 R. S., be made?"

Section 1076 R. S., is at present section 2629 of the General Code, and provides as follows:

> "The county commissioners of the several counties shall make an additional allowance to the county auditor for clerk hire, not exceeding twenty-five per cent. of the annual allowance made in the preceding sections in the years when the real property is required by law to be re-appraised."

The question which you ask has been decided in the case of State ex rel v. Godfrey, 4 C. C., N. S., 465. It was there held in the language of the syllabus that,

> "The provision in section 1076 for an additional allowance to the county auditor for clerk hire, during the period when the decennial appraisement is being made of real property, is not limited to the year during which the reappraisement is actually made, but includes so much of the year following as may be necessary for the boards of equalization to complete their work, * * *"

The reasoning of the court leads to the conclusion that "the purpose of this section" being "evidently to allow the auditor compensation for the additional

clerk hire that is imposed upon him by reason of the decennial appraisement and real estate," (Page 476.) the auditor would be entitled to the allowance in any year in which additional work devolves upon his office by reason of the appraisement.

Yours very truly,
U. G. DENMAN,
Attorney General.

CITY MAY NOT SEND ITS OFFICERS AT PUBLIC EXPENSE TO APPEAR BEFORE LEGISLATIVE COMMITTEE.

November 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have referred to this department a letter addressed to you under date of September 22nd by one of your examiners submitting a question which has arisen in the examination of the affairs of a certain city, as follows:

> May the expenses of the city solicitor or any officer or employe of the city government, incurred in appearing at the capitol of the state before a legislative committee for the purpose of securing legislation deemed advantageous to the city, be lawfully paid from the city treasury?

In an opinion recently prepared by me at the request of Hon Newton D. Baker, City Solicitor of Cleveland, I have cited authorities and attempted to define the principles relating to the payment of the expenses of city officers and employes. In that opinion I expressed the conclusion that no enterprise in which the city government itself could have no interest as such could give rise to the incurring of expenses on the part of city officers which might lawfully be reimbursed from the city treasury. This principle, it seems to me, is elementary, and it is amply supported by the authorities.

I do not believe that a city government as such may incur expenses for the purpose of procuring legislation deemed advantageous to the community. No such power is conferred by the Municipal Code, or by any of the provisions of the constitution and laws of this state upon municipal corporations as such. No such power flows by implication from any of the powers expressly conferred by law upon municipal corporations. If there is any rule of public policy at all applicable to the question, such a rule would, in my judgment, be against a public corporation engaging for any reason in the enterprise of influencing legislation.

The city as such then had no right to appear before any legislative committee. The citizens of the city might lawfully undertake this service for their common good. The city solicitor has no powers broader than those of the city itself, his client. However praiseworthy it may have been for him to appear before a legislative committee in behalf of the general good of the citizens of the city he could not be reimbursed for expenses so incurred by the city.

For the foregoing reasons I am of the opinion that not only you should find against the city solicitor for the amount paid through him in reimbursement of his

expenses incurred in attendance upon the sessions of the legislative committee, but that you should in all cases hold against the payment of such expenses by municipalities, counties, and other political sub-divisions.

Yours very truly

U. G. DENMAN,
Attorney General.

SCHOOLS — SCHOOL LANDS — ORIGINAL TOWNSHIPS — TRUSTEES OF, HOW ELECTED.

Funds derived from rental of school lands impressed with trust for benefit of schools of original township to which such lands belong.

April 12th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIRS: — I have carefully read the documents submitted to me by you, covering the situation in original fractional township 1, fractional range 1, Hamilton County, Ohio, and gather from them that the facts are as follows:

> "This fractional township contained no section 16, and was, therefore, allotted a quarter section of land in Darke County, Ohio, for school purposes, which quarter section has never been sold. Said fractional township is now a part of the civil township of Miami, Hamilton County, and as there is no school house within such fractional township, the children of school age residing therein attend a sub-district school located in Miami Township. The territory comprised within the boundaries of this original township is attached for school purposes to the Gravel Pit school district, a sub-district of Miami Township school district. There are now four electors and six children of school age residents of this fractional township. The board of trustees of this original township served until last year, when they removed from the township and there is now no board of trustees. There is now in bank in Cincinnati a sum of money deposited in the name of the treasurer of said original township, being the proceeds of the rents of the said quarter section in Darke County."

Under this statement of facts you ask my opinion as to what disposition shall be made of said funds, and what school districts are entitled to share in the distribution, and also what proceedings are necessary to be had before distribution of the said funds can be made.

In reply thereto I beg leave to submit the following opinion:

This department has heretofore held, on February 3rd, 1908, in an opinion to Hon. E. A. Jones, Commissioner of Common Schools, to be found in the Annual Report of the Attorney General for 1908, at page 144, that the funds derived from the rents and profits of section 16 lands constitute a trust fund for the benefit of the schools of the township to which such section 16 belongs by law; that such funds, if there be any, should once a year be apportioned among the various school districts, or parts of school districts, within such original township, in proportion to the number of children of school age residing in such school district, or part of school district, and should be paid over to the

treasurer of such district, or part of district, to be expended by the board of education, and that such board of education should use such funds for the benefit of the schools of the original township or fractional township to which the school lands were originally assigned.

I am, therefore, of the opinion that the trustees of original fractional township 1, fractional range 1, Hamilton County, when there are any such, would turn over to the treasurer of Miami township school district, the funds derived from the rentals of the quarter section of land in Darke County, now in bank in Cincinnati, under and by virtue of sections 3203 and 3204 of the General Code, (sections 1411 and 1412 R. S. O.) which read as follows:

Section 3203:

> "When, after the payment of just claims and necessary expenses, there is money in the hands of the treasurer arising from the rents of school lands, at least once a year, the trustees shall meet at the office or residence of the treasurer, and make a dividend thereof among the several school districts, or parts of districts within the original township, in proportion to the number of youth of school age therein, and upon their order, the treasurer shall pay out such money."

Section 3204:

> "The clerk of the board of education of any district which, in whole or in part, is composed of territory within the bounds of an original township incorporated as herein provided, shall, on demand of the clerk of such township, furnish him a certified copy of the enumeration of youth within school age, residing within the bounds of such original township in the several subdistricts of such shcool district, and the dividend shall be made on the basis of such enumeration."

That all of such money should be paid to the Miami Township school district follows from the fact that the territory comprising original fractional township 1, range 1, is attached for school purposes to the Gravel Pit sub-district of Miami Township school district. I am also of the opinion that such funds, together with the funds hereinafter derived from such rentals and so apportioned to Miami Township school district by the trustees of said original township, must be used and expended for the benefit of the school which the pupils of original fractional township 1 attend, to-wit: the school of Gravel Pit sub-district of Miami Township. For these funds, as above stated, are impressed with a trust for the benefit of pupils residing in such fractional township, and can not be lawfully expended for any other purpose.

I take it from the facts appearing in the documents submitted by you that the terms of the last properly elected trustees of this original township expired, by limitation, over a year ago. Under such circumstances the proper procedure to be taken precedent to declaring a dividend of the money above referred to is that prescribed by section 3187 of the General Code (section 1371 R. S. O.) which reads as follows:

> "When it comes to the knowledge of the county auditor that the electors of such township have failed to so apply to the commissioners for one year after such application is authorized, or that in such township the trustees and treasurer elected have failed to qualify or perform the duties incumbent upon them, the auditor shall appoint from

> the electors of such township three trustees and one treasurer, who shall hold their offices for the same term, perform the same duties, and have the same powers as if elected as hereinbefore provided."

or an election might be held by virtue of sections 3188 (section 1371 R. S. O.), 3181 (section 1366 R. S. O.), 3182 (section 1367 R. S. O.), and 3183 (section 1368 R. S. O.) of the General Code.

Sections 3181 to 3192 inclusive of the General Code, (being sections 1366 to 1375 inclusive of the Revised Statutes,) and section 3193 of the General Code (section 1403 R. S. O.), and section 3207 of the General Code (section 1415 R. S. O.) cover every situation in this particular and fully provide for the election or appointment and continued existence of boards of trustees of such original townships. These provisions are explicit and clear and need only to be applied to the facts whatever they may be in this particular. I, therefore, refer you to these provisions.

Enclosed herewith find papers submitted to me by you.

Yours very truly,
U. G. DENMAN,
Attorney General.

PROBATE JUDGE — FEES — JOINT GUARDIANSHIP.

Probate judge may charge fees on all of two or more separate accounts filed by joint guardian for several minors.

January 11th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of January 4th, enclosing a letter of the probate judge of Mercer County to the prosecuting attorney of said county, and a letter of the prosecuting attorney presenting a question upon which you desire my opinion.

The question is as follows:

> "When the same person is guardian of two wards, children of the same ancestor, entitled to shares in the same estate, should he file separate accounts and pay into the probate court separate fees on each of said accounts?"

While the existence of joint guardianships is recognized by section 6263 R S., which provides that in case the same person is appointed guardian of several minors, children of the same parentage, etc.,

> "only one application shall be required, and the letters of guardianship to be issued to such guardian by the court shall be in one copy * * * and the court * * * shall charge such fees as are allowed by law for such services, to be charged but once * * *"

this section does not of itself regulate the number of accounts that should be filed. Section 6269 has exclusive application to this matter. It provides in part as follows:

"The following shall be the duties of every guardian of any minor, who may be appointed to have the custody of such minor, and take charge of the estate of such minor, to-wit: * * *

"Second: To manage the estate for the best interest of his ward.

"Third: To render * * * an account * * * and as a part of said account, a * * * statement of all the funds of his ward's estate * * * once in every two years * * *"

From the foregoing provisions, as well as from other provisions of the section, not quoted, it is apparent that each estate is regarded as separate although the guardianship may be joint as to the estates.

I have examined the authorities cited by the prosecuting attorney in his letter, and all of them support the conclusion by me reached, viz., that it is not only permissive but mandatory for the guardian to file separate accounts.

It follows, as a matter of course, that the probate court may charge fees on both accounts.

I herewith return the certified copies of cost bills enclosed with the letter of the prosecuting attorney.

Very truly yours,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—VARIOUS QUESTIONS ARISING OUT OF EXAMINATION OF CONSTRUCTION OF NEWARK WATER WORKS.

Public improvements may be paid for out of more than one issue of bonds where subsequent issues are made necessary by alterations in contract.

Agent of council to purchase land for municipality may take title in his own name.

When municipal officer buys land and sells it to the city for the same price for which he purchased it, he is subject to no civil liability.

Board of public service may not purchase land for water works purposes without authority of council; council, however, may ratify such purchase.

Board of public service may not, by successive alterations, re-write a contract.

Council could, in 1886, grant a street railway franchise unlimited as to time.

Council may appoint an investigating committee, but such committee may not employ an attorney and stenographer or compel the attendance of witnesses.

City board of health may construct sanitary sewer and assess cost against property owners in certain cases.

City may compel street railway company to reimburse it for amount paid to one who contracts with railway company to do its portion of street paving, although city may not assess such sum against railway company.

Board of public service may not change use to which land owned by city may be put. Cemetery may not be abandoned without disinterring bodies.

Collusion among bidders for public contracts is a violation of anti-trust law.

April 13th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have submitted to me for my opinion thereon various additional questions arising out of the investigation by your department of the

construction of the municipal water works plant at the city of Newark, certain questions concerning which have already been answered in an opinion to you of recent date.

For the sake of convenience I shall, in dealing with the questions now submitted, adopt the plan which was followed in the former opinion.

> "1. A contract for the construction of a water works system, as originally let, calls for the payment of a sum less than the amount of the bond issue authorized by council. Alterations in said contract, however, cause the expenditure made on account of the improvement to exceed the amount of the bond issue and the interest on deposits of the proceeds thereof appropriated by council. Such excess is paid out of the proceeds of another issue of bonds made for the same purpose. Should the payment of this excess be regarded as illegal?"

I know of no reason why a municipality may not provide for a public improvement by more than one issue of bonds in case the cost of the improvement, by reason of subsequent alterations in the contract, exceeds the estimate. Your question does not disclose whether the additional expenditures made necessary by reason of the alterations in the contract were preceded by the issuance of a certificate by the auditor under section 45 Municipal Code. However, the proceeds of bond issues may be expended without the issuance of such certificate. Akron v. Dobson, 81 O. S. 66. The power of the board of public service to alter contracts, as set forth in section 143 M. C., clearly exempts such board from all restrictions surrounding the letting of the original contract excepting those of section 45 M. C. To hold otherwise would render meaningless and nugatory those provisions of section 143 which authorize such alterations and modifications and the incurring of additional expenses by virtue thereof.

In any event, the bonds having been issued, and sold, and the expenditures made, there could be no recovery on the part of the city as against the contractor or any other person.

Fronizer vs. State ex rel 77 O. S. 7.

> "2. In 1901 the water works committee of council authorized A, a member of council, to purchase 53½ acres of land known as Horn's Hill site for water works purposes. Some time in the autumn of that year A purchased that land paying $800.00 thereon and giving his mortgage for $1650.00 for balance of purchase price. In October of said year council authorized the purchase of said land from said A, authorizing the issuance of a note for $800.00 for first payment and a few weeks later authorized the issuance of another note for $1650.00 for the balance of purchase price, said A being a member of council and voting on both propositions. A deed was made for said property from A to B on the 30th day of October, 1901, and on the 31st day of October, 1901, a deed was made from B to the city for said tract of land.
>
> Query: Was such transaction legal, A being a member of council, and if not, what kind of finding should be made, and against whom?"

Your question discloses that A was duly authorized by council to act as its agent in the purchase of this property. As I have heretofore held in opinions addressed to your department, council has the power to purchase real estate for this and other purposes. In the exercise of that power council may appoint com-

mittees and employ agents. The fact that the person appointed as the committee or agent of council secured the land designated by council by purchase on his own account and with his own funds, taking title thereto in his own name is immaterial as affecting his interest in the purchase subsequently made by council. He held the land under a previously incurred liability and obligation to council, and could not be held to have acquired any real interest therein unless he sold it to council for a sum greater than that expended by him in its purchase. Even in such case he would have no *interest* in the expenditure. Upon familiar principles of agency the profit made by him would belong to his principal, i. e., council, and the same could have been recovered from him by council at any time. I, therefore, conclude that the transaction described by you was legal, and in so concluding feel constrained to remark that the intermediate transfer to and from B apparently thought necessary by the parties to avoid the consequences of the statute prohibiting members of council from being interested in municipal expenditures, is immaterial.

> "3. In July, 1907, the Newark Trust Co. purchased from Fred C. Evans a tract of land consisting of 12 acres to be used as a site for the water works plant, paying therefor $2250.00. On December 28, 1907, said land was transferred by the Newark Trust Company to C. L. Flory for $2250.00, and on the same day, for the same consideration, said land was transferred by Flory to the city of Newark. A, a member and president of the board of service at that time, was a director of the Newark Trust Company.
>
> Query: Was such a transaction as this legal, and if not, against whom, and for what amount, should a finding be made?"

This transaction, as described in your question, might possibly amount to a technical violation of section 6976 Revised Statutes, but of no other provision of law with which I am familiar. That section makes it a misdemeanor for an officer of a municipal corporation to be interested in the profits of any contract of the municipality. While I am by no means certain that this transaction would be regarded as a violation of said section, yet the transaction having been consummated, and the city having taken possession of the land, I am satisfied that at the utmost A might be technically liable to criminal prosecution. In any event, the city could not recover from any person on account of this transaction.

> "4. During October, 1905, the Board of Service purchased a tract of land consisting of 20.37 acres, paying therefor $4,074.00, said land to be used as a water works site. On December 28, 1907, the Board of Service purchased 12 acres of land paying therefor $2,250.00, said land to be used as a water works site. These tracts of land were purchased without any special action of council or authority from that body. This land was paid for out of the funds derived from the $300,000 bond issue, which bonds were issued for the purpose of establishing and erecting a water works system in the city of Newark.
>
> Query: Were such transactions legal, and if not, why?"

As heretofore held the board of service has no authority to buy land, certainly no authority to make expenditures within the department in the excess of five hundred dollars without special authorization by council. The general authority to supervise the construction of public improvements does not include the power to purchase land. Doubtless the proceeds of the bond issue were properly applied to the purchase in question, but the council should have author-

ized the board of public service or some other agent to make the purchases in question. If council has treated this land as belonging to the city, however, the money thus paid may not be recovered at this time.

"5. Under a contract entered into with the American Light & Water Company on October 4, 1905, there had been work done under this contract at site No. 2 amounting approximately to $10,000. In October, 1906, the board then in power abandoned said site and purchased a new site known as No. 3 and commenced the erection anew of a water works plant at said site. During the years 1906 and 1907 the original contract had been almost rescinded by subsidiary contracts entered into by the board.

"(a) Query: Would the fact that there had been a change of site made necessitate the entering into of a new contract requiring advertisement and letting at competitive bidding?

"(b) Query: Has the Board of Service, under section 143 M. C., the right to alter and modify the original contract by subsidiary contracts to such an extent as to virtually rescind the original contract?"

These questions can not be explicitly answered as questions of law. The principles applicable to their solution were suggested in the previous opinion heretofore alluded to. To re-state, they are as follows: The power imposed in the board of public service by section 143 to alter or modify a contract is limited to such changes in contracts as constitute mere alterations or modifications. A contract may not be re-drafted so as to call for an entirely different improvement under favor of this section.

I incline also to the belief that upon the principle that what may not be done directly may not be accomplished by indirect means, it is unlawful for the board, by a *series* of alterations, no one of which might of itself be unlawful, to substitute an entirely different contract. To hold otherwise would open the door for practical evasion of the requirements of section 143.

I am of the opinion, therefore, that, as a general principle of law, no change in the terms of a contract, whether effected by a single act or by a series of acts, is permissible under favor of section 143, which results in terms essentially and fundamentally different from those embodied in the original contract. When the board reaches the point where it desires to abandon the original enterprise and enter upon a new one, it should re-advertise for bids and, subject, of course, to a possible right of action in favor of the first contractor, formally abandon the first contract.

Where, however, as in the case submitted by you, no objection has been raised to the consummation of the unlawful plan and the contractor has completed the work upon the altered contract, and has been paid therefor, I am of the opinion, upon the principles stated in my former opinion, that no recovery of the money so paid the contractor could be had on behalf of the city unless such payments exceeded in amount the reasonble value of the work done.

Answering the first sub-division of your question specifically, I may say that, while I feel unable to hold, as a matter of law, that the change of site described by you necessitated the making of a new contract, yet if such change of site rendered necessary such further change of levels, plans of distribution system, plans and specifications of power plant, etc., as in fact to substitute in effect a new contract for that originally submitted to competitive bids, then the contract should be re-advertised, and that already entered into should be abandoned The action taken could have been prevented by injunction suit filed at the proper time.

"6. In 1886 a franchise was granted by council to a water works company for the purpose of operating a water works system and furnishing the citizens of Newark with water for private consumption and for public purposes. The furnishing of water for fire protection was limited to twenty years. In said franchise there seems to have been no limit as to the time said franchise should expire for furnishing water for private consumption.

"Query: Had council at that date authority to grant an unlimited franchise, and if not, why?"

This inquiry raises a question that is fundamental. Section 3438 Revised Statutes, now repealed and supplanted by section 29 M. C., was in effect during the year 1886. Neither this section nor any related sections contained any limitation of time as to the power of council to authorize the use of streets by street railroads. Section 3443, being *in pari materia* with said section 3438, provided that,

"Council * * * shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated."

There is considerable authority for the view that ordinances granting franchises to public service corporations unlimited as to time, are to be construed as perpetual; and unless the statute authorizing the municipal legislature to grant the use of its streets expressly authorizes perpetual grants to be made, such grants are to be regarded as void. This view is based upon the principle that statutes authorizing grants are to be strictly construed in favor of the sovereign power. The supreme court of this state, however, does not seem to have adopted this rule of construction of municipal franchises. Instead of regarding an unlimited grant as a perpetual grant, that court in Gas Company vs. City, 81 O. S. 33, held that,

"Where the contract (franchise) between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual, but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto."

By necessary implication from this decision it follows that council was authorized under the statute above cited to make an indeterminate grant to a street railroad company at the time mentioned by you. For if, as seems certain, our courts would hold that indeterminate grant is not to be construed as perpetual, then the reason of the rule which forbids the making of such grants except under express legislative authority is destroyed.

I am, therefore, of the opinion that at the date named a franchise of the kind described by you could lawfully be granted.

"7. In 1908 council authorized the appointment of a committee, consisting of three of its members, for the purpose of investigating the expenditure for the construction of the water works plant. An attorney and stenographer were employed by said committee, paying for said service $150.00.

Query: Had council a right to appoint a committee for said purpose, and had said committee the right to issue subpoena for witnesses and enforce attendance at its sessions?"

Council undoubtedly has authority under its general grant of legislative power to appoint a committee for this purpose. It has not the power, however, to authorize its committee to issue subpoenas for witness and to enforce attendance at its sessions. These powers must be specifically delegated by the general assembly, and are not included in the general grant of power.

Again, a committee so appointed would have no authority to employ an attorney and stenographer. Committees of council as such have no power to order or make any expenditures. Council itself must make all employments within the legislative department. In fact, I question seriously whether even the council could lawfully make employments of this nature.

It lies within the duty of the mayor, under section 38 M. C., at any time to appoint a commission for the examination of any municipal affairs. The commission so appointed has power to administer oaths and to compel the attendance and testimony of witnesses.

"8. In 1907 the Board of Health of the city of Newark constructed a sanitary sewer costing approximately $600.00, said sewer being constructed in a private alley, the cost thereof being paid out of the Board of Health fund. The records show a meeting of the property holders abutting on said private alley, with the Board of Health, and at such meeting the parties agreed to pay the cost of constructing such sewer. There was no action taken by council relative to the matter either authorizing the construction or assessing the cost against the property holders. There has been nothing paid by said property holders towards the cost of the construction of the sewer, neither have any assessments been certified against the property.

Query: (a) Had the Board of Health the right and authority to construct a sanitary sewer and pay for the same out of its funds or should such sewer have been constructed by the Board of Service under authority of council?

Query: (b) The fact that the Board of Health did construct said sewer and there being no action taken by council relative to the matter, can assessments be made against the abutting property holders and certified to the county auditor for collection, or can said property holders be made to pay for the cost of the sewer, it being wholly a private sanitary sewer?"

Section 2122 Revised Statutes provides in part as follows:

"The Board of Health shall abate and remove all nuisances within its jurisdiction * * *

"The board may also regulate the * * * construction * * of all * * * places where offensive or dangerous substances or liquids are or may accumulate, and when any building * * * matter or thing, or the sewerage 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 * * * or otherwise improved by the owner * * * The board may also, by its officers and employes, remove, abate, suspend,

> alter, or otherwise improve * * * the same, and certify the costs and expenses thereof to the county auditor, to be assessed against the property, and thereby made a lien upon the same, and collected as other taxes."

Sections 2123 and 2124 provide the procedure for serving notice upon the offending owners of property, which proceedings are conditions precedent to the exercise of the power of the board of health to construct the sewer itself. These proceedings seem to have been substantially complied with in the case described by you.

Upon consideration of the provisions of the above quoted section it becomes apparent that the board of health had the right to construct the sanitary sewer described by you under the circumstances mentioned, and to certify the cost thereof to the county auditor for collection. No action of council in the premises is necessary.

> "9. The franchise of a street railway company provides that the company shall pave between its rails whenever the municipality shall determine to pave the remainder of the street, occupied in part by it. Pursuant to this provision the company, on the occasion of the improvement by the city of one of the streets traversed by it, enters into a private contract with the same individual who is to do the city's portion of the work. At the completion of the work the street railway company fails to pay the contractor.
>
> "Council now authorizes an issue of bonds and devotes the proceeds thereof to paying the contractor, which is done through the board of service. Subsequently the expense thus incurred by the city is assessed against the street railway company and placed on the grand duplicate for collection. Is this procedure legal?"

Section 2504 Revised Statutes, a statute of long standing, authorizes council to "require any part or all of the tract between the rails of any street railroad constructed within the corporate limits to be paved." Apparently this requirement may be exacted as a part of the franchise grant of the railroad company or by separate ordinance, as the statute would virtually become a part of the franchise grant after its enactment, at least unless the council should attempt to waive this right. It is held that the city on default of the railroad company may improve the company's portion itself and recover the cost in an action against the company.

Columbus vs. Railroad Company, 45 O. S. 98.

This, however, is not what has been done here. The principle announced in the decision cited permits the city to do the work but not to pay for the work done under a separate contract to which it is not a party. That all work of this kind undertaken by the city must be performed by the department of public service in accordance with the provisions of sections 143 and 144 M. C., which provide for inviting competitive bids, etc., seems so clear as to need no discussion. An issue of bonds to pay the contractor was, therefore, in my opinion, unlawful.

The present situation of this matter is somewhat anomalous. The city has no right to compel the railroad company to pay the amounts assessed against it, unless the railroad company has estopped itself by contract or otherwise from denying liability. In case the amounts assessed against the company are paid by it, and the transaction results in no loss to the city, it would seem that the city

would be unable to recover from the contractor, or from the railroad company. If the company should refuse to pay such assessments it would seem that it would nevertheless be liable to the city, inasmuch as the franchise provision was for the benefit of the city, and the contractor has apparently been paid for a thing of value to the city, accepted and used by it.

> "10. About eighty years ago there was transferred and dedicated to the city of Newark a tract of land for cemetery purposes, the dedication containing the provision that said land should remain in the possession of the city so long as it was used for cemetery purposes. A few years since that tract of land was abandoned as a cemetery (although there are at present over 200 bodies interred therein) and used for park purposes. During 1909 there was constructed by the Board of Service across said track or land concrete walks and other improvements made thereon as improvements for a park.
>
> "Query: Has the city a right to use such land for other than cemetery purposes and was the action of the board in accordance with law?"

The statutes relating to the management and control of cemeteries by municipal corporations and township specifically provide that the use of lands for cemetery purposes shall not be discontinued without providing for the removal of the bodies interred therein. Section 1536-515 Revised Statutes, old No. 2555, which was in force at the date named by you, provides in part that,

> "When a city or village holds any land or lands *within its limits* which shall have been used as a cemetery or burial-ground, * * * and it shall have been decided to remove the bodies interred therein, it shall be lawful for the council to sell or otherwise dispose of any such land * * * provided that such * * * other transfer of such land shall not operate to give such purchaser possession of the same until the bodies interred therein shall have been removed from such cemetery, and all monuments and tombstones be removed and re-erected at the place of re-interment of each person, respectively."

Section 1473-a Revised Statutes, which was also in force on the date specified, provides in part that,

> "That where any graveyard, burial ground or cemetery is located *without the corporate limits* of any city or * * * and the title to and the possession of such graveyard * * * is in such a city * * * or the same is under control of any of the authorities of any city * * * and said city * * * has failed to protect the same or keep it enclosed with fences for two years, any five freeholders whose property is in the vicinity of such graveyard * * * may apply by petition to the probate court * * * stating in their petition that such city * * * has failed to protect such graveyard * * * and asking for an abandonment or removal of such * * * graveyard; which upon final hearing, if it appears to the court to be to the public interest to have such graveyard * * * removed, it shall so order * * *. Should such city * * * fail to remove such graveyard, then the court shall order such premises sold as upon execution; provided, that such sale * * * shall not operate to give a purchaser possession of the same until the bodies therein interred shall have been removed * * *"

In view of the provisions of these sections and those related thereto, I doubt seriously the legality of the course adopted by the city in the case described by you. It seems clear that if it was intended to abandon the property for cemetery purposes, the evident intention of the law respecting the removal and re-interment of bodies should have been complied with. The statutes make no specific provision for cases in which it is desired to abandon the cemetery for that purpose and use it for some other related municipal purpose, but I believe that the provision relating to such re-interment should, in any event, be observed.

Your question does not disclose whether or not council had taken any action in the matter when the board of public service proceeded as stated. Council's action is, in my judgment, essential to the validity of the proceeding, and without such action the board of public service would have no jurisdiction to treat the property as a park, and expenditures made by the board in so acting would be illegal. I have not considered the effect of the provision in the original deed to the effect that the land should remain in the possession of the city so long as it was used for cemetery purposes.

It would seem from your statement that the abandonment of the land as a cemetery, if there has been such abandonment, would work a forfeiture of the city's title and a reversion thereof to the heirs of the original donors. If the donors should assert their rights and the city should lose the entire property, by virtue of this unauthorized act of the board of public service, it would seem that the members of the board might be liable upon their official bonds. For a discussion of the principles relating to the liability of the members of the board of public service to actions on behalf of the city, I refer you to the former opinion.

> "11. In 1908 the Board of Service advertised three different times for the construction of the second distribution system. It was clearly proven that at the first and second bidding there was collusion amongst the bidders and upon this ground all bids were rejected.
>
> "Are such persons who are parties to a collusion liable under the law, and if so, what section of the statutes govern in the case?"

I am unable to find any provision of law imposing any penalty, civil or criminal, for collusion in bids, unless it be the so-called Valentine Anti-Trust Laws, which prohibits any

> "combination of capital, skill or acts by two or more persons, firms, partnerships, corporations, or associations of persons * * * for either, any or all of the following purposes * * * to make or enter into any, or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell * * * any commodity or any article of trade, use, merchandise, commerce, or consumption, below a common standard figure or a fixed value, * * * or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity that its price might in any manner be affected."

Various civil and criminal penalties are exacted for violation of this law. In the case mentioned by you it appears that the city was not damaged by the collusion among bidders, unless it be to the extent of the moneys expended by its officers in re-advertising for bids. The civil penalties under the law above

cited do not include money damages, while the fines imposed under the criminal sections thereof would, of course, be paid into the county treasury. I am clearly of the opinion, however, that collusion among bidders constitutes a violation of this law.

> "12. The proper officers of a municipality undertake to sell bonds issued for a certain purpose. The sale was made privately, and the money was received by the city. Thereupon a taxpayer after demand upon the city solicitor procured an injunction restraining the officers of the city from signing, executing or delivering to any person the bonds in question, or registering any of the series. The prayer of the petition sought to enjoin the payment of any money out of the funds arising from the proceeds of the bond sale, and the members of the board of public service from incurring any liability or obligation upon the faith of the bond sale. The order of the court allowing the original temporary injunction was that injunction should be allowed as prayed for in the amended petition, but the injunction actually issued does not go to the extent of the prayer. Subsequently a motion was made to dissolve the temporary injunction and the same was granted. A stay of execution was allowed. The circuit court on appeal and the supreme court on error, both upheld the validity of the bond issue and sale, but stays of execution were duly allowed so that the injunction remained in force from the date of the granting of the original order until the suit was finally determined by the supreme court. In spite of the existence of the injunction the officers of the city proceeded to treat the fund as if it were in the treasury, having deposited it in the municipal depository, and having entered into obligations on the faith of the fund and which could be discharged only by expending such fund.
>
> "What effect, if any, did the disobedience of the injunction have upon the validity of the proceedings of the officers?"

I have examined the printed record in the case in question, being that of Vadakin vs. Crilly et al, No. 9463 general docket. Upon such examination I am in doubt as to whether the injunction as actually issued by the court was broad enough to restrain the municipal officers from treating the proceeds of the bond sale as city moneys. At any rate, I am satisfied that if, in violation of the prayer of the injunction, the moneys were treated as municipal funds, the various steps taken by the municipal officers in pursuance of such a policy during the life of the injunction would constitute mere contempts of court. The violation of the judicial order would not invalidate any of the proceedings.

Very truly yours,
U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE EXERCISING JUDICIAL FUNCTIONS OF MAYOR DURING LATTER'S ABSENCE MUST PAY FEES COLLECTD IN ORDINANCE CASES INTO CITY TREASURY.

August 24th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of August 18th, requesting my opinion upon the following question:

"Acting under section 1536-773a R. S., a justice of the peace is appointed by the mayor of a city to serve as acting mayor during a temporary absence, no salary being paid to the said acting mayor by the city. Has the said acting mayor a right to retain his fees in cases tried before him for violation of city ordinances?"

The provision referred to by you is as follows:

Section 1536-773a Revised Statutes, section 1837 General Code:

"* * * In the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."

Section 126 M. C., which was in force contemporaneously with section 1536-773a, provides that,

"Council shall fix the salaries of all officers * * * in the city government * * *. * * * All fees pertaining to any office shall be paid into the city treasury."

Section 1536-790 Revised Statutes provides in part that,

"The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justice of the peace * * *"

In my opinion the justice of the peace acting by direction of the mayor, under section 1536-773a is not a municipal officer — and is not "acting mayor" — as you assume. Instead he is a justice of the peace having certain extraordinary jurisdiction for the time being.

Section 126 M. C., however, does not provide that the fees of each municipal officer shall be paid into the city treasury. Instead it provides that fees "pertaining to any office" shall be paid into the treasury. By force of section 1536-790 the fees of the mayor, taxable by him as costs, are "fees pertaining to the office of mayor." The justice of the peace, exercising the jurisdiction of the mayor, possesses the power to tax these costs although that power is derived from an ordinance. He does not possess the power to retain them for his own use, however, as that is a power not possessed by the mayor.

I am, therefore, of the opinion that a justice of the peace, when exercising the powers of the mayor, has power to charge, tax and collect the same fees as costs to which the mayor is entitled under the ordinance prescribing the same, in cases for violation of city ordinances, but that when collected such fees must be paid by him into the treasury of the city.

Yours very truly

W. H. MILLER,

Assistant Attorney General.

POLICE PENSION FUND—WITNESS FEES.

Trustees of police pension fund entitled to accumulation of witness fees taxed in names of police officers in criminal cases and common pleas courts, grand jury proceedings, etc., if officers in whose names such fees are taxed have assigned their claims to such trustees.

April 9th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIR:—You have referred to me the letter of Andrew H. Foster, Deputy Examiner, in which he states that the trustees of the police pension fund of the city of Cleveland had made a demand on the county auditor for an accumulation of witness fees of police officers taxed by the county clerk for appearances before the grand jury, and common pleas and circuit courts. You inform me that the trustees of the pension fund have ordered that all witness fees properly taxable in the name of police officers shall be paid into the pension fund, and that the officers have assented to this order.

The questions raised by the examiner are as follows:

> 1. Does section 1315 Revised Statutes authorize such fees to be taxed in any case?
> 2. If the fees were lawfully taxed, does the fund belong to the trustees of the police pension fund?

My predecessor, under date of April 17, 1906, held that said section 1315 providing that,

> "No watchman or police officer is entitled to witness fees in any cause prosecuted under any criminal law of the state, or any ordinance of a city of a first or second class, before any police judge or mayor of any such city, justice of the peace, or other officer having jurisdiction in such cause."

did not deny to police officers the right to witness fees in criminal cases tried in the court of common pleas. Upon the reasoning of the same opinion such officers would be entitled to witness fees in grand jury proceedings also. In my opinion this holding is correct.

With respect to your second question I beg to state that section 2c of the act creating the board of trustees of the police pension fund, now section 4623 General Code, provides in part that,

> "* * * all rewards, fees, or proceeds of gifts and emoluments, allowed by the authority in charge or control of the (police) department, paid and given for or on account of any extraordinary service of any member of the force * * * shall be credited to the police relief fund."

I have some doubt as to whether, by itself, this provision authorizes the trustees of the police relief fund to make demand on the county auditor for an accumulation of witness fees. The phrase, "fees * * * *allowed by the authority in charge or control of the department* * * *" can not, in my judgment, apply to such witness fees to which the officers are entitled as a matter of law.

Having regard, however, to the manifest intention of the police relief statutes, I am of the opinion that the board of trustees, under favor of section 4624 General Code, which provides that "the trustees of the fund may take by gift * * * moneys or real or personal property * * *," may receive assignments from the several police officers entitled to the fees, and that the auditor would be justified in honoring a demand based upon such assignments. As the information by you does not disclose whether or not formal assignments have been executed by the police officers, I am unable to advise that the auditor must honor the demand of the trustees. When all proper formalities have been complied with, however, the trustees of the police pension fund will be entitled to the accumulation of the fees in question.

Yours very truly

U. G. DENMAN,
Attorney General.

POLICE OFFICERS' FEES.

Fees may not be taxed in name of police officers for services and return of warrants.

April 6th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIR: — I beg to acknowledge receipt of your letter of March 31st, submitting for my opinion thereon the following question:

> "May fees for services and return of warrants, subpoenas or other writs be taxed in favor of patrolmen and detectives, who are members of a city police force?"

This question, as you state, has been submitted to this department in at least one other instance, but when thus submitted it was so complicated with other questions that it was not clearly understood that an answer was desired on this point.

The former opinions, therefore, are not to be regarded as expressions of my judgment on this precise point.

I have carefully examined the statutes of this state and fail to find therein any provision authorizing directly or by implication the taxing of such fees. There is no doubt that, in the absence of any such provision, no such costs may be taxed.

I have already held that fees may not be taxed in the name of the chief of police for services performed by such patrolmen or detectives.

It follows that in no case is it lawful to tax any fees in the name of any person for the service and return of warrants, subpoenas or other writs by such inferior members of a city police department.

Very truly yours,

U. G. DENMAN,
Attorney General.

JUSTICE OF PEACE — LIABILITY OF — FOR FEES IN CITY CASES.

Supplementary to opinion of August 24th.

September 6th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Supplementing my opinion of recent date, relating to the disposition of mayor's fees in case a justice of the peace is called upon, under section 1536-7734 R. S., to exercise the judicial functions of that officer during his absence from the city, and replying to a further question suggested by your examiner, I beg to state that in my opinion an action would lie on behalf of the city against a justice of the peace and his bondsmen, as such, to recover such fees illegally retained by him in ordinance cases.

As stated in the former opinion, a justice while exercising the powers and duties of the mayor in the judicial capacity of the latter, is, nevertheless, acting as justice of the peace with certain extraordinary jurisdiction and power, and the powers, duties and liabilities thus arising pertain to his office as justice of the peace.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

MUNICIPAL CORPORATIONS — CONTRACTS — MODIFICATION — SANITARY POLICE OFFICER.

Certificate that money is in the treasury, etc., must be issued in case liability of city on contract is increased by modification thereof.

Sanitary police officers were not under civil service prior to adoption of Paine Law.

July 6th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have verbally requested my opinion upon the following questions:

1. Are additional expenditures arising from the modification or alteration of a municipal contract under favor of section 143 M. C., legal without the issuance of the auditor's certificate, under section 45 M. C., to the effect that the money necessary to defray such additional expense is in the treasury, etc.?

2. Were sanitary police officers protected by civil service rules prior to the enactment of the Paine law?

Both of these inquiries I am told arise under the law as it existed before the enactment of the Paine law and, of course, before the adoption of the General Code. Section 45 M. C. provides in part that,

"No * * * obligation involving the expenditure of money shall be entered into, nor shall any * * * resolution * * * for the expenditure of money be passed by * * * any board * * * of a municipal corporation unless the auditor of the corporation * * * shall first certify to council that the money required for the * * * expenditure, or to pay the * * * expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose * * *; and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the * * * obligation or so long as the * * * resolution * * * is in force; all * * * obligations, and all * * * resolutions * * * entered into or passed contrary to the provisions of this section shall be void, and no party whatever shall have any claim or demand against the corporation thereunder; nor shall the council or a board * * * of any municipal corporation, have any power to waive or qualify the limits fixed by such * * * resolution * * * or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such * * * resolution * * *".

Section 143 M. C. provides in part that,

"* * * whenever it becomes necessary, in the opinion of the directors of the appropriate department in cities * * * in the prosecution of any work or improvement under contract to make alterations or modifications in such contract, such alterations or modifications shall only be made by such directors in cities or councils in villages, by resolution, but such resolution shall be of no effect until the price to be paid for the work and material, or modified contract, has been agreed upon in writing and signed by the contractor * * * and the directors on behalf of the corporation".

It will be seen that the section last above quoted necessitates the making of a new or subsidiary contract in case of desired alterations in an original municipal contract. In my opinion these subsidiary contracts are at least "obligations" within the meaning of section 45 M. C., if the result of the making of such subsidiary contract is to fasten upon the city a contingent liability exceeding the amount agreed upon in the original contract and which is already covered by the certificate under section 45 M. C. Inasmuch as the contract is made effective by resolution, I am of the opinion that the certificate should be filed as a condition precedent to the legal passage of such resolution. Of course it is understood that in cases where this formality has not been observed and money has been actually paid to contractors for work actually done under such modified contracts at a cost exceeding the amount of the original certificate, such excess cannot be recovered from the contractor unless the additional work was not reasonably worth the amount paid for it, and in the absence of fraud. State ex rel v. Fronizer 77 O. S. 7.

I am, therefore, of the opinion that the law requires the certificate mentioned in your first question to be made and filed in case of additional expenditures made necessary by the modification of a municipal contract.

Answering your second question I beg to state that section 2115 R. S., adopted and kept in force by section 189 M. C., provided in part that,

"*The board of health* shall also have power to appoint, with the consent of council, as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation may require, and such persons shall have (a) general police powers, and be known as the sanitary police. *The board shall have exclusive control of their appointees,* * * *. All such appointees shall serve during the pleasure of the board".

This section is in itself conclusive of your question. Without quoting any of the former sections of the municipal code, suffice it to say, that the civil service section, so-called, applied only to the department of public safety. (See particularly section 153 and section 156, etc., M. C., as the same existed prior to the exactment of the Paine law.) As is clear from section 2115 R. S., sanitary police were at that time not within the safety department.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — CONSULTING ENGINEER — VARIOUS QUESTIONS RELATING TO PROCEDURE IN EMPLOYING DISCUSSED.

August 9th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have handed me the letter addressed to you by Mr. E. G. Bradbury, Consulting Engineer, and you request my opinion as to the following questions submitted to you by him:

"1. Has a city the right to employ an engineer other than the city engineer to prepare plans for or supervise the construction of a sewer system, sewage disposal plant, water works, water purification plant or street improvement?

"2. If the compensation of an engineer employed by a city or village for special work, or as consulting engineer is in excess of $500.00, is it necessary to advertise for such service whether the same is to be paid for on a salary, per diem, lump sum or percentage?

"3. If on a per diem or salary basis can the same be made to include the service of draftsman and other assistants?

"4. In the case of a city is it the prerogative of the director of public service or of the council to fix the compensation of engineers employed by said director?

"Section 227 of the code explicitly confers upon the council authority to fix the salaries and compensation of all city employes whose number is determined by them and to fix the amount of bond to be given by employes in any department of the city government, (if bond be required). Does the power to fix such salaries and compensation extend to such employes as are by section 145 made exceptions to the general rule laid down in section 227?

"5. Does the same rule apply in case the total compensation is less than $500.00?

"6. If council is required to fix the compensation, then in the case of a city having issued bonds for the purpose of constructing a specified improvement and the council having authorized the Director of Public Service to expend the proceeds of said bonds and council further having authorized by proper ordinance or resolution the Director of Public Service to have plans and specifications prepared for the said improvement at a stated price or not to exceed a stated price, the same being in excess of $500.00, is such action of council a sufficient fixing of the compensation of the engineer employed by said director for the purpose specified, said engineer being employed on a per diem, or must council fix the per diem rate to be paid?

"7. How should a city or village having no regularly employed engineer proceed in the case of projected improvements to be paid for by special assessment, the preparation of plans, estimates, etc., being a necessary preliminary to the legislation ordering such improvements, and it being desired to include the cost of plans, etc., in the cost of the improvement, the same to be paid for by property benefited?"

Answering the first question submitted by Mr. Bradbury I beg to state that in cities there is no statutory office such as "city engineer." Under section 4327 General Code the director of public service has authority to "determine the number of * * * engineers * * * necessary for the execution of the work and the performance of the duties of this department" (which, of course, includes the public utilities and undertakings enumerated by Mr. Bradbury.) The action of council under section 4214 General Code, fixing, by ordinance or resolution, their respective salaries and compensation (referring to the officers and employes of the various municipal departments), supported by appropriation, or perhaps an issue of bonds, is, of course, necessary in order to arm the director of public service with complete authority to employ an engineer. When all these requirements have been complied with, however, the director of public service may, in my judgment, employ as many engineers as he sees fit, and, if the action of council is consistent therewith, may make such employment for the accomplishment of a specific undertaking, rather than in a permanent manner, at an annual salary, etc.

Referring to the second question submitted I beg to state that section 4221, applicable to village councils, provides in part that " * * * when any expenditure *other than the compensation of persons employed therein,* exceeds five hundred dollars" competitive bids shall be provided.

So also section 4328 General Code, which governs the director of public service in a city in making contracts within his department, provides in part that, * * * when an expenditure within the department, *other than the compensation of persons employed therein,* exceeds five hundred dollars," the director shall advertise for bids.

As already indicated, all the engineers, consulting and otherwise, employed by the public service department of a municipality, are "persons employed therein" within the meaning of these quoted provisions, and it is not necessary to advertize for competitive bids in the making of such a contract of employment. I do not wish to be understood as condemning the practice of advertising for bids in such cases if such practice exists. Doubtless the same is well advised from a business standpoint. There is no law requiring such action, however.

Answering the third question, I am of the opinion that consulting engineers may be employed by cities and villages either at a stated compensation for the entire work, or on a per diem or salary basis, and in either event the compensation

allowed the consulting engineer, may be made to include the services of draftsman and other assistants employed by him in the performance of the services required of him. While the statutes defining the powers of the director of public service are to be strictly construed, yet a practice such as this would be in conformity to the usages of business and as such should be upheld in the absence of specific statutory prohibition.

Answering the fourth question submitted by Mr. Bradbury, I beg to state that, in my opinion, council should fix the compensation of all employes within the department ot public service, including engineers.

Section 4214 General Code, is in part as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. * * *"

Section 4327 General Code, formerly section 145 M. C., "provides otherwise" with respect to the *determination of the number* of employes in the department of public service, but does not provide for the fixing of the salaries and compensation of the employes in such department. I am, therefore, of the opinion that, notwithstanding the apparent ambiguity of section 4214, the same confers upon council the power to fix the salaries and compensation of engineers employed by the director of public service.

The fifth question submitted by Mr. Bradbury has been answered by the foregoing.

Referring to the sixth question I beg to state that, in my opinion, the director of public service may not, by contract, employ an engineer or any other employe at a per diem unless the same has been fixed and determined by council. In the case submitted by Mr. Bradbury the action of council should, in my judgment, be deemed sufficient to authorize the director of public service to employ an engineer to do the work for a stated "lump sum" compensation, but not to employ such an engineer by the day at a rate to be determined by contract between the director and the engineer.

In consideration of the seventh question asked by Mr. Bradbury the following provisions of the General Code are in point:

Section 3896:

> "The cost of any improvement contemplated in this chapter shall include (here follows an enumeration of different items, no specific mention being made of the expense of procuring plans and specifications), and any other necessary expenditure."

Section 3816:

> "At the time of the passage of such resolution (of necessity) council shall have on file in the office of the director of public service in cities and clerk in villages, plans, specifications, estimates and profiles of the proposed improvement * * *"

Under these two sections, or rather, the corresponding sections of the Municipal Code of 1902, my predecessor advised your Bureau that

> "If" the superintending and engineering, in connection with the construction of a bridge, were performed by the engineer of a city and his assistants, who were appointed as such at a fixed salary, which is paid out of the general funds of the municipality, the cost of such superintending and engineering cannot be paid from such bond issues; but if a special engineer of such an improvement is necessary, * * and is employed for that purpose, the amount allowed for his services may properly be paid from the proceeds of the bond issue, provided the amount of his compensation has been duly appropriated for that purpose, by council. (Section 45 M. C.; Longworth v. Cinti., 34 O. S. 101; Commissioners v. Fullen, et al, 118 Ind. 158; Pittinger v. Wellsville, Vol. 52, O. L. B. 83.)
>
> "The latter portion of your question should be answered * * * by stating that if the board of public service is of the opinion that special engineers should be employed * * * the compensation of such engineers as fixed by the board may be paid as part of the cost of the improvement, when duly appropriated therefor, either from the fund raised by special assessment or the proceeds of a sale of bonds made for the purpose of constructing such improvement."
>
> Annual Report of Attorney General for the year 1907, page 154.

In all the foregoing I concur and suggest the following procedure in case the employment of an engineer for the special purpose of preparing the necessary plans and specifications for use in the construction of a public improvement to be paid for by special assessment is deemed advisable.

1. Council should determine at the time of passing the ordinance providing for the assessment of the cost of the improvement upon the abutting property, which ordinance should precede all other steps taken, that the compensation of the engineer is a necessary part of such costs. Said ordinance should also fix such compensation or the rule by which it shall be determined.

2. The director of public service may, in such case, with or without the direct authority of council, employ an engineer to do the necessary work, and may expend from the proceeds of bonds issued or assessments levied, the money necessary to discharge, on the city's part, the terms of the contract of employment.

Yours very truly
W. H. MILLER,
Assistant Attorney General.

PREMIUM ON BONDS OF MEMBERS OF POLICE AND FIRE DEPARTMENT — AUTHORITY OF DIRECTOR OR COUNCIL TO ORDER PAID — Y. M. C. A. MUST PAY WATER RENT — CIVIL SERVICE COMMISSIONER — MANNER OF CERTIFYING NAMES FOR APPOINTMENTS.

City auditor may not draw warrant to pay premium on bonds of members of police and fire departments even though council or director of safety so directs.

Council or director of service may not allow free water rent to Y. M. C. A.

Where one of three men certified to appointing officer by civil service commission refuses appointment, commission must, upon notice, then certify the three candidates graded highest.

May 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You submit to this department the following questions, in request for opinion:

> "1. Should the city auditor draw his warrant in payment of the premium on bonds of members of the police and fire departments, if council by ordinance has stipulated that the city shall pay for the premium on said official bonds? If council has not acted upon the matter, has the director of safety the authority to allow such claim and should the city auditor draw his warrant in payment thereof?
>
> "2. May the council or director of public service allow free water to the Young Men's Christian Association from the service furnished by the municipal waterworks? May any city authority extend the free water privileges beyond those set forth in old section 2417, R. S.?
>
> "3. If one of the three men certified to the appointing officer by the civil service commission of a city refuses the appointment upon the same being tendered to him, may the civil service commission be required by the appointing officer to certify an additional name before he makes the appointment to fill the vacancy in a position in the civil service?"

1. As to your first question, the only authority which I am able to find for the payment of premium on bonds of members of police and fire department, or other public officers within this state, is contained in the act of 97 O. L. 182, (3641c R. S.), which act was declared unconstitutional by our Supreme Court in the case of State ex rel. v. Robins, 71 O. S. 273, and also in the case of Haunts v. Lanman Company, 15 O. D. 64. This unconstitutional act contained among other things the following provision:

> "In all other cases, where, by the foregoing provision of this act, a corporate surety or guarantor is required, the premium to be paid to any such company or companies for becoming such surety or guarantor, shall be paid out of the general fund of the division of government by or for which the person giving such bond or undertaking was appointed or elected."

The above quoted language is not found in the act of 92 O. L. 320, which the act of 97 O. L. 182 attempted to amend as to section 3641c, R. S., nor is such language contained in sections 9571, 9572 or 9573 of the General Code which appears to be a codification of section 3641c as contained in the act of 92 O. L. 320. The act of 92 O. L. 320 provided in part as follows:

> "* * * and any judge, court or officer, whose duty it is to pass upon the account of any assignee, trustee, receiver, guardian, executor, administrator or other fiduciary, required by law to give bond as such, and whenever such assignee, receiver, trustee, guardian,

executor, administrator or other fiduciary, has given bond with a surety company as surety thereon, shall allow, in the settlement of the account of such assignee, receiver, trustee, guardian, executor, administrator or other fiduciary, a reasonable sum paid a company authorized under the laws of this state so to do, for becoming his surety on such bond, etc."

The present section 9572 of the General Code contains almost identically the same language.

The fact that it was deemed necessary to add the above quoted language in the act of 97 O. L. 182 to the provisions of section 3641c, R. S., as found in the act of 92 O. L. 320, indicates that, in the opinion of the General Assembly, the language of 92 O. L. did not permit the payment of premiums upon bonds of such public officers as members of the police and fire department or other officers of the political subdivisions of the state. In addition to this, the specific uses of the terms "assignee," "trustee," etc., in the act of 92 O. L. 320 and also section 9572 of the General Code, under the rules of statutory construction would necessarily exclude any other classes of persons from coming within the provisions of such section.

It appears that the codifying commission ignored the act 97 O. L. 182 for the reason that the Supreme Court, in the case of State ex rel. v. Robins, 71 O. S. 273, declared the entire act to be unconstitutional. A further reason for excluding the provision authorizing the payment of premiums in the case of public officers from the present code is found in the following language of the Supreme Court in such case:

"The requirement of the statute is that an executor, administrator, guardian, trustee or other fiduciary shall give a security company as bondsman and that the estate shall pay for it, which is a taking of private property for private uses without compensation, and that a public officer shall give bond with a surety company as surety, the premium to be paid out of the public funds. The effect of the latter provision is to require the state, county, township or municipality to pay to the enrichment of security companies, each year, vastly more than it would lose by defaulting public officials; and it thus becomes evident that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result perhaps in no official bond in any case. It does not seem to us, therefore, that any part of this statute was promoted by considerations of public necessity of public welfare, and thence it follows that it is an unconstitutional restriction upon the liberty to contract which is guaranteed by article 1, section 1 of the constitution of this state."

The Court further say, page 293:

"but it is pressing the conclusion too far to maintain that the legislature may go beyond the purpose of the security to be given, and may require things to be done which do not increase the protection of the obligee, which abridge individual rights without contributing to the general welfare, and which enrich a designated class of sureties to the exclusion of all others. Such a conclusion would lead not only to violation of article 1, section 1 of our constitu-

> tion, as already shown, but of article 1, section 2, also, which declares that 'government is instituted for the *equal* protection and *benefit*' of the people."

It is to be noted that the above language attacks the constitutionality of the provision for paying premiums upon the bonds of public officers.

Upon investigating the powers granted to municipalities, I find that while cities through their councils, may provide for the salary and compensation of municipal officers, no provision is made anywhere for the payment of premiums on bonds of officers, which payment can in no wise be included within the term "salary" or the term "compensation." The giving of a bond is preliminary to the holding of an office and the payment of such premium is a personal matter between the person giving the bond and his surety.

For all of the above reasons I am of the opinion that a city council is without power to provide for the payment by the city of premiums on the official bonds of members of the police and fire departments, that the director of safety of a city is without power to allow such a claim, and that the city auditor is without authority to draw his warrant in payment thereof.

2. As to your second question, section 3963 of the General Code is the codification of former section 2417 R. S. and provides as follows:

> "No charge shall be made by such director for supplying water for extinguishing fires, cleaning fire apparatus or for furnishing or supplying connections with fire hydrants and keeping them in repair for fire department purposes, the cleaning of market houses, the use of public school buildings, nor for the use of any public building belonging to the corporation, or any hospital, asylum or other charitable institution devoted to the relief of the poor, aged, infirm or destitute persons or orphan children."

It is a well settled rule that statutes granting exemption from taxation, assessments or charges due the public must be strictly construed in favor of the public and that, unless an exemption is clearly and explicitly indicated in the language of the statute, there can be no escape from payment to the public.

Section 3963 makes specific exemptions from charge for supplying water and the enumeration of the exemptions made in this section acts as a prohibition against exemption in all cases not thus enumerated. A Young Men's Christian Association cannot in any manner be included in any of the classes named in such section 3963. Even though it may be classed as a charitable institution, this section exempts only charitable institutions which are "devoted to the relief of the poor, aged, infirm or destitute persons or orphan children," and a Young Men's Christian Association is not an institution of such character.

I am, therefore, of the opinion that a Young Men's Christian Association may not be furnished any free water by a municipality, and I am further of the opinion that no city authority can extend the free water privileges beyond the limits specifically set out in section 3963 of the General Code.

3. As to your third question, sections 4481 and 4482 of the General Code, formerly sections 160 and 161 of the Municipal Code, provide as follows:

> "Section 4481. Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such

board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

"Section 4482. Forthwith, upon such appointment and employment, each appointing officer shall report to the civil service commission the name of such appointee or employe, the title, the character of his office, the date of the commencement of service, and the salary or compensation thereof, and such other information as the commission requires in order to keep the roster herein mentioned."

You will note that in case of a vacancy the commission shall certify to the appointing officer "the three candidates graded highest" and that the appointing officer "shall thereupon appoint one of the three so certified." The language "appointment and employment" in section 4482 succeeds the language "appointment or employment" in section 161 of the Municipal Code and in my opinion the words "appointment" and "employment" are used as synonomous. When, therefore, the appointing officer appoints one of the three candidates certified to him, he has filled a vacancy and the person appointed by him is entitled to the position for the reason that his application for employment has been fully accepted. Should he fail to begin work in such position, the appointing officer has fully performed his duties as to the three candidates certified to him, because he has appointed "one of the three so certified" and a new vacancy has occurred which should be filled by the appointment of one of three candidates to be again certified to him by the civil service commission. It appears to me that the appointing officer should not be denied, in any case, the right to make his selection from three candidates who are eligible and willing to serve in the position.

I am, therefore, of the opinion that, where an appointing officer has appointed one of the three candidates certified to him by the civil service commission, such commission should, upon notice from the appointing officer, certify to him "the three candidates graded highest," in order that the appointing officer may appoint one of the three to the position which is to be filled.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION MAY NOT SELL ALL ELECTRIC POWER OF MUNICIPAL PLANT TO PRIVATE CORPORATION.

November 30th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of November 17th, enclosing a copy of an agreement made and entered into between the Board of Public Service, of a certain city, with the consent of council, on May 18th, 1909, with a certain electric and gas company, the terms whereof will be hereafter more fully set forth. You request my opinion as to the validity of this contract.

The following are the material portions of the contract:

"This agreement made and entered into by and between the city * * * through its board of public service, and with the consent of council, said city being hereafter known as party of the first part, and the * * * electric and gas company, being the owner of certain water power, from which electricity is generated, by its proper authorized officers, party of the second part:

"WITNESSETH: That said second party hereby agrees to furnish said first party by means of its said water power * * * electric current * * * to be delivered to party of the first part at its power station in the city * * * on the following terms and conditions:

"Party of the second part is to furnish the meters, the transformers necessary, and make the switchboard connections on the property of the party of the first part; said meters, transformers and switchboard connections are to be and remain the property of the second party. Also party of the second part agrees to furnish party of the first part with two pumps * * * for the pumping of water, the same to be driven by motors * * * which * * * party of the second part also agrees to furnish. * * *

"Party of the first part hereby agrees to operate the electric driven pumps exclusively during the period of this contract, which shall be for twenty (20) years, and to furnish the city and its inhabitants * * * *only such current as it buys under this contract,* the intent being that party of the first part uses the current which it buys from second party exclusively for the power to drive all water pumping machinery, and also electric light service, which the second party agrees to furnish to first party, and to no others within the limits of said city during the terms of this agreement."

"Party of the second part is hereby given permission by party of the first part to make all necessary changes and repairs at the power house by party of the first part, so that in case of interruption to the service, or shortage of power, * * * party of the second part may, at its option, operate any, or all, of the steam plant of party of the first part. * * * Whatever labor or material is put into the betterment of the power station of party of the first part by party of the second part, shall not effect the title of the property * * * but will be given to party of the first part by party of the second part for the purpose of making this an auxiliary steam plant that may be operated at any time when party of the second part may so desire. Party of the second part further agrees to pay one dollar per day rental for each day that the plant is operated as an auxiliary * * *"

"Party of the first part agrees to pay therefor the prices named herein, to-wit:

"Two and one-quarter (2¼c) cents per k. w. hour, as measured by the meters, in the power house of party of the first part, payment to be made on the 20th of the month for all current which has been used the preceding month. * * * (The contract provides for certain contingencies upon which the party of the second part will reduce the rate to two (2c) cents per k. w. hour.) The contract then provides that "at this time the title to the pumps, etc., shall pass from party of the second part to party of the first part * * *. The rate of two (2c) cents per k. w. hour shall extend for the balance of twenty (20) years * * *".

While the contract does not so expressly state you inform me that the reference to "pumps" and "steam plant", etc., is such as virtually turn over to the electric and gas company existing municipal water works and electric light plants, in other words, that the contract provides that the company shall operate these two municipal plants and sell the current to the city at a certain price.

I do not believe this contract is valid. It certainly is not enforcible under section 143a M. C., in force at the time the contract was entered into. That section provides in part that,

> "The directors of public service * * * by and with the consent of the council * * * are hereby empowered to enter into a contract with the owners of any hydraulic * * * to furnish water power for the propeling of machinery nor or hereafter to be erected in the water works, electric light or gas plant of such municipal corporation * * * for any term of years, and the provisions of section 143 and section 45 of this act herein referred to, and to which this is supplemental, shall not apply."

This section authorizes a contract for water power while the contract is, at the very least, a contract for electric current.

The only other section of the Municipal Code under which authority for the contract might be claimed is section 45 which provides in part as follows:

> "* * * The council of any city may authorize * * * a contract with any person, firm or company for lighting the streets, alleys, * * * and public places in the municipal corporation, or for furnishing water to such corporations, or for the collection and disposal of garbage in said corporation, or for the leasing of the electric light plant and equipment, or the water works plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract; * * *"

The contract above quoted is not a contract for the lighting of streets, etc., in the municipal corporation. It is simply a contract for certain electric current and power. Neither is it a contract for the leasing of the electric light plant and equipment, or the water works plant of a third party, as, under its terms, the municipal plants are to be turned over to and operated by the third party. It is not a contract for furnishing water to the corporation. It is, therefore, not within the authority of the above quoted clause of section 45.

Under section 70 M. C. every municipal corporation is vested with power "to furnish the municipality and the inhabitants thereof with light, power and heat, and to procure everything necessary therefor * * *".

Under this section I have heretofore held, in an opinion to the City Solicitor of Nelsonville, that a municipality might lawfully buy electric current produced in a plant outside of its borders, and sell such electricity again to private consumers. But this again is not the arrangement witnessed by the contract above quoted The company under this contract is to operate the municipal plant. It appears in the transaction not as a manufacturer or owner of an electric light plant, but merely as the owner of water power, evidently seeking to conform to the provisions of section 143a.

In short, I find no authority anywhere in the Municipal Code for this kind of a contract, which, not coming within the provisions of section 143a or 45 M. C., would have to be condemned at any rate on the ground that it was not entered into after competitive bidding, and that the auditor has not certified that the money necessary to discharge the contract is in the treasury and unappropriated for any other purpose.

Very truly yours,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — STREETS AND ALLEYS — ABANDONMENT — STATUTES OF LIMITATIONS.

August 3rd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You have submitted to me for my opinion thereon the following question:

> 1. An alley surveyed and dedicated as such has for 35 years been peacefully, openly, notoriously and exclusively within the possession of owners of abutting property; has the public lost its title thereto or easement therein?
>
> 2. Assuming an affirmative answer to the first question, what proceedings are necessary to acquire on behalf of the public the full use and benefit of such alley?

Section 11220 General Code expressly provides:

> "If a street or alley, or any part thereof, laid out and shown on the recorded plat of a city or village, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owner or owners of the inlots, lots or outlots lying on, adjacent to or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession and occupancy of such owner or owners for the period of twenty-one years, and if such street, alley, inlot or outlot is a part of the tract of land so laid out by the original proprietor or proprietors, the public easement therein shall be extinguished and the right of such city or village, the citizens thereof, or other persons, and the council of such city or village and the legal authorities thereof, to use, control or occupy so much of such street or alley as has been fenced up, used, possessed and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to or along such streets or alleys who have occupied them in the manner aforesaid."

There is also much anthority in this state to the effect that the same rule obtained at common law, but I deem it unnecessary to quote the same in view of the express provisions of this section, which is a portion of the statute of limitations.

Answering your second question I beg to state that, the public having lost its rights to the alley in question the same cannot be again acquired without purchasing the necessary land or appropriating the same under sections 3679 et seq. General Code, formerly sections 12 et seq. M. C.

Yours very truly,

W. H. MILLER,

First Assistant Attorney General.

MUNICIPAL CORPORATION—STREET IMPROVEMENT—RIGHTS AND LIABILITIES OF CITY IN CASE MATERIALS NOT IN COMPLIANCE WITH SPECIFICATIONS ARE ACCEPTED AND PERMITTED TO BE USED BY CITY OFFICERS—GENERAL DISCUSSION.

Former member of board of public service retired from office within year may not legally act as chief inspector of improvements begun or prosecuted by city during term of office, or one year thereafter.

August 20th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIRS:—You have submitted to me various questions raised by your inspector in examining the affairs of the city of Akron as follows, viz.:

1. The specifications of a paving contract provide for brick of certain dimensions. The contractor furnishes brick having a depth uniformly less than that required by the specifications. Such brick are approved in advance by the board of public service and are permitted to be laid by the board. The director of public service, succeeding the board of public service, continues the policy of the board in this respect and permits the work to continue. Under authority of the board and of its successor, the director, the various payments provided for in the contract are ordered and made. The director of public service orders the final estimate to be paid but the city auditor refuses to comply with the order. No formal alteration or modification of the contract in the manner prescribed by statute has been attempted to be made. The improvement, with the exception of inter-sections, etc., is to be paid for by special assessment.

Query: (a) The work being completed by the use of such material, has the contract been substantially performed by the contractor?

(b) What are the present rights of the city, if any, and upon whom does liability to the city, if any, rest?

2. At the time the contract was entered into no certificate of the city auditor was filed to the effect that the city's portion of the funds was in the city treasury, etc. What effect does the absence of such certificate have upon the legality of the contract?

3. May an ex-member of the board of public service, retired from office within the year, be legally appointed chief inspector of improvements by the mayor or board of control, the position and salary having been previously established and authorized by council?

4. The specifications of a municipal contract for street improvements provide in effect that the board of control shall interpret the contract and be the sole judge of the proper execution of the work; and that the director of public service shall approve the brick to be used. Are such specifications lawful and binding upon the city, or are the decisions of the board of control and the director of public service, or either of them, subject to review?

5. May the sinking fund trustees of the city purchase notes issued by the city under authority of former section 95a M. C.?

The first set of questions submitted by you can not be answered strictly as questions of law. They are questions of mixed law and fact, and I can do no more than to suggest the principles of law applicable to their solution.

In the first place it is clear that if the directors and the director of public service were authorized to accept the performance tendered by the contractor, including the quality of material used by him, and that if such acceptance was binding upon the city, then the city is estopped so far as its interest in the contract is concerned. Like any other corporation, a municipality can only act through its duly authorized agents, and the acts of such agents, within the scope of their actual authority, are virtually, in law, the acts of the city. It is settled by well-established common law principles that an individual may accept any tender of performance, whether the same would otherwise be substantial performance of the terms of the contract or not, and thereby preclude himself from resisting payment of the full contract price. What acts amount to such acceptance, and what circumstances must exist in order to make the same conclusive upon an individual, are questions of minor importance in this connection. It follows that if a municipal corporation has the power to act as an individual in this respect, and that if this power is in turn delegated to any officer or agent of the corporation, then it is possible for such officer or agent, under certain circumstances, to render the city liable to pay the contract price of an improvement whether the same has been substantially performed or not.

I deem it proper here to remark that fraud of the contractor inducing acceptance on the part of an owner, whether an individual or a corporation, vitiates any acceptance made by the latter. This is one of the many circumstances above alluded to, but its importance justifies special mention of it. So also, fraud or conspiracy on the part of public agents otherwise authorized in the premises, renders any attempted acceptance by them on behalf of the corporation of no force as against the latter. This is very important, and I wish to advise you specifically that if the circumstances under which the directors and the director of public service of the city of Akron accepted the tender of performance described by you, as having been made by the contractor, under circumstances clearly showing an intent to defraud the city, then the city is not precluded by such acceptance from repudiating the same, and if the contractor is innocent of fraud from adjusting its account with him as best it may, or if the contractor himself is guilty of complicity in the fraud, from suing to recover damages therefor from him.

The foregoing general comments all relate to the city regarded as the real party in interest. However, it is obvious that, under your statement of facts, the major interest in the contract is held by the owners of property liable for assessment to pay for the improvement. As to such owners it is held in this state that, in the absence of fraud, the approval of the officers of the munici-

pality duly authorized in the premises is conclusive, regardless of the question of substantial performance.

McGlynn v. Toledo, 22 C. C. 34, affirmed without report, 47 W. L. B. 712.

While there may be some doubt as to the present application of this decision in its entirety, I have no hesitancy in stating that the principle, the support of which is herein cited, is correct.

The first inquiry then is as to the extent of the power of a municipality as such. This question is easily answered and I do not deem it worth while to cite authorities or statutes. In making public improvements, to be paid for by special assessment, a city as such has full power to contract and to act as an individual with respect to such contract. With respect to its own portion of the cost of the improvement it certainly has full power; with respect to the proportion of the cost assessed upon the owners of abutting property, it seems that if the requirements of the statutes with respect to the formalities of making such assessments are complied with, the city has full power subject to the foregoing qualification to bind those liable for the assessment.

What powers then are or were conferred upon the department of public service, and its directors or director, respecting the acceptance of a contract on behalf of a municipality?

The following statutory provisions are in point:

Section 140 M. C.:

"The directors of public service shall supervise the improvement and repair of streets * * *"

Section 143 M. C.; (Applicable to the board of public service as such.)

"* * * Whenever it becomes necessary, in the opinion of the directors * * * in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made by such directors * * * by resolution, but such resolution shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor * * * and the directors * * *".

These sections of the Municipal Code were amended by the enactment of the Paine Law so as to apply to the director of public service, but their provisions were otherwise substantially identical with the foregoing after such amendment. Sections 4325 and 4331, General Code, constitute a substantial reenactment of such amended sections.

Reading these sections together it appears in the first place that, under the first of them, all powers belonging to the city and to be exercised in its behalf with respect to the execution and performance of contracts, are vested in the department of public service and its supervising officers. This is made clear by an examination of the entire Municipal Code, which discloses that no such powers are conferred upon any other officer or department of the city. The conclusion then is that, by the force of the first section above quoted, all powers belonging to the city are to be exercised by the department, unless there is some

express or implied limitation on the exercise of such powers arising by virtue of some other statute. One such limitation is created by former section 143 M. C., now section 4331, General Code, quoted above; that is to say, the general power of the officers of the department of public service to change a contract — a power that would possibly otherwise exist as incidental to the power of management or supervision — is curtailed and limited by the requirement that changes be effected in a certain way. Your statement of facts discloses that the formalities prescribed by the statute were not complied with. Indeed, it seems that no one regarded the action of the directors of public service in accepting the brick in question as a change in the contract itself, although in one view of the case it might possibly be considered a change in the contract. In my opinion, however, it does not really amount to a change in contract inasmuch as the specifications themselves were not changed.

So far as these two sections are concerned, the directors and the director of public service had the power to exercise, on behalf of the city, its necessary power of acceptance.

The question is now raised as to whether the power to accept, the city government itself being a public agency, extends to the acceptance of something not in compliance with the terms of the contract. On the one hand, it is clear that large contracts, particularly construction contracts, are frequently incapable of exact performance; but, on the other hand, it is equally clear that the provisions of law respecting competitive bidding in the awarding of contracts, formalities in making alterations and modifications, etc., therein, are for the protection of the public, and should be liberally construed, so far as their effect upon the powers of officers of the city to bind the city is concerned.

It so happens that the determination of the exact extent of the power of the department of public service to determine whether a contract has been performed or not, is in this state not altogether to be made by application of common law rules.

Section 12918, General Code, formerly section 6970, R. S., provides in part as follows:

> "Whoever being an officer * * * whose lawful duty it is to superintend the erection, enlargement, repair or improvement of a public structure, or part thereof * * * knowingly performs work to be done in a manner other than in accordance with the plans and specifications thereof, or with material different from that required thereby, or, being a contractor * * * knowingly permits material to be used therein, different from the plans and specifications, and in violation of his contract, shall be imprisoned in the penitentiary not less than one year nor more than five years."

Ever since the revision of 1880 this statute has applied to all officers whose duty it is to superintend the improvement of any public structure, including, of course, municipal officers. Prior to that revision it did not apply to municipal officers.

See 70 O. L. 102, section 10,
66 O. L. 52, section 15.

Although the revision of 1880 did in this respect change the law it has remained unchanged from that time until the present, and no question could be seriously made at this time as to its applicability to municipal officers.

Some question arises as to the meaning of the word "structure" in this section. The section, while criminal and penal, it is at the same time remedial,

and upon principles heretofore alluded to in opinions from this department addressed to your Bureau, it should be given a liberal construction so as to effect the objects of its enactment and a strict construction with regard to its operation upon individuals. Under the rule of liberal construction the word "structure" is to be interpreted just as it would be in any remedial statute. Such a construction leads to the definition of a meaning broad enough to include a street improvement.

See Lewis vs. State ex rel 69 O. S. 473.

It is, therefore, my opinion that the statute applies to and prohibits any deviation from the plans and specifications of a paving contract.

What then is the exact meaning of this statute? Has it the effect of eliminating all question of substantial performance and forbidding the acceptance by the public authorities of work that is not performed according to the letter of a contract? I do not think that this is the meaning of the statute. The strict construction to which the statute is, in part, subject would lead to the conclusion that the general assembly must be deemed to have had in mind the rules of law pertaining to substantial performance, and inasmuch as such rules of law, as will be hereafter pointed out, impose no hardship upon the public, must have intended that they should remain in force unaffected by this statute, and that proof of substantial performance should be a perfect defense to a prosecution thereunder.

It is quite apparent, of course, that this statute, making criminal the doing of a certain act on the part of a public officer, has the effect of depriving him of authority to bind the city by such act. It would be fallacious to claim that, although a director of public service might be sent to the penitentiary for accepting work in violation of this statute, yet his acceptance would be binding on the city and on the owners of abutting property. The true rule is that, by virtue of this statute, the directors and the director of public service are deprived of power that otherwise would, under former section 141 M. C., vest in them, and that they can not arbitrarily bind the city by an acceptance of performance which is not substantial regardless of the question of good faith.

From all the foregoing it follows that the directors and the director of public service have authority to accept on behalf of the city the substantial performance of a contract, but no authority to accept any other kind of a performance, either in advance or after the same has been completed. It is true that this virtually denies to the directors and the director any real discretion in the matter at all, inasmuch as a contractor who had substantially performed his contract could recover from the city, subject to setoff, regardless of the approval or acceptance of any city official.

It is apparent then that the ultimate question involved in your inquiry is as to whether the contract in question has been substantially performed. This is, of course, a mixed question of law and fact. On the one hand failure to perform substantially may be so apparent as to preclude the question of substantial performance from being considered by a jury.

Meburin vs. Stone, 37 O. S. 49.

On the other hand, the question of substantial performance, when the same is subject to reasonable dispute may be submitted to a jury and thus become a subject of fact.

Kane vs. Stone, 39 O. S. 1,
Ginther vs. Schultz, 40 O. S. 104,
Ashley vs. Henahan, 56 O. S. 559,
Elizabeth vs. Fitzgerald, 114 Federal 547.

It seems to me that thickness of the wearing surface of the pavement is a vital and essential term of a paving contract, and that a uniform deviation in performance from the specifications relating to such thickness could scarcely ever be held to be a substantial performance.

Mehurin vs. Stone, supra.

However, I desire to express no opinion as to whether or not there has been specific performance in the instance cited by you. There is some authority to the effect that if the structure is reasonably adapted to the purpose for which it is intended, and is capable of service substantially equivalent to that which could have been performed if the contract had been completed according to the plans and specifications, then the performance is substantially made.

In the last analysis the question is one for expert witnesses and practical men to determine, by testimony respecting the comparative strength and wearing power of the two surfaces. If such testimony establishes that the surface as actually completed would last as long as that specified, and would retain its smoothness, etc., as long as that specified, then the conclusion would be that the contract had been substantially performed; and if the testimony was to the opposite effect the conclusion would be otherwise.

Having regard to my promise to discuss all the principles of law applicable to the question, I beg to state the consequences of the two possible conclusions of fact and law above suggested. If it is determined that the contract has been substantially performed, then, in my opinion, the contractor is entitled to be paid the full sum ordered paid by the director of public service. It is true that the rule respecting the measure of recovery in case of specific performance is that the contractor is entitled to recover the contract price less the damages to which the owner is entitled by reason of the deviations in the work from the specifications of the contract, but some one must determine for the city that the contract has been actually performed and that the city has suffered no damages. If the contractor should sue to recover in the absence of the approval of his final estimate, then his measure of recovery would be as above indicated, but his final estimate having been approved, he thereby acquired the right to payment in full. The city auditor, who is now refusing to honor the final estimate, - -and properly so doing.— is justified in refusing to pay only on the ground that the determination of the director of public service was illegal — not on the ground that if within the scope of his legal authority, it was nevertheless contrary to fact. In other words, if the contract is substantially performed, the director of public service has the authority to determine if it has been actually performed and that the contractor is entitled to the entire amount just as he has authority to act for the city in determining the amount which the city considers itself damaged by failure to perform in full.

If the conclusion of fact should be that the contract has not been substantially performed a very different question is presented. Had nothing been paid to the contractor he could recover nothing. The contract is express and substantial performance is a prerequisite to any right to recover. The contractor, who must be held to know the law, had no right to rely upon the acceptance of the brick by the officers of the service department if the same were not in compliance with the specifications. There is no recovery upon implied contract against a municipal corporation, and there is no recovery in this state upon an implied contract from any person where the terms of an express contract have been violated by the persons seeking to recover. See authorities above cited.

However, the contractor has already been paid a large portion of the contract price. This he can not be compelled to return. Though he has not performed his contract the city now has the fruits of his labor, so to speak, and will not be permitted to enrich itself unjustly by retaining both the work (which

it can not do otherwise than retain, of course) and recovering the money already paid to the contractor.

Fronizer vs. State, 77 O. S. 77.

However, it is clear that if the contract has not been substantially performed, the amount of money involved in the final estimate now being held up by the city auditor, should not be paid to him.

From all the foregoing it follows that, in the absence of fraud, the contractor is entitled either to be paid all of the final estimate or none of it, and that the city auditor should refuse to honor such estimate until the question as to whether the contract has been substantially performed is determined. This should be the finding of your Bureau in the first instance, and this conclusion answers the first subdivision of your first question.

The second subdivision of your first question pre-supposes a finding to the effect that the contract has not been substantially performed, or a conclusion that the city officers have acted fraudulently. It has already been stated that moneys already paid to the contractor can not now be recovered by the city in the absence of fraud, and this statement is in itself a partial answer to this portion of your question. There is, of course, no liability on the part of the manufacturer—a possibility suggested by the examiner—as the manufacturer is not a party to the contract with the city. The directors and the director of public service are technically liable to the city for any damage suffered by virtue of any act committed by them in excess of their authority. The acceptance of materials not in substantial conformity to the specifications of the contract is, as has been stated, in excess of the powers of these officers. They would, therefore, be liable at the suit of the city for damages measured by the amount of damage the city had suffered by paying the contractor more than his work is reasonably worth to the city; that is to say, it being determined that the contract has not been substantially performed and that the amount already paid to the contractor and not subject to recovery from him, exceeds the reasonable value of the improvement to the city, the difference thus ascertained would be the amount which could be recovered from the members of the board of public service. Inasmuch as no money has been paid out since the director of public service has taken office, it is probable that no finding could in any event be made against him. It is true that if the board of public service had acted as they might have had the right to act, the city would not have been liable at all to the contractor, and hence it might be argued that the measure of the liability of the officials should be the full amount paid by the city to the contractor upon estimates approved by the board. Such a holding, however, would result in the city recovering all the money paid for the pavement and keeping the pavement, and I do not believe that it is the correct rule. The principles applicable to this subject have been discussed in a former opinion to your department.

It is, of course, to be remembered that the directors as well as the director are liable for the entire sum paid, whether the contract has been substantially performed or not, if the transactions between the board and the contractor constitute a conspiracy to defraud the city, and this fact can be proved. The letter of the examiner does not impute any fraud to any person connected with the transaction, but I state this principle as one of the rules of law which might apply in a similar case.

With respect to your second question I beg to refer you to the opinion of this department addressed to your department in which the effect of the omission of a certificate required by former Section 45 M. C. is fully discussed. To recapitulate the holdings of that opinion I may state that so far as that portion of the improvement, the cost of which is to be assessed upon abutting property,

is concerned, the certificate of the auditor is not required, and the validity of the contract is in no wise affected by its omission. The omission of the auditor's certificate as to the presence in the treasury of the city's portion of the cost of the improvement is, however, probably a defect which would, at least, *pro tanto* defeat the right of the contractor to recover in any event, but which would not authorize recovery by the city of any moneys already paid to the contractor, upon the principle above set forth. The authorities and the statutes applicable to this question will be found set forth in the opinion referred to. The enactment of the General Code did not in any way affect the conclusions therein reached.

Answering your third question I beg to state that, in my opinion, an ex-member of the board of public service retired from office within the year may not legally be appointed chief inspector of improvements. Section 12912, General Code, formerly Section 6976, Revised Statutes, provides in part that,

> "Whoever being an officer of a municipal corporation * * * acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation * * * during the term for which he was elected or appointed, or for one year thereafter, shall be fined * * * and forfeit his office."

This section has been amended since the enactment of the General Code. The amendment is unimportant in this connection and I forbear to quote it. In my opinion, the office of chief inspector of improvements must constitute "acting as superintendent" within the meaning of the foregoing section, if the name of the office accurately indicates the duties to be performed by the officer. The official nature of the positions enumerated in Section 12912 indicates clearly that the intention of the general assembly was to prevent an ex-officer from acting in such capacities on behalf of the city.

I deem it proper to state, however, that this department has held that the phrase "during the term for which he was elected, * * * or for one year thereafter" modifies the words "undertaken or prosecuted" and not the word "acts;" so that in a given case the test is as to whether the work is begun by the corporation within one year after the retirement of the official, or prosecuted by the corporation during that period of time, and not as to the date when the individual begins his service as commissioner, architect, superintendent or engineer. It is apparent, of course, that the chief inspector of improvements could not perform any services within the year excepting upon work being prosecuted at that time by the municipal corporation, and for this reason the answer to your third question is unequivocally in the negative.

Your fourth question is sufficiently answered in the discussion relating to your first question. For the sake of clearness I may add that the determination of municipal officers as to the proper execution of a contract is conclusive upon the city only in the absence of fraud, and when the contract has been, irrespective of their action, substantially performed.

With respect to your fifth question I beg to state that this department has heretofore held that sinking fund trustees may not invest the funds in their possession in notes issued by the city under authority of section 95a M. C.

Very truly yours,

W. H. MILLER,

Assistant Attorney General.

COUNTY SURVEYOR MAY COMPEL COUNTY COMMISSIONERS TO FIX AGGREGATE COMPENSATION OF ASSISTANTS.

August 24th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of August 18th requesting the opinion of this department upon the following question:

> "If the county commissioners refuse to make an allowance for all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in a surveyor's office, as they are required to do by section 2787, General Code, may the county surveyor proceed in any way to compel the commissioners to take the necessary action?"

Section 2787, General Code, provides in part as follows:

> "* * * The county surveyor shall file with the commissioners * * * a statement of the number of all necessary assistants * * * in his office for the year beginning September first next succeeding, and their aggregate compensation. The county commissioners shall examine such statement, and after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year."

The duty of the county commissioners to examine a statement and to exercise their discretion in the matter of making alterations, and as to the amount to be expended, is mandatory, although such discretion as to alterations and amount can not itself be controlled. The duty to exercise discretion and to act in some way is one which may be enforced by mandamus upon proper relation. In my opinion the county surveyor has such an interest in the matter as to entitle him to sue as relator in such an action.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

TREASURER — COUNTY, FEES ON TAXES COLLECTED THROUGH BANKS PRIOR TO JANUARY 1, 1907.

August 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of August 11th requesting my opinion upon the following question:

> "In an opinion rendered to this department recently you hold that the fees which accrued to the county auditor's office at the February settlement, 1907, should have been divided between the auditor and

his fee fund in proportion to the amount of taxes collected prior to January 1, 1907, and the amount collected after that date, and that in cases where auditors failed to retain their proper proportion in accordance therewith adjustments may be made at this time.

"In one instance a county treasurer designated a number of banks throughout the county to receive taxes and said banks collected a large amount prior to January 1, 1907, but the same was not turned over to the county treasurer until some time after that date. Should this amount be considered as collected before January 1st, in making the adjustment referred to above?"

I assume that your question arises under some of the local laws contained in sections 1084-1 et seq. and 1088a and 1088b of Bates' Revised Statutes. Regarding these statutes as constitutional, and the method therein provided for the collection of taxes as legal, I am of the opinion that when taxes were received under authority of said sections by the persons or corporations designated by the treasurer, they are to be regarded as having been "collected" within the meaning of section 1069, Revised Statutes, as the same was effective prior to January 1, 1907.

I am informed, however, that in many counties of the state, treasurers have, for convenience, designated banks at which taxes might be paid without any warrant of law whatever. Wherever this is the fact, the opposite conclusion follows and taxes paid to a bank under such circumstances are not to be regarded as "collected" within the meaning of section 1069, Revised Statutes.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CLERK OF TOWNSHIP BOARD OF EDUCATION WILL NOT DEVOLVE ON TOWNSHIP CLERK UNTIL REORGANIZATION OF BOARD.

May 27th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of May 21st is received in which you request my opinion on the following question:

> Shall clerks of township boards of education elected by said boards, under section 4747 of the General Code, serve out the terms for which they were so elected, or are such clerks deprived of their office by the amendment of section 4747, as passed by the General Assembly April 21, 1910, approved by the Governor April 28, 1910?

In reply thereto I beg leave to submit the following opinion:
Section 4747 of the General Code prior to its amendment reads as follows:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president and a person, who may or may not be a member of the board, shall be elected clerk. The president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meetings."

Section 4747 as amended reads as follows:

> "The board of education of each school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and in township school districts the clerk of the township shall be clerk of the board. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

It is a well settled principle of statutory construction that all statutes must be given a prospective operation unless the intent of the legislature clearly appears to the contrary.

Cincinnati v. Seasongood, 46 O. S. 304;
2 Lewis' Sutherland Statutory Construction, 6 Am. & Eng. Ency. of Law, 939;
Sedgwick on Stat. & Const. Construction (2nd Ed.) 346.

The above quoted amendment to section 4747, therefore, must be held to be prospective in its operation, unless the intention clearly appears to the contrary from the wording thereof. This, however, is not the case but, on the contrary, the whole section is prospective in its intent. The first paragraph of the amended section, "The board of education of each school district shall organize on the first Monday of January after the election of members of such board", in my opinion governs and modifies the other provisions of the section and plainly shows the intention of the legislature in the enactment of this amendment to have been that this section, as amended, should apply to future organizations of such boards. In other words, all its provisions govern and apply to boards of education upon their organization "on the first Monday of January after the election of members of such boards."

I am, therefore, of the opinion that the provisions of this amended section, "in township school districts the clerk of the township shall be the clerk of the board", will operate only upon future organizations of such boards and, therefore, that the present clerks of township boards of education, holding office by virtue of their election by such boards of education, under section 4747 prior to its amendment, should serve out the terms for which they were so elected.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

COUNTY LAW LIBRARY — DISPOSITION OF FINES, ETC.

Under section 3056 General Code as amended common pleas and probate clerks must together contribute five hundred dollars out of funds assessed in such courts of law library fund; contributions of respective clerks need not be equal in amount; amounts on hand at end of first quarter must be paid over until amount paid by both clerks together exceed five hundred dollars.

August 24th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio

GENTLEMEN: — You have referred to this department a letter addressed to you by Hon. Frank W. Geiger, Probate Judge of Clark County, in which he submits the following questions:

"On May 10th, 1910, section 3056 of the General Code was amended so as to provide that not to exceed $500.00 be paid to the library trustees, out of fines assessed in common pleas and probate court. I desire to be informed on the following:

"1. Is the amount to be paid not to exceed $500.00 each court or a total of $500.00 for both courts?

"2. Am I protected in paying this money to the library association by virtue of this law?

"3. The question has also arisen as to whether the probate court which has sufficient money to pay the $500.00, should pay the total amount or half of the amount, and whether we may pay the whole amount at once, or must wait and pay in quarterly?"

Senate Bill No. 85, being the act referred to by Judge Geiger, provides in part as follows:

Section 3056:

"* * * In all counties the fines and penalties assessed and collected by the common please court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not exceed five hundred per annum."

It will be observed that the statute provides for no apportionment as between the two courts. It will also be noted that it imposes a duty upon the "*clerk* of such courts." If the singular number is to be retained then the statute is meaningless for there is no such officer. The obvious meaning of the statute, however, requires that the word "clerk" be read "clerks." Such a meaning imposes a duty upon the clerk of courts as clerk of the common pleas court and also upon the probate judge as clerk of his own court.

The latter portion of the sentence above quoted which prescribes the limitation called directly into question by the inquiry of Judge Geiger is very obscure. In the first place it will be noted that the word "sum" is in the singular number. Undoubtedly this fact alone lends support to the conclusion that the primary meaning of this portion of the sentence is that the sum paid into the library fund in any one year from *both* courts shall not exceed five hundred ($500.00) dollars. On the other hand, the lack of a provision for apportionment would seem to justify the conclusion that the intention was that each of the two courts should contribute the sum of five hundred ($500.00) dollars to the fund. This latter view, however, presupposes a legislative intent which, while reasonable, can not be assumed, viz., that the two courts should contribute equally or ratably to the fund. In other words, at first glance it would appear that this must have been the legislative intent, but upon careful analysis it appears that there is no justification for such a conclusion. The foregoing considerations all lead to the conclusion that no more than five hundred ($500.00) dollars per annum can be contributed to the library fund from both the common pleas and probate courts together, and that the trustees of the library association have no power to accept more than that sum in the aggregate from both of these sources. This statement answers the first question asked by Judge Geiger.

Answering Judge Geiger's third question, I beg to state that the above quoted provision requires that the fines and penalties collected in each of the courts be paid in quarterly. As I read it this provision means that the entire amount

available at the end of a given quarter is to be paid in and that if one or more such quarterly payments exhaust the amount which may be paid under the act, then the duty to make subsequent quarterly payments is discharged.

From all the foregoing it is apparent that the trustees of the law library association are entitled to receive such sums as the clerks of both of the courts have on hand at the end of the first quarter. If the clerk of the probate court, i. e., the probate judge first pays over the sum of five hundred ($500.00) dollars, by reason of having collected more than that amount from fines, during said quarter, then the trustees would be entitled to accept such a tender, and the clerk of the common pleas court would not be liable for any payment whatever. In short, the clerk first offering to pay must pay all that he can and his payment discharges the other clerk *pro tanto*. If both of the clerks refuse to pay and both have on hand sums which, in the aggregate, will exceed five hundred dollars, a very difficult question would be presented. I do not attempt to say what the holding of the court in such an instance would be. In fact, the law is very defective, and its practical operation is subject to grave difficulty.

The second question of the judge is sufficiently answered by the foregoing.

Very truly yours,

W. H. MILLER,

Assistant Attorney General.

COMMON PLEAS JUDGE—MANNER OF COMPUTING COMPENSATION.

March 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your letter of January 27th, in which you ask my opinion upon the following question, is received:

> "We desire your written opinion as to the salary of common pleas judges payable out of the county treasuries under section 1284a, Revised Statutes. Is the amount of additional compensation to be allowed under this section based upon the population of the county in which the judge resides at the time of his election, or is it based upon the population of the whole judicial subdivision when such subdivision comprises more than one county?"

In reply thereto I beg leave to submit the following opinion:
Section 2252 of the General Code reads as follows:

> "In addition to the salary allowed by the preceding section, each judge of the court of common pleas and of the superior court shall receive an annual salary equal to sixteen dollars for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office, if in a separate judicial subdivision. Such additional salary shall be paid quarterly from the treasury of the county upon the warrant of the county auditor. If he resides in a judicial subdivision comprising more than one county,

such additional salary shall be paid from the treasuries of the several counties of the subdivision in proportion to such population thereof upon the warrants of the auditors of such counties. In no case shall such additional salary be less than one thousand dollars or more than three thousand dollars."

Section 1384a of the Revised Statutes of Ohio reads, in part, as follows:

"Each judge of the court of common pleas and of the superior court shall receive, in addition to the salary allowed by section 1384 of the Revised Statutes, an annual salary equal to sixteen dollars per thousand for each one thousand population of the county in which he resided at the time of his election or appointment, as ascertained by the federal census next preceding his assuming the duties of his office, payable quarterly out of the treasury of the county of which he is a resident as aforesaid, if said county is a separate judicial subdivision, upon the warrant of the county auditor of said county, or, if he resides in a judicial subdivision comprising more than one county, out of the treasuries of the several counties comprising such judicial subdivision, in proportion to the population of the several counties of said judicial subdivision ascertained as aforesaid, upon the warrants of the county auditors of said counties; provided, that in no case shall such annual salary so payable to such judge out of the county treasury or treasuries be less than one thousand dollars or more than three thousand dollars; * * *"

It will be noted that in the above quoted section 2252 of the General Code, in the seventh line thereof, there is an apparent error in punctuation and paragraphing. That is, the comma appearing after the words "suchoffice" in that line should be a period and the period appearing in the eighth line after the word "subdivision" should be a comma, and the second sentence of that section should read as follows:

"If in a separate judicial subdivision, such additional salary shall be paid quarterly from the treasury of the county upon the warrant of the county auditor."

That this erroneous punctuation and paragraphing is due to clerical error becomes apparent from a reading of this section and of section 1284a, R. S. O., supra. Section 2252 of the General Code, thus corrected, subdivides itself into three divisions. The first paragrhp of which deals with the computation of the extra compensation therein provided; paragraph 2, as thus corrected, fixes the mode in which such compensation shall be paid when the judge entitled thereto resides in a county comprising a separate judicial subdivision; the 3rd paragraph thereof fixes the mode of payment of such compensation when the judge entitled thereto resides in a judicial subdivision comprising more than one county; and the 4th paragraph thereof places a minimum and maximum limitation upon such extra compensation.

I am, therefore, of the opinion that the amount of additional compensation to be allowed, under such section, to a common pleas judge is based upon the population of the county in which such judge resided at the time of his election or appointment; but, where such common pleas judge resides in a judicial subdivision comprising more than one county, then the amount of such additional compensation, computed from the population of the county in which he resided

as aforesaid, is to be divided for payment among the several counties of such subdivision in the same proportion as the population of each county bears to the total population of the whole judicial subdivision.

Very truly yours,
U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION.

Clerks of township boards elected by board January, 1910, not deprived of office by amendment of section 4747, General Code, enacted April 21, 1910.

May 27th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of May 21st is received, in which you request my opinion on the following question:

> Shall clerks of township boards of education elected by said boards, under section 4747 of the General Code, serve out the terms for which they were so elected, or are such clerks deprived of their office by the amendment of section 4747, as passed by the General Assembly April 21, 1910, approved by the Governor April 28, 1910?

In reply thereto I beg leave to submit the following opinion:
Section 4747 of the General Code, prior to its amendment, read as follows:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president and a person, who may or may not be a member of the board, shall be elected clerk. The president shall serve for a term of one year and the clerk for a term of not to exceed two years. The board shall fix the time of holding its regular meetings."

Section 4747 as amended reads as follows:

> "The board of education of each school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and in township school districts the clerk of the township shall be clerk of the board. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

It is a well-settled principle of statutory construction that all statutes must be given a prospective operation unless the intent of the legislature clearly appears to the contrary.

Cincinnati v. Seasongood, 46 O. S., 304.
2 Lewis' Sutherland Statutory Construction, 6 Am. & Eng. Enc. of Law, 939.
Sedgwick on Stat. & Const. Construction (2nd Ed.) 346.

The above quoted amendment to section 4747, therefore, must be held to be prospective in its operation, unless the intention clearly appears to the contrary from the wording thereof. This, however, is not the case, but, on the contrary, the whole section is prospective in its intent. The first paragraph of the amended section, "the board of education of each school district shall organize on the first Monday of January after the election of members of such board," in my opinion governs and modifies the other provisions of the section, and plainly shows the intention of the legislature in the enactment of this amendment to have been that this section as amended should apply to future organizations of such boards. In other words, all its provisions govern and apply to boards of education upon their organization "on the first Monday of January after the election of members of such boards."

I am, therefore, of the opinion that the provision of this amended section, "in township school districts the clerk of the township shall be clerk of the board," will operate only upon future organizations of such boards, and, therefore, that the present clerks of township boards of education holding office by virtue of their election by such boards of education, under section 4747 prior to its amendment, should serve out the terms for which they were so elected.

Yours very truly,
U. G. DENMAN,
Attorney General.

ELECTIONS — EXPENSES, PAYMENT OF.

What election expenses, properly payable out of the county treasury, require the allowance of the county commissioners?

April 22nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of April 20th, in which you request my opinion upon the following questions:

> "Does the statute require the allowance by the county commissioners of expenses incurred by the deputy state supervisors of elections for the following purposes:
>
> 1. For the purchase of supplies, such as poll books, tally sheets, ballots and other stationery for election purposes.
> 2. For furniture, carpets and other supplies for the office of the deputy supervisors.
> 3. For the compensation and mileage of judges and clerks of election.
> 4. For the personal expenses incurred by members of the board under the direction of the board as a whole.
>
> Should such expenditure be allowed and approved by the county commissioners before payment, or may the county auditor legally issue his warrant upon the county treasury upon the certificate of the deputy state supervisors?"

You state specifically that the questions all arise under the Revised Statutes, but not under the General Code. I, therefore, beg to make the following quotations as embodying the statute law bearing upon the different inquiries submitted by you.

Section 2926t Revised Statutes:

"Each deputy state supervisor, in counties containing cities in which registration is required, shall, in addition to the compensation provided for in * * * section (2866-4) receive * * * the sum of five dollars for each election precinct, in such city; * * *

"The additional compensation provided by this section shall be paid monthly from the city treasury, on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board."

"The registrars of each election precinct shall be allowed and *paid four dollars per day, and no more, nor for more than six days in any one election* * * *. In cities containing a population of thirty thousand or more, the judges of election, including registrars as judges, and the clerks of election, shall each be allowed and paid five dollars for each election at which they serve, and no more either from the city or county, and in other cities they shall each be allowed and paid three dollars for each election at which they may serve, and no more, either from the city or county. But no registrar, judge or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors * * * certifying that each has fully performed his duty * * * and stating the number of days' service actually performed by each, *and signed by the chief deputy* and clerk of the board to the city or county auditor.

"But for all November elections the county in which such city is located shall pay the general expenses of such election other than the expenses of registration; and such allowance and order *for such expenses* and compensation to such judges and clerks shall be signed by the chief deputy and clerk of such board to the county auditor * * * who shall issue his warrants upon the county treasury for such amounts."

Section 2966-4:

"* * * the compensation paid to each of (the) deputy supervisors under this section * * * shall be paid quarterly out of the general revenue fund of the county treasury upon vouchers of the board made and certified by the chief deputy and the clerk thereof. Upon presentation of such voucher or vouchers, the *county auditor shall issue his warrant upon the treasurer for the amount thereof, and the treasurer shall pay the same.*

"All proper necessary expenses of such board of deputy state supervisors shall be defrayed out of the county treasury as other county expenses * * *"

Section 2966-27:

"All expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury *as other county expenses* * * * The amount

of all such expenses shall be ascertained and proportioned by the deputy state supervisors to the several political divisions and certified to the county auditor."

Section 894 Revised Statutes provides that,

" * * * No claims against the county shall be paid otherwise than upon the allowance of the county commissioners * * * except in those cases in which the amount due is fixed by law, or is authorized to be fixed by *some other person or tribunal.*"

The first three sections above quoted justify the following classification of election expenses:

1. *The compensation* of the deputy state supervisors of elections and the regular clerk of the board. This, under sections 2926t and 2966-4, is to be paid out of the county treasury directly without allowance by the county commissioners.

2. The compensation of registrars, judges and clerks in registration cities, under section 2926t, is to be paid upon the allowance of the board of deputy state supervisors and without that of the county commissioners.

3. The compensation of judges and clerks outside of registration cities. This, under section 2966-27, is to be paid out of the county treasury, "as other county expenses," *but upon the certificate* of the deputy state supervisor. This language is somewhat ambiguous. Inasmuch, however, as Section 2966-52 provides a specific compensation for each "election day" I am of the opinion that this, at least, does not need the allowance of the commissioners.

4. Expenses of *elections* as such, in counties containing registration cities, are to be paid upon the certificate and order of the deputy state supervisors under section 2926t. What are such expenses of elections is indicated by section 2966-27, which enumerates some of the items as follows: printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, etc.

5. Expenses of elections as such, outside of counties containing registration cities, and of special elections everywhere. These, under section 2966-27, are to be paid "as other county expenses," and in spite of the ambiguity of the latter provision of the same section, I am of the opinion that they must be allowed for by the county commissioners.

6. Expenses of the board of deputy state supervisors other than those incurred in holding elections and conducting registration. These, under section 2966-4, are to be paid "as other county expenses," and must be allowed for by the county commissioners.

Answering your questions specifically I beg to state:

1. Expenses incurred in the purchase of supplies such as poll books, tally sheets, etc., for election purposes require the allowance of the county commissioners, excepting such as are enumerated for November elections in counties containing registration cities.

2. The expenses of purchasing furniture, carpets and other supplies for the office of the deputy state supervisors, may only be paid upon allowance by the county commissioners.

3. The compensation of judges, and clerks of election need not be allowed for by the county commissioners; the mileage of such officers is subject to allowance.

4. Personal expenses incurred by members of the board of deputy supervisors under the direction of the board, as a whole, may only be paid upon allowance by the county commissioners.

Very truly yours,
U. G. DENMAN,
Attorney General.

FUGITIVE FROM JUSTICE—ALLOWANCE BY COUNTY COMMISSIONERS TO OFFICER.

Allowance by county commissioners to officer for returning fugitive from justice without requisition may be made, but may not be included in cost bill if defendant is convicted.

June 1st 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 28th, in which you state that the village marshal of Oxford, Butler County, at the request of the proper authorities pursued into another state, and returned without requisition papers, a person charged with a felony. After conviction of the prisoner the marshal requested the county commissioners to pay his expenses under section 1310 Revised Statutes. Upon this statement of facts you submit the following questions:

> "1. May the allowance under Section 1310 be made in any case except where the state fails to convict?"
>
> "2. If the allowance may be legally made in this case wherein no requisition was had, is the state liable for the expenses thus paid by the county commissioners under section 7332 Revised Statutes?"

Section 1310 Revised Statutes is in full as follows:

> "The county commissioners may allow and pay any necessary expense incurred by an officer in the pursuit of a person charged with a felony, who has fled the country, in addition to the allowance provided for in the preceding section."

In my opinion this section, while embodied in an act relating to the payment of costs in criminal cases, is, by the last phrase thereof, sufficiently disassociated from other sections of the original act to make unnecessary any qualification of its terms in the light of such other sections. Therefore, in my opinion, not only would it do violence to the real meaning of section 1310 to read into it the qualification "In causes of felonies wherein the state fails" but it is equally improper to regard the allowance made as in the nature of "costs" at all. To put it in another way, this section, in my judgment, confers upon the county commissioners a broad and unqualified power and they may pay the expenses of any officer incurred in the pursuit of a person charged with a felony with or without requisition papers, and whether or not the person pursued is apprehended and tried, or is or is not indicted.

To answer your questions specifically then I may say:

1. The allowance under section 1310 may be made in cases in which conviction follows the apprehension of the fugitive without requisition.

2. The allowance thus made may not be included in the cost bill. It is not costs of a trial at all.

Very truly yours,
U. G. DENMAN,
Attorney General.

DEPUTY STATE SUPERVISORS OF ELECTIONS — COMPENSATION OF — SPECIAL PRIMARY ELECTIONS.

December 31st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your letter is received in which you inquire as to the compensation of deputy state supervisors of elections and their clerks in conducting special primary elections.

Section 4964 of the General Code provides for the holding of special primary elections. There is no special provision for compensating election officers for their services in conducting special primary elections, but section 4990, General Code, provides for the compensation of election officers in primary elections and is as follows:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers of general elections."

The compensation received by the deputy state supervisors and their clerks for conducting primary elections is measured by the number of election precincts in their respective counties, the deputy state supervisor receiving two dollars and the clerk three dollars for each such election precinct. The primary election laws providing therein for the holding of special primary elections and failing to make special provisions for the payment of election officers for holding such special primaries and in the holding of primary elections the compensation of said election officers being measured as above indicated, it is evidently the intention of the legislature that the same measure of compensation should be used for special primaries.

I am therefore of the opinion, that in the holding of special primary elections, the deputy state supervisor of elections is entitled to receive as compensation for his services in conducting such special primary election, the sum of two dollars for each election precinct required for the holding of such special primary election and the clerk is entitled to receive the sum of three dollars for each such special primary election precinct.

Yours truly,
U. G. DENMAN,
Attorney General.

COUNTY AUDITOR, DEPUTY OF, MAY SERVE AS CLERK OF CITY BOARD OF APPRAISERS.

June 1st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit the following question:

> May a deputy county auditor legally be appointed as clerk of a city board of appraisers and receive compensation out of the county treasury in both capacities at the same time?

In reply I beg to say the county officers salary law authorizes a county auditor to fix the compensation and the number of deputies, assistants, clerks, etc., in his office, and the statutes contain no provision whereby a deputy auditor is prohibited from accepting other employment in connection with his services as deputy auditor. It follows, therefore, that a deputy county auditor may serve as clerk of a city board of appraisers and receive compensation therefor unless the two positions, viz: deputy county auditor and clerk of a city board of appraisers be incompatible. Upon an examination of the duties devolving upon the incumbent of each position under the statutes, I am unable to find that the duties of one position in any wise conflict with the duties of the other.

I am, therefore, of the opinion that no legal objection may be made to the same person occupying both positions. There is another phase of this question, however, that should be considered, and that is the question of administrative policy. This question, however, is to be determined by the county auditor and the city board of appraisers. The deputy auditor is under the control and direction of the county auditor and it rests with the county auditor as to whether or not the deputy's entire time shall or shall not be devoted to the duties of the auditor's office. It is to be presumed that a county auditor will, in the economic administration of his office, employ only such assistants as are necessary to perform the duties of the office, and if this policy is adhered to a deputy auditor's time will all be taken up in the auditor's office, and his services as clerk would consequently not be available to a city board of appraisers.

Yours very truly,.

U. G. DENMAN,
Attorney General.

SHERIFF.

Allowance to sheriff for lost costs not required to be placed to the credit of fee fund.

June 1st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit the following inquiry:

> "At the time of the passage of the salary law it was held by you that sheriffs were entitled to retain for their own use the allowance

made to them by the court under section 1231, Revised Statutes, by reason of the exception found in section 23 of the county officers salary law. Said section 23 of the salary law is incorporated in the General Code as section 2998, but the wording seems to be different in the code from that in the original section and does not seem to exempt the allowance from the provisions of the salary law requiring that all fees and allowances be paid into the county treasury.

Query: Under the law as it now is in section 2998, General Code, are sheriffs required to pay the allowance into the county treasury to the credit of the fee fund?"

In reply I beg to say section 23 of the county officers salary law (Sec. 1296-33 R. S.) is as follows:

> "That all acts or parts of acts inconsistent herewith be and the same are hereby repealed. Provided further that this act shall not affect the provisions of section 1231, Revised Statutes of Ohio."

Section 1231 of the Revised Statutes provides that,

> "The court of common pleas in each county shall make an allowance of not more than $300.00 per annum, for the sheriff, for services in criminal cases, where the state fails to convict, or the defendant proves insolvent, and for other services not particularly provided for to be paid out of the county treasury."

This section authorizes the common pleas court to make an allowance of not more than $300 as "lost costs" to the sheriff for services in criminal cases, and the courts in construing section 23 of the county officers salary law have held that the language therein used, to-wit, "provided further that this act shall not affect the provisions of section 1231, Revised Statutes of Ohio" did not require sheriffs to pay the allowance made to them under section 1231 into the county treasury to the credit of the fee fund.

Section 23 of the county officers salary law is incorporated in section 2998, General Code, and is as follows:

> "Nothing in this chapter shall affect the power of the court of common pleas in each county to make an allowance of not to exceed $300 each year to the sheriff for services in criminal cases where the state fails to convict or the defendant proves insolvent and for other services not particularly provided for by law."

The language in this section, to-wit, "nothing in this chapter shall affect the power of the court of common pleas in each county to make an allowance, etc.," should in my judgment be construed to have the same effect as the language used in section 1296-33, Revised Statutes, to-wit, "provided further that this act shall not affect the provisions of section 1231 of the Revised Statutes of Ohio," and that sheriffs retain the same rights under section 2998, General Code, as was given them under section 1296-33, Revised Statutes.

Yours very truly,

U. G. DENMAN;
Attorney General.

COUNCIL — TRANSFER OF FUNDS — MANNER OF.

City council may transfer money from one fund to another: 1st, by vote of three-fourths of all the members elected thereto and the approval of the mayor; 2nd, by filing a petition in the common pleas court.

June 2nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIRS: — Your communication of May 16th is received, in which you ask for a written opinion upon two questions, as follows:

> 1. A city has a surplus in its general fund of $50,000 which is idle and not needed at the present time for the uses of said fund. Is there any method by which this money can be legally used to pay estimates on special assessment improvements, the same to be returned to the general fund when bonds are issued after the payment of the final estimate?
>
> 2. Is it legal for the Board of Sinking Fund Trustees of a city to invest its surplus funds in notes issued under authority of section 95a of the Municipal Code?

In reply to the first question I beg to say that in addition to the semi-annual appropriation by council, there are two methods provided by statute for the transfer of money from one fund to another.

Section 43 of the Ohio Municipal Code, after providing for semi-annual appropriations by council, reads as follows:

> "Provided that councils of cities or villages may at any time, by a vote of three-fourths of all the members elected thereto, and the approval of the mayor, transfer all or a portion of one fund or a balance remaining therein, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, and no such transfer shall be made until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

The other statute providing for a transfer of money from one fund to another, is the Act of May 6th, 1902, (95 O. L. 371) now known as sections 2296 to 2303 inclusive, of the Revision of the General Statutes of Ohio.

This Act provides for the filing of a petition in the Common Pleas Court by the proper municipal authority, setting forth the facts and asking for an order directing the transfer of such fund or funds as council may desire. The statute sets forth in detail the different steps to be taken, provides that such cases shall have priority over all other cases upon the docket of said court, and is so broad in its terms as to provide a method for the transfer of any desired fund.

In reply to your second question I desire to call your attention to section 109 of the Municipal Code of Ohio, as amended in the 99th Ohio Laws, page 136, which reads as follows:

> "The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in said state,

hold in reserve only such sums as may be needed for effecting the terms of this Act, and all interest received by them shall be re-invested in like manner."

The provision requiring the investment of all moneys received by the sinking fund trustees in bonds, is mandatory, and I am of the opinion that the sinking fund trustees of a city cannot lawfully invest its surplus funds in notes issued under authority of section 95a of the Ohio Municipal Code.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE OIL INSPECTOR.

Outgoing State Inspector of Oils may not receive compensation as such inspector after his successor has been duly appointed and qualified and assumed the duties of the office.

June 14th, 1910.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication received in which you submit the following statement of fact, and request my opinion thereon:

"The term of office of the State Inspector of Oils is for two years from the 15th day of May of each even numbered year, and until his successor is appointed and qualified, and the annual salary of the State Inspector of Oils is $3,500.00.

W. H. Phipps was appointed State Inspector of Oils, was qualified, and reported to the office May 19th, 1908.

Mr. Findlay (his predecessor) drew salary as State Oil Inspector from May 15th to May 31st, $145.83.

Mr. Phipps drew salary as State Oil Inspector from the time of his appointment and qualification during the two years for which he was appointed to May 15th, 1910, $7,000.00, and no more.

From this, it appears that during the two years from May 15th, 1908, to May 15th, 1910, there was paid as salary for State Inspector of Oils, $7,145.83, of which Mr. Phipps received $7,000.00 and Mr. Findlay $145.83.

Was Mr. Phipps legally entitled to receive the $7,000.00 as salary for two years' service as State Inspector of Oils?

Was Mr. Findlay entitled to receive the $145.83 for services from May 15, 1908, to May 31, 1908?

In reply I beg to say section 844 General Code (Sec. 395 R. S.) provides that,

"The governor, with the advice and consent of the senate, shall appoint a state inspector of oils, who shall hold his office for the term of two years from the fifteenth day of May of each even-numbered year, and until his successor is appointed and qualified.

Section 848 General Code (Sec. 396 R. S.) provides that,

> "The state inspector of oils shall receive an annual salary of thirty-five hundred dollars, and an allowance for salary of a stenographer, not to exceed seven hundred and twenty dollars in any year".

These two provisions just quoted answer your first inquiry in the affirmative. That is, Mr. Phipps was entitled to receive $7,000.00 as salary for two years' service as state inspector of oils, provided he served the two years. The statement of fact, however, discloses that Mr. Phipps did not assume the duties of the office of oil inspector until May 19, 1908, and while Mr. Findlay's term expired on the 15th day of May, 1908, he was authorized by law to continue in office until his successor qualified, which was on May 19, 1908. It follows, therefore, that Mr. Phipps was not entitled to draw compensation for the four days beginning May 15, 1908, and ending May 19, 1908.

Following the same reasoning Mr. Findlay was entitled to receive compensation as oil inspector from May 15, 1908, to May 19, 1908, and no longer. In other words, Mr. Phipps is not legally entitled to the compensation received by him covering the period of time from May 15, 1908, to May 19, 1908, and Mr. Findlay is not legally entitled to the compensation received by him covering the period of time from May 19, 1908, to May 31, 1908.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL BOND LIMIT.

Bonds issued upon the approval of the electors of municipality must be counted in determining as to the four per cent. bond limitation.

Sections 2835, 2835b, 2837 R. S. Sections 3942, 3943, 3945, 3946, 3948 and 3954 General Code.

June 29th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You ask whether bonds which have been issued by a vote of the people are to be included in determining whether or not a subsequent issue of bonds must be submitted to a vote of the people under the four per cent. limitation of the Longworth act.

Prior to the adoption of the General Code, section 2835 R. S. provided that:

> "Provided, however, that the net indebtedness incurred by any township or municipal corporation, after the passage of section 2835, Revised Statutes, as amended April 29, 1902, for the purpose herein enumerated, shall never exceed four (4) per cent. of the total value of all property in such township or municipal corporation, as listed and assessed for taxation, unless an excess of such amount is authorized by vote of the qualified electors of such township or municipal corporation in the manner hereafter provided in section 2837, Revised Statutes.
>
> "In arriving at the net indebtedness incurred, allowance shall be made only for the amount held in the sinking fund for the redemption

of bonds theretofore issued under the provisions of section 2835 as amended April 29, 1902, and subsequently, and the net indebtedness shall be held to be the difference between the par value of all such outstanding and unpaid bonds and the amount held in the sinking fund for their redemption."

Section 2835b provided that:

"Provided further that the limitations of one per cent. and four per cent. prescribed in section 2835, Revised Statutes, shall not be construed as affecting bonds issued under authority of said section 2835 upon the approval of the electors of the corporation, nor shall bonds which are to be paid for by assessments specially levied upon abutting property, nor bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due, nor any bonds issued prior to the passage of section 2835 Revised Statutes as amended April 29, 1902, be deemed as subject to the provisions and limitations of said section, or be considered in arriving at the limitations therein provided."

Section 2837 R. S. provided that:

" * * All bonds heretofore issued in good faith under the authority of section 2835, Revised Statutes, as amended April 29, 1902, and April 23, 1904, which at the time of issue, were within the limitations herein provided, shall be valid obligations of the township, city, village or other municipal corporation which issued them and in arriving at the limitations of 8 per cent. herein provided, and of 4 per cent. in section 2835 Revised Statutes provided, all such bonds, except those excluded by the provisions of section 2835b, Revised Statutes, shall be considered."

It is to be noted that, under the above quoted language of section 2837 R. S., all bonds "except those excluded by the provisions of section 2835b," were to be counted "in arriving at the limitation of * * 4 per cent. in section 2835." It seems from this language that every type of bond mentioned in section 2835b was not to be counted in arriving at the 4 per cent. limitation. Among the types mentioned in section 2835b are those "bonds issued under authority of section 2835 upon the approval of the electors of the corporation." It seems, therefore, that, under the law prior to the adoption of the General Code, bonds issued by a vote of the people were to be excluded from enumeration in determining whether a subsequent issue of bonds must be submitted to a vote of the people under the 4 per cent limitation of the Longworth act.

The General Code now provides as follows:

Section 3942:

"The net indebtedness incurred by a municipal corporation for such purposes shall never exceed four per cent of the total value of all the property in such corporation, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the corporation in the manner hereafter provided."

Section 3943:

"To ascertain the net indebtedness incurred, allowance shall be made only for the amount held in the sinking fund for the redemption of bonds then lawfully issued for such purposes, and the net indebtedness shall be the difference between the par value of such outstanding and unpaid bonds and the amount held in the sinking fund for their redemption."

Section 3945:

"Such limitations of one per cent. and four per cent. hereinbefore prescribed shall not affect bonds lawfully issued for such purposes upon the approval of the electors of the corporation."

Section 3946:

"Bonds to be paid for by assessments specially levied upon abutting property, bonds issued for the purpose of constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due, and bonds issued prior to April 29, 1902, shall not be considered in ascertaining such limitations."

Section 3948:

"Before any bonds in excess of such limitations of one per cent. and four per cent. are issued or tax levied, the question of issuing them shall be submitted to the voters of the corporation at a general or special election."

Section 3954:

" * * Bonds issued in good faith for such purposes, which at the time of issue were within the limitations herein provided, shall be valid obligations of the municipal corporation which issued them. In ascertaining the limitations of such eight per cent. and of such four per cent, all such bonds shall be considered except those hereinbefore excluded."

The language of section 3945 plainly construed now means simply that bonds lawfully issued by a vote of the people in excess of the four per cent. limitation, shall be valid in spite of such excess, but does not exempt such bonds from being counted in ascertaining whether new bonds can be issued only by a vote of the people.

The language of section 3946, in enumerating those classes of bonds which "shall not be considered in ascertaining such limitations," by implication provides that all other classes of bonds shall be considered in ascertaining such limitations. Since bonds issued upon the approval of the electors are not enumerated in section 3946, they must therefore be considered in ascertaining such limitations in the absence of a specific provision of the statute to the contrary. I am unable, however, to find any such specific provision. For this reason, the language of

section 3954: "in ascertaining the limitations of such * * four per cent., all such bonds shall be considered except those hereinbefore excluded," refers to bonds excluded by section 3946 but cannot apply to bonds issued upon the approval of the electors, for the reason that neither section 3946 nor any other provision of the statutes now specifically excludes bonds issued upon the approval of the electors.

I am, therefore, of the opinion that a change in this law has been made by the adoption of the General Code and that, under the law as it now exists, bonds which have been issued upon the approval of the electors of the corporation by a vote of the people, are to be counted and included in determining whether the four per cent. limitation has been reached and in determining whether or not a subsequent issue of bonds must be submitted to a vote of the people.

Yours very truly,
U. G. DENMAN,
Attorney General.

DEPUTY SUPERVISORS OF ELECTIONS.

Expenses, livery hire notifying judges and clerks.

January 21st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your communication is received, in which you submit the following question with a request for an opinion thereon:

> A board of deputy state supervisors of elections authorizes payments out of the county treasury to each member of said board, of the sum of thirty dollars designated as expenses. Upon inquiry it is stated that such payments were for the expense of the deputy supervisors in personally notifying the judges and clerks of the various precincts in the county of their appointment, said expense being for livery hire incurred.
>
> Query: Are these items legal expenditures from the county treasury, and if not, may they be recovered from the parties receiving them?

In reply I beg to say, section 2966-6 of the Revised Statutes authorizes the board of deputy state supervisors of each county to appoint the judges and clerks of election for the various precincts in the county. The paragraph in said section granting this authority is as follows:

> "At least ten days before any general election the deputy supervisors of each county shall appoint, in all precincts in which the voters are not registered, four judges and two clerks of election, residents of the precinct, who shall constitute the election officers of such precinct."

Under this provision of the section the deputy supervisors have the authority to appoint the judges and clerks, but I find no provision in this or any other section of the statutes where it is required of such deputy supervisors to give notice of appointment to the appointees. I assume, however, that the legislature in pass-

ing this provision contemplated that the duty would rest upon the deputy supervisors of elections to notify all the persons whom they had appointed of their appointment. Certainly such information would have to be brought to the knowledge of the appointees in some way. Therefore, in the absence of any statutory direction as to the manner of notice, I am of the opinion that the same will be governed by custom, and the general custom is, I am informed, to deliver to each appointee, through the mails, a certificate of his appointment.

It is my opinion that, in the instance cited in your inquiry, the board of deputy state supervisors were without authority to incur the expense of livery hire in notifying the judges and clerks appointed by them in person, and I am further of the opinion that the money so drawn by the members of said board of deputy supervisors to reimburse themselves for such expense may be recovered back for the use of the county in a suit at law.

Very truly yours,
U. G. DENMAN,
Attorney General.

MUNICIPAL CODE—COUNCIL OF VILLAGE—WHAT CONSTITUTES QUORUM. SEC. 119.

January 27th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you state that of the six members elected to the village council but three met for organization in January next after their election. You also state that the three members qualified as councilmen, organized and proceeded to levy special assessments against abutting property owners. You inquire if these proceedings are legal.

Section 196 of the Municipal Code provides that councils of villages shall be governed by the provisions, so far as applicable, of sections 119, 120, 121, 122, 124 and 125.

Section 122 provides that no ordinance shall be passed by council without that concurrence of a majority of all members elected thereto.

Section 119 provides that a majority of all the members elected shall be a quorum to do business, and a less number may adjourn from day to day and compel attendance of absent members, etc.

The question now is, do the three of the six members elected to the village council under section 193 of the Municipal Code, when qualified, constitute a majority of all the members elected to council so that they may proceed to organize and transact business of a general and permanent nature.

Three is not a majority of six and therefore no quorum was present to do business at this meeting. (State v. Orr, 61 O. S. 386, Commissioners v. Cambridge, 7 C. C. 72). If the three members who failed to qualify succeeded outgoing members, the old members who would continue to serve until their successors qualified; but this fact would not make a quorum present to do business.

From these considerations I reach the conclusion that these three members of council, when qualified, were without authority to organize or transact business, and that they should have adjourned to await attendance of out-going members, if any, the qualification of the newly elected members or the filling of the vacancies existing as provided by section 120 of the Municipal Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

DEPUTY SUPERVISORS OF ELECTIONS.

Compensation, increase due to increase in precincts, when to begin.

January 21st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit the following inquiry:

> The compensation of deputy supervisors of elections is fixed by section 2966-4, Revised Statutes. If the number of precincts in a county is increased at the annual election, 1909, may the deputy supervisors draw from the county treasury the increased compensation occasioned thereby immediately after the November election, 1909, or should such increased compensation begin with the next official year which begins August 1, 1910?

In reply I beg to say the provision in section 2966-4 which fixes the compensation of deputy state supervisors is as follows:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county; and the compensation so allowed such officers, during any year, *shall be determined by the number of precincts in such county at the November election of the next preceding year.*"

The above quoted portion of section 2966-4 clearly provides that the compensation "during any year" shall be determined by the number of precincts in such county at the November election of the next preceding year. It follows, therefore, that if the number of precincts is increased at the November election 1909, such increased number of precincts shall not be regarded in fixing the compensation of the deputy supervisors for the official year 1909, but the whole number of precincts, including the increase at the November election, 1909, shall be the basis for the compensation of deputy supervisors for the next succeeding official year, to-wit, 1910.

Very truly yours,
U. G. DENMAN,
Attorney General.

PUBLICATION—WEEKLY NEWSPAPER.

January 17th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 15 submitting for my opinion thereon the following questions:

> "A statute requires a notice to be published in two weekly newspapers of different politics, printed in the county, if there are

two papers thus published; if not, then publication in only one is required.

"Will publication in two semi-weekly papers of opposite politics comply with said statute: (1) When there is one weekly paper published in said county; (2) when there are two or more weekly newspapers published in said county?

"Will publication in a daily newspaper on the same day of two successive weeks comply with said statute?"

If the statute expressly requires publication in a *weekly* newspaper the publication must be so made, if there is such newspaper in the county. Authorities on this point are decidedly meagre. However, it is a well-known fact that weekly newspapers reach an entirely different class of subscribers from that reached by daily newspapers. At the time the statute was enacted the general assembly evidently intended that the notice in question should circulate among the members of that class. Accordingly, publication once in a week in some other kind of a newspaper would be insufficient.

See Bank vs. Jacobson, 66 N. W. 453.

By applying the foregoing principles all of the specific questions submitted by you may be answered.

Very truly yours,
U. G. DENMAN,
Attorney General.

SUPPLEMENT TO OPINION OF ————.

April 4th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of February 17th in which you submit certain additional information relating to the employment of an attorney at law to represent the county treasurer in certain cases for the collection of omitted taxes. Certain questions arising under the same facts were considered and answered in an opinion of this department addressed to you under date of December 1st, 1909. In that opinion it was held that if the employment of the attorney was made illegally, nevertheless, the money expended under such an illegal contract would not be subject to recovery under section 1277, R. S., — the only section under which such recovery might be effected. (Fronizer v. State, 77 O. S. 7).

It appears from the additional information furnished by you that the employment was undoubtedly made without any authority of law. This being the case the principles set forth in the former opinion are applicable to the facts as now presented. As a corollary to the principal question submitted with respect to this employment you ask my opinion as to whether, under the resolution of the county commissioners, the employment should have been made by the treasurer, or whether the person named in the resolution could consider the same as sufficient authority for entering upon his employment.

The resolution recites that:

"Charles E. Roth, the treasurer of Hamilton County, Ohio, be and he hereby is, authorized to employ Alfred B. Bendict to repre-

> sent and act for him, the said treasurer, as attorney and counsellor at law in the following cases pending in the courts of this state, involving the collection of taxes * * * Said attorney * * * shall prosecute said cases to final judgment in each case, or until adjusted or compromised. Said attorney's compensation is hereby fixed at, and shall be a sum equal to four percentum of the amount of taxes actually recovered and paid into the treasury, whether upon judgment or adjustment or compromise, and said compensation shall be payable immediately upon the payment of said taxes into the treasury in any of said cases".

Upon consideration of all of the foregoing I am satisfied that while the whole contract was illegal, the attorney would be justified in regarding this resolution as authority to represent the treasurer. Every thing which could be done in order to fix the terms of his employment was accomplished by this resolution. The authorized "employment" by the treasurer would be a mere formality. Let it be reiterated, however, that I do not intend to approve any of these proceedings. They were all illegal.

You submit another question under the above quoted language of the resolution, viz., as to whether the attorney would be entitled to his percentage thereunder on the amount of interest accruing on the judgment for taxes or only on the amount of the original judgment.

In my opinion the amount of money actually paid into the treasury is the sum upon which the percentage should be based.

You also enclose a copy of a contract entered into by the county commissioners of Hamilton county with another person as tax inquisitor, and request my opinion as to whether, under such contract the inquisitor was entitled to his percentage upon the whole amount paid into the treasury including interest, or upon the amount of the original judgment without interest. The contract in question provides that,

> "Whenever any payment shall be made to the treasurer of said county on account of any such charges on the duplicate, said (inquisitor) shall be entitled to receive for his services therein, one-fourth or twenty-five percentum thereof, and the county auditor shall thereupon draw his warrant or order in favor of said (inquisitor) on the county treasurer for the payment of the sum of 25% of the money so paid in the county treasury, but no payment shall be ordered by the auditor or made by the treasurer * * * under this agreement except as aforesaid, out of money actually paid into the county treasury on such omitted property".

This contract, in my judgment, authorizes the computation of the inquisitor's percentage on the sum of money paid into the treasury as a result of the services of the inquisitor, whether the same be composed in part of interest or not.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — BONDS.

Bonds may not be issued under paragraph 24 of the Longworth act, section 3939 General Code for the purpose of creating a general fund for the purchase or condemnation of land necessary for street or highway purposes.

April 18th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of April 13th, submitting for my opinion thereon the question presented to you by Hon. Edward M. Ballard, City Solicitor of Cincinnati. Mr. Ballard's question is as follows:

> May a city issue bonds under paragraph 24 of the Longworth act, section 3939 General Code, for the purpose of creating a general fund out of which to purchase or condemn land necessary for street or highway purposes, without designating in the ordinance the particular land necessary to be purchased or condemned?

Mr. Ballard states that he has been unable to find any case directly in point on this question, and I may say that I have been unable to find any such case. It is clear that the case of Heffner v. Toledo, 75 O. S. 413, which decides that a city may not issue bonds to provide a fund from which to pay its part of cost of improvements that may be made from time to time is not authority for either an affirmative or a negative answer to the question you now submit. It seems to me, however, that section 3939 of itself affords an excellent reason for holding that bonds may not be issued in the manner described. Said paragraph 24 of that section provides that:

> "When it deems it necessary, the council of a municipal corporation * * by resolution or ordinance, may issue and sell bonds * * for purchasing or condemning any land necessary for street or highway purposes * *".

The power thus created is one which involves the expenditure of money to be raised by general taxation — the pledging of the credit of the municipality. The law creating it must be strictly construed. In order that the power may exist in a given case there must be a present *necessity* for the acquisition of land for highway purposes. If this necessity exists the location of the land would be known and it could be described in the ordinance or resolution. On the other hand an attempted issue of bonds for such a purpose as that described by you would not be based upon any present necessity, but simply upon speculative possibility of future necessity.

On this ground alone I am inclined to the opinion that bonds may not be issued under favor of the Longworth act for the purpose of creating a fund to pay for lands to be purchased or appropriated for highway purposes in the future. However, there are other reasons supporting the same conclusion. In case the issue would have to be submitted to a vote of the people by reason of its causing the bonded indebtedness to exceed the limitations of the Longworth act, then it seems to me that the spirit of that act would require that the electors should be apprised of the exact location of the land to be purchased. There is no distinction in the law between the degree of exactness required in proceeding where

it is not necessary to submit a proposed issue to the people and that required in case of such submission.

Again, section 3918 of the General Code referred to by Mr. Ballard requires that,

> "Bonds issued under authority of this chapter shall express on their face the purpose for which they were issued".

While not of itself conclusive of the question under consideration, this section in connection with the 24th paragraph of the Longworth act serves to strengthen the construction of the latter law as above outlined. In other words, unless the Longworth act clearly permits the issue of bonds for the creation of a *general* fund this section 3918 serves to emphasize the implied requirement of the other law, that the specific purpose shall be exactly described in all the proceedings by which bonds are issued.

I therefore conclude that an issue of bonds for the purpose above described may not be made under favor of the Longworth act.

I return herewith Mr. Ballard's letter to your department.

Yours very truly,
U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY — EXPENSES. COSTS IN FELONY CASES — GRAND JURY TRANSCRIPTS.

What expenses may be allowed on voucher of prosecuting attorney under section 1298, R. S., General Code, section 3004.

Fee of official court stenographer for making transcripts of grand jury proceedings at request of prosecuting attorney may be taxed as costs in penitentiary cases.

March 4th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Referring to your letter of January 20th, receipt whereof is hereby acknowledged, in which you refer to a large number of expenditures which have been made, ostensibly under section 1298, Revised Statutes, and allowed upon the voucher of the prosecuting attorney as "reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice" by the prosecuting attorney, you request me to indicate the kinds of expenses which may be allowed under favor of this section.

You also request my opinion as to whether the fees of the official stenographer for making transcripts of testimony before the grand jury in its investigation of a felony charge may, upon the ultimate conviction of the defendant, be included in the cost bill when paid by the state.

Answering your first question, I beg to direct attention to the opinion of my predecessor to your department rendered August 8, 1906, Annual Report of the Attorney General, page 264. In that opinion it was held that the primary meaning of the above quoted provision of section 1298 is limited to personal expenses of the prosecuting attorney. By implication the statute was held applicable to the expenses of a secret service officer regularly employed under section 470-1,

Revised Statutes, to aid the prosecuting attorney in the collection and discovery of evidence to be used in the trial of criminal cases.

As to what constitutes personal expenses of a prosecuting attorney some latitude must undoubtedly be given to the discretion of the prosecutor and the commissioners. The phrase "in furtherance of justice" has a somewhat indefinite meaning. However, it is not every expenditure that may be authorized under this language. In the first place, expenditures authorized and directed to be made under other sections of the statutes may clearly not be made under favor of this section. In the second place, expenditures in matters in which there is not a criminal prosecution, or, at least, a complaint pending on which the defendant has been arrested should not be authorized, as the prosecuting attorney in his official capacity has no authority to institute such proceedings. Legitimate expenses incurred by the prosecutor in procuring testimony aside from the fees lawfully paid to witnesses, and the expenses of the secret service officer, may, in my opinion, be paid under this section. These expenses would seem to be "in furtherance of justice" and if the prosecuting attorney bears them in the first instance he may be recompensed. I trust that the foregoing principle will enable you to answer the specific questions submitted.

Your second question involves consideration of section 474-5 et seq., Revised Statutes, being the act providing for the appointment of an official court stenographer. Section 2 of that act provides that,

> "Upon the trial of a case * * * if either party to the suit, or his attorney, requests services of such stenographer, the trial judge shall grant same."

Section 3, being section 474-7, Revised Statutes, provides that,

> "In every case reported, as hereinbefore provided, there shall be taxed for each day's service * * * a fee of four dollars, to be collected as other costs in the case * * *"

Section 5 of the act provides that,

> "When shorthand notes have been taken in any case as herein provided, if * * * either party to the suit, or his attorney, request transcripts of all or any portion of said notes * * * the official stenographer * * * shall cause a full and accurate transcript to be made * * *
>
> "The compensation of such stenographers for making such transcripts shall be not more than eight cents per folio of one hundred words, to be fixed by the common pleas judge, * * * all transcripts made in criminal cases, either by request of the prosecuting attorney or the defendant * * * shall be paid for out of the county treasury, and when so paid shall be taxed and collected as other costs in the case. * * *
>
> "The costs of all such transcripts so made in criminal cases when ordered by the prosecuting attorney * * * shall be taxed as costs in the case, and collected as other costs * * * *When the testimony of witnesses is taken before the grand jury in any county by such stenographers in pursuance of section* 7195 *of the Revised Statutes they shall receive the same compensation per folio for such transcript as may be ordered by the prosecuting attorney and be paid therefor in the manner herein provided.*"

Section 7195 Revised Statutes provides in part that,

> "The official court stenographer of the county shall, at the request of the prosecuting attorney, take shorthand notes of the testimony (before the grand jury) and furnish a transcript of the same to the prosecuting attorney * * *"

While the earlier provisions of the statutes above quoted limit the taxation of stenographers' fees as costs to services in connection with *cases,* which would not include grand jury proceedings, yet the last provision of section 5 of the Stenographers' Act, is clearly effective to permit the payment of the expense of making transcripts of grand jury testimony out of the county treasury. While there may be some doubt as to whether the fees in such cases should be taxed as costs, yet it is my judgment that the same may be done, and that the state, in a proper case, is liable therefor.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — CONSTRUCTION CONTRACT, ALTERATIONS IN BY BOARD OF PUBLIC SERVICE — SAME — DEPOSIT OF MONEYS.

Stipulation for liquidated damages for failure to complete waterworks construction contract by certain date is enforcible by the municipality and subject to alteration by agreement under section 143 Municipal Code, section 4331 General Code.

Said section must be complied with in making any alteration regardless of the terms of the contract; change of plans necessitating different quantities of materials from those originally specified is an alteration within the meaning of said section, regardless of rovisions of contract.

Consulting engineer need not be employed under section 143 Municipal Code, sections 4328 and 4329 General Code; such employment governed by section 145 Municipal Code (since amended); such employment, however made, subject to rescission and terminable at will of board of public service, for satisfactory cause.

Board of public service had discretionary power to divide certain portions of work included in construction of municipal waterworks among bidders. Notice to bidders may be looked to to determine whether such bids are on separate branches of work as well as upon aggregate.

Board of public service might purchase fuel for waterworks plant in small quantities without competitive bidding.

When amount of money in hands of city treasurer exceeds amount which city depository, duly designated, is qualified to receive, treasurer may lawfully deposit the excess in any bank in the county, under section 135 Municipal Code, section 4294 General Code; bank may not derive interest or profit from said funds, or commingle the same with its general funds; "finance committee" of council has no authority respecting such deposits.

Board of public service might not purchase an extension to waterworks system constructed by private enterprise, for sum exceeding five hundred dollars without authority of council.

Personal liability of members of board of public service who sanction illegal payments to contractors discussed.

Various questions arising upon the special examination conducted by Bureau of Inspection and Supervision of Public Offices into construction of municipal waterworks plant at Newark, Ohio.

February 24th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIR: — Pursuant to your request I have given consideration to various questions submitted by your examiner in regard to the construction of a municipal water works plant at Newark, Ohio. For convenience I shall state the questions separately.

> 1. Is a provision in a contract for the construction of a municipal water works plant whereby the contractor agrees to pay to the city a certain stipulated sum for each and every day required by him to complete the work beyond the time stipulated in the contract, enforcible by the city, it being expressly recited that time is of the essence of the contract?

No statute expressly directs the inclusion in municipal contracts of any such clause. However, it is, in my judgment, competent for the corporation to enter into such a contract. Section 143 M. C. does, it is true, provide that,

> "where a bonus is offered for completion of the contract prior to a specified time, the department may exact a pro-rated penalty in like sum for every day of delay beyond a specified date."

However, this clause does not, in my judgment, by inference or otherwise prohibit the department of public service from inserting in the contract a provision of this sort where there is no co-ordinate provision for a bonus.

It will be noted that the statute uses the word "penalty." In this connection it may be remarked that if the contract in question provides for a penalty, such a penalty is not enforcible as such. The question for determination in the construction of such contracts is as to whether such provisions constitute penalties or liquidated damages.

In view of the fact that the contract submitted to me recites not only that time is of the essence, but also that the amount per day is agreed upon as liquidated damages for such delay, I am of the opinion that this provision should be regarded as one for liquidated damages in spite of the rule which favors the opposite construction.

> See Page on Contracts, Chapter 55, and especially Section 1183, and cases cited.

Inasmuch as the code does not prohibit such a contract being made, and at the most prescribes the terms upon which a *penalty* as distinguished from liquidated damages may be provided for by the directors of public service, I am of the opinion that this clause of the contract could lawfully be entered into by the directors of public service, and that the same is enforcible.

> 2. Is a stipulation such as that described in the first question subject to alteration by agreement under section 143 M. C.? The pertinent provision of section 143 is as follows:
>
> "Whenever it becomes necessary in the opinion of the directors of the appropriate department in cities, or of the council in vil-

> lages, in the prosecution of any work or improvement under contract to make alterations or modifications in such contract such alterations or modifications shall only be made by such directors in cities or council in villages, by resolution, but such resolution shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor, and the mayor in villages, and the directors of the appropriate department in cities, on behalf of the corporation; and no contractor shall be allowed to recover anything for work or material, caused by any alteration or modification, unless such contract is made as aforesaid; nor shall he, in any case, be allowed, or recover for such work and material, or either, more than the agreed price."

I have examined the decisions relating to the power of municipal authorities to make alterations and modifications in contracts, and I find the courts have laid down the very reasonable rule that a municipal contract after being entered into by both parties may lawfully be modified and altered if such modifications and alterations do not change an essential element of the contract, that is, make an entirely new contract between the parties.

McMaken vs. Cincinnati, 7 N. P. 203;
Ampt vs. Cincinnati, 6 N. P. 208, 60 O. S. 621.

I am of the opinion that a stipulation of the kind in question is one which may lawfully be changed by alteration or modification. It is clear to me, however, that the above quoted provision of section 143 M. C. prescribes the only method which may lawfully be followed by the municipal authorities in making such alterations and modifications. In other words, in order that a purported alteration or modification may bind the municipality, the directors of public service must enter into an agreement in writing signed by themselves and by the contractor setting forth the altered terms and reciting the price to be paid for the work and material under such altered contract.

I am, therefore, of the opinion that a stipulation of the kind mentioned by you, in a municipal contract, may lawfully be altered or modified by proceeding under section 143 M. C.; *but that without proceeding under section 143 M. C., the directors of public service may not release the rights of the city, if any, under such a stipulation.* In other words, if the contractor has incurred liability by virtue of such a provision for liquidated damages, it would be unlawful for the directors of public service to approve the payment of the contractor in full without deduction.

3. A clause in a municipal contract is as follows:

> "Should the city, at any time during the progress of said work request any alteration, deviation, addition or omission from this contract, it shall be at liberty to do so, and the same shall in no way affect or make void the contract or bond given to secure its performance, but the value thereof shall be added to or deducted from, the contract price, as the case may be, by a fair and reasonable valuation to be ascertained by the engineer whose decision shall be final and conclusive on both parties."

Does this saving "to the city," of the right to make alterations, etc., obviate the necessity of the board of public service complying

with the above quoted provisions of section 143 M. C. relative to the alteration and modification of contracts, or, in short, is there any manner in which a contract may be altered after having been entered into regardless of its provisions without complying with said section 143 M. C.

As above indicated, I am of the opinion that the board of public service can alter contracts only as provided in section 143, above quoted. It is not competent for the board to enter into any agreement enlarging or restricting its own powers in the premises. In other words, section 143 is virtually a part of every municipal contract, and when it conflicts even remotely with any portion of any such contract drawn by the parties themselves, it must over-ride such other portion. The clause above quoted does not conflict with section 143, it simply provides a convenient method of bringing the directors (who, of course, constitute the "city"), and the contractors together upon such a modified contract as that described in section 143. The clause is binding upon both parties, but does not excuse non-compliance with the statute.

4. The specifications of a municipal contract relating to the construction of a water works system provide in part that,

"All parts after having been freed from sand and thoroughly cleaned shall be tested for thickness by calipers. No pipe or casting will be accepted when the thickness of metal shall be found to be more than 1½ inches less than that called for by the plans.

The weight of straight bell and spigot pipes in the distribution system and all other places where fire pressure is to be maintained shall be approximately:

	Wt. per ft.	Lead.
24-inch pipe	279.2	38.0
16-inch pipe	143.8	25.0
12-inch pipe	91.7	18.0
10-inch pipe	70.8	15.5
8-inch pipe	52.1	12.5
6-inch pipe	35.8	9.5

The margin of four per cent., either above or below weights will be allowed the pipe before laying, and no pipe will be accepted that weighs less than ninety-seven per cent. of the standard required. The aggregate weight of pipe shall not be in excess of the weight calculated upon the weights noted above, and actual length of pipe delivered.

The actual length of pipe shall be construed as the lay or run, exclusive of bells.

In estimating the lay or run of the pipe, no allowance will be made for the length or depth of the bells, and in computing the weight of the pipe, the weight specified above for the run will be multiplied by the net length or weight of pipe."

"For what purpose is the weight of the pipe to be computed as described in the last paragraph above quoted, and what effect, if any, does such computation have upon determining the tonnage of pipe for purposes of payment, when bids are for furnishing pipe, so much per ton."

This question calls for a practical construction of the entire clause above quoted.

Without entering into a lengthy discussion permit me to state that, in my opinion, the margin of four per cent. referred to in the third paragraph relates to the acceptance or rejection of the individual pieces of pipe, that is to say, if a given length of pipe weighs in the aggregate four per cent. either above or below the weights set forth in the preceding paragraph, the same should not be accepted by the city.

All that follows this provision regarding the margin of four per cent., etc., relates not to the weight of the individual pieces, but to the aggregate weight of the pipe furnished. For the purpose of preventing the contractor from so constructing his individual pieces of pipe as to cause an undue amount of weight to be lodged in the bells where the same is immaterial as affecting the quality of the pipe, it is provided that the aggregate weight of pipe as actually delivered shall not exceed a certain artificial or theoretical weight to be computed in the manner described. This theoretical weight is determined by ascertaining the actual length of the pipe as it will appear when laid in the trenches; that is, by subtracting the aggregate length of the bells from the aggregate length of the pieces of pipe. This actual length, or "lay, or run," is to be multiplied by the approximate weight fixed by the table in paragraph two. The product is the theoretical weight above referred to. If this theoretical weight exceeds the aggregate weight of pipe actually delivered, or if the two weights are equal, then the contractor may be paid for the actual tonnage delivered; if, however, *the actual tonnage delivered exceeds the theoretical weight as computed, then the director is entitled to receive pay for the theoretical weight only.* It will thus be seen that the computed weight fixes the tonnage of pipe for payment only when such computed weight is less than the aggregate weight delivered.

5. The directors of public service desire to engage the services of a consulting engineer for the purpose of supervising the construction of a municipal water works plant. It is supposed that the compensation of such consulting engineer will exceed five hundred dollars. Should council authorize such employment and should the directors advertise for bids, and let the contract under Section 143 M. C., or is this an employment in the department of public service, and therefore, not subject to the provisions of said section? In either event, is the contract for the employment of such a consulting engineer terminable at will, and if not, may it lawfully be rescinded?

Section 143, Municipal Code, provides in part as follows:

"The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars ($500). When any expenditure within said department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city. The bids shall be opened at 12 o'clock noon, on the last day for filing the same by the clerk of such department of public service and publicly read by him. Each bid shall contain the

full name of every person or company interested in the same, and shall be accompanied by a sufficient bond or certified check on some solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material they shall be separately stated with the price thereof. The board may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash."

Section 145, Municipal Code, before its amendment by the Paine Law, 99 O. L. 562, provided as follows:

"The directors of public service may employ such superintendents, inspectors, engineers, harbor masters, clerks, laborers, and other persons, as may be necessary for the execution of the powers and duties of this department, and may establish such subdepartments for the administration of affairs under said directors as may be deemed proper. The compensation and bonds of all persons appointed or employed by the department of public service shall be fixed by said directors, and no person shall be removed except for cause satisfactory to said directors, or a majority of them."

I assume that your question relates to the powers and duties of the directors of public service as the same were prescribed by law prior to the adoption of the Paine Law.

On consideration of the two sections above quoted I have reached the conclusion that contracts of this nature must necessarily fall within one of the two classes indicated thereby. It will be noted that section 143 excepts the compensation of persons employed *in the department* of public service. In my opinion this exception relates to all employments made under favor of section 145 above quoted. That section authorizes the directors of public service to employ such engineers and other persons as may be necessary for the execution of the powers and duties of the department, and to fix the compensation of such persons. This section does not expressly, or by implication limit the power of the directors of public service in making employments to the filling of fixed positions; temporary employments are quite as clearly within the scope of this section as such permanent appointments. The mere fact that section 143 exempts the "compensation of persons employed therein" which might in one view of the case be held to refer only to permanent employes, does not change the view above expressed. The two sections must be read together. I, therefore, conclude that the board of public service was not required by the old municipal code to advertise for bids in employing a consulting engineer.

From this it follows that an employment of such a consulting engineer, however made, is subject to termination by rescission of the contract of employment. It is also terminable at the will of the directors upon cause satisfactory to them. The compensation of such consulting engineer, which could be fixed in the first instance by the directors, could be changed by them at will, there being no provision of the old code prohibiting this action. Therefore, if a board of public service employed a consulting engineer upon competitive bids, and thereafter by mutual consent such contract of employment was rescinded and a new one entered into without advertisement and competitive bidding, such a transaction would not violate the law relating to the powers of the directors of public service.

"6. May the board of public service in letting a contract for the construction of a water works system reasonably divide among the bidders certain portions of the work, or must they award the contract to the party bidding the lowest on the aggregate of the items specified in the bid? Is the answer to this question dependent in any way upon the form of the notice to bidders?"

Section 143, Municipal Code, provides in part that,

"The provisions of section 794 of the Revised statutes of Ohio so far as the same may apply, shall remain in full force and effect,"

Section 794, Revised Statutes, provides that,

"when any * * * board of directors of * * * any city * * * of the state * * * or other municipal authority, who are now or at any time shall be authorized to contract or engage for the erection * * * of any * * * public building or improvement, and who are now or hereafter may be required by law to advertise for and receive proposals for the furnishing of materials and doing the work necessary for the erection of the same, such officer, board or other authority shall require separate and distinct proposals to be made for furnishing the materials or doing the work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment or business necessary to be used in making such public improvement; and in no case where more than one such trade or kind of mechanical labor, employment or business is required to furnish the materials for, and do any such work, shall any contract for the whole of the job, or any greater portion thereof, than is embraced in one trade or kind of mechanical labor, employment or business, be awarded by any such officer, board, or authority, unless the separate bids do not cover all the work and materials required, or the bids for the whole, or for two or more kinds of work or materials are lower than the separate bids in the aggregate; and in all cases the contracts for the doing of the work belonging to each separate trade, or kind of mechanical labor, employment or business, or the furnishing of the materials for the same, or both, at the discretion of said officer or board, or other authority, shall be awarded to the lowest and best *separate* bidder therefor, and a contract for the same shall in all cases be made directly with him or them by said officer, board, or other authority, in the same manner and upon the same terms, conditions and limitations as to giving bonds * * * as are now prescribed by law, unless the same is let as a whole or to bidders for more than one kind of work, or materials, as aforesaid; but the provisions of this section shall not apply to the erection of buildings and other structures of a less cost than ten thousand dollars."

Under this section it has been held that where all bidders furnish bids covering every item in detail, the public authorities have the discretionary power to award separate contracts to those bidding lowest on the separate items, and may not be compelled to award the contract as a whole to a bidder whose aggregate bid is lowest.

State ex rel vs. Commissioners, 36 Bulletin, 176.
State ex rel vs. Hanna, 13 Decision 321.

The rule laid down by this case sufficiently answers the first branch of your question. In my judgment, the notice to bidders may be of service in determining whether the bids made in compliance therewith are bids on the entire work or on the separate branches thereof. See,

State ex rel. vs. Hanna, supra, page 325.

However, it is clear to me that where nothing is said in the notice as to whether bids on the separate branches are invited, and the bids themselves are capable of either construction, they will be judicially construed as being bids on the separate branches of the work. In the case submitted to me, I am satisfied that such a construction should be given to the bids in view of the fact that the notice specifically reserves to the board the right "to accept any portion" of any bid, and that in such case there can be no doubt but that the board had the right reasonably to divide among the bidders the separate portions of the work. It is to be kept in mind, however, that they could not be compelled to do this, and that they had discretionary power to award the contract to the bidder bidding the lowest on the aggregate in the item specified in the bid.

7. In the specifications of a water works contract there are a number of estimates of quantities of materials and the bids are invited and the contract is let with reference to such estimated quantities. It is specifically provided that,

> "These quantities are approximate, being given only as a uniform basis for comparison of bids, and the city of Newark reserves the right to increase or diminish the amount of, or omit entirely, any class or portion of the work as may be deemed necessary."

Has the board of public service the right either to increase or decrease the quantities specified in the estimate of the engineer without entering into an altered contract as provided by section 143 Municipal Code.

Permit me to suggest an amendment to the form of this question. It seems to me that the quantities are not to be regarded independently of the rest of the contract. On examination of the whole contract it appears that the agreement is, in effect, to construct a water works plant and distribution system complete, *not* to furnish so much pipe and *to do so much excavating,* etc. These estimates or approximate quantities are based upon the plans prepared by the engineer, which, in turn, were offered for inspection of bidders in the same manner as the estimates were offered. Accordingly, the plans thus prepared constitute an element of the contract, and, in my judgment, this is the controlling element. The above quoted clause, therefore, should be construed as a reservation to the city of the right to alter the plans. If the construction of the work in strict accordance with the plans and specifications will not require the exact quantity of material estimated by the engineer, such a deviation would not require any action of the city whatever, but the quantities actually furnished should be paid for according to the rate specified in the bid. If, however, the plans are changed, this in my judgment, is such an alteration of the contract as must be made under section 143 M. C., and the board of public service had no right so to change the plans *whether or not a change in quantities of materials furnished was necessitated by such change of plans,* without complying with section 143 M. C.

8. A contractor bids a lump sum for "carpenter work and hardware in pumping station". Has the board of public service the right to increase the quantity under this lump sum bid and hold the contractor to the price bid? This question arises under the clauses quoted in questions three and seven.

This question is in part answered in my discussion of your seventh question. There could be no increase in quantity in such a case as this without a change of plans, and this change of plans could only be affected under section 143. If section 143 has been complied with and the contractor has not seen fit to stipulate that another price should be paid, and to make such stipulation a part of the modification, then the board not only may but must hold the contractor to the price paid. It would be proper, however, for the contractor and the board to agree upon a different price in the course of their compliance with section 143 M. C., and this is what the statute contemplates.

9. Has the board of public service the right to pay for extras resulting from changes in the plans and specifications in the absence of altered contracts under section 143 M. C., and what is the effect of such payments, if made?

As above indicated, no change of plan is valid and binding upon either party to the contract unless the same is effected by alteration or modification undersection 143 Municipal Code. If the result of such change of plan entails the furnishing of more material than that required by the original plans, specifications and estimates, there is nevertheless no liability created against the municipality for such excess, and payments made by the directors of public service on account thereof are illegal.

10. Is the board of public service required to advertise for and let at competitive bidding, a contract for the necessary fuel for the running of a water works plant?

The statutes relating to the powers and duties of the board of public service did not direct the board of public service to purchase fuel or to enter into similar running expense contracts in any particular way. If they attempt to contract for all the coal to be needed during an appropriation period, they should determine the maximum amount to be furnished under such contract, and if the price thereof exceeds five hundred dollars they should proceed as directed in section 143 Municipal Code. The board could not, however, be compelled to make such a contract. It has the power to purchase coal and like supplies in carload lots in the open market, paying for each carload as it is furnished. In so doing they would not be obliged to advertise for bids under section 143.

11. On December 19, 1904, water works bonds to the amount of $300,000 were sold and the proceeds of said bonds placed in the custody of the treasurer. Ostensibly an order was given by the Finance Committee of council to divide said money equally among five banks, said money being deposited upon demand certificates, this money remaining in said banks from December 20, 1904, to March 3d and 5th, 1906, during which time one of said banks was the legal

depository of the funds belonging to the city, a bond having been filed by said depository for $50,000, said depository paying interest on daily balances at the rate of 3.86 per cent per annum.

(Query: Would the Finance Committee of council have a right direct to the treasurer as to the disposition of the $300,000?

(b) Query: Would the treasurer have a right to distribute this money as stated above upon demand certificates without interest?

(c) Query: Such money having bee placed with the general funds of said banks, would the city have a right to recover interest on the same?

Section 135, Municipal Code, provides in part as follows:

"The treasurer * * * may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of said funds, which said deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn *and all profits arising from said deposit or deposits shall inure to the benefit of said funds* * * *."

"The council shall have authority to provide by ordinance for the deposit of *all public moneys coming into the hands of the treasurer,* in such bank or banks, situated within the county, as may offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond * * * *in a sum not less than twenty per cent. in excess of the maximum amount at any time to be* deposited * * *"

So much of the foregoing section as relates to the designation of a city depository is designed to provide for the deposit of *all* the moneys in the hands of the treasurer. However, it is clear to me that such depository or depositories may not at any time receive money on deposit under the special contract provided for in the section in an amount so large that the amount of the bond shall not be twenty per cent. in excess thereof.

When the proceeds of the sale of the bonds came into the hands of the treasurer, such proceedings should have been had under authority of the ordinance already in force as would have invited bids from all the banks in the county for the use of such money. It ise apparent, however, that no such bids were in fact invited. The money being then in the hands of the treasurer, and no lawful depository being provided for it, the treasurer could, in my judgment, proceed under the first paragraph above quoted and make general deposits in such bank or banks situated within the county as might seem best for the protection of the funds, this being done at his own risk and that of his bondsmen. In my judgment, the action described by you should be considered as having been taken under favor of said first paragraph, as the "order" of the finance committee of council is of no effect whatever, said committee having no authority in law whatever except as a legislative committee.

In my judgment also the form of the certificate of indebtedness given to the treasurer by the banks is immaterial. The statute does not prescribe that any particular form shall be exacted, and in this respect also the action of the treasurer was a compliance with the statute.

In my opinion the banks so obtaining such money are liable to the city for any profit reaped by them from its use. These moneys being public moneys

are in the nature of trust funds, and the principle that all profits derived by any person having the custody thereof from the use of any trust fund inure to the fund itself, applies with especial force. This would probably be the case were there no express provision of law applying to such cases. But whatever might be the law, in the absence of any statutory provision, it seems to me there can be no doubt as to the effect of that clause of the first paragraph above quoted which provides that,

> "All profits arising from said deposit or deposits shall inure to the benefit of said funds."

This provision is very broad. It is not limited in its scope, by implication or otherwise to profits derived by the treasurer; it can only mean that whatever profit or increment is earned by the use of such funds so deposited shall become a part thereof. It is possible that this clause is more far-reaching than the rules of common law and equity, but it can not be doubted that its practical effect is to declare a constructive trust as against any person having the custody, possession or control of municipal funds, otherwise than under a depository contract, and to make such person or corporation answerable to the city for all profits derived by him or it from such funds.

Accordingly, I am of the opinion that a finding should be made against the banks in which the three hundred thousand dolars was deposited during the period between December 20, 1904, and March 3, and 5, 1906, for all interest and profits which, upon examination, may be found to have been earned and reaped by said banks from the use of such funds.

Your question, however, suggests another contingency. If the banks did not keep such funds separately from their general fund, and there is no way to determine what, if any, profits were derived from the use of such funds by said banks because they have commingled the funds with their general funds, then and in that event, I am of the opinion that the banks would be liable for interest at the rate of six per cent. from the time when such funds were so commingled to the time when the equivalent of the principal was repaid to the city. Having decided that the substantial effect of the above quoted provision of section 135, Municipal Code, is to impose upon the banks a constructive trust, it follows that such a commingling of the public funds with their own funds constitutes a conversion thereof. In such cases the trustee is liable for interest at the legal rate.

See Pomeroy's Equity Jurisprudence, section 1076, and cases cited.

> 12. An extension of the Newark Water Works distribution system was made by the Board of Trade of said city and known as the Wehrle extension. At the time of the letting of the contract under the second distribution this extension was still in the possession of the Board of Trade. Arrangements subsequently were made by which said extension was purchased by the Board of Service from the Board of Trade under an ostensible estimate, made by the York Construction Company, the contractor of the second distribution system, of $2,616.00. Would such a purchase be legal, there having been granted to the Board of Service no authority for such purchase, by council?

The facts stated by you in this question do not fully advise me as to all the circumstances surrounding this transaction. It appears to me, however, that

this was an attempt by the board of public service to accomplish indirectly what could not be done by direct means, to-wit, making an expenditure in the department, amounting to more than five hundred dollars without direction of council and without advertising for bids. Indeed, I am uncertain as to the power of the directors of public service to make such a purchase unless they are designated by council to act as its agents. I have heretofore held that out and out purchases of municipal utilities should be made by council, such matters not relating, in the first instance, to the "management and supervision of all public works" (Section 1398, M. C.), "the *construction of* public improvements and public works" (Section 141, M. C.), nor to the "*management* of municipal water plants" (Section 141, M. C.), which activities constitute the scope of the powers of the department of public service, as the same were defined prior to the enactment of the Paine Law. In either view of the case, however, this expenditure was illegal and this illegality could not be avoided or cured by including the expenditure in a payment to a contractor for another similar public work who did no part of the work thus paid for.

13. Where amounts are illegally paid to contractors, such illegality being known by the board of service, can recovery be had against the members of such board?

The answer to this question involves a discussion of several related provisions and principles of law. There are certain important distinctions which must be kept in mind.

In the first place the municipal code did not specifically designate the authority which should *accept,* on behalf of the city, the performance of work undertaken under a contract with it. There can, however, be no doubt but that the board of public service was the proper authority to do this; its power rises by clear implication from the power to manage and supervise the construction of public works and to enter into contracts therefor. The city auditor, although he has the right, under Section 133 of the code, to examine into the validity of every claim presented to him, has also the right to depend upon the approval of the board of public service for his authority to pay such claims. Where the face of the claim or voucher presented to the auditor does not disclose the illegality of the payment ordered by such claim or voucher, he is justified in honoring the same and issuing his warrant on the treasurer for the amount thereof.

The city then must depend upon the fidelity and diligence of its board of public service to protect its treasury from being mulcted by over-payments and illegal changes made in favor of those who have contracted with it through said board. It follows that, as a general rule, the members of the board of public service are liable to the city for any such loss so incurred.

This rule is, however, as above suggested, subject to certain very important exceptions and qualifications. In the first place the members of the board would not be *primarily* liable for payments illegally made to the contractors, as long as the contractor remains himself liable, and this liability can be enforced. There is no doubt in my mind but that the city solicitor, upon being required so to do by resolution of the council, may bring suit in the name of the corporation under section 1774 Revised Statutes to recover moneys illegally paid to the contractor. Such recovery would follow as a matter of course, granting the illegality of the payment, unless the contractor might have a defense. The only defense which it would be possible for him to have would be that successfully interposed in the case of State ex rel vs. Fronizer, 77 O. S. 7. It was held in that case that where the authorities of a political sub-division have accepted, on behalf

of the public, the fruits of an illegal contract, and where the plaintiff in an action to recover moneys paid under such a contract does not or can not come into court tendering back to the contractor the things paid for, received, accepted and converted to the use of the public, there can be no recovery against the contractor. The operation of this rule would probably prevent recovery against the contractor in a great majority of the particular cases of the kind described in your question. However, it is not all illegal payments to contractors that are affected thereby. As an instance of a case in which the contractor remains liable, and in which the finding of your department should be against him in the first instance, permit me to cite the first question above submitted and discussed. If the liquidated damages stipulated for under a contract of the kind therein described have not been released on behalf of the city, by appropriate legal proceedings, the directors of the board of public service should deduct from the amount paid the contractor the ascertained amount of such liquidated damages. If they fail to do so such failure must necessarily constitute an over-payment in the nature of a mere gift or gratuity for which the contractor has not parted with anything of value which the city would be obliged to tender back in case of a suit brought for the recovery of such excessive payment. Previous action, under section 143, Municipal Code, or subsequent action by the council, after suit brought in directing a compromise of such claim, which is merely a right of action, would justify the board in such failure; otherwise, the members would be liable.

Eliminating cases of the sort above described and illustrated, the question of the exact liability of the members of the board of public service for sanctioning illegal payments is still subject to qualification. In the first place they would not be liable at all in cases where it appears that they have exercised due care and diligence. However, this qualification is unimportant inasmuch as failure to observe the plain requirements of the statute defining the method of the execution of their powers would *per se,* constitute failure to exercise due care, and amount to malfeasance in office.

It may be then that a technical liability does exist against directors of public service who authorize the payment of public moneys in cases where no liability exists against the city, and in which the payment of such moneys could have been enjoined by an action brought in time. The real difficulty here arises in fixing the measure of damages, i. e., the *amount* of a finding of your department predicated upon such a liability. If, for instance, "extras" have been allowed without altered or modified contract, and such work has been put in by the contractor and accepted by the city so that the city could not recover the sum paid to the contractor, the same plaintiff could not recover against the members of the board of public service anything more than nominal damages unless it could be shown that the city suffered actual damage by virtue of the payment of its money for the particular work unlawfully done. The practical question would be, has the city paid more for this unauthorized work than the same is reasonably worth? It will be seen at a glance that to fix the amount of a given finding under this rule would be a very difficult matter if the same is possible at all, for the actual damage so described is the measure of damages in an action by the city against the members of the board.

Very truly yours,
U. G. DENMAN,
Attorney General.

TOWNSHIP TREASURER — "EXPENSES" CANNOT BE PAID.

School teacher — Contract for employment — resolution for, roll must be called and votes entered on records or contract invalid.

March 16th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — Your request of recent date is at hand in which you ask my opinion on the following statement of facts and questions:

> *First:* Four years ago the township treasurer of Greene township, Hocking County, was appointed to a position in the federal revenue office with headquarters at Chillicothe, Ross county, and was at the office in said city notified to meet the state inspector at Logan. He came to Logan and met the inspector and charged the necessary expense to the school board and the township trustees. The trustees paid their part but the school board refuses. Can the school board legally pay their share of the expenses?
>
> *Second:* On June 20th, 1904, the school board of Greene township, Hocking county, elected two teachers under eighteen years of age, one a Mr. Brown and the other a Miss Wolf. Both opened their schools and taught until the new board of five members came into office. Some six months after they started to teach the school board refused to pay their back salaries for the previous three months, and both of these teachers resigned. Brown subsequently filed suit to recover compensation for the time he taught. He recovered a judgment in the common pleas court for his full contract time. The circuit court sustained the judgment of the lower court. The case was taken to the supreme court on error but before the time for filing defendant in error's brief the board of education compromised with Brown for the amount of his salary for the time he had actually taught. Thereupon Brown's attorney failed to file an answer brief in the supreme court and that court reversed the judgments of the lower courts.
>
> May the present board of education pay Miss Wolf under her contract in view of the above facts.

In reply thereto I beg leave to submit the following opinion:

I am unable to find in the statutes any authority for the payment of "expenses" to a township treasurer, and I am, therefore, of the opinion that the board of education of Greene township cannot legally pay their proportion of the expenses of the township treasurer from Chillicothe to Logan. In this connection I call your attention to section 3261 General Code, (Sec. 1451 R. S.) which reads as follows:

> "If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustee, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term".

From the above section it would appear, and this department has heretofore held, that one of the qualifications for the office of township treasurer is

that he shall be an elector of such township. It would seem clear, therefore, that if your township treasurer took up his permanent legal residence in Chillicothe during the term of his office as township treasurer, he thereby forfeited such office, and such office became vacant.

In regard to your second question, I have examined the papers in the case of the Board of Education of Greene township, Hocking county v. Brown, on file in the supreme court clerk's office, and find from the journal entry and mandate of that court, that the supreme court reversed the circuit and common pleas courts in that case on the authority of Board of Education v. Best, 52 O. S. 138. The syllabus of this case reads as follows:

> "1. The clause in section 3982, of the Revised Statutes, to-wit: 'Upon a motion * * * to employ a * * *teacher * * * the clerk of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept, the names of those voting aye, and the names of those voting no,' is a mandatory provision and must be strictly pursued."
>
> "2. Where the minute book, containing a record of the proceedings of a board of education, shows that all the members of the board were present; that motion to proceed to the election of teachers was carried by a unanimous vote; and that an applicant for the position of teacher was declared elected by a unanimous vote, but that the clerk did not call the roll of the members, and the names of those voting aye were not entered on the record, the requirement of the statute was not sufficiently complied with, and the election was invalid".

From the printed record as filed in the clerk's office, it would appear that the records of the board of education of Greene township for the 20th day of June, 1904, did not show that the vote was properly taken in order to make the employment of either Brown or Miss Wolf legal, and it was upon this point that the supreme court decided the case.

I am of the opinion, therefore, that the board of education of Greene township cannot legally pay the compensation of Miss Wolf under such contract.

Enclosed herewith please find letter from Mr. C. W. Cox, addressed to Mr. Sam A. Hudson, enclosed by you in your request for an opinion.

Yours very truly,

U. G. DENMAN,

Attorney General.

BOARD OF EDUCATION — AUTHORITY TO PAY WATER RENT.

May 7th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You state that the Village of Hartwell procures its water by contract from the Village of Wyoming, paying to the Village of Wyoming the minimum charge of five dollars per day for one hundred thousand gallons a day and an additional sum for quantities in excess of this amount. I understand from your communication that the Village of Hartwell takes charge of such water, distributes it through its own pipes to such village and supplies water throughout such village at rates fixed by the Village of Hartwell.

You inquire whether, under these circumstances, the provisions of section 2417 of the Revised Statutes apply to the Village of Hartwell and whether the Village of Hartwell can legally collect water rent from the board of education of the Hartwell school district for water furnished for the use of public school buildings within such village.

Section 2417, as now contained in section 3963 of the General Code, provides that:

> "No charge shall be made by such director for supplying water for extinguishing fires, cleaning fire apparatus or for furnishing or supplying connections with fire hydrants and keeping them in repair for fire department purposes, the cleaning of market houses, the use of *public school buildings,* nor for the use of any public building belonging to the corporation, nor any hospital, asylum or other charitable institution devoted to the relief of the poor, aged, infirm or destitute persons or orphan children."

In the case of Gallipolis v. Trustees, 2 Nisi Prius 161, at page 163 the Court holds that such section 2417, R. S. is constitutional; that

> "The legislature has provided how the expenses of conducting and managing city water works are to be raised";

that the collection of water rent is provided for

> "by way of assessment rather than by tax";

that Section 2417 R. S. is

> "an enactment in harmony with other acts of the legislature exempting institutions of purely public charity and other public property used exclusively for public purposes, from taxation";

and that

> "this view is strengthened by a consideration of the fact that the assessment of water rents provided for in section 2411 is made a charge upon the tenements and premises supplied with water and is to be collected in the same manner as other city taxes, which means that if they are not paid when due the premises may be sold to pay them."

In the case of Ramsey v. Columbus, 12 Ohio Decisions, page 729, the Court say that:

> "The power to assess and collect water rents is limited by the terms of the legislation concerning it."

And since municipalities have only those powers which are given to them by law, the express prohibition of section 3963 of the General Code would prevent a municipality which has a water works system from making a charge for water used in a public school building within the municipality.

This view is strengthened by the fact that by section 2732 R. S. public school property is exempt from taxation and by section 3973 R. S. school property is exempt, not only from taxation, but also from "sale on execution, or

write, or order in the nature of an execution". It was held, too, in the cases of Toledo v. Board, 48 O. S. 83, and Board v. Toledo, 48 O. S. 87, that school property is not liable for street or sidewalk assessments and this department has held that, under section 63 of the Municipal Code, a board of education is without authority to pay for paving a street abutting upon school property, even if such board of education desires to make such payment. The language of section 3963 of the General Code is much stronger than the language of section 63 of the Municipal Code and in my opinion amounts to a positive negation.

I think that if the Village of Hartwell purchases its water from the Village of Wyoming, such fact does not change the situation. The purpose of section 3963 of the General Code is to provide that wherever a municipality has full charge of furnishing water throughout the entire municipality, it shall furnish water free of charge for the use of public school buildings. A municipality can furnish such water only through pipes and by means of other apparatus owned by it and it is operating a water works system, even though it purchases the water which it distributes from another municipality.

I am, therefore, of the opinion that the board of education of the Village of Hartwell is without authority to pay for water furnished for the use of public school buildings within the municipality.

Yours very truly,
U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY—PIKE COMMISSIONERS MAY NOT EMPLOY.

Sept. 20, 1910.

The Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You ask this department for an opinion upon the following question:

> "May a prosecuting attorney be employed by the board of pike commissioners, organized under the one mile assessment pike law, and be legally paid for his services out of the funds of the pike district in addition to his salary as prosecuting attorney?"

Your inquiry seems to involve the question whether improvements carried out under the one mile assessment pike law, sections 7232 et seq. of the General Code, are in reality improvements of the county under the control of the county commissioners with the board of turn pike directors as the agents of the county commissioners, in which case the prosecuting attorney would ge the adviser of the board of county commissioners as to such matters, or whether the board of turn pike commissioners is a county board within the meaning of Section 2917 of the General Code.

The present one mile assessment pike law was originally contained in the act of March 29, 1875, 72 O. L. 93, entitled "An Act to authorize the board of county commissioners to lay out and establish free turn pike roads, and to repeal certain acts therein named." The present law, while varying in details, provides for a procedure in the main like the procedure under the original act, some sections of which were amended by the act of 73 O. L. 96.

From an inspection of the present one mile assessment pike law, it is seen that the laying out and establishing of free turnpike roads under such law is very largely under the control of the county commissioners. The original petition is filed before the county commissioners; the county commissioners appoint the three turn pike commissioners, fill vacancies and may remove such commissioners; the map, profile and plans for such road are presented to such commissioners, who direct the county auditor to make a levy in case they approve of the construction of such road; the turnpike commissioners file the bond of the county commissioners; the county commissioners may order the road commissioners to extend the bounds of the free turnpike road; the road commissioners must annually make a full settlement with the county commissioners. If they fail it is the duty of the county commissioners to institute proceedings against them, which proceedings "shall be conducted by the prosecuting attorney of the county;" the county commissioners prescribe a name by which the road commissioners shall be known; upon completion of the road the county commissioners make an examination of it to see whether the road is "in suitable condition to be received as completed;" "the expense of receiving and locating the road sholl be paid out of the county treasury;" the county commissioners may change the location of any part of a free turnpike road; "the county commissioners shall build bridges and culverts upon the roads provided for in this chapter and contract and pay for all material used in the construction of such roads."

From the above references and from many provisions of the law it is seen that, while certain powers are given to the board of turnpike commissioners, nevertheless one mile assessment pikes are laid out and established under the control and direction of the county commissioners and that expenses, other than the amount received from the levy upon property within the road district, are paid out of the county treasury.

If, therefore, the turnpike commissioners are officers at all, it would seem that they are county officers because they are engaged in county work. It is difficult, however, to term them county officers for the reason that, under sections 1 and 2 of the Constitution, county officers are elected, whereas turnpike commissioners are appointed by the county commissioners. I believe, therefore, that it is better to take the view that turnpike commissioners are the agents of the county commissioners in the construction of one mile assessment pikes.

Taking this latter view, it would be the duty of the prosecuting attorney to advise the county and turnpike commissioners as to all legal questions arising under the one mile assessment pike law. Taking the former view and considering the turnpike commissioners as a board with powers of its own, their work is nevertheless so largely of a county nature that I believe it would be the duty of the prosecuting attorney to serve the turnpike commissioners in the same manner as he serves county commissioners and county boards. Even if the turnpike directors were authorized to employ an attorney for their work, it appears to me contrary to public policy, if not illegal, for them to employ and pay the prosecuting attorney who, under the law, may be required by the county commissioners to proceed against the turnpike commissioners under section 7264 of the General Code and who must, from time to time, be the attorney for the county commissioners on questions relating to the work of the turnpike commissioners.

I am, therefore, of the opinion that the board of turnpike commissioners, under the one mile assessment pike law, may not legally pay to a prosecuting attorney for his services, out of the funds of the pike district, any amount in

addition to his salary as prosecuting attorney, but that it is the duty of the prosecuting attorney as such to be the legal adviser of the county commissioners and such road commissioners in laying out and establishing one mile assessment pikes.

Yours very truly,
U. G. DENMAN,
Attorney General.

ORDINANCES AND RESOLUTIONS — MANNER OF PUBLISHING.

May 4th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — You request my opinion upon the following question:

> "The council of a city fails to make contract with the publisher of a democratic paper (said paper being the only paper of that political faith published in that municipality) for the publication of its ordinances and resolutions, and therefore said ordinances and resolutions are only published in the republican paper. Does such publication comply with the requirements of the law and are such ordinances and resolutions of legal effect?"

The following portions of the following sections of the General Code apply to this subject:

> "Section 4227. * * * Ordinances of a general nature, or providing for improvements, shall be published as hereafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. * * *"
>
> Section 4228. Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and in general circulation in such municipality, if such there be, * * *."
>
> "Section 4229. Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, * * *."

Section 4232 provides that:

> "In municipal corporations in which no newspaper is published, it shall be sufficient publication * * to post up copies thereof * *,

and that

> "Advertising for bids for the construction of public improvements shall be published in at least one newspaper of general circulation in the corporation. * *"

Section 4233 provides that:

> "It shall be deemed sufficient defense to any suit or prosecution under an ordinance, to show that no such publication or posting as herein required was made."

Other provisions, such as section 3878, provide for the particular form of publication in specific cases.

Section 4676 provides as follows:

> "Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for."

Section 6251 sets out the rates which newspapers may charge for publishing ordinances, resolutions, etc.

Where the statutes require that an ordinance or resolution be published "in two newspapers of opposite politics, published and of general circulation in such municipality", and where there are two such newspapers published in a municipality, I believe that such provision is mandatory and that publication must be made in such newspapers, provided they will publish ordinances, etc., at rates not exceeding those provided for in section 6251 of the General Code, and if such conplete publication is not made such ordinance, etc., while of legal effect, will be subject to the defense provided for in above section 4233. This view is sustained in the case of *State v. Commissioners, 7 N. P. 239.*

Where ordinances, etc., must be published "in two newspapers of opposite politics, published and of general circulation in a municipality", and there is only one such newspaper in the municipality, or one of two such newspapers refuse to publish at the rates provided for in Section 6251, in that case, under the provisions of section 4676, publication must be made in a newspaper published in the municipality and also in a newspaper of opposite politics published elsewhere but of general circulation in such municipality.

In construing a similar provision of section 4367 of Bates' Revised Statutes, now section 6252 of the General Code, the Circuit Court, in the case of Columbus v. Barr, 6 O. C. C., N. S., 151, at page 155, says:

> "The purpose of the legislature was to provide for the widest publicity of the public acts of the municipal council under a general law. It is common knowledge that this purpose would be best accomplished, as a general rule, by publication in the newspapers of opposite party politics, for the reason that when applied to all municipalities they are the local papers that generally reach the most people. * * it still remains that extended publicity is the governing purpose of the statute, and must be kept to the fore when seeking to discover the legislative intent."

I am, therefore, of the opinion that where the statute requires the publication of an ordinance or resolution in *two newspapers of opposite politics,* the pub-

lication as set out in your question does not comply with the law and that the want of such complete publication will be a sufficient defense to any suit or prosecution under such ordinance or resolution.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY SURVEYOR—CITY ENGINEER—TAX MAP DRAUGHTSMAN—ASSISTANT STATE HIGHWAY COMMISSIONER—COMPENSATION.

County surveyor may only receive one day's pay for a particular day's work.

City engineer may not receive pay for work for which he is employed when such work is performed by a deputy.

County surveyor may receive pay as tax map draughtsman and other public work not conflicting with duties of surveyor.

Assistant state highway commissioner, an engineer appointed under 1182 *G. C., may not act as surveyor, city engineer, resident engineer or county tax map draughtsman.*

June 20th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You ask:

1. How many of the following positions the same person may hold: county surveyor, assistant engineer of the state highway department (by which I believe you mean engineers under sections 1181 or 1182 of the General Code), city engineer, resident engineer for the construction of a road under the state highway law, and tax map draughtsman.

2. Whether a county surveyor, employed by the day under section 1183, R. S., (2822, General Code), may legally receive for services on the same day a day's pay as surveyor and also a day's pay as resident engineer employed by the day, or ten hours' pay as city engineer employed by the hour, or full compensation as tax map draughtsman employed by the month, or full compensation as civil engineer of the state highway department employed by the year.

3. Whether a person, employed as city engineer by the board of public service of a city at the rate of 40 cts. per hour, may legally perform the services of a deputy whom he pays 15 cts. per hour and still receive the 40 cts, per hour.

Section 1181 of the General Code, as amended, provides that:

"Subject to the approval of the governor, the state highway commissioner *may* appoint an assistant highway commissioner who shall be a competent civil engineer, experienced in road building and *serve during the pleasure of the commissioner.* In addition to his salary, the assistant highway commissioner shall be paid his necessary traveling expenses not to exceed ten hundred dollars in any

year. The commissioner may require the assistant highway commissioner to give bond in such amount and with such sureties as he approved. The assistant state highway commissioner shall perform such duties as shall be required of him by the state highway commissioner, and may, when authorized in writing by the state highway commissioner, act officially for him."

Section 1182 of the General Code, provides that:

"The state highway commissioner may also appoint three competent civil engineers, each of whom shall be allowed in addition to his salary his necessary traveling expenses, not to exceed seven hundred and fifty dollars in any year, a chief clerk, and not to exceed six additional clerks or stenographers. Each such additional clerk or stenographer shall receive such compensation as the commissioner allows, not to exceed nine hundred dollars in any year. The commissioner may require each such appointee to give bond in such amount and with such sureties as he approves."

Section 2250, General Code, provides that:

"The annual salaries of the appointive state officers and employes herein enumerated shall be as follows:
* * *; assistant highway commissioner, one thousand, eight hundred dollars; civil engineers, each, one thousand, five hundred dollars; * * *"

Section 1215, General Code, provides as follows:

"The state highway commissioner shall use a competent engineer to make the necessary surveys and plans for a proposed highway improvement. Such engineer may also be employed to superintend the work of construction of such improvement. Such person shall be compensated for each day employed in such service, not to exceed the amount allowed by law."

There is no permanent office of assistant highway commissioner because the state highway commissioner "may appoint," but is not required to appoint, an assistant highway commissioner, and also because an assistant highway commissioner, when appointed, serves only "during the pleasure of the commissioner" and may be removed at any time. The law requires that such assistant shall be "a competent civil engineer, experienced in road building," and I take it from the above that the assistant highway commissioner is employed for the reason that there is sufficient engineering work to keep him engaged during the entire time of his employment. I believe that the general assembly, by the language above quoted, intended that such assistant highway commissioner should, during the time of his employment, devote all his engineering skill to the interests of the state and that he should not undertake engineering work outside of his employment as assistant highway commissioner. It is clearly impossible for an assistant highway commissioner to give satisfactory service as such when his services may be required in any part of the state, and at the same time to be under obligation to perform services by the day, hour, or otherwise, in a particular locality. In addition to this, it is clearly contrary to public policy for

an employe of the state, who is paid a regular salary and expenses, to render services and receive pay for work performed for a political subdivision of the state. Such a position is clearly incompatible with the position of county engineer since the assistant highway commissioner's services may be required at any time in a particular part of the state while the services of a county surveyor may be required at the same time within his county. Since, as stated below, the county surveyor is the only person who may be directly employed as a tax map draughtsman, the assistant highway commissioner may not be employed as draughtsman. Also, for the reasons above stated, the assistant highway commissioner may not perform engineering services as city engineer, neither can he be a resident engineer in charge of the construction of a particular road under the state highway law, because the assistant highway commissioner's duties are general all over the state, whereas the resident engineer's duties, under section 1215 of the General Code, apply only to a particular road improvement, because the assistant highway commissioner is paid a regular salary while the resident engineer is paid by the day, and also because the assistant may now act for the commissioner.

The rules above laid down for the assistant highway commissioner apply equally well to the civil engineers appointed under section 1182 of the General Code. The state highway commissioner "may," but is not required, to appoint any or all three of such civil engineers. Having the power to appoint in the absence of specific provisions of the statutes to the contrary, he has the right to remove any of such civil engineers at any time. Such engineers draw a regular salary as engineers during the time of their services and it seems to be the intention of the general assembly that such engineers shall be employed only as long as there is sufficient work in the state highway department to require their full services.

I am, therefore, of the opinion that such civil engineers may not, while in the employ of the state, perform work and receive compensation in any capacity as county surveyor, city engineer, resident engineer, or tax map draughtsman.

Section 1183, R. S., is now contained in section 2788 of the General Code which provides that,

> "The county surveyor shall appoint such assistants, deputies, draughtsman, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners,"

and also in section 2822 of the General Code, which provides that:

> "When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses."

and that "when not so employed he shall be entitled to charge and receive" the fees set out in such section.

It is seen from this that the county surveyor is paid not a salary but compensation for the actual services rendered, either by the day or in performance of particular work.

As to the tax maps, sections 5549 and 5550 provide for the preparation of the same by contract with competitive bidding. The county commissioners, however, may have such work done by employing the county surveyor and

draughtsman under the following prvisions of sections 5551 and 5552 of the General Code:

> "Section 5551. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting and keeping up to date a complete set of tax maps of the county. * * *"
>
> "Section 5552. The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

While a salary is provided for the county surveyor as such tax map draughtsman, it is clearly seen from the fact that provision is made for the doing of such work by contract, from the fact that the county surveyor is given a number of assistants deemed sufficient by the county commissioners, and from the fact that such work is not to interfere with the county surveyor's other duties, that the salary provided in section 5552 is not so much a salary within the ordinary meaning of that term, but rather a particular compensation for a particular piece of work not requiring the entire time of the county surveyor.

For these and other reasons the positions of county surveyor and tax map draughtsman are not incompatible and the county surveyor may receive compensation for work as a tax map draughtsman. In addition to this, the county surveyor may, subject to the limitations below stated, also draw pay for particular service rendered as resident engineer employed by the day under section 1215 of the General Code, or as city engineer employed by the hour under sections 4365 and 4366, General Code, for the reason that in each case he is performing a particular piece of work for a particular compensation, so long as he does not bind himself to perform work at such times as will conflict with his duties as county surveyor.

We come now to the question whether such county surveyor may receive for services, on the same day, a day's pay as surveyor and also a day's pay as resident engineer, or ten hours' pay as city engineer.

While it is recognized that an officer who holds two or more separate and distinct offices not incompatible with each other may recover the compensation provided by law for each office, it is held that:

> "Where the compensation is a *per diem* allowance, the officer cannot have such an allowance for the same day's service, in each of two or more offices held by him."
>
> See *Throop on Public Officers,* Sec. 496, *Mechem on Public Officers,* Sec. 859.

On this subject it is held in the case of Commissioners v. Bromley, 108 Ind. 158, that:

> "Where a township trustee during his term intermingled his services for the township and as overseer of the poor, and receives full compensation from the township fund for every day when he performed an official duty, he cannot recover compensation from the county for services as overseer, on the ground that he is liable to re-

imburse the township fund for the amount over-charged for other official services."

The Court further say, page 162:

"We further interpret the section under consideration to mean that, as applicable to both classes of service, an allowance of only two dollars can be made for an actual day's service, without reference to the manner in which the day may have been divided between the two classes of service, and that, consequently, a township trustee is not entitled to receive, out of any fund, more than two dollars for official services performed during any one day. * * Having intermingled his services as overseer of the poor with his other official duties, and having received full compensation from the township fund for every day during which he performed any official duty, he is now precluded from recovering any further compensation from the county, or from any other fund."

I take it from the above authorities that a county surveyor can receive for a particular day only one full day's compensation and that if he draws pay either as county surveyor, or as resident engineer, he thus disqualifies himself from drawing pay in any other capacity, either for an hour or for any fraction of a day. A county surveyor cannot, therefore, after having drawn pay for a full day as county surveyor, draw further pay for any number of hours of the same day as city engineer, or for a day, or any fraction, or all, of the same day, as resident engineer.

As to your third question, when a person was employed as engineer by the board of public service of a city at the rate of 40 cents per hour, it is clear, in the absence of a specific agreement to the contrary, that the board desired to procure the personal services of the engineer employed, and that such engineer had no authority to employ another person as a deputy, or otherwise, to perform such work. Had it been the intention of the city, through its board of public service, to permit a deputy to perform the work for which the engineer was employed, it is clear that the board of public service would have directly employed such a deputy at 15 cents per hour instead of giving to the engineer employed a profit of 25 cents per hour on the deputy's work without the performance of engineering work by the engineer employed. An engineer is employed because of his own personal character and ability and I believe the board of public service was without power to employ an engineer at a given compensation per day and at the same time permit the work to be done by some person chosen by such engineer instead of by the board of public service.

Yours very truly,

U. G. DENMAN,

Attorney General.

BRIDGES — CONSTRUCTION OF BOND GIVEN FOR FAITHFUL PERFORMANCE TO BUILD.

August 18th, 1910.

The Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — In your communication of August 11th, you submit a form of bond which contains the following language:

"The condition of the above obligation is such that whereas the said ..... is engaged in contracting for the construction of sundry bridge work in said County in a manner in sundry contracts and specifications on file in the office of the County Auditor of Butler County, Ohio, set forth.

"Now therefore if the said ..... shall honestly and faithfully discharge and perform all and singular the obligations of any contract and specifications entered into within a period of one year from the above date, and hold the County of Butler free and harmless from any damage suits that may arise during the construction of any work awarded the said ..... and also hold said County free from any damage resulting from faulty construction within a period of one year from the completion of any contract, then the above obligation to be void, otherwise to remain in full force and virtue."

You ask whether such a general bond is in compliance with the law relating to the building of bridges.

It appears that the form of bond presented is intended to be a blanket bond for a certain sum of money, in this case five thousand dollars, which bond is to cover all contracts made during the year between the county and the person giving such bond in connection with bridge work in such county.

Some of the provisions of the General Code, relating to bonds given in connection with bridge contracts, are the following:

Section 2346:

"* * * At such time and place, or at a time to which they shall publicly adjourn the consideration thereof, they shall publicly open, read and examine the proposals made, and award the contract for furnishing the material and for the erection of such superstructure to the person or persons giving security as required by the provisions of this chapter, who is the lowest or best bidder or bidders, considering price, plan, material and method of construction."

Section 2355:

"* * * Such contract, so far as it relates to public buildings or bridge substructures, shall be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price, and gives good and sufficient bond for the faithful performance of the contract in accordance with the plan or plans, descriptions or specifications herein required, which shall be made a part of the contract."

Section 2365:

"The bonds provided for in this chapter required to be taken by a board or officer of the county, township, city, village or school district of the state shall not exceed fifty per cent. of the estimated cost of such public building, bridge substructure or superstructure, or repairing, altering or rebuilding thereof. The officers named herein may require the person or persons on the bond of the successful bidder or bidders to qualify that they are residents of the state, and jointly worth

a greater sum than the amount named in the bond over and above all liabilities and exemptions allowed by law."

It appears to me, from the language of these sections and from the general policy of our law in relation to the giving of bonds as security for the faithful performance of contracts, that it was the intent of the general assembly that a separate bond should be given for each and every separate bridge contract and that no such blanket bond as is presented by you can be permitted as in compliance with the law relating to the building of bridges.

I am, therefore, of the opinion that such a bond as you present should not be accepted by the county.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

DEPUTY STATE SUPERVISORS OF ELECTION MAY EMPLOY ASSISTANT CLERK.

December 6th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 23rd requesting my opinion upon the following questions:

"1. Are the provisions of Section 4877 of the General Code, relating to the payment of a deputy clerk and assistants applicable to all counties, or do they only confer such authority in counties containing registration cities?

"2. If it is held that the provisions of Section 4877 of the General Code do not apply to counties not containing registration cities, does the provision of Section 4821 that all proper and necessary expenses of the board shall be paid out of the county treasury, authorize the board of deputy state supervisors of elections, or that board in conjunction with the county commissioners, to employ a deputy clerk or assistant clerk?

"3. If the second question is answered in the negative, how are the examiners of this department to distinguish between a deputy clerk or assistant clerks that may not be legally employed and 'clerks to assist the board of election in canvassing and tabulating returns' that may be legally employed?"

Section 4877 of the General Code provides in part as follows:

"When necessary, the board (deputy state supervisors or the supervisors and inspectors of elections) may employ a deputy clerk and one or more clerks as temporary assistants of the clerk at a salary of not to exceed the rate of one hundred dollars per month each and prescribe their duties. * * *"

This section is a part of the chapter relating to the registration of electors, and, in my opinion, applies only in counties containing registration cities.

In connection with your second and third questions you cite for my consideration the case of State ex rel Vail v. William E. Craig, 21 C. C. 180. That case involved a construction of Section 2966-4 R. S., now Section 4821, of the General Code. While, as you state, the case was decided before the present election law was enacted, nevertheless, the law then in force and construed therein was the same as that involved in your second and third questions. The carefully considered opinion of Marvin, J., is very aptly summed up in the syllabus which is as follows:

> (1) "Under Section 2966-4 R. S., the compensation for a necessary assistant to the board of deputy supervisors of elections may be allowed and paid as necessary expenses.
>
> (2) "But the county auditor can not issue his warrant on the treasurer to pay for such services unless the amount has first been allowed by the county commissioners."

I am, therefore, of the opinion that a board of deputy state supervisors of elections, with the approval of the county commissioners, has authority under Section 4821 of the General Code, to employ assistants to its clerk. This holding makes it unnecessary for me to answer your third question.

Yours very truly,

U. G. DENMAN,
Attorney General.

SHERIFF MAY ACT AS PROBATION OFFICER.

December 8th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You ask:

> First, Whether a sheriff may be legally appointed as probation officer of the juvenile court;
>
> Second, Whether a sheriff, who is also a probation officer and who acts under Section 1660 of the General Code, may retain the fees arising under such section, or pay the same into the county treasury to the credit of his fee fund as sheriff;
>
> Third, whether a sheriff may receive compensation out of the county treasury as a probation officer and, if so, whether he may retain the same, in addition to his salary as sheriff, or must return the amount of such compensation into the county treasury.

Section 1662 of the General Code provides for the appointment by the judge of a chief probation officer and as many as three assistant probation officers. The law also provides that:

> "The judge may appoint other probation officers, with or without compensation."

Section 1663 of the General Code sets out the duties of such probation officers in the following language:

"When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect, or dependency, the parentage and surroundings of such minor, his exact age, habits, school record, and every fact will tend to throw light upon his life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct. He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. He may make arrests without warrant upon reasonable information, or upon review of the violatiton of any of the provisions of this chapter, detain the person so arrested pending the issuance of a warrant, and perform such other duties, incident to their offices, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals and police officers shall render assistance to probation officers, in the performance of their duties, when requested so to do."

It appears, from a review of the history of the juvenile court law, that the purpose of having probation officers was to secure individuals, other than the then existing officers, to assist in the handling of juvenile cases. Among such officers who have, under the juvenile court law, been largely supplanted in the handling of these cases by such probation officers, are the sheriffs and their deputies. The section above quoted shows that a probation officer, in the serving of "warrants and other process of the court," is "clothed with the powers and authority of sheriffs." A probation officer not only performs all the duties in such cases which were formerly performed by the sheriffs, but he performs additional duties, such as making "examination and investigation into the facts and circumstances", being "present in court to represent the interests of the child," furnishing "to the judge such information and assistance as he may require," etc. In other words, the probation officer may perform all duties of the sheriff in such cases, and also a number of additional duties. The law provides that "sheriffs * * * shall render assistance to probation officers in the performance of their duties, when requested so to do", but the law does not specifically state that a sheriff may be a probation officer.

It appears to me from the above that a probation officer must perform certain duties in addition to those which are to be performed by the sheriff and that the performance of all the duties of a probation officer by a sheriff would at least interfere with the faithful performance of the duties of his office as sheriff. Since section 1663 requires a sheriff to render assistance to a probation officer, it would seem that the statute differentiates the two positions and considers them as positions which should be held by different persons. Such differentiation is also emphasized by section 1660, which provides that:

"The warrants * * * may issue to a probation officer of any court or to the sheriff of any county, *".

It appears to me, therefore, that it is the policy of the juvenile court law that probation officers should be persons other than regular officers of the law such as sheriffs. If, however, a sheriff could also act as a probation officer, in

such case, under section 1660, warrants, etc., should issue to him as sheriff because he is a regular officer of the county for the serving of such warrants, etc., and since practically the only reason for issuing such warrants, etc., to a probation officer, under the changed condition of the law, is to procure a person other than the sheriff to serve such warrants, etc. A further reason for this conclusion arises from the fact that if the warrants issued to the sheriff, as such, he must, under section 2977 of the General Code, pay all fees, costs, etc., arising therefrom into the treasury of the county, whereas if such warrants issued to the sheriff not as sheriff but as probation officer, he could, as probation officer, retain to his own personal use such fees or expenses as might be incurred in the handling of such warrants, etc. In other words, if the sheriff could act as a probation officer in such matters, he could evade the provisions of the county salary law.

As to your third question, it might be argued that a sheriff could act as probation officer to the extent that he would perform services not required of a sheriff but rather the additional services which are required of a probation officer and that he could, under section 1662, General Code, receive some compensation for such additional services. To argue thus would be to say that a person, namely a sheriff, may be appointed as probation officer but may not perform all the duties of such position of probation officer, for the reason that he would be compelled to perform some of such duties as sheriff. Such a condition is so inconsistent as to be impossible for the reason that one probation officer must have as much power and be able to perform as many duties as another.

I am, therefore, of the opinion that a sheriff may not act as probation officer or receive any compensation or fees of any kind in the capacity of a probation officer.

Yours very truly,
U. G. DENMAN,
Attorney General.

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

December 12th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I have before me your letter of December 1st, in which you submit to me for an opinion thereon the following questions:

> "1. If the person occupying the office of coroner of a county removes from the county and becomes a resident of an adjoining county, does such removal operate to create a vacancy in the office, or is any action required to declare the office vacant, or may said person continue to hold the office notwithstanding his removal?
>
> "2. If the coroner above mentioned is also employed by the infirmary directors as infirmary physician, does he forfeit this employment by reason of his removal, or may he continue to act in the capacity of infirmary physician and receive the compensation under his contract?"

After carefully searching the statutes I can find nothing authorizing the removal of the coroner or creating a vacancy in that office by reason of the

removal of the coroner from the county in which he is elected during his term of office.

Article 15, section 4 of the Constitution provides:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

Article 5, section 1 of the Constitution provides:

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

From a reading of this section it will be readily seen that the coroner must be a resident of the county in which he is located at the time of his election to the office, and it is unreasonable to think that it was the intention of the legislature and the framers of the Constitution that the coroner after his election, and during his term of office, could take such action as would render him ineligible to be elected to the office in the first place.

It would be contrary to public policy for a public officer, during his term of office, to be permitted to take such action as would disqualify even a candidate for the office which he holds. It is a well-settled principle of law that a vacancy in office will occur when the incumbent, before the expiration of his term, removes with the intention of permanently remaining away from the political division in and for which he was elected or appointed to perform the duties of the office; and a judicial determination is not necessary to establish the fact of such vacancy.

I am, therefore, of the opinion that the office of county coroner, in the absence of statutory provisions, is vacated by reason of the coroner taking up his residence in another county than the county in which he was elected, and that no action is necessary to declare the office vacant, and, further, that the county commissioners may consider the office as vacant and proceed to fill the vacancy as provided for in section 2829 of the General Code.

I am further of the opinion, replying to your second question, that the removal of the infirmary physician from the county operates a forfeiture of his employment on the ground that the continuation of his employment would be contrary to public policy, and also by reason of the fact that his removal operates as an abandonment of the office.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY OFFICERS—DATE COMPENSATION WILL CHANGE BASED ON FEDERAL CENSUS OF 1910—FULLY DISCUSSED.

December 12th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have before me your letter of November 30th, in which you submit to me for an opinion the following questions:

1. "At what date will each of the officers receiving salary change the basis of his compensation to the federal census of 1910?"

2. "If a probate judge is elected at the November election, 1910, to fill out the unexpired term ending in February, 1913, would his salary be based upon the census of 1900 or that of 1910 for the period from November 8th, 1910, to February 9th, 1913?"

Sections 2990 et seq. of the General Code, fixing the salaries of the various county officers, provide that each of the following officers: auditor, treasurer, probate judge, clerk, sheriff, recorder and prosecuting attorney, shall receive so much money, fixing the amount based on the population of the county "as shown by the last federal census next preceding his election." The meaning of the statute is so perfectly clear that it seems incapable of misconstruction. The only questionu for solution is the question of what was *the last federal census* next preceding the election of the officer in question.

Section 2 of the Act of Congress passed July 2nd, 1909, entitled "An Act to provide for the thirteenth and subsequent decennial censuses" is as follows:

Section 2. "The period of three years, beginning the first day of July next preceding the census provided for in section one of this act shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed and published within such period."

Section 1 of the above act provides that the census shall be taken in the year 1910 and every ten years thereafter. The decennial census period, therefore, covers the three years beginning July 1, 1909, and ending June 30, 1912. The act requires *the completion and publication* of the census within the said period of three years.

Section 2 of the Municipal Code of Ohio provides in substance that the classification of cities and villages shall be determined by their population as shown by the federal census, when the same is officially made known by the director of census to the secretary of state of Ohio, and by him transmitted to the mayor of the municipal corporation affected. The provisions of the Municipal Code do not touch the question at issue except that the classification of cities and villages and the salaries of county officers have this much in common, that they are both determined by the federal census. The Municipal Code, however, goes a step further than the statutes fixing the salaries of county officers and specifically provides the manner in which the different municipalities shall be officially notified of the fact of their respective populations as shown by the federal census.

The statutes of Ohio, except those referred to in the Municipal Code, are silent on the proposition of the manner in which what constitutes the last federal census shall be ascertained. It is a well settled principle of law, however, that courts will take judicial notice of the population of a state, of a county, or of a municipality as shown by the federal census. The statutes provide absolutely no way in which the fact of the last federal census shall become known, as affecting the salaries of county officers. The county commissioners, in making appropriations covering the salaries of the various county officers, must, however, necessarily take notice of the federal census if it has been officially completed and published, but if the census is not completed and published, or if the enumeration is completed and not published, the county commissioners are certainly not bound to take notice of the census as having been made. The last general election at which the various county officers were

elected was held November 8th, 1910. That much of the federal census of 1910 showing the population of the various counties of the state of Ohio was not given out by the Director of the Census Durand until November 23, 1910,—more than two weeks after the county officers were elected. The giving out by the director of census was of itself an official act, but I may say that the official certification showing the population has not yet been made by the secretary of state.

Section 20, Article 2 of the Constitution of Ohio, of 1851, provides that:

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

If the population of the counties of Ohio as shown by the federal census had not made known or published before the officers elected on November 8th began their respective terms in office, the question would be settled by the above section of the Constitution, and the decision of the courts under it, which have firmly established the rule that the compensation of a county officer can not be changed during his existing term of office. However, as the publication of the population of the counties of Ohio was made by the federal director of census, before the county officers elected November 8th began their terms of office, we must look to the statute itself for the solution of the question.

The statute provides in the case of the auditor, treasurer, probate judge, clerk, sheriff, recorder, and prosecuting attorney, that the salary of such officer shall be based upon the population of his county "as shown by the last federal census next preceding his election." The last federal census preceding the general election of November 8th, 1910, was the census of 1900. It is certainly not the meaning of the statute, nor was it the intention of the legislature that the salaries of county officers should be based upon a fact which was not known to the public at the time of their election. So far as the public was concerned, so far as the county officers were concerned, and so far as the county commissioners were concerned, the last federal census next preceding the election of November 8, 1910, was the census of 1900. The fact that the census figures of the population of the counties of Ohio was given out on November 23rd is a fact of no consequence as affecting the county officers elected November 8th. So far as was known outside of the census department at that time, the figures might be legally withheld until June 30th, 1912. The meaning of the word "election" is perfectly clear. It means,

> "a public meeting of the electors within a prescribed election district * * * proceeding by ballot to the choice of persons to fill the various offices."

It is a perfectly obvious fact that by no possible distortion of the word "election" as it is used in section 2990 of the General Code et seq. can it be construed as to have any other meaning.

I am, therefore, of the opinion, answering your first question, that the basis of compensation of county officers elected November 8, 1910, will be the federal census of 1900, and that, under the existing statutes, the salaries of county officers elected at the next election, and thereafter until the census of 1920 is completed and published, will be based upon the census of 1910.

I am further of the opinion, replying to your second question, that the salary of a probate judge, elected at the November election of 1910, to fill out an unexpired term ending in February, 1913, will be based upon the census of 1900.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION—CONTRACT—SPECIFICATIONS—MUST AFFORD COMPETITION IN BIDDING.

December 13th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 7th in which you state that a certain village council has entered into a contract for the purchase of the equipment for an electric light plant, and that the specifications approved by council and upon which the contract was let are so drawn as, in effect, to limit the purchase to the products of a single manufacturer. You request my opinion as to whether or not a taxpayer may enjoin the payment of any money under such a contract.

Section 3811 of the General Code, formerly Section 45b M. C., provides in part as follows:

> "No municipal corporation shall adopt plans or specifications for a public improvement required by law to be made by contract let after competitive bidding, which requires the exclusive use of * * * an article or process wholly controlled by any person, firm or corporation or combination thereof."

The purposes and intent of this section are clear. It aims to secure true competition in bidding on municipal contracts. The letter enclosed in your letter discloses that the specifications do not expressly require any particular article, but that they are so drawn as to make it impossible for any articles produced by other manufacturers to conform thereto, although such articles are of the same kind and intended for the same use. It appears, therefore, that an attempt has been made to accomplish by indirect methods what would clearly be a violation of law if directly undertaken.

I am, therefore, of the opinion that the contract has been unlawfully entered into, and that an injunction suit could be maintained for the purpose of restraining its performance.

Yours very truly,
U. G. DENMAN,
Attorney General.

TAXES—DELINQUENT—SALE.

December 17th, 1910.

Treasurer's office must be open for payment of delinquent taxes until second Tuesday in February.

Delinquent tax sale must be held on second Monday in February though it cannot be completed before semi-annual settlement.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 10th enclosing a letter addressed to you by the Treasurer of Wood County in which he requests an opinion upon the following facts:

> "Section 2649 of the General Code provides that the office of the County Treasurer shall be kept open for the collection of taxes from the delivery of the duplicate until the 25th day of January. Session Laws 101, pages 164 and 165 show that the notice should read thus: 'And notice is hereby given that the whole of such several tracts, lots or parts of lots * * * will be sold by the county treasurer at the court house in such county on the second Tuesday of February, ————, unless the taxes and penalty are paid before that time.' Section 2596 provides that settlement must be made or on before the 15th day of February. Section 2600 provides that the county auditor shall send a copy of settlement papers to the state auditor within ten days after he has made semi-annual settlement with the treasurer.
>
> "1st. If the notice is published as provided by Session Laws 101, pages 164 and 165, taxpayers will be mislead if the treasurer's office is only open until January 25th for the collection of taxes.
>
> "2nd. It will be impossible in this county to have the delinquent sale February 14th and include the amounts received in the February settlement, which is to be made on or before February 15th, and if the proceeds of the delinquent sale are not included in the February settlement the penalty should be added for the first half of the 1910 taxes. So the amount the various pieces would have to sell for on February 14th, 1911, would be more than what the owners would have to pay if they paid their taxes before January 25th. This would conflict with the provisions of Sections 5704 and 5705, as amended in 101 Session Laws."

The following provisions of the General Code may be quoted for the purpose of defining the machinery of delinquent tax proceedings:

Section 5678 of the General Code:

> "If one-half of the taxes charged against an entry of real estate is not paid on or before the twentieth day of December, in that year, or collected by distress or otherwise prior to the February settlement, a penalty of fifteen per cent. thereon shall be added to such half of said taxes on the duplicate. If such taxes and penalty, including the remaining half thereof, are not paid on or before the twentieth of June next thereafter, or collected by distress or otherwise prior to the next August settlement, a like penalty shall be charged on the last half of such taxes. The total of such amounts shall constitute the delinquent tax on such real estate to be collected in the manner prescribed by law."

Section 5679:

"If the total amount of delinquent taxes and penalty * * * together with one-half of the taxes charged against such real estate for the current year, is not paid on or before the twentieth day of December, of the same year, the delinquent taxes and penalty, and the *whole of the taxes* of the current year, shall be due, and be collected by the sale of the real estate, in the manner authorized by law. * * *"

Section 5704 (as amended 101 O. L. 164):

"Each county auditor shall cause the list of delinquent lands in his county to be published weekly for two weeks between the twentieth day of December and the second Tuesday in February next ensuing * * *. There shall be attached to the list a notice that the delinquent lands will be sold by the county treasurer, as provided by law."

Section 5705 of the General Code (as amended 101 O. L. 164):

"Such notice shall be in substance as follows: * * * The lands, lots and parts of lots returned delinquent by the treasurer * * * with the taxes and penalties charged thereon, * * * are contained and described in the following list, * * * And notice is hereby given that the whole of such several tracts, lots or parts of lots, or so much thereof as may be necessary to pay the taxes and penalty charged thereon, will be sold by the county treasurer at the court house in such county on the second Tuesday in February, * * * unless the taxes and penalty are paid before that time, and that the sale will be continued from day to day, until the several tracts, lots and parts of lots, have been * * * offered for sale."

Section 5711 of the General Code (as amended in 101 O. L. 165):

"The county treasurer * * * shall attend at the court house * * * on the second Tuesday in February, * * * and at and after the hour of ten in the forenoon, offer for sale, separately, each tract of land, * * * contained in such advertisement, on which the taxes and penalty have not been paid. * * * The treasurer shall continue such sale from day to day until each of such tracts * * * have been offered for sale."

Section 2649:

"The office of the county treasurer shall be kept open for the collection of taxes from the time of delivery of the duplicate to the treasurer until the twenty-fifth day of January, and from the first day of April until the twentieth day of July."

The conflicts noted by the county treasurer are more apparent than real. It is true that it may be misleading to taxpayers to notify them that their lands will be sold for taxes unless the taxes are paid by a certain date, when, as a matter of fact, they can not be paid later than another date previous to the date

specified in the notice. It is true also that the procedure in the matter of the sale of delinquent lands must be strictly adhered to in order that its validity may be upheld and that every opportunity for the payment of taxes by the person charged therewith afforded by the state must be in point of fact presented. For this reason, I incline to the view that section 2649 of the General Code should be regarded as referring only to the payment of taxes not delinquent. The section immediately preceding it, section 2648 of the General Code, provides for the collection of the current taxes, and it is perfectly logical to regard section 2649 as applicable only to the payment of this class of taxes. I do not find that said section 2649, which was formerly section 1088 R. S., has ever been construed.

I am, therefore, of the opinion that, in order to carry out the manifest intention of amended section 5705, the treasurer should not close his office for the collection of delinquent taxes on the twenty-fifth day of January, but should receive such delinquent taxes up to the date of the delinquent tax sale.

The second conflict noted by the treasurer grows out of a practical rather than a theoretical difficulty. It is clearly the duty of the treasurer to hold the delinquent tax sale on the second Tuesday of February, which may occur, of course, as late as February 14th. So long as the tax sale is completed on the fourteenth it is still logically possible for the proceeds thereof to be included in the settlement to be made on the fifteenth, so that the treasurer would have no right to anticipate the fact that land sold on February 14th would have to be sold for an amount sufficient to cover the penalty on the current taxes which had accrued under section 5678 of the General Code; on the other hand, such penalty should not be included in the amount for which the land should sell if it were sold on February 11th.

If, however, the sale is continued from day to day and lands are sold after the settlement, then the penalty of fifteen per cent. must be added and included in the amount for which the property is to sell. It is thus apparent that this difficulty can be surmounted and that these apparent conflicts can be worked out satisfactorily. In proceeding under the delinquent tax law it is of vital importance that all the provisions for the protection of the delinquent taxpayer be strictly adhered to, and for this reason if the treasurer published the delinquent list as provided in amended section 5704 and thus, so to speak, puts the machinery in motion, he must permit it to run its course regardless of any practical inconvenience to which it may submit him at the time of the February settlement.

The treasurer refers also to section 2601 of the General Code which provides that,

> "During the month of August of each year, the auditor shall make and record, in a book provided for that purpose, a list of all lands and town lots returned by the treasurer delinquent at the preceding settlement, * * * charging thereon the unpaid taxes for the year next preceding, together with the penalty thereon, and also the taxes of the current year. * * *"

As the treasurer observes, this is the section which provides for making up the delinquent tax list for real estate. If there is a conflict between this section and amended sections 5704 and 5705 of the General Code, it is no greater than the apparent conflict between sections 2601 and 5679 of the General Code above quoted, which provide that the whole of the taxes of the current year shall be due and collected by sale of the real estate in case the first half of the taxes are not paid on or before the twentieth day of December, and in case the taxes on the same property were not paid at all during the preceding year. The solution of this difficulty, it appears to me, is as follows:

In case a tax once becomes delinquent, the lien for such tax is to be discharged by a single sale, and such sale must be made for a sum that will include all taxes and penalties accrued at the date of the sale. That is to say, if taxes on a certain tract become delinquent in such manner as to be included in the delinquent list sold for taxes in February of a given year, the amount realized from such sale must be sufficient to pay the taxes originally delinquent, and those which have accrued for the preceding year as well; the property is not twice delinquent. Under such a construction of the law section 2601 of the General Code must be held to apply only to taxes *for the first time* delinquent; that is to say, the delinquent list made each August is not under any circumstances to include lands previously returned as delinquent and sold or offered for sale for taxes before the preceding February settlement.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS — CERTAIN EXPENDITURES FULLY DISCUSSED.

December 12th, 1910.

The Bureau of Uniform Accounting, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I am in receipt of your letter enclosing copies of pay rolls and vouchers relating to the public works of the state and submitting a number of questions relating to expenditures in connection with the public works. The matters submitted are stated by you as follows:

> "1. Voucher No. 4, $8.00, rent of house to Mrs. Marie Aylward, wife of James Aylward, locktender at Lockland;
>
> James Aylward's salary at the time of his appointment was fixed at $22.00 per month, and no mention was made of house rent. Referring to the officer's pay roll you will see that he is receiving the above salary.
>
> The questions arising are: Has Mrs. Aylward, the wife of a regularly appointed officer or employe of State Board of Public Works the legal right to contract in any way with said Board? Has Mrs. Aylward the legal right to receive any remuneration in addition to his salary fixed by this Board and for which he performs no additional labor other than those for which he is paid his regular salary?
>
> 2. Voucher No. 5, $6.00, rent of house to Mrs. J. W. Gorman, is identical with the above case.
>
> If these bills were submitted in names of husbands would the application of the law be the same?
>
> Some locktenders live in state dwellings, while others do not and receive no extra pay for rent.
>
> 3. Voucher No. 7 has one item for telephone rental one month in dwelling of foreman. Is the allowance of that item legal?
>
> 4. Voucher No. 9 is similar to Voucher No. 7.
>
> 5. Voucher No. 14 is not itemized.
>
> 6. Voucher No. 17, — If James K. Aylward and James Aylward are one and the same person, is the allowance of this bill legal?

7. Has a regularly appointed employe of Board of Public Works the legal right to sell any material of any kind to same department?

8. Has a regularly appointed employe of the Board of Public Works the legal right to receive any remuneration for labor other than that for which he was appointed, providing said labor does not in any manner lessen his efficiency for the position to which he was appointed?

9. May any employe of Board of Public Works legally receive any remuneration for labor or material by written contract or otherwise, other than the fixed salary and necessary hotel and traveling expenses?

10. Has a regularly appointed employe of Board of Public Works the legal right to hold two positions, for each of which he receives a separate salary, and to each of which he has been regularly appointed?

11. Pay roll No. 1. — Millie Cable, $20.00, cook on boat No. 1.

Pay roll No. 1. — Anna Brown, $20.00, cook on boat No. 2.

The members of the crews connected with these boats pay $4.00 apiece each week to the foreman for their board. They live in the boats which are their homes for all intents and purposes and receive a wage of $1.75 each per day, being the customary price paid in other parts of the state for similar work.

On the other repair boats the cooks are paid by some one other than the state.

Under these conditions, are the above bills allowable?"

As to matters 1 and 2, records on file in the office of the board of public works indicate that from the beginning it was the policy of the State either to own houses for their locktenders or to lease houses in the name of the State, the use of which houses was given to the locktenders free of charge in addition to their salaries. Prior to the leasing of the public works in 1861 most of the locktenders of the State lived in lock houses owned by the State.

That this policy of providing locktenders with homes at lockhouses adjoining their posts of duty was continued since the public works were recovered from the lessees in 1878, is shown by a perusal of the annual reports of the board of public works. For example, the Annual Report of the board of public works for the year ending November 15, 1886, shows that H. M. Skillman, then locktender at Lockland, who seems to be a predecessor of James Aylward, received a salary of $22.00 a month (see page 5 of Report), and in addition received $8.00 a month for "rent of locktender's house" (see page 114 of Report). The Report of the board of public works for the year ending November 15, 1896, shows (page 8) that French Whitehead was at that time predecessor of Mr. Aylward at $22.00 a month and that (see page 92) he received $8.00 a month for "rent, Lockland". The Report for 1896 also shows that during that year J. W. Gorman was locktender at Crescentville at $10.00 a month (page 8) and that he received $6.00 a month for "rent, Crescentville". The reports of the board of public works show this to have been the uniform policy with the various locktenders so far as I have been able to investigate, no data on this subject having been submitted with your letter. When, therefore, the board appointed a locktender to one of these posts at a given salary such as $22.00 a month or $10.00 a month from year to year, or appointed one locktender as successor to another, it was clearly understood on all sides that such locktender should receive both the amount stipulated as salary and the amount necessary for rent of lockhouse in which such locktender must have lived. And the fact that the board of public works during all

these years made separate provision for rent of lockhouse showed that in their opinion it was advantageous to the state to make such arrangements rather than to permit the various locktenders to make individual provision for securing homes in which to live. I believe, therefore, that it is legal for the board of public works to pay the rent for such lockhouses in addition to the salary stipulated in their resolution employing a locktender.

Since section 412 of the General Code provides that:

> "The board of public works shall have the care and control of the public works of the state, and shall protect, maintain and keep them in repair * *, it may purchase on behalf of the state such real and personal property, rights and privileges as it deems necessary to accomplish such purposes".

Under this language the board has a large discretion as to the business methods to be employed in handling the public works of the state.

As to the person to whom such rent should be paid, it has usually been the policy of the board of public works, as far as I have been able to ascertain, to consider the amount of such rent as a part of the expense account of the locktender and to pay such amount to him. I believe that it would be a better policy to make the voucher payable direct to the person owning the premises if this would not work unnecessary inconvenience to such persons in cashing their vouchers. If such a lockhouse belongs to the wife of a locktender, the board has the legal right to pay rent to her, since under the laws in Ohio a wife has a separate and independent right to contract and may own real estate as well as personal property separate and independent from her husband who has no legal interest whatever except inchoate right of dower in such property or in such contract during her lifetime.

As to matters 3 and 4, I find that the policy of the board of public works for many years past in relation to telephones for foremen and superintendents of repairs has been of the same nature as their policy in relation to rent of the lockhouses. For example, on pages 102, 103, etc., of the Annual Report for the year ending November 15, 1886, I find that such telephone rent has been paid; likewise in the report of the board of public works for the year ending November 15, 1896, pages 88, 89, 90, 91, etc., I find similar payments for telephones. When, therefore, the board employed a foreman or superintendent of repairs at a certain salary it was understood by all parties that telephones were to be paid for by the board in addition to the salaries fixed. Since telephones for such persons are absolutely necessary for the proper maintenance and care of the canal system, and, since it is for the board to determine in what manner the state can receive the best results for the money expended, the board can provide for the payment of such telephone bills. If there is any objection, of a business nature, to the payment of these bills separately, the board can, of course, fix a salary for any of its employes and make it a condition of their employment that they personally pay for the telephones which they use.

As to matter No. 5, relating to voucher No. 14, this voucher is as follows:

> "The State of Ohio, Board of Public Works, Debtor, to Thomas Dowling for supplies furnished as per bill itemized below,
>
> | | |
> |---|---|
> | Material | $9 00 |
> | Plasterers and labor | 21 40 |
> | | $30 40 |
>
> Plastering side walls and ceilings in three rooms, state house, Cumminsville."

Section 430 of the General Code provides that:

> "At the close of each month the superintendent of each division shall file with the chief engineer of public works duplicate time rolls of employes, itemized bills of materials purchased for the state, and other contingent expenses."

While the extent to which bills shall be itemized is largely a matter to be determined by each department, I believe that the above quoted provision of law requires that the bills should set out names of the persons who do the work, the time each person works, and the amount due each person for the time worked, also the amount of each kind of material purchased and the cost of each kind of material. Since the above bill does not conform with these requirements, such bill should be itemized before payment is made.

As to matters 6, 7, 8, and 9, section 12914 of the General Code provides as follows:

> "Whoever, being a member of a board of public works, engineer, superintendent, collector of tolls, gatekeeper, weighmaster, inspector, secretary, clerk or other person holding office under such board, during the location or construction of a canal or feeder, is interested in a contract for purchase of lands, town lots or water privileges for hydraulic purposes on or adjacent to a canal or feeder under the charge of such board, or for labor, construction or supplies thereon, shall be fined not less than one hundred dollars nor more than one thousand dollars and forfeit his office."

This is a codification of section 10 of the act of May 13, 1878, 75 O. L. 584, which reads as follows:

> "No member of the board of public works, engineer, superintendent, collector of tolls, gate-keeper, weighmaster, inspector, secretary, or clerk, or any other person holding office under said board during the location and construction of any canal or feeder, shall become interested, either in contract or purchase, directly or through another, in any lands, town lots or water privileges for hydraulic purposes, on or adjacent to any such canals or feeders under the charge of such board, until after the expiration of his term of office; or be engaged or concerned, either directly or through another person, in any contract for labor, construction, or supplies of any description whatever. Every person found guilty of violating the provisions of this section, on conviction thereof in any court of competent jurisdiction, on indictment or information, shall be adjudged to pay a fine of not less than one hundred dollars, nor more than one thousand dollars, and shall, moreover, forfeit his office."

The above revisions of section 10 occur in a number of provisions of the canal laws which were made in the early years of the canals and are found in section 10 of the act of 57 O. L. 73, in section 11 of 55 O. L. 110, and perhaps in earlier acts of which the act of 55 O. L. is a revision. Since such section 12914 is a criminal section, it must, according to the rules of statutory construction, (see Sutherland), be strictly interpreted according to the exact language of the statute. A reading of the statute shows that the words "during

the location or construction of a canal or feeder" precede the words "is interested in a contract." Immediately following the words "is interested in a contract" are the words "for purchase of lands, town lots or water privileges for hydraulic purposes, on or adjacent to a canal or feeder under the charge of such board, or for labor, construction or supplies thereon." Remembering the strict rule of construction which must be applied to criminal statutes, it cannot be said that the words "during the location or construction of a canal or feeder" can be made applicable only to one or more classes of contracts mentioned immediately following the verb "is interested," since, in the absence of specific language to the contrary, the words "for labor, etc.," are co-ordinate with the words "for purchase, etc.," and are both equally affected by the modifying language of the verb "is interested." For these reasons the statute refers only to contracts, etc., entered into at a time "during the location or construction of a canal or feeder," since the plain language of the statute, so far as it relates to the questions asked, is as follows:

> "Whoever, being a member, * * * or other person holding office under said board during the location or construction of a canal or feeder, is interested in a contract * * * for labor, construction or supplies thereon."

Taking into consideration the history of the above statute, and the plain construction of its language, it apears that the statute was not intended to cover transactions occurring in connection with the maintenance and repair of a part of the canal system, but was meant to apply only during the location or construction of a new canal or feeder. While it would, of course, be improper for a member of the board of public works to enter into a contract with the board of which he was a member, it is not difficult to mention many situations in connection with the maintenance of the public works in which it might be advantageous for the state to enter into contracts for material or services with individuals who, at the time, hold positions under the board of public works, such as lock tenders, collectors, etc., who could perform services to the state during emergencies. For example, if James Aylward, mentioned in matters Nos. 1 and 6, were a lock tender receiving a salary of $22 a month and also the only blacksmith within a distance of several miles, it might be a distinct advantage to the state to pay him the 70 cents set out in voucher No. 17, complained of, for blacksmithing, rather than to consume a day's time in having the same work done by some blacksmith residing at a considerable distance from the canal. I therefore, answer your questions 6, 7, 8 and 9 in the affirmative.

As to the matter No. 10, the board, in employing lock tenders, foremen, collectors and others, may employ them without stipulating that they shall give all of their time and effort to the work of the state. That this has been the policy is evidenced by the low salaries which have been paid to many of such employes. This being the case, the board of public works may either pay such an employe an amount in excess of his fixed salary for work done which is not a part of the regular work for which he is paid, or the board may, if it so desires, combine two or more positions and pay to a single person the compensation for the work performed in each of such positions.

Even in the case of public offices, the same person may hold two or more offices, in the absence of statutory prohibition, unless the duties of the offices held are incompatible with each other. Since most of the persons connected with the public works are not officers of the state under Article 2, section 20

of the Constitution, and since either their term of office, or their compensation, or both, as well as the duties to be performed, are in most cases provided for by the board of public works, for these reasons the rules of law relating to public offices do not apply on the one hand, and, on the other hand, the board of public works, in exercising its discretion in the management of the public works, may legally determine that the interests of the state will be best promoted by the consolidation of two or more positions not incompatible with each other and one person may, in such case, legally hold two or more of such positions.

As to matter No. 11, section 218-5 of the Revised Statutes contains the following language:

> "The superintendent * * * shall * * * file * * * bills for the subsistence of horses and for the board of hands, where the state is liable for such board, and other contingencies."

Under this section, as well as under its general powers to maintain the public works of the state, the board of public works may, if it so desires, pay for a cook on a state boat in any case in which it deems that such payment will be advantageous to the interests of the state. The fact that a cook is paid on one state boat and not on another does not affect the legal situation since the board of public works, in handling the business of the state, is clearly empowered to handle each situation independent of any other. Such bills for cooks may, therefore, be legally paid.

Yours very truly,
U. G. DENMAN,
Attorney General.

NATIONAL CONFERENCE DEVOTED TO CHILD SAVING—MANNER OF TRUSTEES OF CHILDREN'S HOME SELECTING DELEGATE.

December 20th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of recent date, in which you submit the following for my opinion:

Section 3087, General Code, is as follows:

> "The trustees shall not receive any compensation for their services, but they and the superintendent shall be allowed their necessary expenses while on duty, including expenses as duly accredited delegates to state and national conferences devoted to child-saving, and other charitable and correctional work, and such expenses shall be paid in the same manner as other current expenses of children's homes, and shall not exceed four hundred dollars in any year for any county."

In one instance in the state a superintendent of the children's home received a letter from the governor of the state designating him as a delegate to the national conference to be held in St. Louis.

Without any other authority from the board of trustees of the institution, the superintendent attended the conference. After his return he preseented a bill for his expenses to the board of trustees for their allowance; two of the members of the board approved the bill and signed a voucher for its payment; the other two members refused and still refuse to sign this voucher.

Query: 1. Was such superintendent, under the circumstances, a duly accredited delegate to the conference and are his expenses to be paid by the board of trustees?

2. Was the county auditor authorized to draw a warrant on the county treasurer upon the allowance of only two members of the board?

You will note that Section 3087, General Code, provides that the trustees and the superintendent shall be allowed their necessary expenses while attending a state or national convention as a duly accredited delegate. Nowhere have I been able to find where the governor is authorized to select the accredited delegates to a national convention, nor do I find anywhere any method provided for the selecting of any duly accredited delegate, and for this reason I am of the opinion that the selecting of the duly accredited delegate is within the power only of the board of trustees of the institution.

From a reading of Sections 3077 and 3108, inclusive, of the General Code, you will note that the trustees are given the entire control of the children's home. They elect superintendents, appoint matrons, assistant matrons, etc., and have entire control of the home, and I am of the opinion that Section 3087 grants a power to the trustees to select the duly accredited delegate to national and state conventions and any person selected in any other manner is not the duly accredited delegate within the meaning of Section 3087, General Code.

Answering your second question, I beg to call your attention to Section 3081 of the General Code, which provides that the trustees of children's homes shall consist of four members. I am, therefore, of the opinion that the county auditor is without authority to draw a warrant on the county treasurer for any expense incurred at the home without the approval of a majority of the trustees.

Yours very truly,
U. G. DENMAN,
Attorney General.

TAXATION—QUADRENNIAL APPRAISEMENT.

County auditor in printing pamphlets need not advertise for bids.

December 20, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 19th in which you submit for my opinion thereon the following questions:

1. Must the county auditor in printing the pamphlets required to be mailed to each owner of real estate by section 5546, General Code, let the contract for same at competitive bidding?

2. May the county commissioners refuse to allow bills for printing pamphlets for any reason whatever?

Replying to your first question I beg to state that section 5546, General Code, simply requires the auditor to "cause to be printed in pamphlet form a list showing all the real estate" in townships and villages. There is no provision requiring the auditor to invite competitive bids, and I am, therefore, of the opinion that the auditor is not required to do so.

Answering your second question I beg to state that section 5546, General Code, provides that "the expense of * * * printing * * * such pamphlets in *cities* shall be paid out of the county treasury upon the order of the board of assessors and the warrant of the county auditor", but said section is silent as to the manner of paying the expenses of printing and circulating such pamphlets in townships.

Inasmuch as the same is clearly a charge upon the county funds, I am of the opinion that it must be paid as other claims against the county, viz., upon the allowance of the county commissioners. It is clear, therefore, that the county commissioners may refuse to allow such bills for any good reason, but the fact that such bills were not incurred after competitive bidding is not in law a reason which would justify the county commissioners in refusing to allow the same.

Yours very truly,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—BONDS—MANNER OF ADVERTISING—NOTICE OF SALE.

December 28th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of recent date in which you request my opinion as to the number of insertions of the advertisement of the sale of bonds by the commissioners of road districts authorized to be made under Section 7125 of the General Code.

Your letter makes it apparent that you have had before you the original form of said section, which was as follows:

"The sale of all such bonds shall be advertised for at least thirty days in two newspapers in the county * * *."

There would seem to be no difficulty as to the construction of this section as applied to a daily newspaper. The law does not require simply thirty days' notice of a thing; it stipulates that an advertisement shall be made for thirty days. This being the case I am of the opinion that so far as a daily newspaper is concerned, an insertion in each of its issues during a period of thirty days will be necessary to comply with the law.

On the same principle I am of the opinion that in counties in which there is no daily newspaper, or in cases in which the commissioners have chosen to advertise in the weekly or semi-weekly newspaper in the county, the number of insertions required and authorized would be such a number as would em-

brace all the issues of the paper during the period of thirty days; that is to say, the statute above quoted, in my judgment, means that an advertisement shall be inserted in the newspapers referred to and published from issue to issue during a period of thirty days, in all of the issues of the newspaper published during that period.

I have been unable to find any authority as to the question which you present which is not free from difficulty. The foregoing is, in my judgment, the best practical solution of the matter.

I have considered your question with respect to Section 7125 in its original form, because you have informed me verbally that the question now before your department arose under the same while it was in force in the foregoing language. Permit me, however, to call your attention to the fact that said Section 7125 of the General Code was amended by the Act of March 15th, 1910, 101 O. L. 33, to read as follows:

> "The sale of all such bonds shall be advertised once each week, for four consecutive weeks, in two newspapers in the county. * * *"

It will be readily observed that no question arises as to the proper construction of the amended statute.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—ALLOWANCE TO AUDITOR FOR CLERK HIRE UNDER SECTION 2629—UNEXPENDED BALANCE OF 1909 MAY BE USED IN 1910.

December 29th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 20th in which you request my opinion as to the following question:

> "If the county commissioners make an allowance under Section 2629 of the General Code, for additional clerk hire in the auditor's office, for the year 1910, and such allowance is not used in whole during said year, may the balance be used by the auditor during the year 1911?"

The section which you refer to is as follows:

> "The county commissioners * * * shall make an additional allowance to the county auditor, for clerk hire, not exceeding twenty-five per cent. of the annual allowance made in the preceding sections in the years when the real property is required by law to be reappraised."

I have previously advised you that this allowance is not properly a part of the fee fund of the county auditor unless the county commissioners, in fixing

the amount to be expended by the county auditor for clerk hire for a given year, have taken the extra clerk hire occasioned by the appraisement of the real estate into account, in which event, of course, an additional allowance may not be made under authority of Section 2629 of the General Code.

I have also advised you that the allowance authorized under section 2629 extends not only to the year in which the actual primary valuations are required to be made, but also to such other years within the quadrennial period as in which work connected with the quadrennial re-valuation of real estate devolves upon the office of the county auditor.

From these two facts the conclusion follows that the allowance made for any one year does not revert to and become a part of the general fee fund of the county auditor to be re-apportioneed by the commissioners as required by the county salary law at the end of a given year, but until the purpose for which it was originally made is accomplished it remains available for that purpose and may be expended.

In my judgment also the fact that the language in which the commissioners have recorded their allowance specifies a given year for which the same is made, is immaterial. It is mandatory upon the county commissioners under Section 2629 to allow to the county auditor a sum sufficient to defray the expense of such additional clerk hire as is necessitated by the work of re-appraisement, so long as such expense does not in the aggregate exceed the twenty-five per cent. of the annual allowances for the years in which the additional allowances are made.

From all the foregoing I am of the opinion that a balance of an additiontl allowance to the county auditor for clerk hire occasioned by the re-appraisement of the real estate made in terms for the year 1910, unexpended at the end of such year, may be used by the auditor for the purpose for which it was originally made and, of course, only for such purpose, during the year 1911.

Yours very truly,

U. G. DENMAN,

Attorney General.

COUNTY OFFICERS — SALARY LAW — EXTENSION OF ALLOWANCE.

If county recorder who retires in September exhausts all the allowance to his office for calendar year made by county commissioner, county auditor is liable if he issues warrants to clerks appointed by incoming recorder.

December 29th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of December 19th, in which you submit for my opinion thereon the following question:

> "A county recorder made a legal contract with the commissioners for transcribing records under the law, drew the compensation provided by law under said contract and paid the whole amount drawn into the county treasury to the credit of his fee fund. He employed clerks in addition to his regular force, certified them to the county auditor under the salary law, fixing their compensation at 6 cents

per one hundred words and 12½ cents per one thousand words and paid their compensation out of the recorder's fee fund. The only allowance made by the commissioners for clerk hire in the recorder's office for the year 1909 was $1,380.00. The recorder paid his wife as deputy at the rate of $115.00 per month up to the first Monday in September, 1909, when he retired from office. During the year 1909 he paid $437.42 to transcribing clerks in addition to the amount of $939.16 paid to his wife, making the total for that part of the year to the first Monday of September, $1,376.58, leaving $3.42 of the amount appropriated by the commissioners for the use of his successor for clerk hire for the remaining four months of the year. His successor paid clerk hire at the rate of $115.00 per month, or $440.84 for the remainder of the year. In the whole year there was, therefore, paid for clerk hire the sum of $1,817.42 which exceeded the allowance made by the commissioners in the sum of $437.42.

"Who is responsible for this overdraft in the allowance for clerk hire and against whom should this department make a finding for recovery?"

Your question arises under the Revised Statutes, or, more properly speaking, under the county officers' salary law, 98 O. L. 90, sections 1291-11 et seq. Bates' Revised Statutes. Section 3 of the act, section 1296-13 Bates' Revised Statutes, provided in part as follows:

"On November 20th, 1906, each of the aforesaid officers (including the county recorder) shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks, and other employes of their respective offices, for the year 1907; * * * and on the twentieth day of each November thereafter shall file a like detailed statement showing in detail the requirements of their offices for the year beginning January first thereafter. The county commissioners shall * * * determine and fix an aggregate sum to be expended for the period covered by said statement, for the compensation of all such deputies, assistants, bookkeepers, clerks or other employes of said respective officers, which shall be reasonable and proper, regard being had to the amount of labor necessary to be performed by those to receive the same * * *"

"The officers herein named shall appoint and employ such deputies, assistants, clerks, bookkeepers or other employes as may be necessary for their respective offices, and discharge them and fix their compensation, and shall file with the county auditor certificates showing such action; but such compensation shall not exceed in the aggregate for each office the amount so fixed for that office by the commissioners as herein provided. The compensation of all such deputies, assistants, bookkeepers, clerks and other employes, duly appointed or employed, after being so fixed, shall be paid monthly to those entitled to the same, out of the county treasury, upon the warrant of the county auditor."

The plain requirement of the law is that the necessities of the office for the calendar year following a given November shall be set forth in a statement to be filed with the county commissioners by each of the county officers governed

thereby. It would seem in one view of the case that the compensation to be fixed under the second paragraph of the section by the certificate of the officer to the auditor in the case of each deputy or clerk, should be an annual compensation. This requirement would seem to follow from the fact that the compensation so fixed is to be paid monthly to those entitled to the same, and also from the fact that when a certificate is once made as to a given person, it remains in force for the guidance of the auditor until it is supplanted by another certificate as to the same position, without any further action on the part of the officer. Again it would seem that the fact that the compensation certified to the auditor by an officer at the beginning of a calendar year does or does not exceed the aggregate allowance made by the commissioners, should be determinable at the time of its filing.

All these views, however, are superficial. The power and duty to appoint and employ deputies and assistants is coupled with the power to discharge them and to fix their respective compensations anew at any time during the year, so that it can not be said that the amount certified for a given position will continue to be expended during the entire year. That is to say, the recorder might discharge all his deputies at the end of four months, and thus relieve the auditor from the obligation of paying anything out of the fee fund of his office for the remainder of the year or until such time as he should certify the appointment of other deputies and clerks.

From this fact follows the conclusion that the county auditor can not be held liable for or criticized for paying the amounts certified to him up to such time as the allowance of the commissioners is exhausted. If the amount certified to him at the beginning of the year, is paid throughout the year, would exhaust the allowance of the commissioners as in the case submitted by you, nevertheless, the auditor is entitled to presume that, before the year is ended, the recorder will discharge some of his clerks or reduce their salaries as the case may be.

It also follows from the foregoing that the determination and certification made by the recorder in the first instance was lawful, and that no finding can be made against him because he certified to the auditor amounts which, if continued throughout the year, would exhaust the aggregate allowed by the commissioners.

Your letter states that the incoming recorder "paid clerk hire at the rate of $115.00 per month, or $440.84 for the remainder of the year." You do not state the manner in which this was paid. Clearly it was paid without authority of law. Regardless of the equities of the case the allowance of the commissioners for clerk hire for the entire year had been exhausted by payments to the deputies and clerks of the outgoing treasurer. There was, therefore, no fund from which the compensation of the deputies and clerks of the incoming auditor could be paid. If the auditor drew warrants under the salary law for the payment of these sums, paid after the allowance of the commissioners had been exhausted whether with or without a supplementary certificate from the incoming recorder, he is clearly liable primarily for such payments. If the incoming recorder made a supplementary certificate, he might be deemed liable on the theory that his certificate amounts to an allowance. Inasmuch, however, as such certificate could in no way authorize the auditor to pay the deputy of the incoming recorder, and could in no way protect him in making such payments, I am of the opinion that the incoming recorder is not liable to any extent.

If the county auditor drew his warrants on the fee fund, and the county treasurer paid them without question, the county treasurer is also liable as he should have refused payment on the warrants and endorsed them as provided by law. I refer, of course, in each of these instances, to the warrants drawn in

favor of the deputy of the incoming recorder. On the other hand, however, if the auditor's warrants were drawn on the general fund of the county, then the auditor is solely liable.

In equity and in justice the outgoing recorder should be held primarily liable. However, I am unable to advise that he is liable in law. The reasons for my holding appear in the above discussion. I think it may safely be said, however, that, under the county officers' salary law as it stands, each county officer whose term expires during the year may be said in a way to have the legal right to exhaust his allowance during his term, and to leave his successor with no money available for clerk hire during the remainder of the calendar year. That this is the case results from what is a glaring defect in the law. This defect should, in my opinion, be remedied at an early date by the general assembly.

I can not forbear to state that the outgoing recorder in this case has evidently acted most culpably; he has taken advantage of a legal technicality in such a way as to virtually cripple the administration of his successor during the first few months thereof. In so doing he has not only escaped the consequences of his own acts, but he has in addition thereto and through what was doubtless the well-intentioned ignorance of the auditor and the treasurer, imposed upon those officials the liability which he escaped and for which he was morally responsible.

It is with great regret, therefore, that I feel obliged to hold that the outgoing recorder in the case submitted by you is not subject to any liability, and that the auditor and the treasurer, whose motives may have been good, may be required to make good the over-draft occasioned by his conduct.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE JUDGE—COMPENSATION OF CLERKS, ETC., FOR REFILING PAPERS IN OFFICE—FULLY DISCUSSED.

December 30th, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 19th, submitting for my opinion thereon the following question:

> "The probate judge entered into a contract with the county commissioners for refiling the papers in the probate judge's office as authorized by section 533-2, R. S. The commissioners, in their journal entry, authorized the probate judge to employ additional clerks, if necessary, and the cost of said service and clerks was not to exceed 20 cents per case, which is the statutory compensation. All the compensation paid under this contract was paid to the probate judge's wife, amounting to $1,529.60.
>
> "Was this a legal transaction, or should the amount have been allowed to the probate judge and by him paid into his fee fund and the clerks, if any, received their compensation out of the regular appropriation made by the county commissioners for clerk hire in the

probate judge's office? If the transaction was not legal, may the amount of $1,529.60 be recovered from the person receiving the same?"

Section 533-2, Revised Statutes, provides in part as follows:

> "Such probate judge shall be entitled to receive compensation for assorting, arranging, preserving and marking said * * * papers as required in the preceding section, in such amount as may be allowed by the commissioners of such county * * *"

The county officers' salary law, section 1296-24b, Revised Statutes, prescribed an annual salary for the probate judge, and in section 1296-28 provides that,

> "Said salary shall be in lieu of all fees, costs, penalties, percentages, allowances, and all other perquisites of whatever kind which any of the officials herein named may now collect and receive * * *"

It is apparent that under section 533-2 before the enactment of the salary law the probate judge himself was entitled to receive the allowance for refiling papers and doing similar work. He might employ clerks to do the actual work and receive the compensation for his own use. Upon the adoption of the salary law, however, this allowance, while still authorized to be made to the *office* was clearly required, under section 1296-28 above quoted and under section 1296-16, Revised Statutes, which provided that,

> "Each of the officers named herein shall at the end of each quarter, pay into the county treasury * * * all * * * allowances collected by his office during said quarter, for his official services, * * *"

to be credited to the fee fund of the probate judge.

Under section 3 of the salary law, section 1296-13, R. S., the county commissioners are authorized to allow an aggregate sum to each of the offices to which the act relates including that of probate judge for clerk hire during the calendar year. As a general rule no compensation may be paid to any clerks in any of these offices excepting out of this aggregate allowance. The commissioners are without authority to prescribe the number of clerks which any office may have; each of the county officers has authority to employ as many clerks as he may deem necessary, and to fix their compensation, it being required merely that he shall file with the county auditor certificate showing his action, and that the compensation so fixed shall not exceed in the aggregate the amount allowed by the commissioners.

The compensation of a clerk or clerks employed by the probate judge to do the class of work referred to in your question is, in my opinion, clearly included within the intendment of section 1296-13, R. S., and may only be paid out of the allowance for the year fixed by the county commissioners. The probate judge has authority to employ clerks without the action of the commissioners which was in that respect void and of no effect.

From all the foregoing it follows that the county commissioners should have taken into account this additional work in fixing the aggregate amount to be paid by the probate judge to his deputies and clerks during the calendar

year in which it was done, and that the payment of compensation of such additional clerks out of any fund other than the annual allowance made by the county commissioners for clerk hire in the office of the probate judge, was illegal.

You also ask whether the amount paid under the contract which you describe may be recovered from the person receiving same. Assuming what is the fact unless circumstances other than those stated in your letter appear, to-wit: that the appointment of the wife of the probate judge to do this work was itself legal, so far as the relationship between the appointee and the appointing authority was concerned, the same was otherwise a legal appointment. As above indicated, the probate judge has authority to appoint as many clerks as he sees fit, and his appointment of this clerk would be presumed to have been made under authority of section 1296-13, Revised Statutes, above referred to. The person thus appointed I presume rendered services and was compensated therefor. Unless it clearly appears then that the employment of this clerk was made in such a way as to preclude any possibility of regarding her as having been employed under section 3 of the county salary law, and unless also the services which she rendered were not reasonably worth the amount paid to her — and they were reasonably worth that amount, which is the statutory rate — no action could, in my judgment, be maintained against her to recover the sums paid to her.

I assume from your question that the amounts paid to this clerk were paid out of the general revenue fund of the county as if upon allowance by the county commissioners. If they were so paid the liability for their payments rests upon the county auditor and upon the commissioners of the county. The commissioners are liable because they had no authority to make the allowance in question in the manner in which they made it. As above indicated it should have been made to the fee fund of the probate judge instead of to the probate judge himself, or to the person employed by him. The auditor is liable because he is not protected by an allowance of the commissioners made unlawfully, but his liability is clearly secondary to that of the commissioners. The probate judge himself is liable if he drew vouchers for the compensation of this clerk, — a thing which he had no power to do; although in this instance the liability of the judge is secondary to that of the auditor who had no right to rely upon such voucher and should have refused to pay it.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE—WITNESS FEES IN MISDEMEANOR CASES. MAYOR—FEES OF WITNESSES AND JURORS IN MISDEMEANOR CASES.

Fees of witnesses in ordinary misdemeanor cases before Justice of the Peace are not payable out of county treasury.

Fees of witnesses and jurors in ordinary misdemeanor cases in Mayor's court are payable out of county treasury; jury fees equal in amount to witness fees.

December 31st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 20th in which you request my opinion upon the following questions:

> "Are the fees of witnesses in misdemeanor cases before a justice of the peace payable out of the county treasury?
>
> "Are the fees of witnesses in misdemeanor cases in the mayor's court payable out of the county treasury?
>
> "Are the fees of jurors in misdemeanor cases in mayor's court payable out of the county treasury? If so, to what fees are such jurors entitled?"

You inform me verbally that your first question relates to misdemeanor cases other than those within the special original jurisdiction of a justice of the peace such as prosecutions for the violation of certain pure food laws, those arising under the fish and game laws, and other similar cases.

The language of your question indicates that you desire to be advised as to costs in cases heard and determined by the justice, and this you inform me is the meaning which you intend to convey. It follows, therefore, that the only class of cases to which your first question relates is that arising under Section 13511 of the General Code, which provides in part as follows:

> "When the accused is brought before the magistrate and there is no plea of guilty * * *. If the offense charged is a misdemeanor and the accused in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

As you have been previously advised in an opinion from this department, this section states the only circumstances under which a justice of the peace may hear and determine a criminal prosecution other than in one of the special classes of cases in which he is given final jurisdiction as above referred to.

I have carefully examined the provisions of the General Code and find therein nothing authorizing the fees of witnesses subpoenaed by a justice of the peace in a proceeding under Section 13511 of the General Code to be paid out of the county treasury in any event. The fees to which the witnesses are entitled are prescribed by Section 3011 of the General Code, and amount to 50 cents for each day's attendance and the mileage specified by Section 3012 of the General Code.

Section 3014 of the General Code, which makes provision for the payment of fees of witnesses in criminal cases before a court of record or before the grand jury, provides that,

> "When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury."

The inclusion of this specific provision in the section providing for the fees of witnesses in criminal cases in courts of record by negative inference establishes the necessity of a like provision for the payment of witness fees in

courts of inferior jurisdiction. That is to say, the presence in this section of the provision above referred to illustrates the impossibility of relying upon implication to authorize the payment of like fees from the county treasury in cases before justices of the peace.

Sections 3016, 3017 and 3018 cited by you in your letter contain provisions similar to that in Section 3014 and from which a like inference may be drawn.

Section 3017, however, which provides that,

> "In no other case whatever shall any cost be paid from the * * * county treasury to a justice of the peace, police judge or justice * * * or constable."

might be regarded as immaterial in this connection on the ground that it merely prohibits the payment of fees to *these officers* and is not intended to *prohibit* the payment of witness fees in criminal cases before justices of the peace from the county treasury. However, as above indicated, the question is as to whether the payment of such fees from the county treasury is authorized; not as to whether or not it is *prohibited.*

Sections 3019 and 3020 of the General Code contain the following related provisions which tend to cast some doubt upon the question:

> "* * * In misdemeanors wherein defendant proves insolvent, the county commissioners, at any regular session, *may make an allowance to any such officers*" (referring to the officers mentioned in 3017 above quoted) "in place of fees * * *."
>
> "Until satisfied by the certificate of such justice of the peace, police judge or justice, or mayor, or by other proof, to the satisfaction of the commissioners, that the prosecuting witness was indigent and unable to pay the costs or procure security thereof, and that the officer exercised due care in taking such security, such *officer's* fees in such cases shall not be included in ascertaining the amount so to be allowed."

The doubt to which I refer arises from the last clause above quoted which indicates clearly that fees other than officer's fees are to be included in the amount which may be allowed by the county commissioners in lieu of fees. However, closer reading of the related sections dispells the doubt. The "officer's fees" referred to in Section 3020 are the fees of the officer required to make the certificate referred to in the same sentence and to take security for costs. Persons other than such officer and possible witnesses may, in a given case, be entitled to fees: thus, a justice of the peace and a constable are both entitled to fees in a given criminal case, and if the defendant is convicted and proves insolvent, the commissioners are authorized to make an allowance to the constable for his lost costs in the case regardless of the diligence of the justice of the peace. I mention these sections not because they have any bearing upon the question, but because there is in them an element upon which an argument opposed to the conclusion which I have reached might be based.

Section 3022 of the General Code provides as follows:

> "In all cases in which a justice of the peace may fine a person charged with the commission of an offense, such justice shall render judgment for such fine, and tax such costs for himself, the constable and witnesses as are allowed by law."

This section authorizes the justice to tax the witness fees provided for in Section 3011 above referred to, and without this section a justice of the peace rendering judgment under favor of Section 13511 above quoted, would have no authority to tax any costs at all. Under authority of Section 3022 then the justice may lawfully include the costs in his judgment, and if the defendant is able to pay them the witnesses will get their fees. If the defendant is acquitted, however, or if, upon being convicted, he is found to be insolvent, I know of no provision under authority of which the witnesses may have their fees.

Referring again to Section 3019 and 3020 which provide an allowance in case the defendant is convicted and proves insolvent, permit me to point out the fact that it refers to an allowance in lieu of *fees*—fees due the magistrate and certain other officers—not in lieu of *costs* in the case.

The sections of the General Code above quoted and referred to are the only ones which relate in any way to the subject matter of your question. Upon consideration thereof the conclusion which I have already stated becomes the more apparent, viz., That there is no authority of law for the payment of fees of witnesses in a misdemeanor case before a justice of the peace other than a case in which such justice has special final jurisdiction.

Your third question relates to jury fees in the mayor's courts. At this time permit me to state that no similar question can arise in the court of the justice of the peace proceeding under Section 13511 above quoted. A justice of the peace so exercising the jurisdiction therein provided for is without power to empanel a jury.

Your second question invokes consideration of Sections 4554 and 4555 of the General Code, formerly Sections 1841 and 1842 Revised Statutes, which provide in part as follows:

Section 4554:

> "* * * Except as herein otherwise provided, witnesses and jurors" (in the mayor's court) "shall receive the same compensation as witnesses before justices of the peace."

Section 4555:

> "In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate on the county treasury."

These two sections have always been of general application to mayor's courts in all municipalities. It follows from section 4555 that witnesses in an ordinary misdemeanor case in the mayor's court are entitled to have their fees paid from the county treasury when properly certified under section 4555.

The question as to the fees of jurors in such cases is, however, more difficult. The jurisdiction of a mayor to empanel a jury in the trial of a criminal prosecution for violation of a state law is not established by the foregoing sections but must depend upon other provisions, in spite of the inference in these sections that jurors may be empaneled in such cases.

Section 4528 of the General Code provides as to the mayor of a city that,

> "He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the consti-

tution, entitled to a trial by jury, and his jurisdiction in such cases shall be co-extensive with the county."

This section standing by itself would seem to deny the mayor any jurisdiction in jury cases — at least in cases wherein a jury is, by constitution, granted. It is supplemented, however, by section 4532, also applicable to all city mayors, which provides that,

> "If the charge is the commission of a misdemeanor, prosecuted in the name of the state, and the accused, being entitled to a jury, does not waive the right, the mayor may, nevertheless, impanel a jury, and try the case on the affidavit, in the same manner, and with like effect, as such cases are tried in the court of common pleas on the indictment."

It follows, therefore, that the mayor of a city has jurisdiction and power to empanel the jury which is a misdemeanor merely and to try the same, and it is clear that in case the jury is empaneled the fees of the jurors are governed by sections 4554 and 4555 above quoted.

Mayors of villages have exactly the same jurisdiction in this respect as mayors of cities. Sections 4536 and 4540 of the General Code relate to village mayors and are identical in language with sections 4528 and 4532 above quoted.

From all the related sections above referred to I am of the opinion that fees of jurors summoned by a mayor in the trial of an *ordinary* misdemeanor case are, when certified by the officer presiding at the trial, payable from the county treasury as provided in section 4555 above quoted.

The amount of fees, however, is not, as you inform me the contention is, governed by section 4579 of the General Code. That section applies to jurors in the police court and has no application whatever to mayor's courts. It is expressly provided by section 4554 that jurors in the mayor's court shall receive the same compensation as witnesses in the justice's court. As previously pointed out, witnesses in the justice's court are entitled to 50c for each day's attendance and mileage. These are the fees to which jurors in the mayor's court are entitled.

Yours very truly,
U. G. DENMAN,
Attorney General.

MAYOR MAY NOT EMPLOY SECRET SERVICE OFFICER, PAY HIM FROM HIS PERSONAL RESOURCES, AND RECEIVE REIMBURSEMENTS FROM THE MUNICIPAL TREASURY.

February 23rd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIRS: — You have submitted to this department for an opinion thereon the inquiry of Hon. Charles F. Leeper, Mayor of Marietta, who states to you that council has appropriated the sum of six hundred dollars to be used by the mayor for secret service purposes, and that it is desired by him to pay the persons employed by him as secret service officers and to receive reimbursement by warrants drawn in his own name by the city auditor, thus concealing the identity

of the secret service officers and safe-guarding the efficiency of their service. He desires to be advised as to the legality of this plan.

It seems to me that there is a legal infirmity in the plan other than that suggested by the mayor. While it is true that the mayor is the chief conservator of the peace within the corporation, yet in cities detectives are members of the police department, and within the classified service. I do not believe that the mayor has any authority whatever to appoint detectives and to exercise control and supervision over their work independently of the director of public safety and the chief of police.

Aside from the foregoing, which sufficiently answers the mayor's question, I am clearly of the opinion that it is unlawful for the city auditor to issue warrants to the mayor in the manner described.

I herewith return Mr. Leeper's letter.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — TRANSFER OF FUNDS.

The terms "funds" and "appropriation" as used in section 43 M. C., 3797 General Code defined and distinguished.

Council may transfer balance from one fund to another but not from one appropriation to another; contingent fund may be expended only by direct action of council.

March 2nd, 1910

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN: — I beg to acknowledge receipt of your letter of February 25th, submitting for my opinion thereon the following questions:

> "1st. Has council under section 43 of the code the authority to make transfer of moneys from the safety fund to the general fund of a city?
>
> 2nd. Does the authority given council in said section to transfer funds authorize said body to make transfers between funds created by the semi-annual appropriating ordinance? For instance —
>
> a. Has council the authority to make transfers from one appropriation account to another, within the same fund?
>
> b. Has council authority to make transfers from an appropriation account of one fund to an appropriation account in another fund?
>
> c. Has council the authority to make transfers from the contingent fund for the use of an appropriation account, or fund, in another fund?
>
> If council has no authority to transfer between appropriation funds, or accounts, is there any legal way of increasing the amount fixed by council for a specific purpose as expressed in the semi-annual appropriating ordinance?"

The following terms in said section 43 M. C. require definition in order that a clear understanding of the various provisions thereof may be reached and

in order that the questions submitted by you may be answered, viz.: "appropriation", "balances" and "funds".

The first of these terms, the meaning of which must be ascertained, is "funds". In ascertaining such meaning cognizance must be taken of the fact that section 43 is in that portion of the municipal code which relates to the raising and expenditure of public revenues by means of taxation and in *pari materia* with all the other sections relating to that general subject matter. The section itself affords no intimation as to the meaning of this or the other terms now under consideration; but if in the related sections above alluded to such a meaning is defined that meaning must control.

The provisions which prescribe the machinery of taxation and the expenditure of moneys raised thereby are sections 32 to 49 inclusive of the municipal code. The actual working machinery of taxation is prescribed in those successive sections of which section 35 is the first. That section provides:

> "On or before the first Monday in March of each year the several officers, boards and departments in every municipal corporation, shall report an estimate, in itemized form, to the mayor and auditor or clerk of the corporation, stating the amount of money needed for their respective wants for the incoming year and for each month thereof".

Section 36 provides:

> "On or before the first Monday in April of each year the auditor of every city and clerk of every village shall furnish to the mayor and council and to each member thereof the following statements, which council may require to be printed.
>
> 1. A statement showing the balance standing to the credit or debit of the several *funds* on the balance sheet of the corporation at end of the last fiscal year immediately preceding said first Monday of April.
>
> 2. A statement showing the monthly expenditures out of each *fund* in the twelve months, and the monthly expenditures out of all the *funds* in the twelve months of the fiscal year immediately preceding said first Monday of April.
>
> 3. A statement showing the annual expenditures from each *fund* for each year for the five fiscal years immediately preceding said date.
>
> 4. A statement showing the monthly average of such expenditures from each of the several *funds* for the preceding fiscal year, and also the total monthly average from all of them for the five preceding fiscal years".

Here is the first use of the term now under consideration in the sense in which it must be used in section 43.

Section 37 provides in part that:

> "To enable the mayor to make up his annual budget, it shall be the duty of each director * * on or before the last Monday in March of each year, to make and file with said mayor * * * an * * itemized estimate of the amount of money needed in such department for all purposes for the ensuing year * *".

Section 38 provides in part that:

"He (the mayor) shall on the first day of April of each year submit the annual budget of current expenses of the municipality, any item of which may be reduced or omitted by council, but council shall not increase the total of said budget * *".

Section 39 provides in part that:

"The council shall examine and revise the annual budget submitted by the mayor * * * and after it shall have determined by ordinance the percentage to be levied for the several purposes allowed by law * * * on the grand duplicate the same shall be submitted * * to the board of tax commissioners * * * which * * shall examine and return the same to the council * *".

Section 40 provides in part that:

"Council shall cause to be certified to the auditor of the county, on or before the first Monday in July annually, the rate of taxes levied by it on the real and personal property * * * on the grand duplicate who shall place the same on the tax list of the county in the same manner as township taxes are by law placed thereon, the *ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made and the per cent. thereof* * *".

Section 41 provides in part that:

"The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation * * * and the corporation treasurer shall keep a separate account *with each fund for which taxes are assessed* * * * unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the *appropriate fund* * * *".

The foregoing provisions all relate to the management of moneys raised by taxation on the general duplicate of the corporation. They suggest the following partial definition for the word 'fund," viz: *A fund is the proceeds of a tax levy made for a particular purpose.* This is a partial definition only because there are other funds such as proceeds of special assessments and the proceeds of bond issues, etc.; but in no case is the amount determined by the appropriating ordinance. Funds exist independently of any appropriation; they are themselves the source from which appropriations are made. (Opinion of Attorney General, June 29, 1906, page 98, Annual Report).

The term "appropriations" is used in section 43 in its ordinary significance and refers to accounts within the various funds created by council through the semi-annual ordinance. *Appropriation accounts are not funds.* To use the two terms interchangeably would lead to endless confusion.

The meaning of the term "balances" as used in section 43, M. C., is clearly ascertainable from an examination of the context. This section provides in part that:

> "All expenditures within the following six months shall be made with and within said appropriations and balances thereof. All unexpended appropriations or balances remaining over *at the end* of the year, and all balances remaining over at any time after a fixed charge shall have been terminated * * * shall revert to the funds from which they were taken, etc., * * * provided that councils * * * may * * * transfer all or a portion of one *fund* or a balance remaining therein, to the credit of one or more funds."

There are two kinds of balances referred to in the above quoted language, balances in the appropriation accounts, and balances in funds. Balances of appropriation accounts remaining unexpended at the end of the half yearly period expiring in July of each year, may be used to defray expenses arising in such half yearly period and which have not previously been paid. Balances remaining at the end of the year, viz., on December 31st and balances (of appropriation accounts) remaining unexpended at any time after the object of the appropriation has been satisfied or abandoned, revert to the funds from which the appropriations have been made. No other possible disposition of balances in appropriation accounts is suggested in the section.

The term "balances" as it is used in the latter portion of the section, is used with reference to the term fund. It is this balance which *may be transferred.*

With these definitions and distinctions established the answers to your several questions become almost apparent. With respect to your first question I am clearly of the opinion that council may make a transfer of moneys from the safety fund to the general fund, subject to all limitations and in accordance with the procedure defined in section 43, M. C. It is true that said section provides that,

> "there shall be no such transfer except among funds raised by taxation upon the real and personal property in the corporation,"

and that both the general fund and the safety fund of a corporation may receive additions from sources other than the levy of taxes, such as the city's portion of the excise tax on the business of trafficking in intoxicating liquors; the fines collected in prosecutions for violations of the local option laws, etc. The authority to transfer balances consisting of moneys derived from such sources is not questioned in the inquiries submitted by you and no opinion is expressed thereon.

However, the general character of each of these funds is that of a fund raised by taxation, and at least so much of such funds as is so derived may be transferred to another similar fund.

The first two sub-divisions of your second question relate to the authority of council to "transfer" from one appropriation account to another. This cannot be done. In this respect I feel obliged to differ with my predecessor who, in the opinion above referred to, held that council could transfer from one appropriation account to another either within the same fund or between different funds. I have, however, given careful consideration to this question and am convinced that to permit such a so-called transfer would not only necessitate reading into section 43 language that is not there, but it would also do violence to the express provisions of said section. In fact the word 'transfer" as applied to the appropriation account is a misnomer. An appropriation

account or an "appropriation" is the legislative determination of the amount of money which may be expended for a given purpose. A "fund," on the other hand, is a sum of money in the treasury or estimated to come there into from the returns of taxation and other means of raising revenue. It is true in a sense that the effect of an appropriation is to set apart a definite sum of money for a specific purpose; but that is only one aspect of the matter. I am convinced not only th section 43 does not authorize transfers to be made between appropriation accounts as such, but that such a provision, if it existed, would be quite inconsistent with the scheme of public finance which has been adopted with respect to all our taxing districts, and which is merely exemplified in the above quoted sections of the municipal code. (See Stem v. Cincinnati 6. N. P. 15, decided under former sections 2690, etc., known as "Cincinnati Charter," which sections embodied a scheme of taxation and appropriation similar to that now under consideration).

In the use of the term "contingent fund," the general assembly is somewhat unfortunate. The phrase is probably used for the sake of brevity. In reality the contingent fund is not a fund at all but an appropriation account within the general fund. This is clear from an examination of the entire section. It follows that there is no authority to transfer from the contingent fund. There are, however, weightier reasons for returning a negative answer to the third sub-division of your second question. To permit the contingent fund to be diminished by a transfer in favor of another appropriation account would violate the very purpose for which the contingent fund is created. This is an appropriation account not within the control of any department of the executive branch of the municipal government. It is expended only by ordinances passed by two-thirds of all the members elected to council and approved by the mayor. When any other appropriation account is exhausted because of the occurrence of an unforeseen emergency, council may pay bills properly chargeable to such appropriation account out of the contingent fund directly and without transfer of any kind. However, council may only do this in cases of unforeseen emergency and to an amount equal to the expenditure caused by such unforeseen emergency. (Ampt v. Cincinnati, 1 N. P. 379). *This is the only manner in which deficiencies in appropriation accounts may be met.* The machinery thus provided is adequate for all purposes. Municipal administrative officers *must keep* within their estimates, but they are not required by the municipal code to foresee every emergency. There is nothing here which impedes proper and expeditious management of the departments of the municipal government. If extravagance is indulged in and the end of a fiscal year finds outstanding bills incurred during the preceding six months unpaid and chargeable against an appropriation which is exhausted, the *municipality may not pay such bills in any event,* and the persons in whose favor they exist must look to the officer authorizing such expenditures for satisfaction thereof.

I consider it proper to remark that section 45, M. C., which requires the certificate of the auditor or clerk to the effect that the money necessary for the payment of a contract is in the treasury to the credit of the fund from which it is to be drawn, etc., and that all contracts entered into contrary to the provisions of that section shall be void, serves only to bear out the foregoing conclusion.

Yours very truly,
U. G. DENMAN,
Attorney General.

CLERK OF COUNCIL NOT ENTITLED TO COMPENSATION ADDITIONAL TO THAT FIXED IN SALARY ORDINANCE.

March 2nd, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department for an opinion thereon a question raised by your examiner of the accounts of the city of Canton, which is as follows:

> May the clerk of council, whose salary is fixed at $1,000 per year be paid additional amounts for certifying notices under section 52 M. C., and for making transcripts for the issue of city bonds?

Section 52 M. C. provides that:

> "A notice of the passage of the resolution required in the last preceding section shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed".

There is no provision authorizing the clerk to receive additional compensation for services performed under this section, which services are clearly required of him in his official capacity.

I am, therefore, of the opinion that it is not lawful for the clerk to receive additional compensation for performing such services.

As to the second question submitted I am not informed as to the source of the payment for making transcripts for the issuing of city bonds. In any event, however, the provisions of section 126 M. C., to the effect that, "all fees pertaining to any office shall be paid into the city treasury" would govern this matter, as there is no other provision inconsistent therewith.

I am of the opinion, therefore, that the clerk is not entitled to additional compensation for making such transcripts, whether such compensation is paid by the city or by the person ordering the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

FEES—SHERIFF. SAME—MEMBER OF POLICE FORCE. SAME—PROSECUTING ATTORNEY. EXPENSES—OFFICER PURSUING FELON.

Sheriff not entitled to commitment fee in case of convict kept in county jail under subpoena as witness.

Members of city police force entitled to fees in state cases if taxed for services of process.

Commissioners may allow and pay necessary expenses of any officer in pursuit of fugitive from justice.

Sheriff and prosecuting attorney must pay fees and compensation into the county treasury in cases in which sheriff is appointed receiver, trustee or master commissioner, and prosecuting attorney acts as his counsel.

February 21st, 1910.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 5th wherein you submit for my opinion numerous questions, which, for my convenience, I shall discuss separately.

> "1. In cases where convicts in the penitentiary are conveyed to a county seat under subpoena and placed in the county jail for safe-keeping, as provided by section 7292 R. S., may the sheriff charge the fees authorized by section 1230 for "committing to prison and discharging therefrom, sixty cents; attending a person before judge or court, sixty cents;" to be taxed in the bill of costs in the case in which the convict is subpoenaed as a witness?"

Section 7291 of the Revised Statutes makes it the duty of the warden, superintendent or keeper to whom the subpoena for the prisoner is issued, to

> "Take such witness or cause him to be taken, before the court, at the time and place named in the subpoena and hold him until he is discharged by the court. * * *"

Section 7292 cited by you provides that,

> "when such witness is in attendance upon any court, he may be placed for safe-keeping in the jail of the county; and the expenses of the officer in transporting him to and from the court to which he is summoned, including compensation for such guard or attendant of such prisoner * * * shall be allowed by the court, and taxed and paid as other costs against the state."

It is clear to me from an examination of these two sections that the prisoner whose attendance as a witness is required is in the legal custody of the keeper upon whom the subpoena is served, or his duly authorized agent at all times during his absence from the penitentiary, workhouse or prison in which he is confined. His confinement in the county jail "for safe-keeping" does not constitute a "commitment to prison" as contemplated by Section 1230, nor, in my opinion, can the sheriff be said to "attend" him before the court, that duty being imposed upon the keeper. In my judgment the only costs which may be taxed for official services in such case are those mentioned in Section 7292 above quoted.

> "2. May a patrolman or detective receiving salary as a member of a city police force tax fees in a state case for the services and return of a warrant, subpoena or other writ?"

In an opinion to your department under date of June 9, 1909, which said opinion related to the right of a chief of police to retain for his own use fees taxed in his name for services performed by patrolmen, detectives and other inferior officers, I made the statement that "patrolmen may not, of course, receive such fees and retain them for their own use, and, in my judgment, they should be paid into the treasury." This statement was not absolutely necessary

to the decision of the question submitted at that time. However, I desire to adhere to it as a correct answer to the question arising out of the main inquiry then submitted, viz., as to the right of the patrolman or inferior officer to retain fees *which are not taxed in his name.* I understand the question now submitted to relate to the right of the clerk to tax fees in state cases for services and return of a warrant, subpoena or other writ in the name of the detective or patrolman serving the same.

The decision of the circuit court in the case of Portsmouth vs. Millstead, 8 C. C., N. S. 114, affirmed by the supreme court, construes section 126 M. C., which provides in part that,

> "except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury."

as referring to "municipal fees solely", or to such fees as may be fixed by municipal authority. I have been unable to find any general statute expressly forbidding police officers and detectives from receiving fees for service of process in state cases. The court in the Portsmouth case having decided that section 126 does not apply to such fees, and having questioned very strongly the authority of the general assembly to delegate to municipalities the right to regulate fees in state cases at all, I am led to the conclusion that police officers and detectives are entitled to fees of this character earned in state cases, and that the same may be taxed in their names.

> "3. Section 1310 R. S., provides that the county commissioners may allow and pay any necessary expense incurred by an officer in the pursuit of a person charged with a felony, who has fled the country *in addition to the allowance provided for in the preceding section.* Are the expenses to be paid under this section confined to those of the officers named in section 1306 R. S., or may the expenses of a patrolman or detective be paid under its provision, or should the city pay such expenses?"

I have examined section 1310 R. S. in its original form as section 5 of the act found in the 75 O. L., 50. I find by examination of said original act that the same is substantially identical with sections 1306 to 1314 inclusive R. S. Nowhere in said original act is there any reference to any officers other than "justice of the peace, police judge or justice, mayor, marshal, chief of police, constable and witnesses." However, I am of the opinion that the phrase "an officer" is not necessarily limited in its meaning, because of this fact. Had it been the intention of the general assembly to impose such limitation upon a meaning otherwise general, it would doubtless have done so by the use of the word "such" or some other equivalent relative term having regard to the manifest object of the section. I am of the opinion the commissioners may allow and pay the expenses of an officer of a city police department incurred in the pursuit of a fugitive from justice.

> "4. When a sheriff receives compensation under appointment by the court as receiver, trustee or master commissioner, should such compensation be paid into the county treasury to the credit of his fee fund or may he retain same for his own use?"

Section 5489 Revised Statutes which regulates the matter of costs in proceedings in aid of execution provides that,

"The judge shall allow to clerks, sheriffs, referees, receivers and witnesses, such compensation as is allowed for like services in other cases to be taxed as costs in cases * * *"

Section 5485 provides that,

"If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver * * *"

These two sections indicate to me that the sheriff when appointing receiver in proceedings in aid of execution, acts in his official capacity, and that the fees taxed in his name should be paid into the fee fund of his office, and not retained by him for his own personal use. Consideration of other sections authorizing and directing the sheriff to act as receiver, etc., led to the same conclusion (see sections 6543, 4970, 5400, (under which the "reasonable compensation" should go into the fee fund) etc.)

"5. May a prosecuting attorney who acts as counsel for the sheriff in matters of receivership or trusteeship, receive compensation out of such trust funds, or is he required to render such services under his salary as prosecuting attorney?"

Having decided in the consideration of your fourth question that the sheriff acts in his official capacity in receivership and trusteeship matters, it would seem to follow that the prosecuting attorney would be required by section 1274 Revised Statutes, which provides that,

"The prosecuting attorney shall be the legal adviser of * * * of * * * county officers * * * and no county * * officer shall have authority to employ any other counsel or attorney-at-law * * *"

to act as counsel for the sheriff in such matters.

"6. May deputy state supervisors of election and deputy state supervisors and inspectors of election, receive the compensation provided by the Bronson primary election law (99 O. L., 223) in addition to the maximum compensation fixed by section 2926?"

The primary election law, 99 O. L., 223, provides in section 35 thereof that,

"For their services in conducting primary elections, members of boards of election shall each receive for his services the sum of two dollars for each election presented in his respective county."

Section 2926t cited by you, provides in part that,

"The compensation paid to each of said deputy state supervisors *under this section,* shall in no case be less than one hundred dollars per annum * * * and provided further that * * * the whole amount of annual compensation paid to each deputy state supervisor * * * under this section and under section 4 of the supervisory election law, (section 2966-4) shall not exceed in any one year the following:" (here follows a schedule of maximum compensations.)

It is my opinion, upon consideration of these related sections, that the compensation of deputy state supervisors of elections and deputy state supervisors and inspectors of elections, receivable under the primary election law is in addition to the maximum amount prescribed by section 2926t.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Treasurer of State.)

PUBLIC UTILITIES — EXCISE TAX — PROCEDURE IN CASE OF DELINQUENCY.

Corporations — franchise tax — same.

Treasurer of state may not accept payment of taxes on public utilities after December 15, although amount thereof has not been determined prior to such date; procedure in such cases.

Procedure in case of delinquent franchise tax suggested.

December 20th, 1910.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of December 16th, in which you request my opinion upon the following questions:

> 1. On December 15 the Auditor of State certified to this department a list of public utilities on the gross receipts and gross earnings of which he had computed the excise taxes, but to none of which he had sent notice as provided by section 66 of the act of May 10, 1910. I am informed by the Tax Commission that a number of public utilities have not yet reported to the commission, and I assume that excise taxes will in the future be computed on the gross receipts and gross earnings of such public utilities and that the same will be certified in the future to this department for collection.
>
> "Must the Treasurer of State certify either or both of these classes of taxes to the Auditor of State for the computation of the penalty of 15 per cent. thereon under section 68 of said act, or may he accept payment of the same without penalty? If these taxes are not now to be certified to the auditor for computation of the penalty, when, if ever, will the penalty accrue thereon, and when must the Treasurer of State certify the same to the Auditor for computation thereof?
>
> "In connection with the foregoing questions, I suggest that you take into consideration the fact that this law has been in operation but a short time and is doubtless imperfectly understood, which fact, I assume, may have caused the delay which has occurred in many cases; and the fact, on the other hand, that the reports of many public utilities have been delayed through errors and wilful failure to return to the Tax Commission the entire amount of gross receipts or gross earnings.
>
> 2. "Section 94 of the above mentioned act provides that corporations, other than public utilities, neglecting to pay the fee required by the act within thirty days after the same has been certified to the Treasurer for collection, shall be subject to a penalty of 15 per cent. of the amount of such fee.
>
> "The collection of such fees and penalties is provided for by sections 95, 96 and 97 of said act.
>
> "Should the Treasurer of State certify the delinquency of such companies to the Auditor of State, the Tax Commission and the Attorney General, or to any of them?"

The Tax Commission Act, 101 O. L. 395-409 in that portion of the same which provides for the levy and collection of an excise tax on public utilities, provides in part as follows:

Section 47:

> "Each public utility * * * shall, annually, on or before the first day of August, and each * * * railroad company * * * shall, annually, on or before the first day of October, make and file with the commission a statement * * *"

The form of the statement referred to in this section is prescribed by sections 48 to 53 inclusive. Said sections *inter alia* provide that the gross receipts or gross earnings of different classes of public utilities shall be included within such statements.

Sections 55, 56 and 57 of the Act provide that the Tax Commission shall ascertain and determine the amount of gross receipts and gross earnings of certain classes of public utilities.

Section 58 provides that interested parties may be heard by the commission in the matter of its determination of the gross receipts or earnings of any public utility.

Section 59 provides for the revision and correction of the findings of the Tax Commission.

Section 60 provides as follows:

> "The commission shall, on or before the first day of October, report to the auditor of state, the amount of the gross receipts so determined * * *. On or before the fifteenth day of November the commission shall report to the auditor of state the amount of the gross earnings determined as aforesaid, of each railroad company * * *."

Sections 61, 62 and 63 provide that "in the month of October" the auditor of state shall charge for collection from certain classes of public utilities an excise tax on the amount determined and reported by him to the tax commission.

Sections 64 and 65 provide that "in the month of November" the auditor of state shall perform a like duty with respect to the excise taxes of other public utilities.

Section 66 provides as follows:

> "After determining the amount of taxes payable to the state as provided in this act, the auditor of state shall thereupon prepare proper duplicates and reports, and certify the same to the treasurer of state for collection. *At the time of so certifying, he shall notify the companies charged therewith of the amount due.* The treasurer of state shall proceed to collect the same and render a daily itemized statement to the auditor of state of the amount of tax collected and the name of the company from whom collected, under all the provisions of this act."

Section 68 provides in part as follows:

> "* * * If any public utility fail or refuse to pay on or before the fifteenth day of December the tax assessed against it, the

treasurer of state shall certify the list of such utilities so delinquent to the auditor of state, who shall add to the tax a penalty of fifteen per cent. thereon, and forthwith certify the same to the attorney general for collection. * * *"

As preliminary to the general discussion of the first question raised by your letter I deem it proper to say that, in my opinion, the provisions above quoted and referred to directing the tax commission and the auditor of state to perform certain duties, at certain times, are directory as to the time provisions. That is to say, a certification of the tax commission or a computation of the auditor of state would not be regarded as void because not made within the time limited by the statute. There can be no dissent from this conclusion which, I take it, is self-evident. There is no question, therefore, that the taxes certified to you by the auditor of state after the fifteenth of December or in cases in which he has not notified the companies of the amount, will become due and payable to the state as soon as such notice is servied on the companies.

The first question which you ask may be paraphrased and summarized as follows:

Are public utilities which have not been notified as to the amount of their excise taxes before December 15th, subject to the penalty provided by section 68 of the tax commission as above quoted?

It is apparent that the tax is not due and payable to the state until the amount thereof is certified to the treasurer for collection, and until the company has had notice of the amount; that is to say, an action can not be maintained on behalf of the state for the collection of this tax without alleging and proving the fact that the amount thereof has been ascertained and certified to the treasurer, and that the demand specifically provided for by section 66 of the act above quoted has been made.

On the other hand, however, unless penalties are to be charged against companies paying the tax after the fifteenth of December, regardless of the date at which the auditor certifies the amount of the tax in each case to the treasurer for collection, the penalty provision of the act can not be enforced. The law does not fix any date other than December 15th for the guidance of the treasurer and the auditor in adding the penalty, and if taxes not certified for collection until after that date are not subject to penalty as of December 15th, then the treasurer and the auditor being without authority to fix another date upon which they shall become subject to penalty, they must be held immune from such penalty entirely. The seeming contradiction in the law may be reconciled by considering the whole act as above outlined. It is apparent from such consideration that the duty of setting in motion the machinery of taxation therein provided for rests upon the public utility — not upon the taxing officers of the state. It is clearly out of the question to urge that, because a public utility does not report in the month of August, for instance, it is absolved from the duty of reporting at all; and it follows, therefore, that because a public utility reports at a date so late as to make the certification of the amount of tax due from it before December 15th impossible, the company may not be absolved from the payment of the penalty.

Again, the broad powers conferred upon the tax commission for the verification of the returns made to it by the companies and for the review and correction of its own findings when once tentatively made, make it apparent that considerable delay might be occasioned by the exercise of such powers after a company had once reported. It is clear, however, that if a public utility promptly and correctly reports the amount of its gross receipts or gross earnings to the

tax commission in the first instance, the time offered by the statute within which the various determinations and computations provided for therein must be made, is ample.

It is true, as suggested by you, that many public utilities may be ignorant of the law respecting their duties and liabilities under this act. Such ignorance of law, however, can not excuse their failure to act promptly and to report correctly in accordance with the act.

It is true also that it is possible for delays to occur through the fault, neglect or error of some of the taxing officers of the state. If, however, the contention that such is the case with regard to a particular company is made, you may not, as treasurer, take cognizance of such contention for reasons which I shall more fully state.

The principle upon which the main question is ultimately to be determined is the fundamental one that all official acts are presumed to have been duly committed; that is to say, that all things done by a public officer are presumed to have been properly done. This is especially the case where an irregularity may occur as well through the fault of a private individual as through the fault of a public servant or agent.

The application of the above mentioned principle to the case at hand is as follows:

The treasurer of state receiving the auditor's certificate of the amount of taxes due from a given company after December 15th, or on that date, in a case wherein the company has not been notified of the amount of tax due, is entitled to presume and must presume that the failure of the tax to be certified to him for collection before the date on which the penalty occurs, has been due to the fault or neglect of the company, and not to that of the tax commission or the auditor of state. This is the more apparent because of the fact that the treasurer's duty in the matter is purely ministerial, he being vested with no discretion whatever as to the amount which he may collect from a given company.

Because then the section providing for the exaction of a penalty makes no exception in favor of companies whose taxes have not been computed, and upon which notice has not been served prior to the date at which the penalty occurs, and because also in law, so far as the duty of the treasurer is concerned, the delay resulting in the failure of the tax to be certified to the auditor prior to the date on which the penalty occurs is presumed to have been occasioned by the fault or neglect of the company, I am of the opinion with respect to your first question that all taxes not paid on or before December 15th of any year, whether received by certification from the auditor of state before that date or not, must be certified by the treasurer of state to the auditor of state for the computation of the penalty thereon, and by the auditor of state to the attorney general for collection.

Your second question relates to that portion of the tax commission law which was formerly the Willis Law, so called. The sections referred to by you are in part as follows:

Section 94:

> "If a corporation other than a public utility required to * * * pay the fee prescribed in this act, fails or neglects to * * * pay such fee within thirty days after the same has been certified to the treasurer for collection, it shall be subject to a penalty of fifteen per cent. of the fee required to be paid by it."

Section 95:

> "Such penalty * * * and the annual fee * * * to be paid as provided in this act may be recovered by an action in the name of the state, and on collection shall be paid into the state treasury to the credit of the general revenue fund."

Section 96:

> "The attorney general, *on request of the commission,* shall institute such action in the court of common pleas of Franklin County, or any county in the state, in which such corporation has an office or place of business. * * *"

In connection with these sections permit me to quote Section 92 of the act, also a part of the former Willis Law as re-enacted, which provides in part as follows:

> "Upon the filing of the report and the payment of the fee * * * to the treasurer of state, the auditor of state shall make out and deliver to the corporation so paying, a certificate of the compliance by such corporations with * * * this act, and the payment of the annual fee therein provided for. The auditor of state shall make a report monthly to the commission of the annual fees so collected."

In the same connection permit me to call attention to Sections 84, 87, 90 and 91 all of which provide that the tax commission shall certify the companies subject to these sections to the auditor of state who shall charge and certify to the treasurer of state for collection, the fees provided for in the various sections of this portion of the act. I find no other provision of the tax commission act which bears upon the question submitted by you.

The foregoing sections, in my opinion, are to be read in connection with section 247 of the General Code, which is in part as follows:

> "Before paying money into the state treasury, the person shall give the auditor of state a statement showing the liability or indebtedness on account of which the payment is to be made, and exhibit to him all accounts, vouchers and documents necessary to enable him to ascertain the amount to be paid, unless the auditor has in his office the means of determining such amount. * * *"

In order that the auditor of state may have the proper records upon which to issue his pay-in warrants to the treasurer for such fees and penalties, the treasurer of state should, upon computing the amount of penalty due from a corporation delinquent under the foregoing provisions, notify the auditor of state thereof. It is clearly the duty of the treasurer to compute the amount in the first instance. The law does not specifically require the auditor to keep any record of such penalties, but the necessities of the case seem to require a notification such as that suggested.

At the time he computes the penalty as aforesaid, the treasurer of state should not only notify the auditor of state but he should also notify the Tax Commission. This is because the Tax Commission is the only body having authority to certify claims under the Willis Law to the Attorney General for col-

lection. In fact, as a matter of practice, I believe it is incumbent upon the treasurer of state to certify the collection of the entire amount due from a delinquent corporation to the Tax Commission, by it to be referred for collection to the Attorney General at such time as it may deem best.

The procedure above outlined is not expressly required by law, but, in my judgment, it is made necessary in order to carry out the manifest intention of the general assembly.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Board of Public Works.)

BRIDGES ACROSS CANALS — REQUIREMENTS.

Plans of bridges across canals must be approved by the Board of Public Works, and such bridges must not interfere with navigation.

August 29th, 1910.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN: — In your letter of recent date you state that certain citizens of Massillon have applied to your board as to the right of the county to erect a lift bridge across the Ohio Canal at Main Street in the city of Massillon and that to grant their request it will be necessary to narrow the channel of the canal to twenty-five feet in width. I understand that the bridge in question would have its main abutment upon the berme side and would lift in such a manner that the driveway would change from horizontal to vertical, leaving the channel entirely open on the tow path side. You ask what authority, if any, the board of public works has to grant such a request.

Section 7556 of the General Code provides as follows:

> "The council of a city or village, or the commissioners of the county in which such city or village is situated, having lawful authority to construct or erect a bridge on a road, street, or public highway, crossing a canal or feeder thereof, if deemed necessary, may erect and maintain for public use, a swing bridge, or self closing bridge, upon such street, road or public highway, at such place. Such bridge shall not be constructed or erected without first obtaining, for the model and location thereof, the consent, in writing, of the board of public works."

Sections 8775 and 8776 G. C. provide as follows:

> "When the line of the road crosses a canal or any navigable water, the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing, of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board, upon good cause shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and conditions thereof, so as not to impede navigation. Within twenty days from his appointment, such engineer shall make his returns to the common pleas court of the county wherein such crossing is to be made, subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve, and confirm it, unless good cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use, and occupancy of such bridge, in accordance with such plans."

"No company shall construct over a canal any permanent bridge less than ten feet in the clear above the top water line of the canal, and the piers and abutments of such bridge must be placed so as not in any manner to contract the width of the canal, or interfere with free passage on the tow path. This section shall not prevent the construction or continuance of draw bridges which do not interrupt navigation."

Sections 12503 and 12504 G. C. provide as follows:

"Whoever constructs or builds a lock, bridge, dam or other structure in, across or upon a river, stream, lake or reservoir with which any of the canals of this state are united, connected or communicate at a place where such public river, stream, lake or reservoir is navigable and used by steamboats, canal boats, vessels or other watercraft, unless he obtains from the board of public works an order authorizing the construction of such lock, bridge, dam or other structure proposed or contemplated, setting forth that it will not obstruct the navigation of such river, stream, lake or reservoir, or injuriously interfere with the rights of the public or the business of the persons engaged in the use thereof, for the transportation of produce or merchandise, or other navigable or commercial purposes, shall be fined not more than one thousand dollars. Such prosecution shall be by indictment in the court of common pleas."

"A lock, bridge, dam or other structure so erected or built without the order or license provided for in the next preceding section, shall be taken and adjudged a common nuisance and may be abated accordingly."

These are the only sections of the statutes that I find relating to the subject matter of your inquiry. As to the power of the board of public works, the board is specifically enjoined by statute to

"protect, maintain and keep them (the public works) in repair,"

and it has been decided by our supreme court in the case of State ex rel. v. Railway Company, 37 O. S. 157, and in other cases in our courts that:

"The board of public works possesses no powers except such as are necessarily implied, the purpose of which is to perfect, render useful, maintain, keep in repair, and protect and make the canals useful as navigable highways. * * It may be true that in these days of improved methods of commercial intercourse, canals are relatively of more public importance, but so long as the present policy of the state, as shown by its laws, stands, the courts must carry out that policy. It is for the legislature, not for the board of public works, nor for the courts to change it."

On page 173 of the same case the court, in construing section 3317 of the Revised Statutes, now sections 8775 and 8776 of the General Code, says:

"Even the court has no power to approve the plans where the bridge is less than ten feet above the top water line of the canal, or where the piers or abutments interfere with navigation. * * *

"These provisions clearly show the care the legislature has taken to preserve canals.

"They show further that, as between the two public uses, that for purposes of navigation is paramount over public uses for railroads, even as against the right to cross."

While the statutes above quoted make specific provision as to the size, location and construction of railroad bridges crossing canals, the statutes relating to city, village and county bridges across canals are not so specific. It appears to me, however, that the policy of the general assembly, as shown in the laws relating to railroad bridges, should influence the board in its construction of the statutes relating to city, village and county bridges. While it may with some reason be claimed that the board of public works should adopt a more liberal attitude in permitting the construction of city, village and county bridges, for the reason that such bridges are public structures, and permission to construct such bridges of smaller size would be a saving of expenses to the public, the board could only permit the construction of smaller bridges in the exercise of discretion rather than in pursuance of specific authority of law. Whatever the extent of the board's discretion, however, it appears to me from the language of the above cited case that, as between the public use for purposes of navigation and the public use for purposes of crossing the canals, the use for navigation is paramount over the use for crossing the canals.

In view of the above, I am of the opinion that your board cannot approve of the bridge described in your letter in case such bridge will interfere with the navigation of the canal. In determining whether such a bridge will so interfere with navigation, I believe you should consider the minimum specifications for the construction of such canal, the facilities provided for the passage of boats and the general conditions applying to the canal in the locality. While no provision of law makes it your duty to enforce the same requirements for public bridges as for railroad bridges, I am of the opinion that you should give some consideration to the requirements for railroad bridges insofar as such requirements are a declaration of the policy of the general assembly, especially in determining the kind of a bridge which will not interfere with navigation.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

BOARD OF PUBLIC WORKS — AUTHORITY AND PROCEDURE TO SELL CERTAIN REAL ESTATE TO NORFOLK AND WESTERN RAILWAY COMPANY.

June 23rd, 1910.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN: — You present to this department the act approved May 19, 1910, entitled:

"An Act to authorize the Governor, by and with the approval of the Board of Public Works, to grant, bargain, sell, and convey certain real estate in Pickaway County, to Norfolk and Western Railway Company",

and ask what steps should be taken for the sale of the lands described in said act to the Norfolk and Western Railway Company.

Examination of this act shows that the description of the property to be conveyed and certain conditions as to conveyance are not sufficiently clear to obviate future controversy as to such lands.

The land to be conveyed is a strip about 2½ miles long on the east or berme bank side of the Ohio Canal in and north of the city of Circleville. The expression "east water-line of said Ohio Canal" may sufficiently describe this boundary line for present purposes under the existing topography of these lands. Since, however, such east water-line is on the berme side of the canal and is a point at which the water of the canal when at top water-line touches the east side of the canal, it can be seen that this line will vary in case that earth, etc., is either deposited or removed from this side of the canal. It therefore appears to me that such east line should be surveyed, definitely fixed and agreed upon and that a plat of such survey should be made a part of the deed of conveyance. I suggest either that some definite standard line not subject to change be adopted as a basis, or that the west water-line of the canal, that is, the water-line adjoining the tow-path, be definitely surveyed and fixed with reference to permanent monuments and that such west water-line be used as a basis from which the east water-line is described.

The description also shows that the land to be conveyed extends along the bank of Mud Run for several thousand feet. Unless the line along Mud Run is definitely fixed in a similar manner, controversies will no doubt arise in the future as to what is meant by the language "westerly line of Mud Run", "west bank of Mud Run", etc. For example, such a controversy may arise in case Mud Run is filled up or washed away along such boundary line, or in case Mud Run changes its channel. And there may also be disagreements as to whether the line along the bank of Mud Run means the top of the bank or the part of the bank left dry at high or at low water-mark. I believe, therefore, that such boundary line should be made specific and definite for all time instead of being left so indefinite and subject to disputes and controversies.

The language of the last paragraph of the act is also uncertain. My understanding from a reading of this paragraph is that Mud Run is not included in the conveyance and that the state is the owner in fee of Mud Run as a ditch along the line of the lands to be conveyed, and, while it may appear from the words in such paragraph that the railway company is in the future to maintain such ditch, yet, as a matter of public policy in keeping with the uniform policy of the state throughout its canal system, I believe that the state should retain full control over such ditch and maintain it itself if the state is and is to be the owner. At any rate, the board of public works and the governor should come to a definite conclusion on this subject before making an appraisement of the property to be sold under this act. The board and the governor should also provide in detail as to the terms and conditions under which the company shall be given the right to provide another water-way to take the place of Mud Run and as to the ownership and maintenance of such new water-way when furnished by the company. As this land is now under lease to the Norfolk and Western Railway Company, the company should either cancel this lease upon the receipt of a deed from the state, or should accept the deed subject to such lease.

I believe that the boundary line of the state, on the side of the canal upon which this property is situated, has never been officially fixed so that the state's line on the berme side of the canal in this locality has never been legally and permanently defined. It appears to me, therefore, that, prior to a sale of this property, all possible information relative to the title of the state in such lands, including the original specifications for the construction of this portion of the canal, and the various records on file, and information as to the extent of the

state's ownership in Mud Run, should be compiled and that the state may be fully satisfied as to its title in the lands to be conveyed and adjoining lands. With such information at hand, boundary questions between the state and such railway company may be settled along this strip of the canal. This being done, a survey of the lands to be conveyed, and also of the adjoining lands, claimed by the state, can be made and attached as part of the deed of conveyance so as to indicate clearly just what lands are conveyed and what lands are retained by the state.

As to procedure subsequent to the above, the governor and the board of public works should meet together to consider the application of the Norfolk and Western Railway Company for the purchase of such property, to decide whether such property should be sold, and to determine "the reasonable value of such premises", and the conditions attached to such conveyance.

The governor may then execute a deed to the company as provided in such act. This deed must be endorsed with the approval of the board of public works and, under section 464 of the General Code, such deed shall also contain "the written approval of the governor and attorney general".

Since the act itself reserves a berme bank and provides specifically for the sale of this land to the Norfolk and Western Railway Company, it is unnecessary to go through the procedure described in section 218-231, with the exception of the provision that the governor shall execute the deed.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS — CONSTRUCTION OF 101 O. L. 177.

December 31st, 1910.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN: — You call my attention to the following item of the appropriation bill contained in the act of 101 O. L. 177 at page 180:

> "Owners' assessment paving the highway known as the Independence canal road from the south line of Button road, Newberg township, to the south line of Cuyahoga county $5,000.00."

You also present a certificate from the county auditor of Cuyahoga County certifying "that there has been levied and assessed against the abutting property of the State of Ohio, the sum of $5.000 as its share of the cost of the improvement of canal road No. 2."

You ask whether, upon such certificate, you are authorized to pay such money to Cuyahoga County.

The fact that $5,000 was appropriated for this purpose does not indicate that all of such $5,000 should be paid to Cuyahoga County. Since the above act makes an appropriation for "owners' assessment," the act intends that the State of Ohio shall be treated as an abutting property owner upon such road. You should, therefore, satisfy yourselves that the assessment against the state is made on the same basis as the assessment against private abutting property owners and that the State of Ohio is treated in all respects in the same manner as a private owner of property abutting upon such road.

Inasmuch as the matter submitted to me does not fulfill completely the above named requirements, I suggest that you procure a complete certified copy of all

proceedings held to date in connection with such road improvement and satisfy yourselves that the State is being assessed in the same manner as private owners in regard to foot frontage, etc. When you are so satisfied you may issue voucher for that portion of such $5,000 as is required to pay the "owners' assessment" for the construction of such road.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS — NAVIGABLE STREAMS — BRIDGE ACROSS MUST BE AUTHORIZED BY.

January 12th, 1910.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN: — You have inquired as to the duties of your board in relation to authorizing the construction of bridges across navigable streams of this state.

Section 9 of the River and Harbor Act approved March 3, 1899, which section, I am informed by the war department, is still the law upon this subject, provides as follows:

> "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or cause-way over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other water-ways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And Provided Further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the ecretary of War."

You will note that the above section makes reference to the "authority of the legislature of a state." Such authority for building such structures in Ohio is contained in section 3317 R. S., which provides as follows:

> "When the line of the road of a company crosses a canal or any navigable water, the company shall file with the board of public works, or with the acting commissioner thereof having charge of the public works where such crossing is proposed, the plan of the bridge, and other fixtures for crossing such canal or navigable water, which shall designate the place of crossing; if the board or acting commissioner approve such plan, he shall notify the company, in writing, of

such approval; but if the board or acting commissioner disapprove such plan, or fail to approve the same within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board of public works, or said acting commissioner, the court or judge shall, upon good cause shown, appoint a competent, disinterested engineer, not a resident of any county through which the road passes, to examine such crossing, and prescribe the plan and condition thereof, so as not to impede navigation; such engineer shall, within twenty days from his appointment, make his return to the court of common pleas of the county wherein such crossing is to be made, subject to exception by either party; thereupon the court shall, at the next term after the filing of the return, proceed to examine the return, and approve and confirm the same, unless good cause be shown against such approval; and such order of confirmation shall be sufficient authority for the erection, use, and accupancy of such bridge, in accordance with such plan; but no company shall construct over any canal any permanent bridge less than ten feet in the clear above the top water-line of the canal; and the piers and abutments of such bridge shall be placed so as not in any manner to contract the width of the canal, or interfere with free passage on the towpath; but this section shall not be construed to prevent the construction or continuance of draw-bridges which do not interrupt navigation."

Under these provisions of law, the company desiring to construct a bridge across a navigable body of water in Ohio should file an application with the Board of Public Works for their approval or disapproval of the plan for the bridge of such company, and such matters should be determined by the board of public works prior to any action which may be taken by the Chief Engineers of the United States, or by the Secretary of War.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS — CONSTRUCTION OF LEASE BETWEEN COSHOCTON LIGHT & HEATING COMPANY AND E. S. LEE.

November 30th, 1910.

The Board of Public Works, State House, Columbus, Ohio.

GENTLEMEN: — You have submitted to me a copy of an agreement between The Coshocton Light and Heating Company and Edwin S. Lee, which the board is requested to approve by resolution. Mr. Lee at present leases water from the State of Ohio and under the agreement he is to continue this lease but permit the use of such water by The Coshocton Light and Heating Company in a consideration of their furnishing him power by electricity. The agreement also, if carried out, would change the terms both of the lease of the State to Mr. Lee and also of the lease of the State to The Coshocton Light and Heating Company.

While it is possible for Mr. Lee to make an assignment outright of his lease with the consent of the board of public works, there is nothing in the lease or

in the law relating to this subject which authorizes the board of public works to approve of an agreement between private individuals which may later produce confusion and entanglements in the management of the public works. It is rather the policy of the law that the board should deal directly with the particular individual concerned, irrespective of any private arrangements he may make with third parties.

If I have a correct understanding of the facts, I believe tnat the object aimed at in the agreement cannot be legally accomplished while Mr. Lee holds his present lease of water-power from the state, for the reason that the agreement sets forth terms and conditions which are not contained in the lease held by Mr. Lee and since such lease, if assigned, could not grant rights consistent with the terms and conditions of such agreement.

I am therefore of the opinion that the board of public works is without power legally to approve by resolution the above agreement.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Dairy and Food Commissioner.)

DAIRY AND FOOD COMMISSIONER — ACT FEBRUARY 28, 1908, 99 O. L. 28.

Leroux Cider Vinegar Company, unlawful to sell imitation vinegar.
Vinegar must be labeled "Distilled Vinegar", must not contain coloring matter other than that imparted by distillation.

January 17th, 1910.

HON. R. W. DUNLAP, *State Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR: — Your letter of January 11th, enclosing letter from the Leroux Cider Vinegar Company of Toledo, concerning the sale of imitation cider vinegar is received. In their letter the Leroux Cider Vinegar Company state that they plan to manufacture and sell a vinegar composed of boiled cider 1-2%, acetic acid 4-4-2/10%, caramel 1/20 of 1%, water 94-95%, and sell the same under one of the following brands: "Sunrise Brand Imitation Cider, Distilled Vinegar", "Sunrise Brand Vinegar" or "Sunrise Brand Imitation Vinegar".

In your letter of January 11th, you request my opinion as to whether this can lawfully be done. In reply thereto I beg leave to submit the following opinion:

The law regulating the manufacture and sale of vinegar in this state is found in the act of February 28, 1908, 99 O. L. 28. Section 1 of this act reads in part as follows:

> "That no person shall manufacture for sale, offer, or expose for sale; sell or deliver, or have in his possession with intent to sell or deliver, any vinegar not in compliance with the provisions of this act".

Sub-section 4 of section 1 reads as follows:

> "Any vinegar manufactured for sale, offered for sale, exposed for sale, sold or delivered or in the possession of any person with intent to sell, under the name of distilled vinegar, shall be the product made wholly or in part by the acetous fermentation of dilute distilled alcohol, and shall contain in one hundred (100) cubic centimeters (at a temperature of twenty (20) degrees centigrade), not less than four (4) grams of acetic acid, *and shall be free from coloring matter, added during, or after distillation, and from coloring other than that imparted to it by distillation*".

Section 2 reads in part as follows:

> "* * * And all vinegar made wholly or in part from distilled liquor shall be branded "distilled vinegar", and all such distilled vinegar shall be free from coloring matter added during or after distillation and from color other than that imparted to it by distillation. * * * And all vinegar shall be made wholly from the fruit or grain from which it purports to be or is represented to be made, *and shall contain no foreign substance, and shall contain not* less than four per cent., by weight of absolute acetic acid".

From the letter of the Leroux Cider Vinegar Company enclosed by you I gather that the vinegar proposed to be manufactured by them is a "distilled vinegar" and therefore such vinegar must, under the above quoted provisions of section 2 of the act of February 28, 1908, be branded "distilled vinegar", and under such section it must be "free from coloring matter added during or after distillation and from color other than that imparted to it by distillation". This would not be true of the vinegar which they propose to manufacture.

I am also of the opinion that under said section 2 to manufacture and sell such vinegar would be unlawful for the reason that it would "contain a foreign substance".

The above quoted part of section 1 of this act provides that all vinegar manufactured for sale or offered or exposed for sale, sold or delivered, etc., within this state shall be in compliance with the provisions of this act. And sub-section 4 of section 1 provides that "distilled vinegar" shall be free from coloring matter added during or after distillation and from color other than that imparted to it by distillation. As the 1/20 of 1% caramel entering into the proposed vinegar is a "foreign substance" and a "coloring matter" added to the vinegar, I am of the opinion that such vinegar would not be "in compliance with the provisions of" the act of February 28, 1908, and that therefore the manufacture for sale or sale, etc., of this vinegar in the state of Ohio is unlawful.

Yours very truly,
U. G. DENMAN,
Attorney General.

DAIRY AND FOOD—SANITARY INSPECTION LAW. (100 O. L. 15).

Commissioner has power under act to inspect places where food products are kept for sale, and order same placed in sanitary condition.

January 11th, 1910.

HON. R. W. DUNLAP, *State Commissioner Dairy and Food, Columbus, Ohio.*

DEAR SIR:—Your letter of January 8th, in which you request my opinion on the following inquiry, is received:

> Does the act of March 12, 1909, (100 O. L. 15) known as the Sanitary Inspection Law or any other law confer authority on the Dairy and Food Department to prohibit dealers from exposing, offering for sale or selling, meats, cheese, bread, butter and other similar food products, on the streets or other places without being protected by coverings to prevent insects, flies, dust, etc., coming in contact therewith?

In reply thereto I beg leave to submit the following opinion:
The act of March 12, 1909, (100 O. L. 15) reads in part as follows:

> "Sec. 1. That no person or persons shall operate any bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant or eating house, packing or slaughter house, or ice cream plant, *or any place where any food products are manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose whatever, where the same is in a filthy, unclean or unsanitary condition* * * *."

"Sec. 2. That if in the opinion of the dairy and food commissioner, his assistant commissioners, inspectors or agents or either of them, after an investigation thereof, any bakery, confectionery, creamery, dairy, dairy barn * * * or any place where any food products are manufacturer, packed, stored, deposited, collected, prepared, produced or sold for any purpose whatever, is operated in violation of section 1 of this act, the dairy and food commissioner, his assistant commissioners, inspectors or agents shall notify in writing the proprietor or proprietors, owner or owners, manager or managers of such bakery, etc., * * * or any place where any food products are manufactured, etc., * * * to place the same in a clean and sanitary condition within a reasonable time to be stated in said notice, which time so stated shall in no case be less than ten days."

proprietors, owner or owners, manager or managers of such bakery, etc., * * * or any place where any food products are manufactured, etc., * * * to place the same in a clean and sanitary condition within a reasonable time to be stated in said notice, which time so stated shall in no case be less than ten days."

"Sec. 3. Any person violating any of the provisions of this act after the time stated in the notice provided for in section two hereof, shall be deemed to be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than fifty dollars, nor more than two hundred dollars for the first offense, and for each subsequent offense, etc., * * *."

"Sec. 4. A justice of the peace, mayor or police judge shall have jurisdiction within his county in prosecutions for violations of the provisions of this act, and all of the provisions of section 3718a of the Revised Statutes of Ohio shall apply to said proceedings."

Under the above quoted act I am of the opinion that not only have you authority, but it is your duty, through your inspectors, to investigate places where food products are exposed or offered for sale, and that should you determine upon such investigation that the place where any such food products are manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose whatever is in a filthy, unclean or unsanitary condition, you should then serve the notice, provided for by section 2 of the above act, upon the persons therein specified, to rectify the conditions of such place found, upon your investigation, to be "filthy, unclean or unsanitary."

The question whether such places are in a "filthy, unclean or unsanitary condition," is, under this act, one of fact and not of law, and the investigation by yourself or your inspectors must be such as to show that such condition exists before you notify the person or persons specified in section 2 as therein provided.

Yours very truly,

U. G. DENMAN,

Attorney General.

INTOXICATING LIQUORS—MALT LIQUORS—VINOUS LIQUORS, WHAT ARE, WITHIN MEANING OF DOW-AIKIN LAW.

Wholesale druggist liability to Dow-Aikin tax. Malt liquors containing no alcohol now subject to Dow-Aikin tax. Unfermented grape juice containing no alcohol not subject to Dow-Aikin tax. Wholesale druggist selling intoxicating liquors to retail druggists liable to Dow Aikin tax unless liquor is sold for exclusively mechanical, pharmaceutical or sacramental purposes—burden rests on wholesale druggists to show fact.

HON. R. W. DUNLAP, *State Commissioner Dairy and Food, Columbus, Ohio.*

DEAR SIR:—Your letter of March 29th and March 30th are received, in which you request my opinion upon the following questions:

> 1. What malt liquors come within the provisions of the Dow-Aikin Law as interpreted by the late decision of the supreme court in the case of La Follette, Treasurer, v. John Murray, et al.?
>
> 2. Do different brands of grape juice come within the provisions of the Dow-Aikin Law, and are they, therefore, subject to the tax therein provided?
>
> 3. Are wholesale druggists, doing business within this state and selling intoxicating liquors to retail druggists, within the provisions of the Dow-Aikin Law, and subject to the tax therein provided?

In reply thereto I beg leave to submit the following opinion:

In the case of La Follette, Treasurer, v. Murray, decided by the supreme court February 23rd, 1910, being case No. 11855 in that court, the supreme court merely holds that the substitution, in section 4364-9, R. S. O., by the amendment of 1906 (98 O. L. 100) of the word "other" for "any" intoxicating liquors did not change the meaning of this section, and that, therefore, the interpretation placed upon this section by the supreme court in State ex rel Guilbert, Auditor of State v. Kauffman, Auditor of Montgomery county, 68 O. S. 635, was still applicable to the section as it now stands.

In State ex rel Guilbert v. Kauffman, the supreme court, in a *per curiam* decision, uses the following language:

> "Section 4364-9, Revised Statutes, imposes a tax upon the business of trafficking in *any intoxicating* liquors, and also on the business of trafficking in spirituous, vinous or malt liquors. The general term 'malt liquors' includes both non-intoxicating and intoxicating malt liquors. * * *"

The decision by the supreme court was upon a demurrer to a petition in mandamus praying that the Auditor of Montgomery county be ordered to place upon the duplicate of his county as liable to the Dow-Aikin tax, one Brinkle and one Reading. The petition alleged that Brinkle and Reading were engaged as partners in

> "the sale of a malt liquor or beverage, commonly known as 'Bishop's Beer' * * * which malt liquor or beverage contains less than two per cent. of alcohol and is not intoxicating."

In the La Follette case there was an agreed statement of facts from which it appeared that the defendant, Murray, had been engaged in the business of selling

> "what is known as 'Friedon Beer,' a malt liquor containing forty-seven hundredths of one per cent. of alcohol, but not intoxicating."

It will thus be seen that the supreme court in these two decisions has not gone to the extent of saying that the business of trafficking in malt liquor which contains no alcohol is liable to the Dow-Aikin Tax, and that question is, therefore, still open in this state. It becomes necessary, therefore, to decide what the term "malt liquor" as used in section 4364-9, R. S. O., means.

The following definitions are found in the Standard Dictionary:

> "Liquor, any alcoholic or intoxicating liquor."
> "Malt Liquor, any alcoholic beverage brewed from malt."

and in the Century Dictionary:

> "Liquor, an alcoholic or spirituous liquid, either distilled or fermented."
> "Malt Liquor, a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by the distillation of malt or mash."

Malt Liquor has been defined by the courts of last resort of various states as follows:

> "The common and approved usage of the term 'malt liquor' is an alcoholic liquor, as beer, ale or porter, prepared by fermenting and infusion of malt."

State vs. Gill, 89 Minn. 502,
Adler vs. State, 55 Ala. 23,
U. S. vs. Cohn, 2 Ind. T. 474,
U. S. vs. Ducournau, 54 Fed. 139.

And it has been held that the word "liquor" is used in this connection to describe an alcoholic or spirituous fluid.

Brass vs. State, 34 Southern (Fla.) 308,
Houser vs. State, 18 Ind., 107,
State vs. Giersch, 98 N. C. 720,
People vs. Crilly, 2 Barb. (N. Y.) 248.

And the supreme court of Alabama has more particularly defined the term "malt liquors" as follows:

> "'Malt Liquors' are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln-dried, then

mixed with hops, and, by a further process of brewing, made into a beverage."

Allread vs. State, 89 Ala. 112,
Tinker's Case, 90 Ala. 647,
Marks vs. State, 48 Southern (Ala.) 868.

It will thus be seen that both the lexicographers, in generally defining the term "Malt Liquors," and the courts, in interpreting that term, as used in liquor laws, have uniformly held that they contain some percentage of alcohol; nor do I think that our courts or the courts of any state will go so far in the enforcement of liquor laws as to hold that beverages produced by the malting process, from which the alcohol resulting from such process has been entirely extracted, come within the meaning of the term "Malt Liquors" as used in section 4364-9 R. S. O., and are subject to the liquor tax. The very use of the word "liquor" in conjunction with the word "malt" in this phrase, in the light of the above quoted definitions, bears out this construction. A malt beverage containing no alcohol would, in my opinion, be a "malt beverage" or "malt liquid" and not a "malt liquor."

The question, therefore, is not as to the percentage of malt contained therein, but is whether the particular beverage in question is one which is produced by the malting process as above defined, and which contains alcohol in any percentage, no matter how small. Our supreme court, as I have above stated, has merely declared that the intoxicating quality of such a malt liquor does not enter into the question, but it has never declared that the trafficking in non-alcoholic malt beverages is taxable under the Dow-Aikin Law.

In regard to your second question. The following definitions are found in the Century Dictionary:

"Vinous Liquor, liquor made from grapes; wine."
"Vinous, having the qualities of wine."

And in the Standard Dictionary:

"Vinous, of or pertaining to wine; of the nature of wine."
"Wine, the fermented juice of the grape."

In 23 Cyc. 60 we find the following definition:

"Vinous liquor means liquor made from the fermented juice of the grape."

The supreme court of Alabama, in Adler vs. State, supra, gives the following definition:

"Vinous liquors are those liquors made from the juice of the grape."

And in Eureka Vinegar Company vs. Gazette Printing Company, 35 Fed. 571, is the following definition:

"Vinous liquors are liquors which have undergone vinous or alcoholic fermentation."

It will thus be seen from the above quotations and from the definitions of "liquor" herein given, that grape juice which is unfermented and which does not contain alcohol, is not a vinous liquor within the meaning of section 4364-9 R. S. O., and the traffic therein is not subject to the Dow-Aikin Tax. In other words, unfermented grape juice containing no alcohol might properly be called a "vinous liquid or beverage" but, in my opinion, it is not a "vinous liquor."

The determination of your third question involves the construction of section 4364-15 R. S. O., which reads as follows:

> "The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

It has heretofore been held by the supreme court in Senior vs. Ratterman, 44 O. S. 661, that wholesale dealers in intoxicating liquors who are not manufacturers are within the terms of the Dow-Aikin Law, and are liable to the tax therein imposed. It is clear, therefore, that if the wholesale druggists spoken of in your third question are to be exempted from liability for the liquor tax, the sales of intoxicating liquors made by them to retail druggists must come within the exemption of sales "for exclusively known mechanical, pharmaceutical or sacramental purposes," and the burden of showing that they do come within such exceptions rests upon them in each individual case.

McBean vs. Sears, Treasurer, 8 Nisi Prius, 189.
Black on Intoxicating Liquors, section 511.

It would seem, and I understand that the Auditor of State has so practically interpreted the law, that wholesale druggists selling intoxicating liquors in good faith to retail druggists would be protected, but where the circumstances are such as would put a reasonable man upon his notice that the liquor so bought by retail druggists was not intended for "exclusively pharmaceutical purposes," I think that such wholesalers would thereby render themselves liable to the tax, if, as a matter of fact, the intoxicating liquor so sold was not used for exclusively pharmaceutical purposes; and in any case, under the above authorities, the burden would rest on the wholesaler to show that such sales were within the above named exemptions, and each case, were the question to arise, would have to be decided upon the facts peculiar to it.

Yours very truly,
U. G. DENMAN,
Attorney General.

FLOUR — MANNER OF BRANDING.

November 17th, 1910.

HON. R. W. DUNLAP, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your letter of October 15th, asking for construction of sections 5999 and 6000 of the General Code of Ohio.

The above two sections are as follows:

Sec. 5999. "A miller or mill owner shall brand or cause to be branded on the head of each barrel or side of each sack the weight and quality of the flour or meal contained therein, and the initial letter of his christian name and his surname in full; or if the mill is owned or operated by more than one person, then the name of such persons or such company. If a miller, mill owner or company neglects to so brand such flour or meal, or packs or exposes it for sale in a barrel or sack of a less quantity or poorer quality than is branded thereon, he or they shall forfeit and pay for each offense ten dollars for the use of the county, and be liable to the person injured in double the amount of damages sustained."

Sec. 6000. "A miller or mill owner manufacturing flour for persons having private brands, may place the name and brand of such persons upon the barrels or sacks containing such flour, or such flour may be shipped by the miller or mill owner in blank packages to such persons, who shall place thereon their names and brands before offering it for sale. Persons receiving flour in blank packages shall be liable to the penalties of this chapter whenever it is offered for sale without the name and brand of such persons stamped upon the packages containing it".

You will note that section 5999 applies to the branding of each barrel or sack of flour sold by a miller, mill owner or persons operating a mill, and has no application whatever to the branding of flour by a retail dealer, while section 6000 has reference to private brands. In this case a miller, mill owner or persons operating a mill may place the name or private brand of such person upon the barrel or sacks containing the flour, or may ship the flour in blank packages to such person, but in such case all packages in which the brands are offered for sale by the retail dealer must have such private brand on such package before the same is offered for sale by such retail dealer.

I beg to remain,

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Commissioner of Common Schools.)

BOARD OF EDUCATION—RESIGNATION OF MEMBER, TIME OF TAKING EFFECT OF—VACANCY IN BOARD, HOW FILLED—QUORUM—ORGANIZATION OF BOARD.

March 11th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of March 7th, in which you request my opinion on the following question, is received:

> "The board of education of Piqua, Ohio, composed of six members, is unorganized on account of a deadlock in the selection of a president. A member has resigned. Can the remaining members, upon the filing of the resignation with the clerk, proceed to organize and fill the vacancy under section 3981?"

In reply thereto I beg leave to submit the following opinion:

Section 4748 of the General Code of Ohio (section 3981 R. S. O.) reads as follows:

> "A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

Section 4752 of the General Code (section 3982 R. S. O.) reads as follows:

> "A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property or to employ a superintendent or teacher, janitor or other employe or to elect or appoint an officer or to pay any debt or claim or to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting "Aye" and the names of those voting "No." If a majority of all the members of the board vote aye, the president shall declare the motion carried. Upon any motion or resolution, a member of the board may demand the yeas and nays, and thereupon the clerk shall call the roll and record the names of those voting "Aye" and those voting "No". Each board may provide for the payment of superintendents, teachers and other employes by pay-roll, if it deems advisable, but in all cases such roll-call and record shall be complied with."

Under section 4752 of the General Code, *supra,* I am of the opinion that a majority of all the members of your board of education (which would be four in number) constitutes a quorum sufficient for the "transaction of business" and, therefore, sufficient for them to proceed to the organization of such board by the election of a president as provided for by section 4747 of the General Code, (section 3897a R. S. O.) But by the provisions of section 4752 the election of such officer, in order to be valid, must be by the assenting vote of a majority of *all* the members of the board."

Such board having, by such procedure, "organized", it may immediately proceed, by virtue of section 4748 of the General Code, *supra,* to fill the vacancy caused by the resignation of the member spoken of in your question, but such vacancy must be filled by a majority vote of all the remaining members of the board as provided in said section.

The view above taken of the question presented in your letter renders it unnecessary to consider the question whether the resignation of the member spoken of in your query takes effect from its date, or from its acceptance by the board, but in this connection I beg leave to call your attention to the case of Reiter vs. State, 51 O. S. 74, which holds that a resignation of an office without acceptance creates a vacancy, to the extent, at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—MEMBERS HOLD UNTIL SUCCESSOR IS ELECTED AND QUALIFIED—CONSTITUTIONAL LAW—AMENDMENT OF NOVEMBER 7, 1905.

Right of member of township board of education elected November 7, 1905, to hold until successor elected and qualified, not changed by Article XVII of Schedule.

April 1st, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of March 30th is received in which you ask my opinion on the following facts and query:

> "In Prairie Township, Holmes County, no members of board of education were elected last November. The term for three members expired.
>
> "Query: Will the three members whose terms should have expired January, 1910, 'hold over' as provided under Section 3915, O. S. L., or will the two remaining members proceed to select three members as provided under Section 3981 O. S. L.?"

In reply thereto I beg leave to submit the following opinion:
Section 3915 R. S. O. reads in part as follows:

> "The board of education of township school districts shall consist of five members elected at large at the same time and in the same manner as the township officers are elected, for the term of four years from the first Monday in January after their election (or) until their successors are elected and qualified. At the first township elec-

tion held after the passage of this act, there shall be a board of education elected in all township districts as provided for therein, two to serve for two years, and three to serve for four years, and at the township election held every second year thereafter, their successors shall be elected for the term of four years."

This section as it now stands was enacted April 25th, 1904, and the "first township election held after the passage of this act" was held November 7th, 1905. I take it, therefore, that the three members of the Prairie Township board of education whose terms expired January, 1910, were elected by virtue of Section 3915, on November 7th, 1905.

Section 8 R. S. O. reads as follows:

"Any person holding an office or public trust shall continue therein until his successor is elected and appointed or qualified, unless it is otherwise provided in the constitution or laws."

It is, therefore, clear that unless Article XVII, Section 2, of the Schedule in the Constitution which was adopted at the November election, November 7th, 1905, applies to officers elected to office at that election, the three members of the board of education of Prairie Township will, by virtue of the provisions of Sections 8 and 3915, supra, hold over until their successors are elected and qualified.

Article XVII, Section 2, of the Schedule above referred to, reads in part as follows:

"* * * the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years as may be so prescribed (by the general assembly)."

It was held by the supreme court in State vs. Pattison, 73 O. S. 205, the provisions and limitations of Article XVII of the schedule adopted November 7th, 1905, do not apply to the tenure of office of officers elected at the election held November 7th, 1905, but that the terms of such officers are governed and fixed by the provisions of the laws and of the constitution in force on that date.

It would seem, therefore, and I am of the opinion that the terms of office of the three members of the Prairie Township school board spoken of in your letter are governed by Sections 8 and 3915 Revised Statutes, supra, and that, therefore, they are entitled to hold their offices as members of such board until their successors are elected and qualified.

Very truly yours,
U. G. DENMAN,
Attorney General.

SCHOOLS—TEACHERS' INSTITUTES—JOINT COUNTY TEACHERS' INSTITUTES CANNOT BE ESTABLISHED.

July 14th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of July 8th is received in which you request my opinion upon the following question:

"Section 7859 G. C., provides for the organization of a county teachers' institute.

Query: May two or more counties unite to hold a teachers' institute and each county in the union thus formed pay over to a committee of this joint county institute the funds paid into the treasury of the respective counties by the teachers as examination fees as provided by law?"

In reply thereto I beg leave to submit the following opinion: Section 7859 of the General Code reads as follows:

"A teachers' institute may be organized in any county, by the association of not less than thirty practical teachers of the common schools residing therein, who must declare their intention in writing to attend such institute, the purpose of which shall be the improvement of such teachers in their profession".

The above quoted section and section 7871 of the General Code, providing for the establishment of teachers' institutes in city and school districts, are the only provisions in our statutes authorizing the establishment of such institutes, and nowhere is there any provision, by virtue of which joint county teachers' institutes may be established.

Boards of education are, under the school code, bodies corporate, the powers of which are limited by the provisions of that code, and it may, therefore, do and perform only such acts as are authorized therein.

I am, therefore, of the opinion that two counties may not unite to organize and maintain a joint teachers' institute.

Yours very truly,
U. G. DENMAN,
Attorney General.

TEACHERS' PENSION FUND—VARIOUS MATTERS FULLY DISCUSSED.

A teacher who has not been employed in public schools since enactment of teachers' pension law is not entitled to receive a pension.

A teacher who has rejected privileges of pension fund may upon re-employment, accept same and such teacher will not be required to make back payments covering period of rejection except as provided by section 7884 of the General Code.

A teacher need not pay six hundred dollars required by section 7884 in lump sum even if financially able to do so.

November 17th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have before me your letter in which you submit the following for my opinion:

1. May a teacher who has served three years in the public schools of this state prior to the enactment of the teachers' pension fund, but who has not taught at all since the enactment of the above law, be entitled to a pension?

2. May a teacher who rejected the provisions of the pension act now accept the same?

3. If the answer to the second inquiry is in the affirmative, will such teacher be expected under the provisions of the act to pay into the fund the dues that the board of education would have deducted from her salary during the last two years?

4. Will it be necessary for a teacher retired or retiring to pay the specific sum into the fund before becoming a beneficiary if financially able?

Answering your first question I beg to advise that I am of the opinion that the teachers' pension act only applies to persons who were teachers at the time of the enactment of the law, or who have taught at some period since its enactment. This seems clearly to be the intention of the entire act.

You will note by sections 7877 and 7878 of the General Code that no acceptance of the provisions of the pension act on the part of teachers is necessary before they may become beneficiaries under this act. It would, therefore, have been impossible for a teacher who had not taught any period of time since the enactment of the pension act to accept the provisions of the same.

Answering your second inquiry: You will note section 7877 of the General Code provides that teachers who are employed in the public schools at the time of the enactment of the pension act were required either to accept or reject the provisions of the law creating a pension fund. This section standing alone would lead one to the opinion that a teacher employed in the public schools at the time the pension act was enacted who refused to accept the provisions of such law would be forever barred from doing so, but you will note that section 7878 of the General Code provides that,

> "All teachers hereafter appointed in such public schools * * * within thirty days after their appointment shall be notified by the clerk of such board of education of the election of the board of trustees of such pension fund, and within six months thereafter be required to notify the board of education whether they consent or decline to accept the provisions of law hereafter."

By the above quoted section you will see that *all teachers hereafter appointed* are given the privilege within sixty days after such appointment to accept the provisions of the pension act. This section does not limit the privilege of accepting the pension act to *new* teachers hereafter appointed, but expressly applies to *all* teachers hereafter appointed and does not make any distinction whatever between teachers who some time before may possibly have held an appointment.

I am, therefore, of the opinion that a teacher who has rejected the provisions of the pension act may accept the same within sixty days after a new appointment by the board of education.

Answering your third inquiry I beg to call your attention to section 7884 of the General Code which is as follows:

> "No such person shall be paid until the teacher contributes, or has contributed, to such fund a sum equal to twenty dollars a year for each year of service rendered as teacher, but which sum shall not exceed six hundred dollars. Should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, in paying the annual pension to such retiring teacher, the board of trustees must withhold on each month's payment twenty per cent. thereof, until the amount above provided has been thus contributed to the fund."

You will note the above section requires that a teacher shall have contributed equal to twenty dollars a year to the pension fund for each year's service as teacher, provided, however, that such sum shall not exceed six hundred dollars before such teacher would be entitled to be a beneficiary under the pension fund for the full amount of pension allowed. Nowhere in the entire act is there any provision for a teacher to make up any dues in the teachers' pension fund which are due by reason of such teacher failing to accept the provisions of the pension act. The general assembly seems to have provided section 7884 of the General Code as the method for equalizing the burden between teachers who have paid for the full term of service and those who have not.

Answering your fourth question, I am of the opinion that it is not compulsory for a teacher, even if financially able, to pay the entire sum of six hundred ($600.00) dollars, as provided in section 7884, before being able to receive a pension under the pension act. The wording of the above act, in my opinion, makes the payment of this fund discretionary with such teacher.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION — COMMON PLEAS JUDGE — INCOMPATIBILITY OF OFFICE.

A member of a board of education vacates such office by qualifying for the office of common pleas judge.

September 13th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your request of September 12th for an opinion upon the following question is received:

> "A member of a board of education of Elyria, Ohio, is a candidate for common pleas judge. Are these two offices incompatible?"

In reply thereto I beg leave to submit the following opinion:
Section 14 of Article 4 of the Constitution of Ohio reads as follows:

> "The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisities, *nor hold any other office of profit or trust, under the authority of this state, or the United States.* All votes for either of them, for any elective office, except a judicial office, under authority of this state, given by the general assembly, or the people, shall be void."

Inasmuch as the Constitution has prohibited the holding of any other office of trust or profit by a judge of the common pleas court, I am of the opinion that should the member of the board of education of whom you speak in your inquiry be elected to the office of common pleas judge and qualify therefor, he would thereby immediately vacate his office as member of the board of education.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—DEPOSITING OF FUNDS—CLERK ACTING AS TREASURER WHEN MEMBER OF BOARD.

Clerk of board of education who is also member of board may act as treasurer when such board has elected to deposit its funds.

January 5th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of January 4th, in which you request my opinion upon the folowing query, is received:

> "May a board of education who has elected one of its own members clerk, select a depository as provided in section 4042a, supplement to the Ohio School Laws, and may said clerk perform the duties of treasurer as provided in said section 4042a, supplement to the Ohio School Laws?"

In reply thereto I beg leave to submit the following opinion:

Sections 3897a, 3911, 3920 and 3933 of the Revised Statutes of Ohio provide that a member of a board of education of a city, village, township, or special school district, respectively, may be elected by the board of which he is a member, upon its organization, to act as clerk.

Section 4042a as enacted April 27, 1908, 99 O. L. 205, provides in part as follows:

> "When a depository has been provided for the school moneys of any district as authorized by section 3968 of the Revised Statutes of Ohio, the board of education of such district may, by resolution duly adopted by the majority of its members, dispense with a treasurer of the school moneys belonging to such school district; and in such district the clerk of the board of education thereof shall perform all the services and discharge all the duties, and be subject to all obligations that are required of the treasurer of such school district by the statutes of Ohio. Whenever such treasurer is dispensed with as herein provided, then all the duties and obligations required by the statutes of Ohio of the county auditor, county treasurer, or other officer or person, relating to the school moneys of such district, shall be complied with by dealing with the clerk of the board of education of such district. Such clerk, before entering upon such duties, shall give an additional bond equal in amount and in the same manner as is prescribed by law for the treasurer of such school district. * * *"

It has heretofore been held by this department that the offices of treasurer of a school district and member of the board of education of such district were incompatible. The enactment, however, of section 4042a, supra, necessarily changes this ruling. In enacting this section the legislature must be held to have taken cognizance of the fact, that, under the above quoted provisions of the statute, the clerk of a board of education may be a member of such board. By section 4042a, therefore, the general assembly has, in cases of this kind, removed the disability to hold the office of treasurer of a school district which had, before the enactment of such section, existed in members of the board of education of such district.

I am, therefore, of the opinion that a board of education which has elected one of its own members clerk, may select a depository as provided in section 3968 of the Revised Statutes of Ohio, and that the clerk of such board may perform the duties of treasurer as provided in section 4042a, supra.

Very truly yours,

U. G. DENMAN,
Attorney General.

SCHOOLS — CENTRALIZATION BY TOWNSHIP BOARD OF EDUCATION — SUBMISSION OF QUESTION TO VOTE.

Township boards of education must submit question of centralization of schools to vote of electors at general election.

February 23rd, 1910.

HON. JOHN W. ZELLER, *State Commisisoner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of February 23rd, in which you request my opinion upon the following question, is received:

> "Can a township board of education, under section 3927-2, R. S. O., submit the question of centralization to a vote of the people at any other except a general election; or, in other words, can the question be submitted at a special election called for this purpose?"

In reply thereto I beg leave to submit the following opinion.
Section 3927-2 of the Revised Statutes reads as follows:

> "A township board of education may submit the question of centralization, and upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to a vote of the qualified electors of such township district, and if more votes are cast in favor of centralization than against it, at such election, it shall then become the duty of the board of education, and such board of education is required to proceed at once to the centralization of schools of the township, and if necessary purchase a site or sites and erect a suitable building or buildings thereon; provided, that if, at the said election, more votes are cast against the proposition for centralization than for it, the question shall not again be submitted to the electors of said township district for a period of two years."

As will be noted from the above quoted section, no provision is made therein for the calling or holding of a special election and, under such circumstances, I am of the opinion that section 2996-2 of the Revised Statutes is ruling upon this question.

Section 2996-2, R. S. O., reads as follows:

> "Unless the act so providing for the submitting of any question to the qualified voters of any township, county, village or city also provides for the calling of a special election for that purpose, no special election shall be so called, and the questions so to be voted upon shall be submitted at a regular election in such township, county, village or city, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

This department has frequently held that where an act providing for the submission of any question to the voters of a township, county, village or city contains no provision for the calling of a special election for that purpose, then such special election is unauthorized and such question must be submitted to the voters of such political sub-division at a regular election, and that notice that such question is to be voted upon must be embodied in the proclamation for such election, as provided in the above quoted section 2996-2; and such section will rule unless *specific* provision is made for such special election in such act; in other words, the power to call such special election cannot be drawn by inference from the wording of the act but such power must be plainly granted by its provisions.

I am, therefore, of the opinion that a township board of education cannot, under section 3927-2 of the Revised Statutes, submit the question of centralization to a vote of the people at any other except a general election.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS — BOARD OF EDUCATION — TEACHERS' PENSION FUND — WHEN CREATED.

Duty of board of education to pay into pension fund portion of contingent fund of school district. Teachers' Pension Fund created within meaning of section 3897 Revised Statutes, upon election of trustees. Board of education must pay from one to two per cent. of gross receipts from taxation to pension fund semi-annually after creation of such fund.

April 12th, 1910.

HON. J. W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of April 7th is received in which you ask my opinion on the following statement of facts and query:

> "A city board of education in June, 1908, passed a resolution looking to the establishment of a teachers' pension fund. The following September the teachers of that city, by vote, agreed to same. The board of education passed a resolution that pension board should consist of three members. The board selected one member of said board, the teachers, two. Beginning September, 1908, the board of education deducted $2.00 per month from the salary of each teacher and has continued that practice up to the present time. The board of education declined to set aside one or two per cent. of receipts from taxation for school year of 1908-9 on the grounds that at the time they passed the resolution to establish the pension fund, June, 1908, they had already certified the levy for that year to the County Auditor, and the amount for 'pension fund' was not included. The board had a surplus in its treasury at the close of the school year 1908-9 more than sufficient to cover the amount of their payment of said 'pension fund' as required by law."
>
> "Query: Was the board of education for year of 1908-9 obliged to pay the amount of one to two per cent. as law directs?"

In reply thereto I beg leave to submit the following opinion:
Your query calls for a construction of section 38971 which reads as follows:

> "The board of education in any school district which has created, or shall hereafter create, a teachers' pension fund, shall pay, semi-annually, from the contingent fund of such school district into said teachers' pension fund, not less than one per cent. nor more than two per cent. of the gross receipts of said board of education raised by taxation, which shall be applied to the payment of teachers' pensions, as herein and hereinbefore provided."

Under this section the question arises as of what time such board of education shall be deemed to have created a teachers' pension fund.
Section 3897b reads in part as follows:

> "Whenever the board of education of any school district shall declare by resolution, adopted by a majority vote of the members of said board, that it is advisable to create a school-teachers' pension fund for such school district, said school-teachers' pension fund shall be under the charge, management and control of a board to be known as the board of trustees of the school-teachers' (pension fund for such school) district, which board shall be composed of not less than three, nor more than seven, members, as said board of education shall by resolution declare; if composed of less than five members, one of the members of said board of trustees of the school-teachers' pension fund of such school district shall be elected by the board of education of such school district, and the remaining members by the teachers of the public schools, including the teachers of any high schools, of such district, who have accepted the provisions of this act, as hereinafter provided; if such board is to be composed of five or more members, two of the members of said board of trustees of said school district shall be elected by the board of education of such school district, and the remaining members by the teachers of public schools, including the teachers of any high schools of such school district, who have accepted the provisions of this act, as herein provided; such election of the members of said board by the teachers to be at a meeting called by the superintendent of schools of such school district, the first election to be at a meeting to be called by such superintendent when one-third of the teachers of the public schools of such school district shall have accepted the provisions of this act; * *"

Section 3897c reads in part as follows:

> "Whenever the board of education of any school district shall have declared the advisability of creating a school-teachers' pension fund, as herein provided, the clerk of said board of education shall notify each and every teacher in the public schools and high schools, if any, of said school district, by notice in writing of the passage of such resolution, and require said teachers to notify said board of education in writing within thirty days from the date of said notice whether they consent or decline to accept the provisions of this act; and from and after the election of the board of trustees herein provided for, the sum of two dollars ($2.00) shall be deducted by the proper officers from the monthly salary of each teacher who may have

accepted the provisions of this act, and from the salary of such new teachers as may hereafter accept the same, as herein provided, said sum to be paid into and applied to the credit of said school-teachers' pension fund, and shall continue to so deduct said sum during the remainder of the term of service of said teacher. * * *"

Under the above quoted sections I am of the opinion that such school-teachers' pension fund is created within the meaning of Section 38971 R. S. O., upon the election of the trustees provided for by section 3897b R. S. O., for it is provided in section 3897c that,

"from and after the election of the trustees herein provided for, the sum of two dollars ($2.00) shall be deducted by the proper officers from the monthly salary of each teacher who may have accepted the provisions of this act."

It, therefore, seems clear that, under the statement of facts given in your letter, the teachers' pension fund of the city school district concerning which you speak was created within the meaning of section 38971 R. S. O. in September,

I have heretofore held in an opinion to Hon. E. A. Jones, Commissioner of Common Schools, under date of November 14th, 1908, to be found in the Annual Report of the Attorney General for the year 1908, at page 150:

"That the words, 'not less than one per cent. nor more than two per cent. of the gross receipts,' mean not less than one per cent. nor more than two per cent. of the gross receipts since the last semi-annual payment of the board to the teachers' pension fund, and that such per cent. is to be computed semi-annually upon the receipts of the previous half-year."

And in the same opinion it was held that the words "gross receipts raised by taxation" included only funds raised by local taxation, and do not apply to funds received from the state.

I am, therefore, of the opinion, in this case, that it became the duty of the board of education on and after September, 1908, to pay semi-annually, from the contingent fund of the school district into the teachers' pension fund, not less than one per cent. nor more than two per cent. of the gross receipts of said board of education raised by taxation; such percentage to be computed semi-annually upon such receipts for the previous half-year, the first of such computations to be made upon such receipts at the first semi-annual settlement succeeding the election of such trustees.

Yours very truly,
U. G. DENMAN,
Attorney General.

SCHOOL COMMISSIONER — EXPENSES FOR GRADING MANUSCRIPTS.

July 14th, 1910.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of July 8th is received in which you request my opinion upon the following question:

"An 'An act to provide for the certification of teachers in the public schools' passed May 10, 1910, section 5 reads in part as follows:

'When any holder of a diploma as provided in sections 1, 2 and 4 of this act makes application to a board of county examiners for a certificate under this act, said applicant shall pay a fee of $1.50 to the clerk of the board of county examiners, 50c of said fee to be paid into the institute fund of the county in which the applicant writes the examination, and one dollar of it to be forwarded to the state commissioner of common schools to be used in defraying the expenses of grading the manuscripts of the said applicant who shall pay the same into the state treasury to the credit of the general revenue fund.'

Query: Is it legal for the State Commissioner of Common Schools to issue a warrant on the state treasurer for one dollar to pay the expenses for the grading of said manuscripts "

In reply thereto I beg to beg leave to submit the following opinion: Section 22 of Article 2 of the Constitution of Ohio reads in part as follows:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law; * *".

As the fifth section of the act of May 10, 1910, quoted in your inquiry prescribes that you shall pay into the state treasury, to the credit of the general revenue fund, the fee of one dollar provided to be paid to you by such section, and as no appropriation "for receipts and balances" was made to you by the general assembly at its last session, I am of the opinion, under the above quoted section 22 of Article 2 of the Constitution, that you cannot legally draw a warrant on the state treasury for the one dollar to pay the expenses of the grading of the manuscripts of applicants under this act.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Various Appointive State Officers.)

(To the Highway Commissioner.)

STATE HIGHWAY COMMISSIONER MAY PERMIT CONTRACTOR TO SUBSTITUTE SUPERIOR MATERIAL

February 8th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — I have your letter of February 8th, in which you ask my advice on the following statement of facts:

> "The State Highway Commissioner and the county commissioners of Mahoning county, Ohio, on the 29th day of July, 1909, entered into a contract, on behalf of the State of Ohio and Mahoning County, respectively, with John C. Devine, of Alliance, Ohio, for the construction of a highway known as the Sebring Road, in Smith Township, Mahoning county.
>
> This contract calls for the construction of a macadam road from Station O + 22.5' to Station 28, and from Station 61 to Station 99 + 50'; this macadam to be of the standard specifications of the State Highway Department and to be 14' wide. From Station 28 to Station 61, the contract provides that the road shall be surfaced with brick; this brick pavement also to be 14' wide. The estimated cost of the brick pavement, exclusive of the grading, is $2.27 per lineal foot, and the estimated cost of the macadamized road, exclusive of the grading, is $1.37 per lineal foot.
>
> The contractor, Mr. Devine, now proposes to construct the entire road of brick instead of macadam, and I am asking your advice as to whether I would be justified in permitting him to substitute this more expensive construction for that on which the contract is based.

In my opinion there can be no objection to your permitting the contractor to substitute the proposed construction, providing the proposed construction is superior to that called for in the contract, and providing further that you do not waive any of the rights of the state under the contract as entered into and that no expense in addition to the contract price be incurred or apportioned by you as State Highway Commissioner. If the proposed superior construction shall be completed to your satisfaction you would be justified in accepting it on the above conditions.

Yours very truly,
U. G. DENMAN,
Attorney General.

December 30th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of December 29th you state that certain counties have a balance remaining from the state aid appropriations of 1909, that these counties made application for the state aid appropriation for construction work

for the year 1910, and that no contracts were let for construction work in the year 1910 so that there is remaining for such counties all the balance of 1909, and the total apportionment of state aid money for such counties for the year 1910.

You ask whether the balance of the 1909 appropriation which is to the credit of one of these counties, not applying for state aid for 1911 should be reapportioned to the other counties of the state, as provided in Section 1196 of the General Code.

You also ask whether one of these counties which has filed an application for state aid for 1911 will be entitled to use the balance of the 1909 appropriation during the year 1911 in pursuance of their application for state aid money for the year 1911.

Section 1196 of thte General Code provides that,

> "On the fifteenth day of January next following the passage of an act making an appropriation of money for state aid in the construction and repair of roads, if the commissioners of a county, or trustees of a township thereof, have not made application therefor as provided in this chapter, the state highway commissioner shall reapportion the amount so apportioned to such county, among the other counties of the state which have made applications as provided by law. The amount so apportioned shall be in addition to that originally apportioned tto such counties."

Section 1185 of the General Code provides that,

> "* * * Such application shall be filed with the commissioner before the first day of January preceding the date when such appropriation becomes available. If such appropriation becomes available during the year in which it was made, the apportionment thereof to a county remaining unexpended in such year shall become a part of the apportionment to such county for the succeeding year and be subject to an application for such year."

Neither these sections nor other provisions of the General Code specifically authorize the apportionment of the 1909 state aid money to any counties which have applied for state aid during the year 1911, and the specific provisions of the two sections above makes it appear that the general assembly did not intend that balances should be re-apportioned in cases not specifically mentioned in the statute. In addition to this it is a rule of law that no expenditures of money should be made which are not affirmatively authorized by law. Since the constitution also provides that "no appropriation shall be made for a longer period than two years," it will be seen that the appropriation of 1909 will lapse early in the year 1911.

In view of the above I am of the opinion that the balance of the state aid appropriation for the year 1909 can not be apportioned or re-apportioned to counties in this state in the manner suggested in both of the questions submitted by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—IN RE-APPLICATION OF BROWN COUNTY FOR STATE AID.

December 10th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You state that under the State Highwty law Brown County, on December 28th, 1908, filed an application for state aid for new construction of a highway and on the same day filed an application for state aid for repairs, such state aid to be given from the appropriation made by the general assembly for the year 1909; that no construction work was done during 1909 and no money was distributed to Brown County for state aid for repairs; and that, during the year 1909 Brown County made application for state aid for repairs but not for new construction work.

You ask whether, under this state of facts, you should distribute the 1909 apportionment for Brown County to such county for repairs in addition to the 1910 apportionment.

Section 1185 of the General Code provides for "application to the state highway commissioner for aid from an appropriation by the state for the construction and repair of highways" and Section 1218 of the General Code provides for a similar application for state aid money for the repair of improved roads. There appears to be no provision for making two applications, one for construction and one for repairs, as was done in this case. However, Section 1185 provides that:

> "If such appropriation becomes available during the year in which it is made, the apportionment thereof to a county remaining unexpended in such year shall become a part of the apportionment to such county for the succeeding year and be subject to an application for such year."

In view of such provision of Section 1185 of the General Code, and since Brown County actually made an application for state aid for repairs from the money appropriated for the year 1909, and since, also, the application for the year 1910 was for state aid money for repairs, I am of the opinion that, under the state of facts presented, you should give the application for repairs for the year 1909 preference over the application for new construction for the year 1909 and should distribute the 1909 apportionment to Brown County for repairs as a "part of the apportionment to such county" for the year 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE HIGHWAY COMMISSIONER — MAY LOAN HIGHWAY MAPS TO ANOTHER STATE OFFICER.

October 6th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — You state that:

> "The director of the state geological survey has requested the use of the original tracings of the highway maps prepared by the highway department for Logan, Fairfield and Perry counties,"

and you ask as to your duty under the circumstances.

Since your department and that of the state geologist are both departments of the state, and since it appears that the use of your highway maps will be of service to the other department and will be a saving of expense and trouble to the state, I believe that you should turn such maps over to the state geologist, provided no injury will be done to such maps and the rights of the state in such maps will not be interfered with.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE HIGHWAY LAW — EMPLOYMENT OF ENGINEER — FULLY DISCUSSED.

April 15th, 1910.

HON. JAS. C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — You ask for an opinion of this department upon the following questions:

1. Whether, in work under the State Highway law, a resident engineer, other than the county surveyor, may be compensated to the same amount as a county surveyor who performs the same kind of work.
2. Whether a resident engineer may employ an engineer to assist him in the performance of his work.
3. Whether such engineer may be compensated to the same amount as a resident engineer.

Section 1215 of the General Code provides that:

> "The state highway commissioner shall use a competent engineer to make the necessary surveys and plans for a proposed improvement. Such engineer may also be employed to superintend the work of construction of such improvement. Such person shall be compensated for each day employed in such service, not to exceed the amount allowed by law."

Under this section any engineer employed either to make surveys and plans or to superintend the work may be compensated in the same manner and to the same amount as a county engineer or county surveyor who performs such work may be compensated, since the service rendered in each case will be the same and is to be performed by a "competent engineer."

If the engineer, employed by you to superintend the work of construction of an improvement under the State Highway Law, is unable at any time to perform his duties during the progress of the work, I am of the opinion that you may employ an engineer to take his place temporarily or permanently as superintendent of the work of construction. In case the superintendent requires an engineer to assist him, an engineer may be employed with your approval for such work as you may deem necessary to be performed by him.

The compensation of such engineer, in either case, may equal but should not exceed the amount allowed by law to the engineer employed to make surveys and plans or to superintend the work.

While the State Highway law is somewhat indefinite as to your second and third questions, I believe it is clearly the intention of the law that such efficient superintendence should be provided as will ensure a strict compliance with contracts and the best possible results generally in the construction of state aid improvements.

Yours very truly,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — STATE COMMISSIONER MAY BE REIMBURSED FOR TRAVELING EXPENSES INCURRED OUT OF STATE.

May 7th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — In your letter of May 5th, you call attention to the following provision of section 1183 of the General Code, referring to the state highway commissioner, which reads:

> "He shall make inquiry in regard to systems of road building and management throughout the United States, conduct investigations and experiments in regard to the best methods of road making, and the best kinds of road material, examine the chemical and physical character of such materials, and prepare, publish and distribute bulletins and reports on the subject of road improvement."

You ask whether, under this section, the state highway commissioner is entitled to traveling expenses in making the inquiry above referred to in traveling outside of the State of Ohio.

This section either means that you must make your inquiry through correspondence and the reading of books, publications, etc., or that, in addition to this, you may make such inquiry by traveling and personal inspection of road building and road management in this and other states. In view of the importance of highways in our state, and the rapid progress now being made in various other states, and also in view of the fact that a proper inquiry, as provided in section 1183, can be made only by supplementing a reading knowledge of the subject by practical observations of road building and the management of road improvements, I am inclined to the opinion that the language of this section contemplates this more complete and vital feature of making inquiry by personal observation which necessitates travel.

Section 1181 provides that "in addition to his salary," the state highway commissioner "shall be allowed his necessary traveling expenses incurred in the discharge of his official duties, not to exceed seven hundred and fifty dollars in any year." Since the amount you may spend for traveling expenses is thus limited by law, and since the general assembly has made a definite appropriation for the coming year beyond which you cannot go, I believe that you may, under section 1183, use your discretion as to the disbursement of money for your expenses in traveling outside of the limits of this state for the purpose of making inquiry as to road building and road management.

Yours very truly,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — CONSTRUCTION OF CONTRACT TO BUILD STATE ROAD.

May 5th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — You state that your department, during the year 1907, entered into a contract with Mr. P. S. Covan for the construction of a state highway under the state highway law and that a clause of the specifications for such work read as follows:

> "Before final payment, the contractor shall furnish satisfactory evidence that all labor, material and damage by reason of the work has been paid for."

You state that this contract has been completed by Mr. Covan in full and in a satisfactory manner, but that certain claims have been filed with the Auditor of Highland County and also with you against Mr. Covan for labor and material furnished to him in connection with the construction of such state highway. You ask whether, under these circumstances, you are authorized to make out the final certificate provided for in section 15 of the state highway law and issue a voucher to Mr. Covan for the balance of the state's share of the cost and expense of such improvement.

Since I am unable to find any statute in force at the time this contract was made providing for the insertion of the clause above quoted in the contract with Mr. Covan, and since I find no law concerning the enforcement of any such claims or liens in the case of work performed for the State of Ohio, and especially in view of the decision of the court on this subject in the case of Stewart v. Gardner et al, 10 O. C. C., N. S., 408, I am of the opinion that the clause above quoted should be disregarded and that you should prepare your final estimate and certificate provided for in section 13 of the state highway law and arrange for payment to Mr. Covan of the balance still due him from the State of Ohio for the construction of such state highway.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — STATE AID — APPLICATION OF COMMISSIONERS OF ROSS COUNTY — FULLY DISCUSSED.

June 23rd, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — In your letter of June 14th, you state that the commissioners of Ross County, prior to the 1st day of January, 1910, made application under the state highway law for state aid in the construction of four sections of roads located in different parts of the county, three of these sections being one-half mile in length and one but fifteen hundred feet in length. You state that after consideration of the construction of one of such roads of one-half mile in length known as the Frankfort Road near the city of Chillicothe, on being advised that such city had completed arrangements to pave such road with brick as far as the city limits, you approved of the construction of such road and ordered it

surveyed, but that you have since been informed that the city of Chillicothe will not pave such road to the city limits, so that the half-mile of the Frankfort Road applied for will not be an extension of or connected with a permanently improved street or highway of improved construction.

You ask what your duty is as to such roads applied for, and whether you have any authority to proceed with the construction of said Frankfort Road.

Section 1197 of the General Code provides that:

> "The commissioners of a county by resolution may order the improvement of a public road or section thereof at least one mile in length, or, less than one mile in length if it is an extension of or connected with a permanently improved street or highway of approved construction The order shall direct that such road be improved by the construction of a macadamized, telford or other stone road, or a road constructed of gravel, brick, or other suitable material, in such manner that with reasonable repairs such road shall be firm, smooth and convenient for travel at all seasons of the year."

The last sentence above quoted seems to define what is meant by the words "permanently improved street or highway of improved construction." Unless, therefore, a road less than one mile in length applied for is an extension of or connected with a street or highway of the character described in section 1197, such road less than one mile in length cannot be improved under the provisions of the state highway law. The fact that, under misinformation as to the real situation, you approved of the application for the Frankfort Road and ordered a survey, does not alter the conditions, for the reason that you were without power as state highway commissioner to approve of such application or to order a survey under the actual facts existing as to the Frankfort Road.

Yours very truly,

U. G. DENMAN,

Attorney General.

ROADS AND HIGHWAYS — CONSTRUCTION OF APPROPRIATION TO HIGHWAY DEPARTMENT.

August 3rd, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — You state that, under the act approved March 19, 1910, entitled:

> "An Act to make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1910, and the first quarter of the fiscal year ending February 15, 1911",

the general assembly made the following appropriation for the state highway department:

> "State aid in road building, appropriation of 1910, and receipts and balances of an act 'To provide for the registration, identification and regulation of motor vehicles', passed May 9, 1908, and acts amendatory and supplementary thereto";

that the auditor of state has certified to the state highway department, under this item, the sum of $118,654.32, and that, by the act approved May 11, 1910, entitled:

> "An Act to make appropriations for the last three-quarters of the fiscal year ending November 15, 1910, and the first quarter of the fiscal year ending February 15, 1911",

the general assembly made the following appropriation for the state highway department:

> "State aid in road building..... $440,000.00
> The appropriation in this act to the state highway department for "State aid in road building, $440,000.00" shall not be paid out by said department or used in any other manner than in new construction or repair of macadam gravel or brick roads and no part of such appropriation shall be paid to any county for repairs on dirt or unimproved roads. The purpose and intention of this appropriation is hereby declared to be for the encouragement of the construction of new macadam, gravel or brick roads."

You ask what your duty is in regard to the payment of money from these items to counties that have applied under the state highway law for their apportionment of state aid for pike repairs under the provisions of section 1218 of the General Code.

While the state highway law was written primarily for the purpose of state aid in the construction of new improved roads, or in the re-construction of improved roads, section 1218 authorized counties, which had permanent improved roads prior to the establishment of the state highway department, to make application for the state aid money to be apportioned to their county for the repair of improved roads within the county. It was, however, provided (see section 1219 of the General Code), that:

> "The county commissioners, with the consent of the state highway commissioner, may use a part of such apportionment for construction, and the remainder thereof for repairs".

This provision enabled a county which had, prior to the 1st day of January of any year, made application for their portion of the state aid money for repairs, to arrange later with the state highway commissioner for the use of all or part of such money for new construction under the provisions of the state highway law.

As to the $118,654.32, this money is to be used by your department for construction work under the provisions of the state highway law in the case of all counties which have applied for state aid money for construction work. In the case of counties which have applied for this year's state aid money for repairs, and which have or will apply for the use of part or all of their portion of this sum for construction, you may, upon giving your consent to such application as provided in section 1219 of the General Code, use part or all of such sum for construction work under the state highway law. If, however, a county has applied for state aid money for repairs and has not entered into an agreement with you for the use of part or all of the money for construction work, it is your duty to distribute such county's portion of such $118,654.32 to such county. The county commissioners of such county shall use such sum as a board of turnpike directors under section 7445 for the repair of improved roads only, instead of distributing it among the townships, for the reason that the county com-

missioners are now charged with the duty of the repair of all improved roads within their county under the provisions of sections 7407 to 7463, inclusive, of the General Code.

In other words, the appropriation contained in the act approved March 19, 1910, under which you have such fund of $118,654.32, is not different from previous appropriations made under the state highway law, with the exception that under the General Code the county commissioners now use state aid repair money directly for the repair of improved roads instead of indirectly through distribution to the townships. Such a distribution of money is in full accord with the motor vehicle law through which the above fund is obtained, section 6309, General Code, providing that:

> "The revenues derived by registration fees provided for in this chapter, * * shall be a separate fund for the *improvement, maintenance and repair* of the public roads and highways of this state, and be apportioned as the state highway fund is apportioned."

As to the appropriation of $440,000.00 in the act approved May 11, 1910, the situation is different. Had the general assembly used only the language "State aid in road building..... $440,000", such money should be apportioned in the same manner as above described for the $118,654.32, and in practically the same manner in which the various appropriations for state aid, since the establishment of the state highway department, have been distributed, because the above quoted words of this sentence are the same words used in former appropriation bills for such appropriations. If the language of the appropriation bill describing what should be done with such $440,000 means anything at all, it must mean that such appropriation of $440,000 shall be distributed in a manner different from former distributions of state aid moneys. The language qualifying this year's appropriation of $440,000 while involved and somewhat ambiguous, is the result of an effort made on the part of many persons through the legislature to procure better results in the distribution of State aid money, especially in the distribution of such money to those counties which had applied under section 31 of the act of 99 O. L., 308, now sections 1218, 1219 and 1220 of the General Code for State aid money for repair work in the counties.

Investigations of the state highway commission and the bureau of inspection and supervision of public offices show a considerable looseness in methods in handling state aid money and in many cases a failure to apply such money only to improved roads of the standard prescribed by law. Objections also were made to the effect that counties receiving money for repairs reduced their local levy for such purposes. An effort was made to prevent any distribution of any of this year's appropriation to counties for repairs. However, the presence of the language, "New construction or *repair*" in the appropriation bill indicates that the general assembly did not intend to eliminate the repair feature in the use of this year's appropriation of $440,000. However, the language of the appropriation bill indicates that it was the intention of the general assembly that great care should be taken in the distribution of this year's State aid money and that none of the $440,000 appropriated should be used except for the construction or repair of macadam, gravel or brick roads, and the general assembly indicated its displeasure at the disposition which some counties had previously made of State aid money given to such counties for repair purposes by insisting that "no part of such appropriation shall be paid to any county for repairs on dirt or unimproved roads," thus adding a negative to the positive language of the statutes and this year's appropriation bill.

In case of counties which have made application for this year's State aid money for new construction only, the qualifying language attached to the appropriation of $440,000 will require practically no change in your procedure as compared with your procedure under previous appropriations. In such construction work you are limited to the "new construction ..... of macadam, gravel or brick roads" and are to that extent denied certain discretion which the general provisions of the code would otherwise give you as to the character or standard of roads to be constructed.

In the case of counties which have applied for under sections 1218, 1219 and 1220 of the General Code we must take especial care to see that none of this money is used on "dirt or unimproved roads" and that no part of this money is used except upon "new construction or repair of macadam, gravel, or brick roads." In case a county which has applied for state aid money for repairs, determined under section 1219 of the General Code, to use such a portion for construction, such money can be used only upon macadam, gravel or brick roads.

In order to insure the proper disposition of money which is distributed to counties for repairs, I believe that it is your duty prior to the issuing of a voucher to such county to have filed with you a proper certificate of the county, setting forth that there is in the county treasury or levied and in process of collection, an amount of money "sufficient to equal the amount so appropriated" and ready for distribution to such county and that such an amount of money is in a fund to be used only for new construction or repair of macadam, gravel or brick roads. Such certificate should also set out that no money in such funds can be used for repairs on dirt or unimproved roads and there should be filed with you a resolution of the county commissioners agreeing that they will use the money received from the state only for the particular purposes for which appropriated. You should also make sure that none of the money in the county treasury upon which the county depends to procure state aid money is money which belongs to any former apportionment of state aid money to such county for repairs.

In further carrying out the provisions of the law relating to the $440,000 appropriation, I believe you should, through your department, require reports from county receiving moneys for repairs, setting out in itemized form, the disposition of such moneys and that you should also ask the State Bureau of Inspection and Supervision of Public Offices to make reports as to such money in their examinations among the various counties.

Very truly yours,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY ASSUME DIRECT COST OF CONSTRUCTION OF STATE HIGHWAY OTHERWISE APPORTIONED TO COUNTY, TOWNSHIP AND ABUTTING OWNERS.

County commissioners cannot assume to expend state aid money under state highway law; money should be spent by township trustees or officers of special road districts or by county commissioners acting as turn-pike directors.

January 26th, 1910.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — You inquire whether section 16 of the state highway law, (99 O. L. 308), authorizes a county "to assume the entire cost of the con-

struction which should be paid by the county, without collecting the township or property owners' apportionment."

Section 16 of the above act provides that:

> "Nothing contained in this act shall prevent any board of county commissioners or township trustees from agreeing to appropriate a larger amount for any road improvement than the amount specified in this act, up to the full cost and expense of the same."

I am of the opinion that this provision, which is inserted in section 16, is an exception to the general rule for making an apportionment of the cost of a road constructed under the state highway law and that such provision authorizes the county commissioners of a county to assume the entire cost of construction which would otherwise be shared by the county, township and abutting property owners so that the township and abutting property owners may be relieved from paying any portion of the cost and expense of such road.

You also inquire whether, under section 31 of the state highway law, county commissioners have the right to expend state aid money forwarded to the county for repairs, directly in the repair of the improved roads of the county, or whether the county commissioners must apportion such money among the townships for expenditure by the township trustees, and also as to the effect of the recent decision of the supreme court declaring unconstitutional section 4903 R. S., upon the powers of county commissioners as turnpike directors in various counties of the state.

Section 31 of the state highway law provides that:

> "Such appropriation and levy shall become a part of the pike repair fund of the several townships and shall be apportioned to the townships pro rata to the amount of the fund arising in each township or such road district by said levy and the township trustees or other authority that has charge of the repair of improved roads in such county shall proceed to apply said fund in the repairing of such improved roads in the same manner as other pike repair funds are applied, etc."

I am of the opinion that the county commissioners have no right to expend directly money received as provided in section 31 of the above act, but that they must apportion such money to the townships in the case of counties mentioned in section 4889 and to the road districts in the counties referred to in section 4896 or other counties in which special road districts have been specifically provided for by law. However, after money has been apportioned to the road districts, as provided in section 4897, the county commissioners, as turnpike directors, will expend such funds in the manner provided for in section 4897 et seq.

In expressing this view I am assuming that the road laws relating to these matters are constitutional for the reason that the courts have not as yet specifically declared them unconstitutional. However, the reasoning of the supreme court in declaring section 4903 unconstitutional is such that I believe the court would, if called upon, declare all special road laws, including sections 4889, 4896, etc., to be unconstitutional.

The condition of the road laws involved in your second inquiry is so chaotic and deplorable that the enactment of a new law without constitutional objections is absolutely necessary at this time.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Oil Inspector.)

STATE INSPECTOR OF OILS—DUTY TO INSPECT OILS.

Inspector only required to inspect oils sold to be consumed within this state.

January 5th, 1910.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your letter of January 4th, enclosing communication from the Sun Oil Company, in regard to shipments made by it to Portsmouth, Ohio, consigned to the Norfolk & Western Railroad Company, and requesting my opinion upon the question whether or not such shipments were within the meaning of the inspection statutes and should have been inspected in Ohio, by you, is received.

In reply thereto I beg leave to submit the following opinion:

The sections of the act of May 9th, 1908, applicable to this question are in part as follows:

Section 10:

"All mineral or petroleum oil, or any fluid or substance which is a product of the 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 to a consumer for consumption for illuminating purposes within the state;* * * *"

Section 11:

"* * * and when called upon for that purpose to promptly inspect all oils herein mentioned, and to reject for illuminating purposes, *for consumption in this state,* * * *. The Inspector and his deputies are required to make the flash test of all mineral or petroleum oils, or any oil, fluid or substance, which is a product of petroleum, or into which pertoleum or any product of petroleum enters, or is found a constituent element, *which is offered or intended to be offered for sale to a consumer for illuminating purposes in this state,* * * *"

Section 12:

"Any oil intended for sale for illuminating purposes within this state, as defined herein, shall be inspected within this state, * * *"

Section 13:

"All gasoline, petroleum-ether or similar or like substances, having a lower flash test than provided herein for illuminating oils, under whatever name called, whether manufactured within this state or not, shall be inspected by the State Inspector of Oils or his deputies, * * *. The provisions of this chapter relating to the inspection of oil intended to be sold or offered for sale for illuminating purposes in this state which is shipped to distributing stations in tank cars, shall be construed by the Inspector of Oils as governing, so far as practical, similar shipments of gasoline, petroleum-ether, or similar or like substances."

Section 397 of the Revised Statutes reads in part as follows:

> "If any person for or as agent for any other person shall sell, or attempt to sell, to any person in this state any such oils *to be consumed within this state for illuminating purposes,* whether manufactured in this state or not, before having the same inspected as provided in this chapter, he shall be fined, etc. * * *"

Section 401 Revised Statutes reads in part as follows:

> "Whoever shall sell or keep for sale, *to be consumed in the state,* any illuminating oil manufactured from petroleum or its products, and not inspected as provided for in this chapter, shall be responsible to the party or parties injured, etc. * * *"

The above quoted provisions of the statutes governing your inspections of oil in this state, clearly evidence the intention of the legislature to provide for the inspection of such oil only as is intended "for consumption in the state," and that such must have been the intention of the legislature in enacting these statutes also appears from the fact that these laws are police regulations and not enactments for the purposes of producing revenue.

I am, therefore, of the opinion that if you are satisfied that the shipments in question made by the Sun Oil Company were not intended "for consumption in the state" it would not be your duty to inspect the oil so shipped. In other words, it is a question of fact for you to decide whether or not such shipments were for consumption in this state, and if you decide this question in the negative, then such shipments were not liable to inspection.

Enclosed please find letter of December 29th Sun Oil Company enclosed by you in your communication of January 4th.

U. G. DENMAN,
Attorney General.

STATE INSPECTOR OF OILS—COMPENSATION OF DEPUTY INSPECTORS OF OILS.

Compensation of deputy state inspector of oils employed from May 15 to May 31, 1910, limited by provisions of Section 849 General Code to be fifty dollars, although fees for inspections made by him in that time amounted to $97.29.

September 10th, 1910.

HON. W. L. FINLEY, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is received in which you request my opinion upon the following statement of facts:

> "Mr. F. M. Barber, of Chagrin Falls, Ohio, was formerly a deputy in this department. His services were dispensed with on May 31st, 1910. From May 15th to May 31st inclusive he inspected 3243 barrels of oil and gasoline at Cleveland, Ohio. His fees at 3 cents per barrel amounted to $97.29. I paid him $50.00 for the half month's work on my interpretation of a former ruling by your department. Mr. Barber insists on receiving the full amount of fees, $97.29. Is his claim lawful?

In reply thereto I beg leave to submit the following opinion: Section 849 of the General Code reads as follows:

> "For inspections under the provisions of this chapter, each deputy inspector of oils shall receive a fee of three cents for each barrel of oil of fifty gallons inspected by him. Such fees shall be paid from the fees collected under the provisions of the next following section, but no deputy inspector shall receive more than twelve hundred dollars in any year."

I have heretofore held in an opinion rendered to former State Inspector of Oils, Hon. William H. Phipps, under date of Feb. 8, 1909, that by reason of the provisions of section 844 of the General Code the limitation of compensation to deputy inspectors provided for by section 849 General Code should be based upon the total amount of inspection fees earned during each inspection year, and that such inspection year begins on the 15th day of May annually.

The limitation on the salary of deputy inspectors imposed by the above quoted Section 849 of the General Code is a salary limitation placed upon the office of deputy inspector, in my opinion, and not upon the individual who may be the incumbent of such office. It seems clear, therefore, following the reasoning of my opinion of February 3rd, 1909, to the former State Inspector of Oils that where the incumbent of such office serves for only fifteen days of the inspection year, the amount of compensation to which he is entitled under Section 849, supra, should properly be one-twenty-fourth of twelve hundred dollars, or fifty dollars, regardless of the actual amount of fees earned by him during that period. If this were not the case a hardship might be worked on the individual succeeding to such office of deputy inspector, for it is conceivable that, under certain circumstances, a deputy inspector might in that period of time make a sufficient number of inspections to entitle him, at the rate of three cents for each barrel of fifty gallons, to as much as one-half of the compensation to which the deputy inspector is annually limited by Section 849 of the General Code. Under such circumstances you would have the unjust situation of employing a successor to such retiring deputy inspector, who, no matter how diligent he were in making inspections, could only earn six hundred dollars.

In my opinion Section 849 of the General Code was never intended by the legislature to accomplish such a result and I am, therefore, of the opinion that Mr. Barber, having received fifty dollars for his work from May 15th to May 31st, 1910, is entitled to no further compensation.

Yours very truly,
U. G. DENMAN,
Attorney General.

(To the Chief Inspector of Mines.)

MINES AND MINING—SEALING UP OF ABANDONED MINES.

September 22nd, 1910.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 16th, in which you ask my opinion upon the following questions:

> "Would it be contrary to the provisions of section 925 of the General Code, which provides for the removal of standing gas in all available parts of old abandoned workings in mines, to permit the sealing up of such old abandoned workings and prevent gases generating therein from flowing out into the air current passing through other parts of the mine where miners are working?
>
> "In the event that it will not conflict with the provisions of section 925, will this department be justified in advising or requiring, through its inspectors, the sealing up of the abandoned parts of mines; provided, however, that the sealing up of such abandoned parts will, in the judgment of the inspectors, increase protection to the lives of persons working in other parts of the mine?"

The part of section 925 of the General Code material to your inquiry is as follows:

> "Each mine generating fire-damp so as to be detected by a safety lamp, shall be kept free from standing gas. All traveling ways, entrances to old workings, and places not in the actual course of working, shall be carefully examined with a safety lamp by the fire boss not more than three hours before the appointed time for persons employed therein to enter. Parts of the mine not in the actual course of working and available, shall be examined not less than once each three days, and shall be so fenced as to prevent persons from inadvertently entering therein."

You will note that section 925 of the General Code deals exclusively with mines which are in some degree being worked and does not apply to abandoned mines. If the abandoned workings of a mine are so sealed up as to cease to be a part of the mine, I am of the opinion that the above section will not have any application in such a case. However, the sealing up of old workings should be done in a manner satisfactory to the mining department and in a manner which would prevent the standing gas of such old workings, which have been sealed up, passing through other parts of the mine where miners are working or are likely to be stationed. The sealing of the abandoned parts of a mine must also not in any way affect the air passages of the mine.

I particularly call your attention to the fact that after such abandoned workings of a mine are sealed up, that part shall in effect be an abandoned mine and be governed by the provisions of section 938 of the General Code relating to abandoned mines.

Yours very truly,
U. G. DENMAN,
Attorney General.

(To the Chief Inspector of Workshops and Factories.)

BUILDINGS — COUNTER FLOORS — CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES HAS NO POWER TO ENFORCE LAW RESPECTING.

October 3rd, 1910.

HON T. P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 21st, in which you submit for my opinion thereon the following question:

> Is the enforcement of section 12576 General Code enjoined by law upon the chief inspector of workshops and factories?

Said section 12576 General Code, provides in part as follows:

> "Whoever being * * * engaged in and having supervision or charge of the building, erection or construction of a block, building or structure, neglects or refuses to place or have placed upon the joists of each story thereof * * counter floors * * * such* * as to render perfectly safe the going to and from thereon of all mechanics, laborers and other persons engaged upon the work of construction * * shall be fined * *."

This section was formerly a part of section 4238-20 Revised Statutes. The remainder of said section 4238-20 Revised Statutes is now enacted in section 12577, which provides in effect that each day such person neglects to place such counter floors "after written notice by the building inspector or from a person whose life or personal safety may be endangered by such neglect or refusal" shall be a separate offense.

So far as these sections themselves are concerned they present the question as to whether the building inspector referred to therein is the chief inspector of workshops and factories.

In my opinion the phrase "building inspector" does not refer to the chief inspector of workshops and factories. The section is penal and must be strictly construed. If the intention has been to provide that the notice required by section 12577 should be served by the chief inspector of workshops and factories he should have been aptly referred to. Furthermore there are in numerous cities officers known as building inspectors and the general assembly must have been presumed to have referred to such officers and not to the chief inspector of workshops and factories.

I have carefully examined the sections of the General Code which define the general powers and duties of the chief inspector of workshops and factories, and I find therein nothing from which it might properly be inferred that his duties include the enforcement of this section. On the contrary his jurisdiction seems limited to the inspection of and enforcement of the laws relating to workshops and factories, bake shops, the storage of explosives, tenement houses, apartments, stores, the employment of females, places used for public assemblage, manufacture of wearing apparel or tobacco goods, the employment of child labor, etc.

The term "shops and factories" is specifically defined in section 1002 General Code, and the definition therein set forth does not include a building in course of construction. Inasmuch, therefore, as sections 12576 and 12577 do not

themselves impose any duties upon the chief inspector of workshops and factories and inasmuch also as the chapter defining the powers and duties of that officer give him no jurisdiction as to buildings in the course of construction, I am of the opinion that it is not his duty to enforce section 12576 relating to the placing of counter floors upon buildings in course of construction.

Yours very truly,
U. G. DENMAN,
Attorney General.

WORKSHOPS AND FACTORIES — CHIEF INSPECTOR — AUTHORITY RESPECTING OFFICE BUILDING.

Enforcement of orders respecting places of public assemblage.

July 14th, 1910.

HON. T. P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 13th, in which you request my opinion on the following questions:

> 1. Has the Chief Inspector of Workshops and Factories any authority with respect to office buildings?
> 2. When the mayors of the different municipalities or the prosecuting attorneys of the different counties fail to carry out the provisions of section 1033 of the General Code of Ohio, relative to the enforcement of public buildings orders, has the department any further jurisdiction, and what would be the proper procedure?

I have carefully examined the various provisions of the General Code relating to the powers of the Chief Inspector of Workshops and Factories and those regulating the safety and sanitary conditions of buildings. I find therein nothing pertaining in any way to office buildings excepting in section 1006 which provides that,

> "In * * business offices of professional men * * all public buildings and other rooms or places of public resort or use * * * the * * * proprietors thereof shall provide and maintain for the stairs or stair-ways * * a substantial hand rail * *".

The fact that office buildings are thus mentioned in this one connection and are excluded from the some-what lengthy catalogue of buildings set forth in other sections pertaining to the powers of the Chief Inspector of Workshops and Factories indicates very clearly, it seems to me, that such omissions must be admitted to have been by design, and that except in this one respect the Chief Inspector of Workshops and Factories has no powers respecting such office buildings.

Answering your second question, I beg to state that with respect to the enforcement of the orders of the Chief Inspector of Workshops and Factories regarding fire escapes on school houses and other public buildings, the provisions of section 1033 General Code are in no wise different from its provisions in section 3 of the act found in 99 O. L. 233. It was the opinion of this department with respect to that section that the duty of local authorities to prevent the use

of a condemned public building for public assemblage until notified as directed by the Chief Inspector of Workshops and Factories is one that can be enforced only at the instance of resident taxpayers and others directly interested, if at all, and that the Chief Inspector of Workshops and Factories after serving copies of the notices as provided by law has no further jurisdiction in the premises. Upon comparison of the modified sections with the previous law, as above indicated, I am satisfied not only that the former ruling applies to the former section but that it is correct.

Said modified sections are as follows:

> Section 1031 General Code. "The Chief Inspector of workshops and factories shall cause to be inspected all school houses * * with special reference to precautions for the prevention of fires, the provision of fire escapes, exits, emergency exits, hallways, air-space * *".

Section 1032 General Code:

> "* * * the district inspector of workshops and factories shall file with the chief inspector a written report * * *. If it is found that * * * means for the safe and speedy egress of persons assembled therein have not been provided, such report shall specify what appliances, additions or alterations are necessary therefor. Thereupon the chief inspector shall notify in writing the owner or persons having control of such structure of the necessary appliances, additions or alterations to be * * made in such structure".

Section 1033 General Code:

> "If such structure is located in a municipality, a copy of such notice shall be mailed to the mayor thereof * *. Thereupon the mayor with the aid of the police * * * shall prevent the use of such structure for public assemblage until the appliance, additions or alterations * * * have been * * * made in such structure".

Section 1034 General Code:

> "Upon receipt of such notice the * * * person in control of such structure shall comply with every detail embodied therein * *".

There is nothing in the foregoing provisions which expressly or by implication confers upon the Chief Inspector power to compel the mayor to perform his duty.

It is, therefore, my opinion that it is beyond the power of the Chief Inspector of Workshops and Factories to compel the mayor or the prosecuting attorney to perform his duty under section 1033 General Code.

However, section 1037 General Code makes it a criminal offense for "a person, firm or corporation or a member of a board * * *being the owner or in control of any (public) building * *" to fail "to comply with an order * * * relating to the change, improvement or repair of such building".

In my opinion a district inspector of workshops and factories or any other person may make affidavit and cause a warrant to be issued under this section.

I am of the opinion, therefore, that while the Chief Inspector of Workshops and Factories and his district inspectors have no power to prevent a public

building from being used in violation of law, they may properly institute criminal proceedings against those responsible under the law for the unlawful use of such building.

Yours very truly,
U. G. DENMAN,
Attorney General.

CHIEF INSPECTOR WORKSHOPS AND FACTORIES MAY INSTALL TELEPHONES AT BRANCH OFFICES.

October 29th, 1910.

HON. T. P. KEARNS, *Chief Inspector Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of October 21st, in which you state that your department maintains branch offices in the cities of Cincinnati and Cleveland, and inquire whether or not you may lawfully install telephones therein, and pay the exchange service bills therefor out of your appropriation for contingent expenses.

I beg to advise that, in my opinion, it would be perfectly lawful for you to do this. Telephone service has always been regarded as a charge properly payable out of an appropriation for contingent expenses, and if the interests of your department require the maintenance of branch offices at the cities named, it would be lawful to install telephones therein.

Yours very truly,
U. G. DENMAN,
Attorney General.

MINOR — WITHHOLDING WAGES — LAW APPLIES TO ALL PERSONS UNDER LEGAL AGE.

December 17th, 1910.

HON. T. P. KEARNS, *Chief Inspector Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of December 15th, in which you request my opinion as to the meaning of the word "minor" as used in sections 12989, 12990 and 12991 of the General Code. You state that it is contended by some that these sections are to be read in connection with other sections of the Revised Statutes pertaining to child labor, in which the age limits are sixteen for boys and eighteen for girls, respectively.

Said sections 12989, et seq., are in part as follows:

Section 12989:

> "Whoever * * * retains or withholds from a minor in his employ the wages or compensation * * * agreed to be paid and due such minor * * * because of presumed negligence * * * shall be fined not more than two hundred dollars * * *"

Section 12990:

> "Whoever * * * receives a guarantee * * * or other form of security to obtain or secure employment for a minor, or

to insure faithful performance of labor, guarantee strict observance of rules or make good losses which may be charged to such minor's incompetence * * * shall be fined not more than two hundred dollars * * *"

"Whoever * * * gives employment to a minor, without agreeing with him as to the wages or compensation he shall receive * * * and without furnishing such minor with written evidence of such agreement, and * * * with a statement of the earnings due and the amount thereof to be paid to him or changes the wages * * * of a minor without giving him notice thereof at least twenty-four hours previous to its going into effect, when a written agreement thereof shall be given to such minor * * * shall be fined not more than two hundred dollars * * *."

I know of no principle upon which the word "minor" as used in these sections is to be qualified or regarded as having a meaning different in any respect from its ordinary meaning in law. It is true that sections 12993, et seq., for example, provide certain police regulations prohibiting the employment of children under certain ages in certain kinds of work. This fact, however, can have nothing whatever to do with the construction of the sections under consideration. So also the compulsory education law, sections 12974 and 12988 of the General Code, immediately preceding the sections under consideration, imposes another set of age limits, within which children are required to attend school or to present an age and school certificate as provided by law, etc. These sections, however, are palpably all parts of the same original act and can not be regarded as *in pari materia* with the sections under consideration.

If it is competent for any reason to inquire into the mischief intended to be remedied by these statutes, it seems to me that such an inquiry will only serve to confirm the view that the word "minor" is used therein in its ordinary legal sense, for it is clear that all three of these sections relate to and regulate the contractual relations existing between the employer and the minor laborer. It may be proper to infer that the general assembly considered such minor laborers worthy of particular protection because of the legal disabilities under which they rest. Such disabilities are visited by the law upon all boys under the age of twenty-one and upon all girls under the age of eighteen.

Section 8023 of the General Code so provides in the following language:

"All male persons of the age of twenty-one years and upward and all family persons of the age of eighteen years and upward * * * shall be capable of contracting * * * and, to all intents and purposes be of full age."

From all the foregoing considerations I am of the opinion that the word "minor" as used in the three sections above mentioned denotes male persons under twenty-one years of age and female persons under eighteen years of age.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Superintendent of Insurance.)

INSURANCE—POWERS OF SUPERINTENDENT OF—FOREIGN INSURANCE COMPANY—OWNERSHIP OF CAPITAL STOCK BY HOLDING COMPANY.

Superintendent of insurance has power to refuse license to foreign insurance company whose stock is owned by holding company, such holding company being prohibited by the policy and statutes of this state from owning the stock of such insurance company. License refused to Union National Accident Company.

October 1st, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date in which you request my opinion upon the following question is received:

> The Union National Accident Company, a Pennsylvania insurance corporation, has filed with this department an application for a license to do business in the State of Ohio. Among other things this company states that over seventy per cent. of its capital stock is owned by the Columbus Securities Company, a New Jersey corporation, organized for the purpose of "purchasing, holding, selling, assigning, transferring, mortgaging, pledging, or otherwise disposing of the shares of the capital stock of insurance companies. Granting that the Union National Accident Company has complied with all other provisions of the laws of Ohio regulating the admission of insurance companies of its kind to transact business in this state other than with respect to the ownership of its stock should I issue to it a license to transact its business in this state?

In reply thereto I beg leave to submit the following opinion:

I have heretofore, in an opinion addressed to you, under date of January 19, 1910, dealing with the holding by the Columbus Securities Company of the stock of the Columbus Casualty Company, held that the Columbus Securities Company is by Section 8683 of the General Code forbidden to hold the stock of an insurance company of this state, and your inquiry presents the further question whether a foreign insurance company, the controlling stock of which is owned in a manner forbidden to corporations in this state, may be licensed to transact business in Ohio. The principle is well settled, both in this state and in other jurisdictions, that a foreign corporation can exercise only such corporate powers within this state as are not contrary to the laws or the policy of this state, and that they cannot exercise such corporate powers as are forbidden by the laws of this state to be exercised by domestic corporations.

State vs. Aetna Life Insurance Company, 69 O. S. 317.
State ex rel vs. Laylin, 73 O. S. 90.
Falls vs. U. S. Savings Loan, etc., Co., 97 Ala. 417.
Iowa Land Corporation vs. Secretary of State, 76 Mich. 162.
White vs. Howard, 46 N. Y. 144.
Clark vs. Ga. Central R., etc., Co., 50 Fed. 338.

In this connection the point has been made by the attorneys for the Union National Accident Company that the holding of the capital stock of that com-

pany by the Columbus Securities Company is not the exercise of a corporate power in violation of the Ohio laws by the Union National Accident Company. The principle has been well settled in this state, since the decision of State ex rel vs. Standard Oil Company, 49 O. S. 137, that

> "Where all, or a majority, of the stockholders comprising a corporation, do not act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors; and, the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and; to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto.*"

The above quoted language is that used by Judge Minshall, on page 184 of the report, in rendering the opinion of the court in that case. In that case a decree was entered by the supreme court ousting thte Standard Oil Company of Ohio from in any menner recognizing the transfer of stock made by its individual stockholders to the Standard Oil trust of New Jersey, the court thereby recognizing that the transfer of the stock of the Standard Oil Company of Ohio to the Standard Oil Trust of New Jersey by a controlling number of stockholders of the former company, was the exercise of a corporate power by the corporation itself. The case presented by your question seems to be on all fours in this particular with the Standard Oil case above referred to, and I am of the opinion that the transfer of the controlling stock of the Union National Accident Company by the individual stockholders to the Columbus Securities Company was and is a corporate action on the part of that company, and as such is violative of the laws and policy of this state. Having so decided, the question arises whether it lies within your discretion, upon being satisfied of the illegal exercise of this corporate power by the applying company, to refuse to license it to transact its business within this state.

Section 646 of the General Code, dealing with the general powers and duties of the Superintendent of Insurance in regard to the issuance of licenses to insurance companies to transact their business in this state, reads in part as follows:

> "* * * The superintendent shall issue to each newly applying company or association *which he finds should be authorized to do busines in this state, a certificate that it has complied with the laws of this state,* which certificate shall contain a statement of the amounts of its paid up capital stock, etc. * * *"

Under this section I am of the opinion not only that it is within your discretion, but that it is your duty to satisfy yourself that a foreign insurance company applying for admission to do business within this state has complied with all of our laws applicable to such company, and to see that the powers which it desires to exercise in Ohio are not contrary to the laws of policy of this state before issuing to it a license to transact its business here. Your powers on the premises are broader than those granted to the Secretary of State in regard to the admission of foreign corporations other than insurance to transact business in Ohio, yet the supreme court in State ex rel. vs. Laylin, Secretary of State, *supra,* held

that the Secretary of State could not be compelled by mandamus to issue a certificate to a corporation authorizing it to transact business in the State of Ohio as a foreign corporation, the business sought to be done by which corporation being violative of the laws of Ohio. The section of the statutes under which this case was decided was Section 148d Revised Statutes, Section 178 of the General Code, and reads in part as follows:

> "Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business. * * *"

The similarity of the provisions of the above quoted section 178 of the General Code and those of Section 646 of the General Code, supra, should be noted in this connection.

In the case under consideration you inform me that it appears from the application and statement of the Union National Accident Company as filed with you that a majority of its capital stock is owned by the Columbus Securities Company. This circumstance, in my opinion, puts this case practically on all fours with that of State ex rel vs. Laylin, supra, for the reasons hereinbefore given. I feel constrained to say, however, that there is an element of doubt whether the above quoted provisions of Section 646 of the General Code authorize you to refuse to license a foreign insurance company until satisfied that it has complied with *all* the laws of this state, or whether such section authorizes you to compel compliance on the part of such foreign insurance companies with the insurance laws only. The language of Section 646 of the General Code, supra, would seem to be broad enough to authorize you to exercise the former power, however, and it is my judgment, therefore, that, notwithstanding the element of doubt above expressed, it is your duty as superintendent of insurance to resolve such doubt in favor of the possession of that power by yourself.

I, therefore, advise you to refuse to license the Union National Accident Company to transact its business in this state as a foreign insurance company. Should that company take issue with your right to refuse it a license under the above quoted Section 646, and the reasoning hereinbefore given, the question can be tested out in the courts by it.

Yours very truly,
U. G. DENMAN,
Attorney General.

FOREIGN FIRE INSURANCE COMPANY—CAPITAL STOCK—WHAT IS

In re application of the German American Fire Insurance Company of Baltimore.

August 31st, 1910.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 20th, enclosing letter of Hon. A. I. Vorys addressed to you. In your letter you state that the German American Fire Insurance Company of Baltimore, a foreign fire

insurance company, has applied for a license to do business in this state, and request my opinion as to the amount of the capital stock of said company which, under section 9560 General Code, must be paid up before it may be admitted to this state. The facts upon which this question has arisen are set forth in Mr. Vorys's letter, and are substantially as follows:

> The German American Fire Insurance Company of Baltimore was organized under the general incorporation laws of the State of Maryland in 1880. The certificate of incorporation of the company recited that the company might have an aggregate capital stock of two hundred and fifteen thousand ($215,000.00) dollars. This aggregate capital stock was subsequently reduced to two hundred thousand ($200,000.00) dollars by proceedings duly had in conformity to the general laws of the State of Maryland.
>
> On April 1, 1904, the general assembly of the State of Maryland passed an act entitled "An Act to amend the charter of the German American Fire Insurance Company of Baltimore City by increasing its capital stock, enlarging its powers, and giving it perpetual succession." (Laws of Maryland, 1904, Chapter 209, page 345.) This act provided in effect that the capital stock of the company might be increased by the directors to one million ($1,000,000.00) dollars. The general law under which the company was organized prescribed that the capital stock of any insurance company should not exceed the sum of two million ($2,000,000.00) dollars.
>
> The corporation has never increased its actual capital stock under the special act, nor has it ever filed a certificate of increase, as provided by the general law of the State of Maryland.
>
> Query: Is the "capital stock" of the company within the meaning of section 9560 General Code, two hundred thousand ($200,000.00) dollars or one million ($1,000,000.00) dollars.

I have given very careful consideration to this question and to the brief of Mr. Vorys presented in behalf of the company. Speaking generally the question involves the construction of section 9560 General Code, and of both the special act of the legislature of Maryland and the general laws of that state.

Section 9560 applies to foreign insurance companies other than life, and provides in part as follows:

> "No company, association or partnership organized under the laws of another state shall * * * transact business of insurance in this state * * * unless possessed of the amount of actual capital required by similar companies formed under the provisions of this chapter, nor unless the capital stock of the company is paid up and invested as required by the laws of the state where it was organized * * *"

As Mr. Vorys points out in this brief, the phrase "capital stock" has no fixed and certain meaning in the general law but may refer to various corporate incidents. The general corporation laws of Ohio, as well as those applying to insurance companies as such, provide for several things which might be termed capital stock. It may be fairly assumed that our own statutes are representative of the statutes of all the states, and, as I shall hereafter point out, there are reasons for determining the meaning of the phrase "capital stock" as used in section 9560 by the provisions of the Ohio laws, and not by any common law rule or general principle.

The following kinds of capital stock, so to speak, which a corporation may be said to have exist under our Ohio laws:

1. The authorized capital stock. This is the amount of capital stock fixed by the articles of incorporation. (Section 8625 General Code.)

2. The determined capital stock. This is the amount of capital stock which the corporation, through its proper agents, and within itself, so to speak, determines to offer for sale. The determined capital stock of a mercantile corporation may, as far as section 8623 et seq., General Code require, be smaller in amount than the authorized capital stock. That is to say, the corporation may not desire to sell or issue all of its authorized capital stock. The determined capital stock of an insurance company other than life must, of course, be equal in amount to its authorized capital stock (section 9524 General Code.) I mention it, however, with a view to stating the different possible meanings of the phrase in question.

3. The subscribed capital stock. The laws of this state, sections 8631 and 9515 General Code, provide that books shall be opened for subscription to the capital stock of the company. The subscribers thereby agree to purchase shares of stock and become liable to the general creditors of the company by virtue thereof. The amount of the subscribed capital stock at a given time may be less than that of the determined capital stock.

4. The issued and outstanding capital stock. General corporations are authorized to provide, as they may see fit, for the terms upon which shares of stock are issued. They may provide that a share shall be issued when a certain portion of the par value thereof is paid in. It is conceivable, of course, that the amount of the issued capital stock as thus determined may be less than that of the subscribed capital stock.

5. The paid up capital stock. The meaning of this title is clear.

The foregoing are the only kinds of capital stock which our laws relating to domestic corporations provide for or recognize. It is, of course, logically incorrect to designate them as "kinds of capital stock"; I use the term for convenience merely. It seems reasonable to me that in enacting section 9560 General Code the general assembly of this state must have intended to use the phrase "capital stock" in one of the above enumerated senses. In fact, I am satisfied that the general assembly must be presumed to have intended to do so; in construing a statute of this state a doubtful phrase is to be interpreted according to other statutes of this state *in pari materia* — statutes of other states could not be taken into account by a court in seeking for a judicial interpretation thereof.

In my opinion the "capital stock" required to be paid up by section 9560 is the authorized capital stock of the corporation. Many reasons for such a holding will appear. Other statutes *in pari materia* will be found upon investigation invariably to use the phrase in this sense. If the manifest object of the statute is to be taken into consideration the same supports this conclusion. I deem it, however, unnecessary to state at length my reasons for reaching this conclusion, inasmuch as the letter of Mr. Vorys discloses that this has been the ruling of your department ever since the statute, formerly section 3639 R. S., was first enacted, and inasmuch also as Mr. Vorys virtually concedes the correctness of the ruling while pointing out certain considerations which tend to raise some question as to the same.

Assuming then that the general assembly, in enacting section 9560 General Code, intended to require that no foreign fire insurance company should be admitted to do business in Ohio unless its authorized capital stock should have been fully paid up, another difficulty is encountered. It is conceivable, and an investigation discloses it to be a fact, that the laws of the several states providing for the organization of corporations are far from uniform, and that some

of these kinds of capital stock as characterized by me do not exist in some of the states, while others not existing in Ohio are found in other states. Thus, the general laws of the State of Maryland pertaining to fire insurance companies above referred to provide a limit upon the amount of authorized capital stock such companies may have. This limit, which might be termed the "permissive authorized capital stock" is unknown to our statutes. It is also apparent upon reflection and investigation that different terms and names may be employed in the several states to designate different kinds of capital stock. The general assembly of this state could not have intended to adopt or refer to *names* created by the laws of other states. On the contrary, they must have intended that that which should be paid up should be the same or substantially the same with respect to all foreign corporations.

From all the foregoing it is apparent that the capital stock which must be paid up under section 9560 is that capital stock of a foreign insurance company most nearly identical with what is known in Ohio as the "authorized capital stock." In a given case then, it is necessary to compare the charter of the foreign corporation with that of a similar Ohio corporation for the purpose of ascertaining what attribute of the foreign corporation corresponds to the authorized capital stock of an Ohio corporation.

Accurate comparison of two things necessitates exact definition of both of them. I deem it proper, therefore, to comment on certain incidents of the authorized capital stock of an Ohio corporation. As above indicated, the laws relating to the formation of corporations generally in this state and those statutes relating to the organization of insurance companies as such, both require that the articles of incorporation filed in the office of the Secretary of State shall set forth the amount of the capital stock which the corporation is to have, the number of shares into which it is to be divided, and the par value of each share. The power to have the capital stock thus designated emanates from the state, and it is immaterial, in my judgment, that the determination of the amount under authority of law rests with the incorporators. More accurately, the amount of the authorized capital stock is at the same time a grant of a corporate franchise to individuals, and a limitation upon the exercise of the same. So, therefore, if this capital stock so described is exceeded without complying with the statutory requirements as to increase of authorized capital stock, the corporate franchises of the company would thereby be violated, and the state would thereby acquire a grievance or right of action in *quo warranto* against the company (See Cook on Corporations, sections 291, et seq., wherein the distinction between what is there termed "over issued stock" and "irregularly issued stock" is discussed; see also Clark & Marshall on Private Corporations, section 407a.)

It is this aspect of authorized capital stock which distinguishes it from the other kinds of capital stock above enumerated as existing under the laws of Ohio. It is true that the power to increase the determined capital stock, so long as the authorized capital stock is not exceeded, may be said to exist by virtue of statute law, and to be one of the corporate powers or franchises of the persons composing the corporation. But the distinction between the two is obvious. Within the limit of the authorized capital stock, determined capital stock, subscribed capital stock, and issued capital stock may be increased in amount by the corporation itself without hindrance by the state, the question as to the validity of such increase being solved in each case by the regularity of the acts of the corporate officials having the same in charge. In other words, as to such increases, the officers and stockholders participating therein are accountable primarily to the members and creditors of the corporation, and the assent or waiver of such members or creditors will cure any defects in the proceeding. But no

act of any stockholder or creditor of the corporation, nor of the corporation itself, can render legal an increase or issue of capital stock in excess of the authorized capital stock defined in the articles of incorporation.

Having in mind then the fact that the authorized capital stock of an Ohio corporation is the limit placed by the law of this state upon the amount of actual capital stock which the corporation or any private interests concerned may make or assent to, that this limit is a qualification of the corporate franchise as such, and that in a given case, under section 9560 General Code, the limitation, if any, imposed by the law of its parent state upon the capital stock of a foreign corporation, most similar to this limitation, must be ascertained, the special act of the general assembly of the state of Maryland above quoted must be construed with a view to ascertaining the authorized capital stock of the German American Fire Insurance Company.

The special act above referred to is as follows:

> "An Act to amend the charter of the German-American Fire Insurance Company of Baltimore City by increasing its capital stock, enlarging its powers and giving it perpetual succession.
>
> "Section 1. *Be it enacted by the general assembly of Maryland,* That the German-American Fire Insurance Company of Baltimore City, a corporation created under the general laws of this state * * * may *from time to time as the directors of the corporation may determine and upon such terms as they shall prescribe, increase its capital to one million dollars, divided into the requisite number of shares not exceeding forty thousand of the par value of twenty-five dollars per share;* and in addition to the power of insuring property * * * against loss or injury by fire * * * shall have the power of insuring property against loss or damage from tornadoes, windstorms and cyclones; and * * * to acquire * * * any lands, chattels or shares of stock of any corporation, including corporations having all or some of the same or similar powers as those possessed by the said German-American Fire Insurance Company of Baltimore City, or any bonds, certificates of indebtedness, notes or any kind of securities of any * * * property of any kind or character, or any interest or estate therein; and * * * to hold, enjoy, sell * * * or in any other manner dispose of any property it may be authorized to acquire; and to invest its capital * * * in any form, or in any property which it may be authorized to acquire * * *; *and the said German-American Fire Insurance Company of Baltimore City shall also have all the rights, powers and privileges conferred upon corporations incorporated under Article 23 of the Code of Public General Laws of Maryland, and under any amendments and supplements thereto.*"
>
> "Section 2. *Be it enacted that the said German-American Fire Insurance Company of Baltimore City* shall by that name have perpetual succession * * *"
>
> "Section 3. *And be it enacted,* that this act shall take effect from the date of its passage."

Mr. Vorys states in his brief that the general law of Maryland under which this corporation was organized, and which was in force in 1904 was known as Article 23 of the Code of Public General Laws of Maryland, and I take it that the reference in the special act is to the provisions of the general law, some of which are abstracted in Mr. Vorys' brief.

Section 82 of said Article 23 provided that any corporation formed under the article or under any special law and having a capital stock, might increase or diminish the same by complying with certain statutory requirements, as follows: Upon notice by the directors, stockholders at a meeting by a vote of two-thirds of the shares might determine to increase or diminish the capital stock, such increase or diminution became effective upon the filing with the clerk of the superior court of a certificate similar to that required to be filed with the secretary of state in case the increase of the authorized capital stock of an Ohio corporation.

This law was amended in 1908 but no essential change was made in the manner of increasing or diminishing capital stock. Corporations were, however, given perpetual succession by this amendment.

Without fear of contradiction it may be safely assumed that the amount to which a corporation might, under the general laws thus abstracted, increase its capital stock, would be "authorized capital stock" of the corporation. The general law then presents instances of two of the above prescribed kinds of capital stock, viz., permissive authorized capital stock, the limit being two million dollars, and authorized capital stock, the limit being the amount fixed by the certificate filed with the clerk of court. Mr. Vorys' argument correctly assumes that the one million dollar limit of the special act constitutes one of these two things, and the question is, therefore, presented as to whether it is in itself the authorized capital stock of the corporation, or whether it is the amount of authorized capital stock which the corporation may be permitted to have or to acquire by following a certain extraordinary procedure.

Mr. Vorys assumes that the corporation still has the power to increase its authorized capital stock under the general law from one million dollars, the amount which he claims is now the true measure of such capital stock, to two million dollars, and that this right is in addition to the right conferred by the special act.

Some question has arisen in my mind concerning the constitutionality of the special act under consideration in view of the fact that the constitution of Maryland expressly provides that no special law shall be passed touching a subject already covered by a general law. I am restrained, however, from considering this question because of the impropriety of the Attorney General of Ohio considering the constitutionality of an act of the general assembly of Maryland, and I, therefore, assume that the act is constitutional.

Still another question must be disposed of before considering the meaning of the special act. It is contended on behalf of the company that the special act, whatever its meaning, is not operative to change or in any way to affect the corporate powers of the company, unless the company has acted under it. That is to say, it is claimed that a mere special legislative act pertaining to a corporation and purporting to enlarge or restrict its charter, is not binding upon the corporation unless the corporation accepts the same; and that, in the absence of any formal acceptance by the corporation, the only evidence of such acceptance would be the exercise of some of the powers authorized by the special act. Thus in the case at hand the contention is that the German-American Fire Insurance Company is not bound by the special act of 1904 unless its directors have attempted to increase its capital stock without a vote of the stockholders or unless the corporation has exercised the power of insuring property against loss or damage from tornadoes, etc., that of acquiring the property and interest permitted to be acquired under the act, etc. It is clear, and I think not questioned by counsel that the act can not be accepted in part and rejected in part, and that if, for instance, the company has, since 1904, issued tornado policies—the power to issue which policies was not embraced in its original articles of

incorporation — then the special act has been accepted and all its provisions including that relating to the increase of the capital stock of the company are now binding upon the latter.

Such a theory of the law raises a question of fact as to the exercise of *certain specific* corporate powers by the company since the date of the special act. The statement of facts which I have before me does not disclose an answer to such a question, although Mr. Vorys has made certain statements verbally concerning the same.

I am unable, however, to accede to the proposition that the effectiveness of this special act in changing or enlarging the corporate powers of the German-American Fire Insurance Company depends upon its acting in pursuance of the new powers conferred upon it.

In the celebrated Dartmouth College case the supreme court of the United States established the doctrine that a corporate charter is a grant emanating from the state, and that such a grant, when accepted by the corporation, constitutes a contract binding upon both the sovereignty and the corporation. The federal constitution having prohibited the several states from passing or enforcing laws impairing the obligation of contracts, the conclusion followed that a corporate charter once issued could not be altered or amended in any way by the state, through its legislative department, without the assent of the corporation, any more than the corporation itself could acquire new powers without the assent of the state.

As is well known, the establishment of this principle in American jurisprudence led to the adoption of new constitutions in many of the states of the union about the year 1850. Among the constitutions adopted at that time was that of the state of Maryland. Section 48 of Article 3 thereof provides in part that,

> "* * * all charters granted or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification may be altered from time to time, or be repealed * * *"

This reserved power to alter, amend or repeal corporate charters, granted since 1850, or thereabouts, enabled the general assembly of the state of Maryland to exercise an option as to the manner in which it would carry the same into effect. It might choose, on the one hand, to amend a special or general corporation law and to provide that the same should not be effective as to existing corporations in the absence of some formal acceptance by any such corporation, or of some act committed or power exercised by such corporation under the amended law. On the other hand, there is no question that the legislature had the power simply to amend all outstanding charters without affording to the corporations thus affected, any option as to the acceptance or non-acceptance of the amendment.

Referring again to the special act above quoted, and without quoting therefrom, it is apparent from the title of the act, the last clause of the first section thereof, and the third section, that the general assembly of Maryland, has in this instance acted in the second of the two ways above referred to, and has given to the German-American Fire Insurance Company no choice as to the acceptance or non-acceptance of the terms of the special act. The question is thus presented as to the effect of such action by the general assembly upon the powers and liabilities of the corporation.

Even though the state reserves to its legislative department the power to alter, amend or repeal corporate charters, it can not compel the acceptance of

any alteration, amendment or repeal, made under authority thereof. That is to say, the state may no more compel individuals to exercise specific corporate powers when they are already organized as a corporation than it can compel them to accept a general grant of corporate powers in the first instance. The reservation of *a right to amend* did not change the fundamental contractual nature of the grant of corporate powers to this extent. However, such reservation certainly has some effect — it is not a mere nullity. Upon investigation of the athorities I am of the opinion that the rule is as follows: Under a reserved power to alter, amend or repeal corporate charters a state may *repeal* such a charter and thus put an end to the existence of the corporation (assuming, of course, that specific acts may be passed by the legislature); so also a state may, by amendment, *restrict* the corporate powers of a corporation, thus putting an end to the right to exercise certain *specific* franchises, regardless of the acceptance or non-acceptance of the corporation; and a state may, by amendment, enlarge the corporate powers of a corporation, but it can not compel the corporation to exercise such enlarged powers. When the state acts in this last described manner, and does not provide by law for the specific manner of acceptance, acceptance will be presumed, not as suggested by counsel, *when the terms of the amendment as such are accepted, but, if the corporation continued to act as such and to exercise its general corporate power.* Putting it in another way, the act of the legislature is fully effective to amend the charter of the corporation, which, from the date of such amendment forth is entire and unseverable in its amended form; the members of the corporation then have the right to continue under the amended charter in which case they will be bound by it, whether they proceed at once to exercise their new powers or not, or, on the other hand, to dissolve the corporation, abandon the charter and go out of business.

In still other words, continued corporate existence is sufficient evidence of acceptance of an amended charter, when the constitution reserves the power to amend.

Clark & Marshall on Private Corporations, sections 57c, 279, and cases cited.

I have heretofore referred to the title and to the last clause of section 1 of the special act under consideration, as evidencing the intention of the general assembly of Maryland to effect thereby an amendment to the charter as such without acceptance of the amendment as such by the corporation. Careful consideration of the act not only emphasizes this view, but demonstrates that the act itself is more than an amendment; it is, in fact, a substitute. The title recites that it is "an act to amend the charter of the German-American Fire Insurance Company of Baltimore City by increasing its capital stock, enlarging its powers and giving it perpetual succession." The act proceeds in section 1 to confer upon this corporation certain powers not enjoyed by other corporations organized under Article 23 of the Code of Public General Laws of Maryland, and concludes in such section by conferring upon the company,

> *"all the rights, powers and privileges conferred upon corporations incorporated under Article 23 of the Code of Public General Laws of Maryland, and under any amendments and supplements thereto."*

It seems to me perfectly clear that, under this clause of this special act, the German-American Fire Insurance Company acquired all that it ever could have had under its former articles of incorporation and a great deal more. Therefore, taking either view as to the necessity of any given kind of accept-

ance by the corporation of the amendment, it follows that the company could not exercise any powers conferred upon any corporations under Article 23 of the Code of Public General Laws of Maryland *without being presumed to have exercised them under the special act.*

From all the foregoing it follows that every reason supports the conclusion that the fact that the directors of the corporation have never taken any action increasing its capital stock beyond two hundred thousand ($200,000) dollars is immaterial, as affecting the question as to whether the special act is in any way binding upon the corporation. The special act, if valid as a special act, *is the charter of the* German-American Fire Insurance Company.

Coming now to the consideration of the first clause of section 1 of the special act, I have already stated that the question regarding it is as to whether the one million ($1,000,000) dollars is in itself the authorized capital stock of the corporation or the permissive authorized capital stock thereof. The correlative question is as to whether an amount between two hundred thousand ($200,000) dollars and one million ($1,000,000) dollars, to which the directors might at any time increase its capital, would be the authorized capital stock of the company or the determined capital stock.

In my opinion the amount determined by the directors would be the determined capital stock — not the authorized capital stock, and the one million ($1,000,000) dollars is in itself the authorized capital stock, not the permissive authorized capital stock of the corporation.

Among the considerations which have induced this conclusion are the following:

1. The first clause of section 1 of the act provides in part that the corporation, by its directors, may "increase its *capital* to one million dollars," — not "its capital stock". On the other hand, the title of the act employs the phrase "increasing its *capital stock*". It is to be presumed, I take it, that this difference in phraseology is not accidental, and that the two phrases do not mean the same thing. It is doubtless a mere coincidence but worthy of mention, nevertheless, that section 9560 General Code uses both the phrase "actual capital" and that of "capital stock." I am of the opinion that there is a similar although not identical distinction in both statutes. The thing which, under the special act of Maryland, the directors of the German-American Fire Insurance Company are authorized to increase is not the capital stock — it is the *capital,* which, I take it, means at the most the determined capital stock as above defined. It can not mean the authorized capital stock, for reasons which I shall hereafter point out, but, on the face of it, it means something different from what is meant by the phrase "capital stock" as used in the title of the act.

2. The general legislative policy of the state of Maryland as evinced by its general laws pertaining to corporations, and particularly those pertaining to insurance companies, is similar to that of Ohio with respect to the creation and increase of *authorized* capital stock. In both states some public evidence or record of the amount of the authorized capital stock is required by the general laws. In fact, as above suggested, I am strongly of the opinion that without such public record no corporation can properly be said to have that which corresponds to the authorized capital stock of an Ohio corporation. At any rate, however, it seems to me that it should be presumed that the general assembly of Maryland in enacting the special law under consideration, did not intend to depart, as to this company, from its well-founded policy with respect to similar companies. If the special act is to be construed in the way for which the company now contends, and if we are to hold that the authorized capital stock of the German-American Fire Insurance Company, under the special act, is such amount as the directors may, from time to time, determine, then the presumption above referred to would

have to be ignored. For there is no requirement in the special law that the directors, in increasing the capital of the company, shall file any certificate thereof with any public authority; and the act does not admit of the construction that if the directors do so act the stockholders must proceed as the general law requires. Therefore, I am satisfied that the determination of the directors, creating as it does a limit unknown to the public generally, with which apparently only the stockholders and creditors of the corporation have anything to do, could not create that which corresponds to the "authorized capital stock" of an Ohio corporation; that not only is such a limit so determined by the directors under the said special law, not the authorized capital stock of the corporation measured by the Ohio law, but that it is not the capital stock of the corporation measured by the act itself and by the general legislative policy of the state of Maryland.

On the other hand, the one million dollars limitation has all the characteristics of the authorized capital stock of an Ohio corporation. It is a matter of public record. It is a part of the charter of the corporations as such. There is coupled with it a provision as to the number of shares and the par value of each share, a provision which is customarily coupled with the recital of the authorized capital stock of corporations organized under the laws of various states and particularly Ohio. It is not the permissive authorized capital stock, as that, by favor of the general law, is two million dollars. The contention of counsel that the company has two separate permissive authorized capital stocks, so to speak, the one limitation to be reached by following one procedure, and the other to be reached by following another, is untenable.

In fact, I am of the opinion that, standing by itself, the first clause of section 1 of the special act under consideration, might be thus paraphrased:

> "The authorized capital stock of the German-American Fire Insurance Company of Baltimore city is hereby increased to and constituted one million dollars, divided into the requisite number of shares not exceeding forty thousand of the par value of twenty-five dollars per share; and the directors of the corporation may determine the times at which the terms upon which the actual capital may be increased up to said sum of one million dollars."

3. The foregoing discussions all relate to the meaning of the first clause of section 1 standing by itself, except in so far as the use of the two terms "capital" and "capital stock" may shed a light upon the same.

There is still another consideration, however, which has induced me to reach the conclusion above defined. It seems to me that the most that can be claimed by counsel is that said first clause of section 1, standing by itself, is ambiguous and fairly susceptible to the meaning for which the company now contends. It certainly can not be claimed that the clause clearly and unequivocally possesses that meaning. If the clause is to be regarded as of doubtful meaning in itself, then, before considering any matters extraneous to the act itself, a court construing the same would turn to the title of the act for the purpose of ascertaining the legislative intent. The title in plain terms declares that the act is "an Act to amend the charter of the German-American Fire Insurance Company of Baltimore City *by increasing its capital stock.*" If there may be a difference of opinion as to the independent meaning of section 1, there can be no difference as to the meaning of this language of the title. The same under the circumstances is absolutely conclusive and leaves no ground for dissent from the proposition that the "capital stock", meaning the "authorized capital stock", of the German-American Fire Insurance Company was increased by the special act under consideration, and placed at one million dollars.

To summarize, it is my opinion that, within the meaning of section 9560 of the General Code, the capital stock of the German-American Fire Insurance Company of Baltimore City, Maryland, is one million dollars.

Yours very truly,
U. G. DENMAN,
Attorney General.

INSURANCE—UNION CASUALTY COMPANY OF PHILADELPHIA—DEPOSIT BY FOREIGN EMPLOYERS' LIABILITY COMPANIES.

Foreign employers' liability companies may make required deposit out of their capital.

April 18th, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of April 12th is received in which you request my opinion upon the following question:

> "The Union Casualty Company of Philadelphia was incorporated early last year with an authorized capital of one hundred thousand dollars. It was admitted to transact the business of health and accident insurance in this state with an authorized capital of one hundred thousand dollars and a very small surplus. The company now desires to do, in addition to the health and accident business, employers' liability insurance and under the provisions of subdivision 2 of section 3641 R. S., it is required to make a deposit with this department of $50,000.00. It tenders to this department as such deposit $50,000.00 of its authorized capital. Will you please advise me if this department is authorized to accept the $50,000.00 out of such capital."

In reply thereto I beg leave to submit the following opinion:
Section 9524 General Code (section 3634 R. S. O.) in part reads as follows:

> "Except as hereinafter provided, no joint stock insurance company shall be organized under this chapter, or permitted to do business in this state with a less capital than one hundred thousand dollars, which must be paid up before the company can transact business. But on the payment of twenty-five per cent. of its capital stock, a live stock company may do business."

Section 9510 of the General Code (section 3641 R. S. O.) reads in part as follows:

> "A company may be organized or admitted under this chapter to—
>
> * * *
>
> 2. Make insurance on 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; * * * make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to in-

demnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance *for the benefit and security of all its policy holders,* fifty thousand dollars in bonds of the United States or of the State of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value." * * *

The question which you ask requires a construction of the above two quoted sections of the General Code, and in its ultimate analysis is whether the words "for the benefit and security of all its policy holders" in section 9510 *supra,* means for the benefit and security of all its "employers' liability policy holders" or of *all* the policy holders of the company, for if it be held that this deposit is held by the superintendent of insurance in trust for the employers' liability policy holders alone, and such deposit is made from the one hundred thousand ($100,000.00) dollars of capital of the company, then such capital would be to that extent impaired, because the fifty thousand ($50,000.00) dollars of securities thus placed in trust would be thereby primarily devoted to the payment of claims by employers' liability policy holders to the exclusion of the health and accident policy holders of the company.

The result of such an interpretation would be that this deposit would have to be made either from capital in addition to the minimum one hundred thousand ($100,000.00) dollars required by the statute, or from surplus belonging to the company. Such interpretation might reasonably be made of the statute were not the words above quoted so clearly unambiguous, for the losses incident to the conduct of employers' liability insurance would naturally be greater, and such business would be conducted with greater risk to the solvency of the company; but had the legislature deemed it expedient to require a greater amount of capital or of capital and surplus for a company doing an employers' liability insurance business in addition to any of the other classes of business enumerated in subdivision 2 of 9510, *supra,* in my opinion, it could and would have specifically provided therefor. And it can not be said that the requirement of a fifty thousand ($50,000.00) dollars deposit from companies doing employers' liability insurance accomplishes nothing, or is based on no good reason, if such companies be allowed to make such deposit from their minimum capital of one hundred thousand ($100,000.00) dollars, for so much, at least, of their capital as is thus deposited, can not be dissipated by injudicious management, but will be kept intact and inure to the benefit of the policy holders of the company should such company become insolvent.

I am, therefore, of the opinion, in view of the clear and unambiguous terms of the above section 9510, that this company may make the deposit of fifty thousand ($50,000.00) dollars, therein provided for, out of its capital of one hundred thousand ($100,000.00) dollars.

Yours very truly,
U. G. DENMAN,
Attorney General.

INSURANCE—AMENDMENT OF APRIL 26, 1910, OF SECTION 656 GENERAL CODE UNCONSTITUTIONAL, AS FAR AS AFFECTS CONTRACTS OF COMPANIES WITH NON-RESIDENTS OF OHIO MADE PRIOR TO SUCH AMENDMENT.

Deposits with superintendent of insurance. Insurance companies may not withdraw deposits under authority of act of April 26, 1910, until all debts and liabilities on contracts with non-residents made prior to date of act have been satisfied. The Ocean Accident and Guarantee Association.

July 14th, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of July 9th is received in which you request my opinion upon the following question:

> "I enclose herewith copy of letter from the Ocean Accident and Guarantee Corporation, Limited, relative to its deposit of $150,000 with this department. This deposit was made on October 3rd, 1907, and as the law then stood it was made for the benefit and security of all the policy-holders of this corporation in the United States. The recent legislature passed Senate Bill No. 156 which purports to authorize this department to surrender and deliver up such securities when it appears that all debts and liabilities due to residents of Ohio have been paid and extinguished.
>
> Can this department surrender such securities when it is shown that all debts and liabilities due to residents of Ohio have been paid or can it surrender such securities when it is made to appear to the department that all debts and liabilities due policy-holders anywhere in the United States on the date of the passage of this bill have been paid and extinguished?"

.. In reply thereto I beg leave to submit the following opinion: Section 656 of the General Code, prior to its amendment, April 26, 1910, read as follows:

> "When an insurance company or corporation, other than life, which has made a deposit with the superintendent of insurance, intends to discontinue its business in this state, the superintendent upon application of such company or corporation shall give notice, at its expense, of such intention at least once a week for six weeks in three newspapers of general circulation in the state. After such publication, the superintendent shall deliver to such company or association its securities held by him, *if he is satisfied by the affidavits of the principal officers of the company and on an examination made by himself, or by some competent disinterested person or persons appointed by him, if he deems it necessary, that all debts and liabilities which the deposit was made to secure and which are due or may become due upon any contract or agreement made with any citizen or resident of the state of Ohio are paid and extinguished.*"

This section was amended by the last general assembly by an act passed April 26, 1910, and approved April 28, 1910, to read as follows:

> "When any insurance company or corporation other than life, which has made a deposit with the superintendent of insurance, in-

tends to discontinue its business in this state, the superintendent, upon application of such company or corporation, shall give notice at its expense of such intention at least once a week for six weeks in three newspapers of general circulation in the state. After such publication, the superintendent shall deliver to such company or association its securities held by him, *if he is satisfied* by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested persons or persons appointed by him, if he deems it necessary *that all debts and liabilities which are due, or may become due, upon any contract or agreement made with any citizen or resident of the state of Ohio, are paid and extinguished.*"

You will note from the underlined portions of the above sections that the legislature, by the amendment of section 656, has empowered you to surrender the securities of an insurance company discontinuing its business in this state, when all the debts and liabilities due or which may become due upon any contract or agreement with any citizen or resident of the state of Ohio are paid and extinguished, and has removed the requirement in old section 656 that "all debts and liabilities which the deposit was made to secure, must be paid and extinguished before you might surrender such securities.

The question arises whether the amendment of section 656 of the General Code is constitutional in so far as it applies to debts and liabilities due or to become due from such an insurance company upon contracts made with persons not citizens or residents of the state of Ohio. In other words, whether section 656 of the General Code, as amended, does not "impair the obligation of contracts" made by such company with non-residents of Ohio. This question was passed upon by our supreme court in the case of State ex rel the Fidelity & Deposit Company v. A. I. Vorys as Superintendent of Insurance of the state of Ohio in an unreported decision to be found in 72 O. S. 679. The facts in that case are practically on all fours with the one which you present in your inquiry. The relator company in that case had deposited securities in the amount of $30,000 with the superintendent of insurance by virtue of the provisions of 90 O. L. 157. Subsequently the act of 90 O. L. 157 was repealed, as to the requirement of a $30,000 deposit, by the act of 95 O. S. 81. This $30,000 deposit was by the former act required to be made by insurance companies "for the purpose of paying any judgment obtained against them in this state." To the petition for a writ of mandamus a general demurrer was filed by the then superintendent of insurance. The question raised in that case by the pleadings and the briefs of counsel was solely whether the repeal of the original provision requiring a deposit of $30,000 in securities impaired the obligation of contracts made by the Fidelity & Deposit Company with citizens of Ohio, liability upon which had not yet accrued or been reduced to judgment. The supreme court sustained the demurrer and dismissed the petition of the relator without reporting the decision.

I am of the opinion, therefore, under the authority of the above entitled case, that the amendment of April 26, 1910, of section 656 of the General Code is in contravention of section 28 of article 2 of the Constitution of Ohio, and section 10 of article 1 of the Federal Constitution in so far as it concerns contracts between the Ocean Accident and Guarantee Corporation and non-residents of Ohio, and it is my judgment, therefore, that you can legally surrender the securities constituting the deposit of $150,000 made by that company with your department only when it is made to appear to your satisfaction, as provided in section 656 of the General Code, that all debts and liabilities due to policyholders anywhere in the United States on the date of the passage of this bill

have been paid and extinguished, for it seems to me clear that the law as it existed prior to the amendment of April 26, 1910, became and still is a part of all contracts made during the time it was in force by and between the Ocean Accident and Guarantee Corporation and policy-holders not residents of the state of Ohio, and therefore, that the amendment of section 656, in so far as it affects such contracts, is unconstitutional and inoperative.

Yours very truly,

U. G. DENMAN,

Attorney General.

INSURANCE—CONSTRUCTION OF ACT IN 101 O. L. 147.

December 31st, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Pursuant to your written request I have reconsidered my former opinion relative to the operation and effect of the Act of April 26th, 1910, 101 O. L. 147 amending Section 656 of the General Code.

As pointed out in the former opinion, being the opinion of July 14th, 1910, the change in the section effected by this amendment relates to the withdrawal of deposits made to secure the payment of debts and liabilities due or to become due from a foreign insurance company other than life upon contracts made with persons not citizens or residents of the State of Ohio. The former law, by implication, prohibited the Superintendent of Insurance from delivering such securities to such a company unless he was satisfied that all debts and liabilities *which such deposit was made to secure* were paid and extinguished. The amended section permits the Superintendent of Insurance to authorize such a withdrawal when he is satisfied that all debts and liabilities which are due or may become due upon any contract or agreement made with any citizen or resident of the State of Ohio, are paid and extinguished.

The verbal distinctions between the two sections were pointed out in the former opinion, in which it was held that because the amendment might be deemed to authorize the withdrawal of a deposit, before the superintendent was satisfied that all the debts and liabilities which a deposit was made to secure, had been discharged, the amendment was "in contravention of section 28 of article 2 of the Constitution of Ohio, and section 10 of article 1 of the Federal Constitution in so far as it concerns contracts between The Ocean Accident and Guarantee Corporation and non-residents of Ohio."

I then further held that,

> "You can legally surrender the securities constituting a deposit of one hundred and fifty thousand dollars made (in 1907) by that company, (The Ocean Accident & Guarantee Corporation) only when it is made to appear to your satisfaction, as provided in section 656 of the General Code, that all debts and liabilities due to policy-holders anywhere in the United States on the date of the passage of this bill have been paid and extinguished."

And that,

> "The law as it existed prior to the amendment of April 26, 1910, became and still is a part of all contracts made during the time it was in force, by and between The Ocean Accident & Guarantee Corporation and policy-holders not residents of the State of Ohio,

> and, therefore, that the amendment of section 656, in so far as it affects such contracts, is unconstitutional and inoperative."

I am asked to reconsider the opinion for the purpose of stating more clearly whether or not the amendment in question does affect contracts with persons not residents or citizens of Ohio entered into prior to April 26th, 1910. Upon such re-consideration I am of the opinion that the amendment does not apply to such contracts and that the amended section does not authorize the withdrawal of deposits made prior to that date save upon conditions imposed in original section 656 of the General Code.

The general principle of statutory construction is "that a statute is to be taken or construed as prospective unless its language is inconsistent with that interpretation."

Lewis' Sutherland Statutory Construction, section 335.

It is true that at the time section 656 was amended, the original section was, in pursuance to the constitutional rule, repealed, and that there is nothing in the amended act expressly saving the rights of policy holders which had accrued prior to the date of the enactment of the amended section. It does not necessarily follow, however, that rights which had accrued under the old law are not to be regarded as protected under the new law.

The principle embodied in the above quoted authority is, in my judgment, sufficient in itself to sustain this view of the law. This principle, however, is in part supported by the express provision of section 26 of the General Code, formerly section 79 Revised Statutes, which provides in part that,

> "Whenever a statute is repealed or amended, such repeal or amendment shall, in no manner, affect pending actions, prosecutions or proceedings * * * nor shall any repeal or amendment affect causes of such action, prosecution or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

It is clear that by force of this section *all debts and liabilities* due at the time of the amendment of section 656 of the General Code, would continue to be afforded protection under the original law, which was *pro tanto* continued in force for that purpose without necessarily postponing the prospective operation of the amended section. It is necessary to have recourse to the general principle above stated only for the purpose of affording like protection to liabilities and debts to become due. That is, to such liabilities and debts as *have not become causes of action* prior to the amendment of the law.

In view, however, of the nature of this deposit as defined in the former opinion, and in view also of the existence of the principle above described, I am of the opinion that former section 656 is to be regarded as continuing in force, in spite of its express repeal, for the purpose of affording protection to citizens and residents of other states than Ohio who had entered into contracts with such companies prior to April 26th, 1910.

It is, therefore, my opinion that the amended law should be regarded as prospective only; that it is constitutional in every respect so far as its impairment of the obligation of contracts is concerned; and that original section 656 must still be regarded as in force as controlling the action of the superintendent of insurance with respect to authorizing withdrawal of deposits of foreign insurance companies other than life, made prior to April 26th, 1910.

Yours very truly,

U. G. DENMAN,

Attorney General.

INSURANCE COMPANIES OF OHIO MAY NOT OWN STOCK IN AN INSURANCE COMPANY OF NEW JERSEY.

May 28th, 1910.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — Your letter of this date is received in which you ask my opinion upon the following statement of facts and questions:

> "The Columbus Casualty Company, a corporation with a capital stock of one hundred thousand dollars divided into one thousand shares of one hundred dollars each, located in Columbus, is transacting a general casualty insurance business. An examination of this company's books discloses that 316 shares of its stock have been exchanged for like shares of stock in the Columbus Securities Company, a New Jersey corporation, organized for the purpose "of purchasing, holding, selling, assigning, transferring, mortgaging, pledging, or otherwise disposing of the shares of the capital stock of the Columbus Casualty Company."
>
> "In January, 1910, John R. Horst, Frank Shinn and S. D. Hutchins were appointed trustees of The Columbus Casualty Company to receive from stockholders of such company shares of stock to be deposited by such trustees as security for $26,000.00 to be borrowed by two directors of this company individually and donated by them to the company to make good an impairment of that amount. Stock of the par value of $65,000.00 was so pledged under this arrangement and the money borrowed, which is still unpaid. Recently these stock certificates were cancelled and a new stock certificate was issued for 650 shares in the name of W. U. Cole, who was neither a trustee nor a maker of the note, and such stock is now held by a New York Bank as security for the payment of such note.
>
> "In view of your opinion to this department under date of January 19th, 1910, I would be pleased to have your advice as to the legality of this transaction."

Confirming my opinion heretofore rendered to you as of January 19th, 1910, I beg leave to say that, in my opinion, the ownership of the stock of the Columbus Casualty Company by the Columbus Securities Company, a New Jersey corporation, is contrary to the statutes of this state and illegal, and that, therefore, the stock of the Columbus Casualty Company now held by the Securities Company should be transferred to its original owners, and the stock of the Securities Company now held by them in exchange for their Casualty Company's stock should be surrendered to the Securities Company.

It appears from the statement in your letter that the $65,000 of the Columbus Casualty Company stock therein referred to was never, in conformity to our former opinion of January 19, 1910, assigned to John R. Horst, Frank Shinn and S. D. Hutchins, the trustees appointed by the Columbus Casualty Company to receive from stockholders of such company the shares of stock to be deposited by such trustees as security for the $26,000 to be borrowed by them and donated to the company to make good the impairment of that amount, but that said shares of stock were assigned in blank, and a certificate therefor has been issued to W. U. Cole.

I am of the opinion that the Columbus Casualty Company, in view of the condition upon which such stock was so assigned in blank, to-wit, that a certificate therefor should be issued to the above named trustees for the aforesaid purpose, should not have issued the certificate for $65,000 of its capital stock to Mr. Cole, and said stock should be transferred by Mr. Cole to the aforesaid trustees, and the renewal of, or further negotiations in connection with the loan of $26,000 heretofore made on such stock should be conducted and made in the name of such trustees.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

SUPERINTENDENT OF INSURANCE — CERTIFICATE ISSUED TO NEWSPAPER — EFFECT OF.

A certificate issued by the superintendent of insurance certifying that paper is of general circulation is conclusive evidence of that fact.

July 30th, 1910.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — Your letter of July 27th is received, enclosing affidavit of Agnew Welsh, Editor and owner of the Ada Record, and requesting my opinion upon the following statement of facts:

> "The Ada Record on September 13, 1905, filed in this department an affidavit showing it had at that time a bona fide circulation of 800 in Hardin county and was authorized to publish notices required by section 284 R. S. Recently allegations have been made that it does not have such circulation and its right to publish certificates of compliance of insurance companies under the provisions of said section has been challenged.
>
> On July 18th, the editor and owner of said paper filed with this department an affidavit, a copy of which is enclosed. In the issue of July 20th, certificates of compliance were published in said Ada Record. Please advise if these publications are legal."

In reply thereto I beg leave to submit the following opinion:
Section 648 of the General Code reads as follows:

> "Annually, and before the time of making its report to the superintendent of insurance as hereafter provided, such company or association shall publish its certificate of compliance in every county, where it has an agency, in a newspaper published and of general circulation in such county."

Section 649 of the General Code reads as follows:

> "No newspaper shall be deemed to be a newspaper of general circulation as defined in the preceding section unless it has been established for at least one year, is printed in the English language

and has a circulation in the county in which it is published as follows: In a county having at the last preceding federal census a population not more than thirty thousand, six hundred; in a county having a population of over thirty thousand and not more than fifty thousand, eight hundred; in a county having a population of over fifty thousand and not more than one hundred thousand, twelve hundred; in a county having a population of over one hundred thousand, and not more than one hundred and fifty thousand, two thousand; in counties having a population of more than one hundred and fifty thousand, three thousand."

Section 650 of the General Code reads as follows:

"Before publication of any such certificate the manager, editor or proprietor of a newspaper shall certify under oath on a prepared blank, furnished him on application by the superintendent of insurance, the information prescribed in the preceding section, and if such affidavit shows that such newspaper is one of general circulation under the provisions of such section, the superintendent shall deliver to him a certificate that such newspaper is one of general circulation, as defined by the preceding section."

Section 652 of the General Code reads as follows:

"If any such company or association fails to comply with the laws relating to the publication of such certificate, the superintendent shall suspend its authority to do business in any county where such publication has not been made, until such publication is made; provided that if it appears that through mistake or oversight such publication has not been made in any county, such authority shall not be suspended in such county if such publication is made within a time designated by the superintendent".

Section 653 of the General Code reads as follows:

"Publication in a newspaper shall not be approved by the superintendent of insurance unless prior to such publication he has certified that such newspaper is one published and of general circulation in the county, but if publication has been made in any such newspaper without such certificate and a report as herein provided filed and such certificate of the superintendent is procured within such time as he designates, publication in such newspaper shall be approved. The superintendent shall keep a book in which shall be recorded the names of the newspapers so certified as newspapers of general circulation, which book shall be open to inspection, and every such certificate of circulation shall remain in force until revoked, provided that whenever he deems proper the superintendent may demand further certificates as to the circulation of any such newspaper."

It seems clear from a reading of the above quoted provisions of the General Code, that insurance companies have complied with the requirement in regard to the publication of their certificates issued by you to them as authority to transact business in this state, when they have caused such publication to be made

in a newspaper, the editor or proprietor of which holds at the time of such publication a certificate issued by you that such newspaper is one of general circulation, as defined by section 649 of the General Code. In other words, I am of the opinion that such a certificate issued by you to the editor or proprietor of a newspaper that such paper is one of general circulation, as defined by section 649 of the General Code, is conclusive evidence of the fact therein certified, and publication in such a paper constitutes a compliance with the above quoted provisions of the code; and I am further strengthened in this opinion by the fact that power is given to you by section 653, *supra*, to revoke such certificates of circulation, and by the further provision in that section that such certificates shall remain in force until so revoked. If, however, the affidavit required to be filed with you by the editor or proprietor of a newspaper under section 650, *supra*, should be found by you to be false, then, in my opinion, it would become your duty to revoke the same, but until such revocation, it seems clear that a newspaper holding a certificate of general circulation issued by you, is a proper medium for the publication required by section 648, *supra*.

Yours very truly,
U. G. DENMAN,
Attorney General.

INSURANCE—IMPAIRMENT OF CAPITAL OF COMPANY—HOW MADE GOOD.

Insurance Company whose capital becomes impaired may not make good such impairment by organizing holding company, transferring its stock to such company, and having such company borrow amount of impairment on stock so transferred; such plan contrary to policy of this state.

January 19th, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your communication of January 19th enclosing copy of letter from the attorney for the Columbus Casualty Company, also copy of notice of assessment of stock, and copy of form letter sent by the Columbus Casualty Company to its stockholders, also copy of purpose clause of proposed New Jersey holding company organized to hold the capital stock of the Columbus Casualty Company, is received.

In this letter you request my opinion as to whether the plan for making good the impairment of its capital should be authorized by you. In reply thereto I beg leave to submit the following opinion:

As shown by your letter and the enclosures therein the capital of the Columbus Casualty Company, an Ohio corporation, organized for the purpose of doing a casualty insurance business in this state, was found to be impaired to the amount of 26 per cent., and, under Section 274 of the Revised Statutes, you have heretofore made an order upon such company to make good such impairment within thirty days. They propose to do this by organizing a New Jersey holding company for the sole purpose "of purchasing, holding, selling, assigning, tranferring, mortgaging, pledging, or otherwise disposing of the shares of the capital stock" of this corporation. The stock of the Columbus Casualty Company, or, at least, 70 per cent. thereof, will then be transferred to such holding company in exchange, share for share, for the stock of the holding company, which is the same in amount as that of the Columbus Casualty Company. The holding company will then borrow the twenty-six thousand dollars of impairment, using.

the stock of the Columbus Casualty Company as collateral, and transferring the amount of such loan to the Columbus Casualty Company.

The plan as above outlined is, in my opinion, in contravention of the laws of this state. The only circumstances under which a private corporation may, in this state, purchase and hold shares of stock in other private corporations, are those outlined in Section 3256 of the Revised Statutes, which reads in part as follows:

> "* * * and a private corporation may purchase, or otherwise acquire, and hold shares of stock *in other kindred but not competing private corporations,* whether domestic or foreign, but this will not authorize the formation of any trust or combination for the purpose of restricting trade or competition."

The grant of this power given by the above quoted section, under the well-established rule of "enumeration and exclusion," prohibits corporations from acquiring stock in other corporations under any other circumstances. The rule also that a corporation may, by comity, transact such business in a foreign state as it is authorized to transact in the state of its domicile, has no effect in this connection, for it is well established that this comity does not extend so far as to permit a foreign corporation to exercise powers within this state which a domestic corporation of the same kind is not permitted to exercise under the constitution, laws or policy of this state. This proposition is well settled, both in Ohio and other jurisdictions.

State vs. Aetna Life Insurance Co. 69 O. S. 317.
Falls vs. U. S. Savings Loan, etc. Co. 97 Ala. 417.
Iowa Land Corporation vs. Secretary of State, 76 Mich. 162.
White vs. Howard 46 N. Y. 144.
Clark vs. Ga. Central R. etc. Co., 50 Fed. 338.

The legislature has, by the enactment of the above quoted section, evidenced the policy of this state in regard to the holding by private corporations of stock in other private corporations, and as the proposed New Jersey holding company is not a corporation "kindred but not competing" with the Columbus Casualty Company, I am of the opinion that the contemplated transfer of its stock to such holding company by the Columbus Casualty Company would be in contravention of the laws of this state and, therefore, that you should not sanction the plan as above outlined by said company for restoring such impairment.

I enclose herewith papers submitted with your letter.

Yours very truly,
U. G. DENMAN,
Attorney General.

INSURANCE SUPERINTENDENT—LAWFUL EXPENSES OF EMPLOYMENT OF EXPERTS.

Superintendent may pay out of contingent fund proportion of compensation of expert employed by committee of insurance commissioners to value all securities held by insurance companies in United States December 31, 1909.

March 31st, 1910.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of March 28th is received, in which you request my opinion on the following statement of facts:

"The National Convention of Insurance Commissioners, through its committee, employed Mr. Marvin Scudder to appraise all securities held by all insurance companies doing business in the United States on December 31st, 1909. The contract price for this work was $5,000.00. It was agreed that each of the Commissioners of the various states would contribute what he could officially to this fund. I agreed to contribute one hundred dollars ($100.00) upon condition that the same could be legally paid from the contingent fund of this department. My own judgment is that it can be so legally paid, but I prefer to have an expression of your opinion upon the subject before paying it. The valuations furnished by Mr. Scudder were of inestimable value in auditing the annual statements of companies doing business in this state and saved a great amount of time and correspondence, and I think the $100.00 would be well spent..

In reply thereto I beg leave to submit the following opinion: Section 269 R. S. O. reads in part as follows:

"* * * The superintendent may employ from time to time such other clerks as the prompt dispatch of business requires; and he may also from time to time, employ skilled and competent persons to examine the business and affairs of insurance companies and report thereon."

Under the above quoted provision of this section you are empowered to employ, and therefore to pay, skilled persons "to examine the business and affairs of insurance companies and report thereon."

By sections 272, 274, 275, 277, 3605, 3639, and other sections of the insurance laws of this state, it is made your duty to ascertain the value of securities in which the funds of insurance companies are invested. You would, therefore, be authorized by the above quoted provision of section 269 to employ, and compensate, experts to make such valuations, and I am of the opinion that the payment of the one hundred dollars, proposed to be made by yourself, to apply on the compensation of Mr. Scudder for his printed report of valuations of securities held by insurance companies, fixed as of December 31, 1909, comes within the power given you by said section 269 R. S. O., and that, therefore, you are authorized to pay the same ($100.00) from the contingent fund of your department.

Yours very truly,

U. G. DENMAN,

Attorney General.

INSURANCE — AGENTS — VENDING POLICIES BY AUTOMATIC POLICIES.

Insurance policies may be sold by means of automatic vending machines if sample copies of policies displayed, and all persons in charge of such machines are licensed as agents.

May 3rd, 1910.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — Your letter of April 27th is received, in which you ask my opinion upon the follwing question:

The Automatic Vending Machine Company proposes to make a machine for the automatic vending of insurance policies issued by

established casualty companies. The machine is operated by the prospective purchaser stepping on the platform of the machine, depositing a nickel and pushing down a lever, when the machine dates (day of year, hour and minute) both the policy and coupon attached thereto, cuts it off and delivers it. The purchaser then writes his name and address and the name and address of his beneficiary on the coupon, detaches it and deposits it in a suitable receptacle in the machine, thereby making application and accepting the policy contract. A policy is conspicuously shown on the front of the machine so that the purchaser knows beforehand exactly what he will receive.

Query: Is this proposed method of selling policies of accident insurance contrary to the laws of this state?

In reply thereto I beg leave to submit the following opinion:

Section 644 of the General Code (Sec. 283, R. S. O.) reads as follows:

"No person, company or corporation in this state shall procure, receive or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and unless duly licensed by the superintendent of insurance."

You will note that the language of the above quoted section is not restrictive in the same sense that it in any way limits the methods by which insurance agents shall solicit and sell such insurance, but merely requires that they shall be licensed. In other words, this section does not say that the business of insurance can only be transacted by means of and through licensed agents, but merely requires that a person, firm or corporation which procures, receives or forwards applications for insurance in any company or companies not organized under the laws of this state, shall be licensed by you.

As I view the matter, such an automatic vending machine is not an agency for the procuring of applications for insurance, but is rather a method or instrumentality by means of which the agents of such companies procure such applications, and its only office is to obviate the personal solicitation of such agents heretofore customary in the making of insurance contracts.

I am, therefore, of the opinion that this proposed method of vending policies of accident insurance is not contrary to the insurance laws of this state, but such machines must display sample copies of the policies which they contain in such a manner as that all of the terms and conditions of the same may easily be read by the person purchasing such policy before depositing the coin in the machine.

I am further of the opinion that all of the persons having charge of such machines, or having any part in the placing of policies of insurance therein, or the taking of money therefrom, and the forwarding of policy stubs, etc., to insurance companies, must be properly authorized as agents of such companies, as provided in section 644 of the General Code.

I enclose herewith papers submitted by you with your letter.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Superintendent of Banks.)

Banks may not establish branches outside of municipality in which principal located.

January 21st, 1910.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you ask me for an opinion as to whether or not branch banks are permitted under authority of an act "Relating to the organization of banks and inspection thereof," 99th Ohio Laws 269.

In reply thereto, I beg to say that there is no provision contained in this act expressly conferring upon banks the authority to establish branch banks. Sections 3 and 36 of said act make reference to a bank's "principal place of business," from which the inference may be drawn that there may be branch banks. Whether this inference is sufficient authority for the establishing of branch banks under this act is very questionable. In fact, this inference is overcome by the provision contained in section 96 of the act in defining the duties of the superintendent of banks as follows:

> "He shall also ascertain if any such corporation, company, society or association is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation."

Corporate powers rest in the state and that the legislative enactments conferring corporate powers are to be construed strictly is well settled. The business of a corporate bank is, in many respects, distinctly different from the business of an ordinary commercial corporation. While the analogy between federal and state banks is not complete, it is instructive upon this point to state the fact that while the federal banking laws do not expressly prohibit branch banks, yet the Government has always construed such law as not authorizing the establishing of branch banks and in this holding has not been successfully challenged. From these considerations I am inclined to the opinion that branch banks may not be established under authority of the act inquired about.

Yours very truly,
U. G. DENMAN,
Attorney General.

BANKS AND BANKING—OUTSTANDING MORTGAGES MUST BE LISTED AS LIABILITY OF BANK.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit for my opinion thereon the statement of facts and inquiry referred to you by Mr. R. S. Holbrook, of Toledo, as follows:

> In 1907 The Continental Trust & Savings Bank Company of Toledo bought from the Rendrag Building Company its bank building, assuming as part of the purchase price therefor two mortgages

which were at the time outstanding upon the property. Later the building company, for a valuable consideration to it from the bank, adopted a resolution formally releasing the bank company from any and all personal liability incurred by it accepting the deed for said property in which was contained the express provision that the bank assumed the payment of said mortgage.

The inquiry is then made as to whether or not these outstanding mortgages are such liability of the bank as that the bank is required to list them on its books as a liability.

In the deed conveying the property to the bank it assumed the payment of the two outstanding mortgages thereon. The right of the mortgagee to foreclose is not disturbed by reason of this or other subsequent transfers of the equitable interest; it follows the property. Since the purchase of the property by the bank it has held an equity in the property. The fact that there may be no privity of contract between the mortgage and the bank will not be a good defense on the part of the bank to prevent the sale of the bank building under foreclosure proceedings.

Assuming that the resolution adopted by the Rendrag Building Company gives to the banking company the right to look to the building company for reimbursement in case of foreclosure, does not, in my opinion, exempt the bank property from liability for the payment of these mortgages. The mortgagee does not have to specially recognize the liability of the bank property for the satisfaction of the mortgage in case of transfer of the equity therein.

The resolution is doubtless intended in good faith to absolve the bank from liability under the mortgage, but that will not save the bank building in the foreclosure proceeding in the first instance in case of failure on the part of the building company to satisfy the liability prior thereto, even though as above said the bank may seek reimbursement from the building company under the terms of said resolution.

The rule laid down in the case of Trimble v. Strother 25 O. S. 378 that in an action to recover a debt in which A. may have agreed with C. to pay B. a debt which C. owed to B., and in which it would be a good defense to show that before B, assented thereto or acted on the phomise made in his favor, the agreement had been rescinded, is not, in my opinion, wholly decisive of the question here because of the liability in rem as heretofore stated.

I, therefore, conclude that the books of this bank and its report should show that this mortgage liability still continues as against the bank property, but such books need not show such mortgage indebtedness as a personal or direct liability against the banking company because under the resolution above spoken of and the authority of 25 O. S. 378 the bank has been relieved of such personal liability.

Yours very truly,

U. G. DENMAN,

Attorney General.

BANKS NOT HAVING ELECTED TO OPERATE UNDER THOMAS BANKING ACT MAY NOT CHANGE CORPORATE NAME TO END WITH WORD "BANK" AFTER APRIL 1, 1910.

February 4th, 1910.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you inquire if a banking company incorporated under the general savings and loan association laws of

this state, and not having elected to avail itself of the privileges and powers conferred upon such banks by an act "relating to the organization of banks and the inspection thereof," passed May 1, 1908, may change its corporate name so that such name shall end with the word "bank" or name other than the word "company."

In reply thereto I beg to say that section 3997 Revised Statutes directs the Secretary of State, before filing the same to refer articles for the incorporation of such banks to the Attorney General for his approval thereof, provided, "the same are in conformity to law and sufficient."

To be in conformity to law such articles, as to the name of the corporation, should comply with the provision of section 3236 Revised Statutes, which requires that the name shall begin with the word "The" and end with the word "Company."

Section 1 of the act of 1908 provides that the name of such corporation shall begin with the word "The" and end with the word "Bank" or "Company." But the provision of this section is not available to the bank inquired about for the reason that it has not elected to come under the privileges and powers conferred by this act as per section 36 thereof.

In my opinion such proposed change may not be made in the corporate name prior to April 1, 1910.

Yours very truly,
U. G. DENMAN,
Attorney General.

COMMERCIAL PAPER—WHAT CONSTITUTES INDORSEMENT—INDORSEMENT MUST BE ON OR ATTACHED TO PAPER.

November 21st, 1910.

HON. F. E. BAXTER, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to me for an opinion thereon the following inquiry:

> "The question is raised as to whether or not a separate assignment of a mortgage note and deed, instead of the actual indorsement on such note or mortgage, is sufficient and binding, and I therefore beg to submit the matter to you for an opinion."

In reply thereto I beg to say that "indorsement," strictly speaking, means writing one's name on the back thereof.

Section 8136 General Code provides that,

> "The indorsement must be written on the instrument itself, or upon a paper attached to it. * * *"

Such indorsement of commercial paper which is secured by mortgage carries with it such security. In my opinion this statute does not contemplate separate assignments of commercial paper. When by reason of rapid circulation the instrument becomes filled with indorsements, the law merchant permits the holder to paste on a slip of paper for his own and subsequent indorsements. This is called an allonge. Norton on Bills and Notes, page 105; Daniel's on Negotiable Instruments, Vol. I, section 666, etc. Evidently the legislature has expressly declared this rule in said section 8136 General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

BANKS AND BANKING—MAY BE REGISTRAR OF OHIO CORPORATION.

July 25th, 1910.

MR. F. E. BAXTER, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you inquire if a bank organized and operated under the "Thomasc Banking Ace" may serve as registrar for an Ohio corporation's stock.

In reply thereto I beg to say that if such bank confines itself exclusively to that of registrar for an Ohio Corporation, and thereby not encroaching upon the function of banks and trust companies nor in any way involving the faith and credit of the bank, I am of the opinion that an Ohio bank may act as registrar in a clerical capacity for an Ohio corporation's stock.

Yours very truly,

U. G. DENMAN,
Attorney General.

SUPERINTENDENT OF BANKS—WHEN MAY TAKE POSSESSION FORTHWITH OF A BANK.

Sections 729, 730 and 731 General Code construed. Superintendent of Banks—powers. Banks—liquidation of.

October 12th, 1910.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication of the 5th inst. is received in which you submit to me for my opinion thereon the following inquiry:

> "Would I be justified, under the law, in permitting the voluntary liquidation of a bank in the event it is known to me that there is an impairment of its capital stock?

In reply thereto I beg to advise that under the provisions of sections 729, 730 and 731 of the General Code the Superintendent of Banks is authorized to take possession of the property and business of any banking corporation within this state when either of the following two conditions exist: First, when the officers of any such corporation, company, society or association refuse to submit the books of said institution to the Superintendent of Banks for examination or to be examined on oath touching the affairs of such institution. Second, when such corporation, company, society or association refuses or fails, after written notice, to make good any deficiencies appearing or found to exist by the Superintendent of Banks.

When either of these conditions exist the Superintendent of Banks may "forthwith take possesion of the property and business of such corporation, company, society or association until its affairs be finally liquidated by him," as provided in sections 731 and 742, etc., of the General Code. Nothing short of an abiding faith in the efficiency and the discretion of the Superintendent of Banks and Banking, present and prospective, would have prompted the legislature to have conferred upon such officer these summary powers.

Under these statutes the Superintendent of Banks, in the exercise of his sound discretion, is to determine the condition of the bank at the time when

he will be justified as such officer in "forthwith" taking possession of the bank for the purpose of liquidating its affairs. No fixed rule can be laid down in this connection. I think it is fair to assume, however, that banks are not disposed to voluntarily admit inability to continue to do business, but if a bank does enter into voluntary liquidation prior to said bank having reached that place in its course towards insolvency at which the Superintendent of Banks feels justified in taking possession "forthwith," then, under the statutes, I do not find the power vested in the Superintendent to interrupt or prevent such voluntary liquidation.

Yours very truly,
U. G. DENMAN,
Attorney General.

BANK MAY NOT PURCHASE OWN STOCK.

December 22nd, 1910.

HON. F. E. BAXTER, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication is received submitting to me for opinion thereon the following inquiry:

> May a bank legally purchase and own its own capital stock, and if so, may it use its entire surplus fund toward payment of said stock?

In reply thereto I beg to say that the decided weight of authority is against the existence of the power in a corporation to traffic in its own stock unless conferred by express grant or clear implication. No such grant is conferred upon corporations in this state.

Section 9684 of the General Code contains the inhibition that,

> "No banking company shall be the holder or purchaser of any portion of its capital stock, * * * unless such purchase be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure its payment, independent of any lien upon such stock. * * *"

While this section was originally enacted as a part of the free banking act, yet its general terms furnish reason for its application to all banks. Furthermore, for a bank to traffic in its own stock at pleasure seems to be inconsistent with the principles of the present constitution, Article 13, section 3, which reads as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than from the unpaid stock owned by him or her."

Clearly the language of this section does not contemplate the ownership of its own stock by a corporation. If a corporation can buy one share of its stock at pleasure it may buy every share, and if this should be the case there is no provision for the benefit of the creditors. This would not be the security to which the constitution invites the creditors of corporations.

I am, therefore, of the opinion that both branches of your inquiry should be answered in the negative.

Even if the first branch of your inquiry were to command an affirmative answer there would still be the limitation on the disbursement of the surplus fund as contained in section 9735 General Code as follows:

> "* * * Before any such dividend is declared, not less than one-tenth of the net profits of the company for the preceding half year, or for such period as is covered by the dividend, shall be carried to a surplus fund until such fund amounts to twenty per cent. of its capital stock."

Yours very truly,
U. G. DENMAN,
Attorney General.

BANK MAY AMEND ARTICLES OF INCORPORATION AND INCREASE OR DECREASE AUTHORIZED CAPITAL STOCK, AS SOON AS REQUISITE AMOUNT OF CAPITAL STOCK IS SUBSCRIBED—PROCEDURE.

August 24th, 1910.

HON. F. E. BAXTER, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 18th requesting the opinion of this department upon the following question:

> Articles of incorporation of a banking corporation organized for the purpose of establishing a savings bank and trust company have been filed with the secretary of state, but the amount of capital stock required by statute for such company has not been subscribed and paid in. The incorporators of the company now desire to surrender the power to establish and maintain a trust company, and to reduce the authorized capital stock from one hundred thousand ($100,000) dollars, as originally contemplated, to fifty thousand ($50,000) dollars, and to acquire instead of the power to establish a trust company, those of establishing a commercial bank and a safe deposit company.

You request my opinion as to the power of the incorporators to do this, and the procedure, if any, by which the same may be accomplished.

The General Code, Sections 9703 and 9714 inclusive, provide for the preliminary organization and the corporate government of banking corporations. Without quoting specifically from these statutes I deem it proper to say that the authorized capital stock to which the incorporators desire to reduce is sufficient for companies of the type which they desire now to organize.

The sections above referred to provide a method of organization similar to but exclusive of the general statutes regulating the incorporation of companies. Section 9714, however, provides that,

> "In all other respects such corporation shall be created, organized, governed, conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

The chapter relating to the organization of banks provides for a reduction of capital stock (Section 9726 General Code),

> "In the manner provided for other corporations, but notice of such reduction shall be published in a newspaper of general circulation in the city, village or county in which it is doing business."

See also Section 9743 General Code authorizes a banking corporation to

> "engage the objects or purposes for which it was formed, so as to combine one or more of the different classes of business herein authorized with that for which it is already incorporated * * * to diminish the objects or purposes for which it was formed, * * * by amendments to its articles of incorporation in the manner provided for other corporations."

The foregoing sections, in my opinion, authorize a banking corporation organized as a going concern to change the objects of its incorporation by amendment to the articles, and to reduce its capital stock so long as such reduction does not violate the requirements of the banking law. Whether a company which is not fully organized and doing business may take such action, however, depends upon the provisions of the general incorporation act referred to and adopted by the provisions above quoted.

Section 8700 General Code provides for the reduction of capital stock by general corporations. It is in part as follows:

> "With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all shares thereof and issue certificates therefor. * * * A certificate of such action shall be filed with the secretary of state."

Section 8720 General Code, relating to amendments to articles of incorporation, provides that the same may be made.

> "* * * at any meeting of the members or stockholders thereof, of which, and of the business to come before it, thirty days' notice has been given by a majority of the directors in a newspaper published and of general circulation in the county where the company's principal place of business is located, and by a vote of the owners of at least three-fifths of its capital stock tthen subscribed. * * *"

Section 8721 being in pari materia with Section 8720, provides that,

> "* * * A copy of such amendment with a certificate thereto affixed * * * signed by the president and secretary of the corporation * * * shall be recorded in the office of the secretary of state. * * *"

Section 8723 provides in effect that the notices required to be given to stockholders may be waived in writing by all the holders of capital stock.

It is apparent that in order to amend its articles of incorporation, the capital stock of a banking company must have been in part subscribed, a board

of directors must have been elected, and the company must have a president and secretary. So also in order to reduce the capital stock the company must have directors and officers.

It appears, under Section 9711 General Code, that the directors of a banking corporation may be elected "as soon as ten per cent. of the capital stock of such corporation is subscribed and paid in,"—that is to say, before the company can, under the provisions of Section 9720 General Code, certify that the corporation has complied with the law and can be authorized to commence business. As soon as the directors are elected they may, of course, elect officers.

Section 9711 which refers to subscribers to capital stock as "stockholders" is, in my opinion, to be read in connection with the above quoted sections of the general incorporation chapter of the General Code, so that such action as is required to be taken by "stockholders" may lawfully be taken by subscribers to the capital stock who have not yet actually paid in fifty per cent. of their respective subscriptions.

From all the foregoing it follows that if the incorporators of the bank in question so desire, they may, under their present name and powers, open books for subscription to their capital stock; when the required proportion of ten per cent. of the capital stock is subscribed they may organize and elect directors and officers, thereupon they may follow the above outlined procedure to amend their articles of incorporation and to reduce the capital stock of the company. It is to be noted, however, that the amendment of the articles of incorporation must precede the reduction of capital stock. All these steps may be taken before the company is authorized by the superintendent of banks to commence business, but can be taken only in the order above indicated. Each one of these steps is necessary in order to effect the purpose of the incorporators. I may state that the incorporators may, of course, surrender their articles of incorporation and procure new ones if this is desired.

The inquiry is also submitted as to whether the name of a banking company may be changed by amendment to the articles of incorporation. It will be observed that, while Section 9743 above quoted does not refer to a change of name, Section 9714, also above quoted, provides that the corporation shall be governed except as otherwise provided by the general incorporation act.

Section 8719 General Code, being a portion of the latter act, provides that,

> "A corporation * * * may amend its articles of incorporation * * * so as to change its corporate name—but not to one already appropriated, or to one likely to mislead the public. * * *"

In my opinion, under the joint operation of the two sections last above cited, a banking corporation may change its name by amendment to the articles of incorporation. Such action may be taken at the same time, in the same manner, and under the same certificate as above described with reference to changing the objects of the incorporation.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

(To the Adjutant General.)

OHIO NATIONAL GUARD—POSTAGE INCURRED BY ADJUTANT GENERAL'S DEPARTMENT FOR MAINTENANCE OF, MAY BE PAID OUT OF APPROPRIATION FOR MAINTENANCE OF OHIO NATIONAL GUARD.

December 9th, 1910.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 6th, requesting my opinion as to,

> "Whether the cost of postage incurred by this department for maintenance of the Ohio national guard can be paid out of funds alotted by the general assembly to the fund 'Maintenance Ohio National Guard.'"

You state that,

> "Heretofore postage has always been paid out of the 'Contingent Fund', but it has not been sufficient for the past six years to pay charges properly belonging to that fund."

The appropriation made by the last session of the general assembly for the use of the Adjutant General's Department includes the following item:

"Contingent Expense .....$2,000.00"

For the Ohio National Guard the following appropriation is made:

"Maintenance Ohio National Guard.....$263,000.00."

This latter appropriation is in pursuance of the authority set forth in Section 5266 of the General Code, which is as follows:

> "The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section (and known as the 'State Military Fund'). Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio national guard fund.'"

The authority to disburse the fund known as "Maintenance Ohio Nattional Guard" is found in Section 5267 of the General Code, which provides as follows:

> "From the 'maintenance Ohio National Guard fund' the adjutant General shall pay the per diem, transportation, subsistence, and incidental expenses of militia companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage of horses, and medical supplies."

It will be noted that postage on correspondence conducted by the Adjutant General in matters in connection with the National Guard, is not specifically enumerated in this section.

Section 82 of the General Code provides that,

"The Adjutant General shall be in control of the military department of the state."

Section 146 of the General Code provides that,

"By virtue of his office, the adjutant general shall be superintendent of the state house."

It will thus be seen that the Adjutant General is charged by law with the performance of two kinds of duties. The specific duties devolving upon him on the military side of his office, so to speak, are enumerated in the title pertaining to the organization of the militia. Among these provisions, and typical of them is the following, being a portion of Section 6310 of the General Code:

"The adjutant-general shall furnish to commandants, of regiments, battalions, troops, batteries, and unattached companies, blank forms of rolls, bonds, and returns required to be made to him. * * *"

This and other related provisions make it clear that the Adjutant General, in the exercise of his duties pertaining to the maintenance of the National Guard, must incur considerable expense for postage.

Upon careful consideration of the question thus presented, I am of the opinion that this is an item of expense of the Adjutant General's Department as such, and not an expense of the National Guard. It is an expense incidental to the discharge of a duty of the Adjutant General, and it is in no sense an expense of any militia company, within the meaning of Section 5267 of the General Code. Inasmuch as there is no other class of expenses enumerated in Section 5267 within which this particular expense could be, with any show of reason, included, the conclusion follows that postage of the Adjutant General may not be paid out of the "Maintenance Ohio National Guard Fund," although it is made necessary by the duties of the Adjutant General relating to the maintenance of the National Guard.

The contingent fund appropriated by the general assembly for the use of the Adjutant General's Department, is in my opinion, appropriated for this purpose.

Yours very truly,
U. G. DENMAN,
Attorney General.

OHIO NATIONAL GUARD CLAIM FOR DAMAGES NOT PAYABLE OUT OF MAINTENANCE FUND.

October 3rd, 1910.

COL. EDWARD T. MILLER, *Ass't Quartermaster General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 19th enclosing reports of survey in the matter of the claim of William Hurley for the killing of a horse belonging to him, and hired by your department for camp purposes at camp Judson Harmon, Marietta, Ohio. ou request my opinion upon the following question arising by virtue of the award of the surveying officer in this matter, viz.:

May the amount of this award be paid from the fund appropriated by the general assembly of the state of Ohio and known as "maintenance Ohio National Guard fund" or must the claim be satisfied by an appropriation specifically made by the general assembly as was the case prior to the enactment of the act known as the "State armory board law"?

Sections 5266 and 5267 of the General Code provide in part as follows:

"Sec. 5266. The general assembly shall appropriate annually * * * funds * * * known as the 'state armory fund' and 'maintenance Ohio National Guard fund.'"

"Sec. 5267. From the 'maintenance Ohio National Guard fund,' the adjutant general shall pay the * * * incidental expenses of camp, including horse hire, fuel, lumber, forage for horses and medical supplies."

In my judgment the phrase "incidental expenses of camp" as used in section 5267 is defined by what follows. The statutory principle known as the rule of *ejusdem generis* compels this conclusion. That is to say, other incidental expenses of camp aside from those enumerated must be of the same kind as those specifically referred to, viz., "horse hire, fuel, lumber, forage for horses and medical supplies"; the word "including" is thus made synonymous with the phrase "such as."

In view of the constitutional prohibition against paying any money out of the state treasury except in pursuance of a specific appropriation made by law, the above stated principle of statutory construction, and that which applies the rule of strict construction of grant of power to a public officer, I am of the opinion that a claim arising from the destruction of a horse or some other similar casualty is not an incidental expense of camp within the meaning of section 5267, and that such claims against the state must be presented to the General Assembly for satisfaction as in the past.

Yours very truly,
U. G. DENMAN,
Attorney General.

OFFICERS OF THE O. N. G. ENTITLED TO LONGEVITY PAY.

May 11th, 1910

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 10th in which you submit the following for my opinion:

Are the commissioned officers of the Ohio National Guard entitled to receive *longevity pay* which is allowed officers in the United States army?

I beg to call your attention to section 5292 of the General Code of Ohio which provides in part as follows:

"When in actual service, in case of riot or insurrection, or when called upon in aid of the civil authorities, *each commissioned officer*

*shall receive such sum per day for each day's service performed as is allowed commissioned officers of like grade in the army of the United State. * * *"*

To determine what compensation commissioned officers of the Ohio National Guard are entitled to it will be necessary to look to the federal statutes governing the compensation of commissioned officers of the army of the United States.

Section 1261 of the Compiled Statutes of the United States fixes the salary of certain commissioned officers of the United States army.

Section 1262 of the Compiled Statutes of the United States provides for service pay and is as follows:

> "There shall be allowed and paid to each commissioned officer below the rank of Brigadier General, including chaplains and others having assimilated rank or pay ten per cent. of their current yearly pay for each term of five years of service."

From sections 1261 and 1262 of the Compiled Statutes of the United States, an officer of the United States army who has had five years' service would be entitled to the compensation mentioned in section 1261 for his particular service, and in addition thereto ten per cent of his yearly compensation, and I am of the opinion that the compensation of a commissioned officer of the National Guard shall be governed by the same sections of the Federal Statutes. This is supported by a recent decision of the Supreme Court of the State of Indiana in the case of the State of Indiana v. Alvin W. Dudley, 91 Northwestern Reporter, 228, in which it was held that a statute which rovided that "each officer of the National Guard shall be entitled to pay at the same rate in every respect as the corresponding grades may at the time be entitled to in the United States army," and that an officer in the National Guard was entitled to the longevity pay provided in section 1262 of the Federal Statutes. However, I desire to call your attention to section 1263 of the Compiled Statutes of the United States which limits the total amount of such increase for length of service, and provides that no such increase shall exceed forty per centum of the yearly pay.

Yours very truly,

U. G. DENMAN,

Attorney General.

NATIONAL GUARD—ARMORY RENT—LIABILITY FOR RENT UNLAWFULLY PAID IN CERTAIN CASE.

July 11th, 1910.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 8th submitting additional information with respect to the liability of the National Guard Company located at Zanesville, Ohio, for armory rent under the following statement of facts:

> "On July 3, 1889, the county commissioners of Muskingum county leased to the trustees of the soldiers' and sailors' monumental association of Muskingum county certain real estate located in the

city of Zanesville, upon which a building containing a room used for armory purposes was then, and still is located."

This action, I presume, was taken in pursuance of the special act relating to the Muskingum county soldiers' monumental association, with a copy of which you have furnished me, and so far as I am able to see from examination of the act and the lease, the latter is in full compliance with the former.

In the description of the property thus leased is the following clause:

"Excepting from said premises herein described that part or portion of the building and real estate devoted to armory purposes and which shall be used for armory purposes only and now occupied for that purpose. And also excepting a certain room 71 feet in length and 38 feet in width now occupied by Hazlett Post G. A. R. which is to be a place of deposit for the safe keeping for the emblems and relics of the G. A. R. posts of said county perpetually and a place of meeting for said Hazlett Post number 81 so long as it shall have an existence,"

Since the date of this lease the militia company occupying said armory has been paying armory rent to the trustees of the Muskingum Monumental Association and to their agents.

Complying with your request for an opinion as to the question thus presented, I beg to state that the trustees certainly have no right to collect such rents, and the militia company has the right to occupy the room in question for armory purposes rent free, so far as the trustees are concerned. In other words, the trustees simply do not have any title to or interest in the armory room.

It would appear from the foregoing that in the future the militia company should refuse to pay armory rent to the trustees or their agents. Whether or not the moneys already paid can be recovered back is a doubtful question.

As I understand the law, the company, under section 3085 R. S., is entitled to money from the state known as "armory rent" only

"to pay the *necessary* rental and expenses of such armory each year, but before these sums are paid the (commanding) officer shall execute bond to the state of Ohio * * * conditional for the proper expenditure of the amount, and to account for any unexpended balance on hands."

Under this section it is clear that so far as the state is concerned the commanding officer of the local company is liable for the money unnecessarily paid out by him. The lease is clear and the officer should have had knowledge of its provisions. Unless there are circumstances of which I am unable to conceive which would excuse the commanding officers for paying rent under this lease they may be held liable therefor by the state.

Having regard to the question of recovery by the officers from the trustees of the money paid for armory rent the following are the possible facts:

1. The commanding officers may have been ignorant of the exact terms of the lease and may have made these payments under a mistake of fact as to the same.

2. The commanding officers may have had full knowledge of the terms of the lease and knowing the same have voluntarily paid the various installments of rent, either in ignorance of the legal effect thereof or in disregard of the same.

The law in this state is, that payments made under mistake of fact may be recovered regardless of the ignorance of the mistaken party giving rise to the mistake; this is especially the case where, as under the facts submitted by you, the payment is absolutely without consideration. On the other hand, in this state, payments made voluntarily with a full knowledge of the facts and through a mistake or a disregard of the law cannot be recovered back and this principle applies both to private individuals and to public agencies.

(See Vindicator Printing Co. v. state 68 O. S. 362.
Ottawa Co. v. Auditor, 7 N. P., 400.
Broombaugh v. Chapman, 45 O. S. 368.
Railway Co. v. Iron Co., 46 O. S. 44.
Wolley v. Staley, 39 O. S. 354.

Yours very truly,
W. H. MILLER,
First Assistant Attorney General.

CONDEMNATION OF LAND FOR STATE RIFLE RANGE—PROCEDURE

April 15th, 1910.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 14th enclosing corrected copy of House Bill No. 320 which has been passed and approved, and requesting my opinion as to your powers and duties thereunder.

The act in question appropriates the sum of sixteen thousand dollars ($16,000.00) for the purchase of additional land for the State Rifle Range, designating the land to be purchased by particular description.

Section 3 of the act under which your questions arise, is as follows:

> "If, in the judgment of the Adjutant General, he is unable to purchase this tract of land, or any part thereof, at a reasonable cost to the state, it is further provided that for the purpose of carrying out the provisions of this act, the Adjutant General shall have the same power to appropriate such lands as has the Board of Public Works, or any member thereof, to appropriate property for a public necessity, as now authorized by law."

You state that, in your judgment, the amount appropriated is not a reasonable price for the land, and ask to be advised "as to the proper method to pursue,

> 1st. In endeavoring to negotiate with the owners at a reasonable price.
>
> Default of satisfactory negotiations the plan of procedure necessary to appropriate the land as provided for."

Answering your first question I beg to state that, in my opinion, the Adjutant General is empowered by this act to negotiate with the owners of this property, and, if possible, to purchase it at a reasonable price without observing any formalities whatever, just as if he were conducting his own private business.

Your second question assumes that the Adjutant General may be unable, by informal negotioations, to agree with the owners for the purchase of the property at a price deemed by him to be reasonable.

The above quoted section of the law provides that in the event of such failure to agree on price the Adjutant General shall have the same power to appropriate such lands as has the Board of Public Works to appropriate property *for a public necessity.*

In the first place it is clear to me that the procedure which the Adjutant General is thus directed to pursue need not be followed except upon failure of informal negotiations. The Board of Public Works is vested with power to appropriate lands in two different ways. One of these ways is that which must be followed by the Adjutant General in case he is unable to agree with the owners. The powers of the Board of Public Works to appropriate land and the procedure to be followed by them in making such appropriation, are prescribed in sections 435 to 454 inclusive General Code.

Sections 435 to 441 provide the method to be followed in case of "a public exigency. The distinguishing feature of this proceeding is that the board is given power to take possession of the lands in advance of any proceedings to determine the amount of compensation (Section 436).

I do not believe that in enacting House Bill No. 320 the present general assembly intended, by the employment of the phrase "for a public necessity," to refer to the powers of the Board of Public Works in case of a "public exigency." The term "exigency" has a signification quite different from that of the word "necessity." All appropriation proceedings must arise from *public necessity;* while it is only when the necessity is urgent and immediate that it becomes an "exigency."

I am, therefore, of the opinion that the procedure outlined in Sections 442 to 454 inclusive General Code is that which should be followed by the Adjutant General in case he is unable to agree with the owners upon a reasonable price.

Section 442 provides that,

> "When the board of public works deems it *necessary* to appropriate property in cases other than where a public exigency exists, the board shall make and subscribe a certificate which shall contain the following:
>
> 1. A full description of the property, the name of the owner, and a declaration of intention to appropriate such property for the state.
>
> 2. The amount of money which the board deems just and will pay as compensation for the property sought to be appropriated.
>
> 3. The date when proceedings will be commenced to appropriate the property if the owner fails within a time specified in the certificate to accept the compensation offered."

The certificate thus made out must be served upon all the owners of the property (Section 443.) The owners then have the time between service of the notice and the commencement of proceedings within which to accept the compensation named in the certificate (Section 444).

The court proceedings are commenced by filing a copy of the certificate with date and proof of service or publication, in the probate court of the county in which the property is situated (Section 445).

Sections 446, 447 and 448 provide for the impaneling of a jury, and the fixing of the date of the trial.

Section 449 provides the order in which testimony shall be produced.

Sections 450 and 451 provide for the compensation and payment of costs which are paid by the owner unless the board declines to make the appropriation on the ground that the compensation awarded is excessive, in which case the costs shall be paid by the state; in the case in question such costs would properly be payable out of the appropriation.

Sections 452 and 453 provide for special cases, and Section 454, for the fees.

By examining the sections above cited, and substituting in each section the Adjutant General for the Board of Public Works, you may inform yourself as to all the details of the proceeding.

If, at any time, you are satisfied that it will be necessary for you to avail yourself of the condemnation proceedings, I shall be glad to assist you in any way within my power.

Enclosure.

Very truly yours,

U. G. DENMAN,

Attorney General.

To the Various Appointive State Boards.

(To the Board of Health.)

MUNICIPAL LAW—BOARD OF HEALTH MANDATORY IN CITIES.

Sec. 187 M. C. construed, General Code 4404 construed.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

June 17th, 1910.

DEAR SIR:—Your communication is received in which you inquire, if, under the provisions of section 4104 of the General Code of Ohio, as enacted by the Ohio legislature at its session in 1910, it is necessary for all cities to have a board of health composed of five members.

In reply thereto I beg to say that this section as amended reads in part as follows:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office, etc."

Then follows the provision that in villages it is optional with the council thereof whether there shall be a board of health or a health officer. This section before amendment provided that the board of public service of such municipality should be the duly authorized board of health thereof. That is, the section provided that a municipality could have either a board of health consisting of five members or as a substitute therefor, the council might declare by ordinance that the board of public service of the municipality should act as a board of health therefor. The legislature amended this section to read as above quoted. We have a right to assume that the legislature intended to change the meaning of the statute in its amendment thereof, and this, together with the plain provision contained in the statute that, "the council of each municipality shall establish a board of health, etc.," and the elimination from the amended section of the optional provision as to a substitute board of health, makes it clear to my mind, and I am of the opinion, that it is now mandatory that all cities in the state of Ohio shall have a board of health composed of five members.

Section 139 of the Municipal Code as amended by the Paine law, 99 O. L. 563 provides as follows:

> "The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law and shall have all the powers and perform all duties conferred by law upon the directors of public service or the board of public service, except as otherwise provided by law."

Section 187 of the Municipal Code, as amended 97 O. L. 460, Bates Annotated Ohio Statutes, Sixth Ed., sec. 1536-723 provided in part as follows.

> "The council of each city and village shall establish a board of health; such board of health shall be composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall constitute a quorum; provided, that whenever the council of any city shall declare by ordinance that it will be for the best interests of said city, then upon the passage of said ordinance the board of public service of said city shall be the duly authorized board of health thereof, and shall have all the powers and perform all the duties prescribed by law for boards of health; and the mayor shall be president by virtue of his office."

Under section 187, as above quoted, this department held in September of last year that the board of public service became and was the duly authorized board of health in any city in which the council had passed an ordinance declaring it to be for the best interests of that city that the board of public service act as the board of health, and that under section 139, as quoted above from the Paine law, the director of public service who should be appointed pursuant to that law and take office on January 1, 1910, would have the powers and would be called upon to perform the duties of the board of public service that he would succeed, and that among these duties he would be in charge of the department of health. Such an ordinance as the one referred to, or authorized by old section 187, was passed in each of several of the cities of the state, and on January 1 of this year the director of public service, beginning with January 1, 1910, under section 139 of the Municipal Code, as amended in the Paine law, and herein above quoted, was vested with the powers and required to perform the duties of the former board of public service as a board of health. The law remained in this situation until the passage of the General Code and its approval on February 15, 1910. On this last named date section 4404 of the General Code took effect, and the former provision of old section 187, authorizing the council to pass an ordinance such as is referred to therein, was repealed, the same having been dropped from the section in the enactment of the General Code.

Looking now to the language of section 139, as amended in the Paine Law, and hereinbefore set out, I am of the opinion that since February 15, 1910, it is "otherwise provided by law", and that the director of public service does not any longer possess the powers, nor is he required to perform the duties heretofore conferred and incumbent upon former boards of public service where such declaratory ordinance had been passed. Since February 15, 1910, the date of the taking effect of the General Code, it has been mandatory upon council of each city to establish a board of health, composed of five members, to be appointed by the mayor, and confirmed by council, etc., pursuant to said section 4404 of the General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

TUBERCULOSIS HOSPITAL—COMMISSIONERS MAY PURCHASE LAND FOR SITE.

Sections 2433 and 3129 General Code construed. Commissioners—powers of.

May 9th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "Must a county tuberculosis hospital provided by the county commissioners under authority of sections 3139-3147, inclusive, of the General Code, (O. L. V. 100 p. 86) be located on land now owned and occupied for county infirmary purposes, or is it lawful for the commissioners, under authority granted in section 2433, General Code (R. S. 870) to acquire by purchase or otherwise, additional land for said hospital, contiguous to or distant from said lands used for infirmary purposes?"

In reply thereto I beg to say that sections 3139-3147, inclusive of the General Code make such tuberculosis hospitals a part of the county infirmary affairs of the county. If the land now owned by a county for county infirmary purposes is not of sufficient acreage to admit the convenient location thereon of the proposed tuberculosis hospital, then, in my opinion, the county commissioners may, under authority of section 2433 General Code, (R. S. Sec. 870) acquire by purchase or otherwise the necesary land, and it need not necessarily be contiguous to the land owned for infirmary purposes.

Yours very truly,
U. G. DENMAN,
Attorney General.

HEALTH OFFICER—STATE BOARD OF HEALTH—SECRETARY STATE BOARD OF HEALTH—GENERAL CODE SECTIONS 4427 AND 4432 CONSTRUED—OSTEOPATH—POWERS OF.

April 15th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "Has an osteopath, licensed under the laws of Ohio, authority to care for and treat cases of a contagious disease making the report to the local board of health as required by section 4427 of the General Code and the certificate provided for in section 4432 of the General Code?"

In reply thereto I beg to say that an osteopath whose preliminary education is such as is required by law of applicants for examination to practice medicine or surgery, and who has successfully taken the course and passed the examinations prescribed in sections 1288 to 1292 inclusive of the General

Code, is thereby authorized to practice osteopathy in this state; but such osteopath is, by section 1288 of the General Code denied the right to prescribe or administer drugs or to perform major surgery. As I understand osteopathy it depends entirely on the manipulation of the body for the cure of diseases. It administers no drugs. While the legislature has, subject to the limitations above set forth, recognized the practice of osteopathy in this state, it is evident that the question you present was not considered by the general assembly in the enactment of these statutes.

In section 4432 of the General Code is found the word "physician" as being required to make the report to the board of health, and the word "osteopath" is not found therein. But the absence of this word in the statute is not conclusive as to the answer to your inquiry. The statutes contain no prohibition against a person afflicted with any of the contagious or infectious diseases enumerated in section 4427 or section 4432 of the General Code from employing an osteopathic physician to treat them. Neither does the statute expressly deny to the osteopath the right to attempt such treatment, notwithstanding the fact that such osteopath is not authorized to prescribe or administer drugs or to perform major surgery; but the fact remains that if the course of study and examinations which qualify an osteopath to practice osteopathy in this state are not sufficiently comprehensive as to warrant his treatment of such contagious or infectious diseases and to make such report to the board of health as to the time when the quarantine may be lifted with safety to the public, as is provided in section 4432 of the General Code, the resultant liability rests primarily with the osteopathic physician.

If an osteopathic physician does undertake the treatment of such contagious or infectious disease, then it is his duty to make the report to the local board of health as required by section 4427 of the General Code and also the certificate provided for in section 4432, General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

HEALTH OFFICER — SECRETARY STATE BOARD OF HEALTH — POWERS OF RELATING TO TUBERCULOSIS. GENERAL CODE, SEC. 4413 CONSTRUED.

April 14th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I acknowledge receipt of your inquiry in which you state that,

> "There is a glove and shirt factory in a village of this state that employs some seventy or more girls and women, and six or eight men. The man who does the cutting for this factory has consumption, having had the disease for a year or more, and every piece of goods that is handled by these girls and women first passes through his hands. The man expectorates in various places about the factory, and has a severe cough, so that there is undoubtedly opportunity for infection."

You then inquire if the local board of health has authority to make an order which would prohibit the men referred to from continuing to work in this factory.

In reply thereto, I beg to say that this question so vitally important, is not without its perplexities. The principle involved herein is one so far reaching in its effect that I have given it the most careful consideration. The health of the community is of paramount importance, and if the law of the state will justify the making of such an order as this local board evidently desires to make, it is clearly my duty to so advise. The state of Ohio is rapidly coming to a full appreciation of the insidious spread of, and casualty caused by, consumption. This fact is evidenced by the legislature appropriating large sums of money for the establishment and maintenance at Mt. Vernon, Ohio, of a tuberculosis sanatorium for the treatment of those in the incipient stages of the disease.

It is admitted by our best medical authorities that in the association with a person in an advanced stage of tuberculosis the disease is infectious to a marked degree. It is the duty of local boards of health to guard the public at the source of the trouble.

In my opinion the legislature has so conferred this power on boards of health in the enactment of section 4413 of the General Code, as follows:

> "The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances, etc."

Every girl and man referred to in your inquiry is in the greatest danger of being infected with tuberculosis from this consumptive cutter, and through them the families from which they come, and the public. Therefore, an order of the local board of health prohibiting a person having consumption in the advanced stage from working under such circumstances as are described in your inquiry comes within the law as effecting the "prevention or restriction of disease."

> "The care of the public health, it has been held, is an important object, and laws conferring powers upon the agencies for its preservation should receive a liberal construction in order to effect an advancement of the ends and an accomplishment of the purposes for which they are established."
>
> Abbott on Municipal Corporations, Sec. 120.
>
> Blue v. Beach 115 Ind. 121.

I reach the conclusion that the board of health of a municipality within this state has ample authority to make an order that will prohibit the man complained of in your inquiry from working under the circumstances therein described, and which will apply with equal force to all similar circumstances within the jurisdiction of the board making such order. I am impressed with the fact that the enforcement of an order of this character may, in certain instances, work a seeming hardship as against the person amenable thereto, and therefore the order should be invoked and applied with the greatest judgment and discretion; but the protection of the "public health" is the first consideration, and the legislature has expressly provided agencies for such protection, even though it might mean the transposing of a person from a position of self support to that of a public charge.

Yours very truly,

U. G. DENMAN,

Attorney General.

BOARD OF HEALTH MAY NOT CHARGE PUBLIC WITH EXPENSE OF MORE THAN ONE DELEGATE TO NATIONAL CONFERENCE.

January 14th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the authority of local boards of health to pay the expenses of more than one delegate to annual conferences as provided for in an Act "To revise and consolidate the laws relating to the appointment powers and duties of the state board of health, etc.," 99 O. L., 495.

In reply thereto I beg to say that section 16 of said act provides that,

> "The said board of health may provide for one annual conference of representatives of city boards of health, another for representatives of village boards of health, and one or more for representatives of township boards of health, or make such other division of conferences as it deems best * * *."

Section 15 of the act provides that,

> "Each board of health or other body or person appointed or acting in the place of a board of health shall appoint a delegate to such annual conference. The city, village or township shall pay the necessary expenses of such delegate upon the presentation of a certificate from the secretary of the state board that the delegate attended the session of such conference."

It is the plain provision of this section 15 that the local health authority "shall appoint a delegate to such annual conference." Three times in this section has the legislature used the word "delegate" and each time in the singular number. It seems from this section that the necessary expenses may not be allowed to more than one delegate, and such is my opinion. Futhermore, as to the expenditure of public funds for this purpose this section is conclusive.

Very truly yours,
U. G. DENMAN,
Attorney General.

STATE BOARD OF HEALTH — POWER OF.

Officer may make and enforce local regulations subject to approval of State Board of Health.

September 23rd, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you inquire if under authority of section 4404 of the General Code the following order may be adopted by a health officer of a municipality and if the same is enforcible.

> "1. It shall be the duty of each householder, or, whene there is no one living on the premises, then of the property owner, within

the village of Bridgeport, between the first and twentieth days of June and between the first and twentieth days of August and between the first and twentieth days of September of each year, to cut or destroy, or cause to be cut or destroyed, all brush, briars, burrs, vines, Russian, Canadian or other common thistle, or other noxious weeds, growing on the premises occupied or owned by such householder or property owner."

"2. On failure of any householder or property owner to cut and remove the weeds from his premises, or destroy the same, as aforesaid, or cause the same to be cut and removed, or destroyed, the health officer will cause the same to be cut and removed or destroyed, and the cost of having the same so cut and removed or destroyed shall be recoverable in a civil action, together with the costs of such suit, from such householder or freeholder; and any one violating any of the provisions of this order shall in addition be fined on conviction, not more than $50.00, nor less than $5.00."

Said section 4404 provides that,

"But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Subject to the aforesaid limitations on the powers of the health officer appointed under this section, he shall have all the power that a board of health would have if established in such village.

Section 4416, General Code, provides that,

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances."

In my opinion this section confers upon such health officer the power to make and enforce the requirements contained in section 1 of said order. Section 2 of the penal provision of the order is questionable for the reason that section 4414 of the General Code provides that,

"Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for

> the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense."

It will be seen from this that the legislature has fixed the penalty for violations of such orders and regulations as are made by a board of health or health officer. The legislature has the full power to do this. The penalty provided by the legislature and that proposed in the aforesaid order are dissimlar. For instance, the fine in the statute is not to exceed $100 with no minimum fine provided, but the order under consideration has a minimum fine of $5.00. In my opinion section 2 of the order cannot prevail against the different provision of the statute treating with the same subject matter. In fixing the penalty in the statute the legislature evidently intended that municipalities should be guided thereby and, hence, the result would be uniformity.

I, therefore, suggest that the provisions contained in section 2 of the order be either eliminated entirely therefrom or that said section 4414 be substituted for said section 2, changing the language in the first two sentences thereof to read as follows: "Whoever violates any provision of this order, or obstructs or interferes with the execution thereof or wilfully or illegally omits, etc."

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF HEALTH — POWER THEREOF.

Municipality may compel sewer connection under certain circumstances.

October 6th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your communication is received, in which you submit for my approval thereon, the following inquiry:

> "Has the council of a city or village where a system of sewers has been provided, the authority to adopt an ordinance or a resolution requiring that all properties accessible to the sewerage system be connected whether or not said properties are already provided with private sewers sufficient for drainage purposes?"

Under the provisions contained in our statutes relating to assessment, a definite answer cannot be given to your inquiry for the reason that in each particular instance the obligation of an abutting property owner to make connection with the municipal sewer system will depend upon the inefficiency of the private system.

Section 3813, General Code, provides that:

> "Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of a municipal corporation may assess upon the abutting, adjacent and contiguous or other specially bene-

fited lots or lands in the corporation, any part of the entire cost of and expense connected with the improvement of any street * * * sewers, drains, water courses * * * by one of the following methods, etc., * * *"

Section 3819 of the General Code provides that:

"The council shall limit all assessments to the special benefits conferred upon the property assessed * * *. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith."

Our courts have had occasion many times to construe these sections and in each instance seem to have reached the conclusion that in order to justify special assessment or cost to the property owner, some special benefit must be given in return by the city.

City of Cincinnati v. Hess et al, 9 O. C. C. 252.

But in order to exempt the lot owner from the duty of connecting with the city sewer system, and incur the expense incident thereto, the lot must, either as a result of natural drainage or by privately constructed artificial drainage, be kept and maintained so far as its drainage is concerned in a manner substantially equal in comparison to that afforded by the city, and the municipal authorities are to be the judge of the efficiency of the provate sewer. Courts will not interfere with the discretion given municipalities in this connection unless the same is flagrantly misused. The controlling object of a sewer system with a municipality is to promote the health and comfort of its citizens. It is a public question, and the manner of drainage in each instance is to be passed upon by public officials, subject, of course, to judicial restraint. These conclusions are supported by many authorities, part of which are as follows:

Johnson et al v. Avondale, etc., 1 O. C. C. 229.
Toledo v. Railroad Co., 4 O. C. C. 113.
Stanley v. Cincinnati, 1 O. N. P. (New Series) 235.

The "local drainage" contemplated by section 3819, General Code, is:

"That which provides the lot or land with adequate drainage for the necessary and usual purposes of sewerage; and it is not enough to entitle the lot or land to exemption from assessment, that it is provided with sufficient surface drainage, or does not need drainage of that kind."

Ford et al v. City of Toledo et al, 64 O. S. 92.

From these decisions it will be seen that lot or land owners within a municipality must not only have "private sewers sufficient for drainage purposes," but that such sewers must be equal to serving the usual purposes of sewerage;

otherwise the council of a city or village may compel the sewer connections from such lot to be made to the sewer system of the municipality, and become a part thereof.

Yours very truly,
U. G. DENMAN,
Attorney General.

OHIO SANATORIUM COMMISSION—MANNER OF LETTING CONTRACTS.

July 25th, 1910.

DR. C. O. PROBST, *Secretary Ohio State Sanatorium Commission, Columbus, Ohio.*

DEAR SIR:—Your communication of the 19th inst., is received as follows:

> "At a meeting of the Ohio Sanatorium Commission held today, at which you were unable to be present, the following action was taken:
>
> "The architect was authorized to ask for bids from not less than ten bidders to install gas line, water line, heaters, and equipment and to complete eight cottages at the Sanatorium, in accordance with specifications submitted by the architect, provided that the Attorney General advises the Commission in a written opinion that contracts cannot be let without advertising for bids, and that if he so advises, advertisement for bids shall be made at once.
>
> "Will you please give me your opinion, in accordance with this motion?"

I assume that the money sought to be expended by the Commission in the manner indicated in your inquiry, is the appropriation made by the general assembly in House Bill No. 536, under date of April 30, 1910, and which reads as follows:

> "Gas line, water line, heaters and equipment.....$10,000 00"
> "Completing eight shacks at $500.00 each..... 4,000 00"

Section 2314 of the General Code of Ohio provides that,

> "Before entering into contract for the erection, alteration or improvement of a state institution or building, * * * the aggregate cost of which exceeds $3,000 each * * * board * * * charged with the supervision thereof shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood, etc."

Section 2315 of the General Code provides for the submission of these plans to the governor, auditor and secretary of state for approval.

Section 2316, General Code, provides for the giving of public notice of the time and place said bids will be received.

Section 2317 of the General Code provides that,

"The notice shall be published weekly for four consecutive weeks next preceding the day named for awarding the contract, in the paper having the largest circulation in the county where the work is to be let, and in one or more daily papers having the largest circulation and published in the cities of Cincinnati, Cleveland, Columbus and Toledo. Such notice shall state when and where the plans, descriptions, bills and specifications can be seen, and they shall be open to public inspection at all business hours between the date of the notice and the making of the contract."

It will be seen from these sections that the Commission is authorized by law to make contracts amounting to less than $3,000 without advertising, but are bound to advertise for bids for all contracts amounting to a larger sum than $3,000. Applying this rule to the aforesaid items to be expended by this Commission, the result plainly appears that in order to obviate the stautory requirement for advertising, these items must be separated, — for instance, there must be a separate contract for "gas line" amounting to $3,000 or less; a separate contract for "water line" amounting to $3,000 or less; a separate contract for "heaters and equipment" amounting to $3,000 or less, and the second or $4,000 item for the "completion of eight shacks" must be separated into separate contracts and applying to separate shacks so that no contract relating to the completion of one or more shacks shall exceed $3,000.

Without a further written analysis of this statutory rule to the appropriations under consideration, I reach the conclusion that such a sub-division and separation of these items of appropriation as would take the contracts outside of the requirement for advertising, would be a violation of the spirit and letter of said section 782, Revised Statutes, now section 2314, General Code.

It, therefore, follows that the Sanatorium Commission should advertise for bids as provided in the aforesaid sections. A consideration of the opposite view that may be taken of this question immediately suggests the possibility of injunction by disgruntled contractors and the delay of the work.

I believe the conclusion above expressed is supported by the authorities.

Wing v. Cleveland, 15 Bulletin, 50; Lancaster v. Miller, 58 O. S. 558.

Yours very truly,

U. G. DENMAN,

Attorney General.

HEALTH OFFICER ENTITLED TO SALARY FIXED BY BOARD OF HEALTH.

Board of Health fixes salary of health officer.

January 31st, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you inquire of this department if the salary of health officer of a municipality of this state as fixed by the board of health of the municipality, is subject to the approval of the municipal council; and, if not, if it is the duty of council to appropriate a sufficient sum to pay the salaries of the health officer and his subordinates as fixed by the board of health.

In reply thereto I beg leave to say that, by the provisions of section 1536-727, Revised Statutes, a board of health of a municipality,

"may appoint, with the consent of council, as many ward or district physicians, or one ward physician for each ward in their city, as they may deem necessary * * *"

The statute also provides that,

"the board of health shall have power to appoint, with the consent of council, as many persons, for sanitary duty, as in its opinion the public health and sanitary condition of the incorporation may require * * *"

By this further provision of the statute,

"the board shall have exclusive control of their appointees, and define their duties, and fix their salaries, and no member of the board of health shall be appointed as health officer."

From these provisions I conclude that, while council may exercise its discretion as to the number of subordinates which the board of health may appoint to the health officer, as district or ward physicians, or for sanitary duty, the exclusive power to "fix their salaries" when appointed, is vested in the board of health. And it, therefore, follows that it is the duty of council to appropriate a sufficient sum of money to pay the salary of the health officer, and the salaries of the employes of the board of health as fixed by said board.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE BOARD OF HEALTH — AUTHORITY OF BOARD TO ISSUE CERTAIN ORDER TO CITY OF TROY.

December 2d, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I have your letter of November 27th, in which you submit to me the following statement of facts and inquiry:

"At the request of the board of health of the city of Troy, the State Board of Health made an investigation of the public water supply of that city, said supply being derived from a series of wells The examination gave some evidence of a slight pollution of the water supply, colon bacilli having been found present.

"In reporting to the local authorities the result of this examination the Board suggested that in order to protect the supply wells from danger of contamination that privies and other sources of pollution in the vicinity of the wells should be removed or reconstructed in such manner as to prevent chance of pollution and that the board of health establish a district having a radius of 1,000 feet from the wells in which no vault, unless constructed in accordance with the regulations of the board of health, shall be permitted.

"The authority to enforce such an order has been questioned by the board of health of Troy.

"Will you please give me your opinion as to the authority of the State or local board of health to enforce such an order as contemplated above?"

In reply thereto I beg to say that the power of the board of health to enforce an order such as may be based upon the facts submitted in your letter will depend upon whether or not the pollution of the water supply exists in such marked degree as to make dangerous to health the use thereof. When this danger actually exists the power of the board is plenary, section 4427, General Code, providing that,

"The board of health may * * * regulate the location * * * of water-closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate. * * *

The statute further provides that,

"When a * * * excavation, premises * * * or the sewerage, drainage, plumbing * * * is in the opinion of the board of health, in a condition dangerous to life or health * * * the board of health may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner * * * and may prosecute them for the refusal or neglect to obey such order. The board may also by its officers and employes, remove, abate, suspend, alter, or otherwise to the county auditor, to be assessed against the property, and thereby improve or purify them and certify the costs and expense thereof made a lien upon it and collected as other taxes."

This power may be invoked in the correction of conditions dangerous to health or which are prospective to an alarming extent. A board of health will not be legally justified in seeking to enforce an order made pursuant to this section on mere conjecture or assumption. The dangerous substance or liquids must be a present reality or may be expected to accumulate to a dangerous degree, to be within the meaning of this section.

Your inquiry does not state that the water supply of Troy has caused to the citizens inconvenience, as result of pollution, sickness or death; so that the case resolves itself into one question, does the evidence of slight pollution occasioned by the existence of colon bacilli in the water supply emanate from privies within a radius of one thousand feet from the municipal wells, and if so, does it exist to such a degree as would justify a demand in the interest of the public, of the making and enforcement of an order that would require their abatement within the distance designated?

While it is unquestionably true that the protection of the public health is the primary duty imposed upon the boards of health, and is properly so, I am unable to reach the conclusion that the conditions surrounding the supply wells referred to in your inquiry, and the information which I have gathered outside of your inquiry, will justify at the present time the making or enforcement of an abatement order by the board of health of Troy. No contagious or infectious disease exists in the municipality of Troy or is threatening to become epidemic therein; and even if such disease should exist, not until the local authorities would neglect or refuse to enforce efficient measures for its prevention would the State Board of Health be authorized to take charge of the situation and

enforce its orders pursuant to sections 1237 and 1244 of the General Code of Ohio. Conditions may arise at any future day that would make such an order highly essential, but under the facts submitted to me, I refer the matter back to the board of health of Troy to rest in the sound discretion of that board for its application.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE BOARD OF HEALTH—COMPENSATION OF ENGINEERS.

December 2d, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to me for my opinion thereon, the following statement of facts:

> "This board granted a leave of absence of one year without pay to Mr. Pratt, its chief engineer. Mr. Paul Hansen, first assistant engineer, was made acting chief engineer during that time. On Mr. Pratt's return, July 1, 1910, the engineering work was in such condition that the services of Mr. Hansen were needed for one month to straighten up matters that could only be looked after by him.
>
> "The question arose with the board as to the legality of paying Mr. Hansen for an extra month's service. Our appropriation for the engineering department reads:
>
> Chief Engineer $3,000
> Six assistant engineers..... 6,340
>
> "At no time, even including this month's service of Mr. Hansen, have we had more than six assistant engineers."
>
> "Please advise me whether the board may properly pay Mr. Hansen for his month's service."

In reply thereto I beg to say that there is no legislative instruction as to the salary that an engineer in the employment of the State Board of Health shall receive except that of Chief Engineer. Upon Mr. Pratt's resuming the office of chief engineer and drawing the specific salary provided for that service, Mr. Hansen would be precluded from a continuation of service in the capacity of chief engineer, but in view of the wording of the appropriation for the assistant engineers as found on page 21 of the 101 Ohio Laws, I see no objection to the Board making Mr. Hansen one of the assistant engineers, not exceeding six, in which capacity he might complete the work in his personal charge, and which he had begun while acting as chief engineer.

I, therefore, conclude that the board may legally allow Mr. Hansen for his month's service as above indicated.

Yours very truly,
U. G. DENMAN,
Attorney General.

MEMBER OF BOARD OF HEALTH, AFTER RESIGNATION, MAY BE APPOINTED HEALTH OFFICER.

December 5th, 1910.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you request my opinion on the following inquiry:

> "Where a health officer of a city proposes to resign his office, and the board of health wishes to appoint as his successor a person who is a member of the board, can this be legally done, provided the said member first resigns his position as a member of the board, and his successor is appointed before the present health officer resigns?"

Section 4412, General Code, contains the provision that,

> "No member of the board of health shall be appointed a health officer."

It is apparent, therefore, that for a member of the board of health to become eligible to the position of health officer there must first be a complete severance of his relationship to the board of health. This being done, it is my opinion that he would be eligible to appointment as health officer, even though his successor on the board of health might not as yet be appointed.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Board of Agriculture.)

AUTHORITY OF STATE BOARD OF AGRICULTURE TO LEASE STATE FAIR GROUNDS TO COLUMBUS CHAMBER OF COMMERCE.

January 11th, 1910.

The Ohio State Board of Agriculture, Columbus, Ohio.

GENTLEMEN: — I am in receipt of your letter presenting the following question:

> "Ohio State Board of Agriculture wishes you to advise whether or not it has authority to permit use of Ohio State Fair Grounds and buildings thereon to any firm, organization or association not strictly agricultural, for exhibition purposes."

On examination of all the laws relating to the powers and duties of the Ohio state board of agriculture, I find no authority expressed or implied authorizing any such use of the Ohio state fair grounds and buildings. Since our supreme court holds that state officers have only those powers and duties which are specifically granted or necessarily implied, and since the use mentioned in your letter does not have to do with the encouragement or promotion of agriculture in the state of Ohio, I must advise you that you are without authority to permit such use of the Ohio state fair grounds and buildings.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTHORITY OF STATE BOARD OF AGRICULTURE TO LEASE OHIO STATE FAIR GROUNDS TO COLUMBUS CHAMBER OF COMMERCE.

January 31st, 1910.

The Ohio State Board of Agriculture, Columbus, Ohio.

GENTLEMEN: — I am in receipt of the following inquiry from you:

> "At a meeting of the Ohio State Board of Agriculture January 13th, attached communication was received from the Columbus Chamber of Commerce. In response to this communication the Board adopted the following resolution:
>
> 'Resolved, That permission be granted to the Columbus Chamber of Commerce for the use of the State Fair Grounds in holding thereon an Industrial Exposition of the nature and scope expressed in its written request dated January 12, upon its compliance with all conditions which it has included in said request, and any other reasonable request the Board may incorporate; and that further, the Secretary be instructed to submit a copy of said written request and a copy of this resolution to the Attorney General to ascertain whether or not the granting of said request is in violation of law.'"

The communication from the Columbus Chamber of Commerce sets out that such Chamber of Commerce desires "the use of the State Fair grounds,

and such of the buildings thereon as may be needed, for a period of two weeks from and after June 21st, 1910, for the purpose of exhibiting the manufactured products of this city," sets out the advantages of such exhibition, offers to furnish a bond and indemnify the State board of agriculture against loss or damage from the holding of such exhibition, agrees to put the grounds and buildings of the state in as good condition at the end of the exhibition as before, and offers "to have a committee appointed by your board to act with us in an advisory capacity," or "to appoint some members of your board on some of the committees in charge of the exposition."

In a recent communication you asked this department "whether or not it has authority to permit use of Ohio State fair grounds and buildings thereon to any firm, organization, or association not strictly agricultural, for exhibition purposes." In an opinion rendered to your department January 11th, 1910, I state that "on examination of all the laws relating to the powers and duties of the Ohio State Board of Agriculture, I find no authority express or implied authorizing any such use of the Ohio State fair grounds and buildings." I believe that the opinion then given fully answers your inquiry of January 14th.

I will state further, however, that the Ohio State fair grounds are the property of the State of Ohio, held in trust for the state by the Ohio State board of agriculture. It is fundamental that state property, as well as other public property, cannot be turned over to private individuals for any purpose except n pursuance of specfic laws provding for the use, lease, or sale of such public property. Our general assembly has passed no such laws relating to the Ohio State fair grounds and your board have no power, express or implied, to enter into any agreement for turning over such grounds and buildings to the use of any private individuals or organizations, or in any other way to give up your direct control as trustees in charge of such property.

The objects desired by your board and by the SColumbus Chamber of Commerce can be legally obtained only upon the enactment of a law by the general assembly authorizing the board of agriculture to permit such use of such grounds and buildings. Aside from the lack of legal authority to make the arrangement proposed between your board and the Chamber of Commerce, I see no objection but, on the contrary, feel that if the board were given authority under the law to permit such use of the grounds and buildings, much advantage might be gained by both the state and the various organizations which might desire, from time to time, to use them. On request for my opinion, however, as to the present state of the law on the matter, I can only give the law as it now exists. If the board so request, I shall be pleased to assist in the preparation of a bill for such purpose.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF AGRICULTURE—CENSUS OF 1910 TO BE USED IN COMPUTING COMPENSATION OF COUNTY AGRICULTURAL SOCIETY.

December 31st, 1910.

HON. A. P. SANDLES, *Secretary, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—In your letter of December 23d, you call attention to sections 3697 to 3699, Revised Statutes, now sections 9880 to 9884, General Code, and ask whether agricultural societies, during the year 1911, shall receive, under

such sections, a sum of money on the basis of the 1900 census or on the basis of the 1910 census.

Section 9880 of the General Code provides that:

> "Upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, * * * the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census."

The act of Congress providing for the 1910 census provides that:

> "The period of three years, beginning the first day of July next preceding the census provided for in section 1 of this act, shall be known as the decennial census period and the reports upon the inquiries provided for in said section shall be completed and published within such period."

Such three year period ends June 30th, 1912, but in the absence of any law to the contrary, an official report upon any "inquiry" provided for in the law when once completed and published, becomes the final act of the Government under the act providing for the 1910 census as to such "inquiry."

I am informed that the 1910 census has been completed and published insofar as the census relates to the population of the various counties of this state and that you have obtained from the United States Government a statement of the population of the various counties of this state under the new census.

I am, therefore, of the opinion that, in fixing the amount due to the agricultural societies of the various counties during the coming year, you should be governed by the population returned by the census of 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Tax Commission.)

TAXATION — LANGDON TAX ACT — REPORTS OF CORPORATIONS TO TAX COMMISSION NOT MATTERS OF PUBLIC RECORD.

October 1st, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: — Your letter of September 27th is received in which you ask my opinion upon the following statement of facts and questions:

> "The Tax Commission is in receipt of letters, — copies of which are attached — one asking for a copy of the report of a foreign corporations and the other asking for information contained in the reports of certain named telephone companies — filed with the Commission in compliance with the provisions of the Act of May 10, 1910. (101 O. L. 339.) As many similar requests are being received the Commission desires your opinion upon the following questions:
>
> "1. Are the reports and statements required to be filed with the commission under the provisions of the Act of May 10, 1910, (101 O. L. 399) by public utilities and corporations, public records and as such open to public inspection?
>
> "2. If such reports and statements are public records, is the Commission upon demand and tender of proper fee, required to furnish copies of the same to any and all persons applying therefor?"

In reply thereto I beg leave to submit the following opinion:
Section 4 of the Act of May 10, 1910, reads in part as follows:

> "* * * All of the *proceedings* of the commission shall be shown on its record of *proceedings,* which shall be a public record, and all voting shall be by calling each member's name by the secretary, and each member's vote shall be recorded on the record of proceedings as cast."

Section 17 of the Act reads in part as follows:

> "* * * Except in his report to the commission, or when called on to testify in any court or proceeding, any such agent who shall divulge any information acquired by him with respect to the transactions, property or business of any public utility, while acting or claiming to act under such order shall be filed not less than fifty dollars nor more than one hundred dollars, and shall thereafter be disqualified from acting as agent or in any other capacity under the appointment or employment of said commission."

Section 25 of the Act of May 10th, 1910, reads as follows:

> "A transcribed copy of the evidence and proceedings, or any specific part thereof, on any investigation, taken by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript of all the testimony on the investigation, or of a particular witness, or of a specific part thereof,

carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand, to any party on payment of the fee therefor, as provided for transcripts in courts of common pleas."

The above quoted sections are the only provisions of the Act of May 10, 1910, dealing with the question of the publicity of the records of your commission. Sections 4 and 25 are the only provisions making any part of your records matters of public record, and these two sections, in my opinion, apply only to hearings held by the commission and to findings formally made by the commission. At no place in this act is there any provision that reports required by the act to be made by corporations or public utilities shall be matters of public record and as such open to the inspection of the public at large. Indeed, provisions to that effect would seem to have been expressly limited by the legislature as I have above stated. The well known rule of statutory construction, known as the rule of enumeration and exclusion, therefore, leads me to the opinion that only such records of your commission as are expressly specified to be such by the act, are matters of public record, to-wit: hearings held by your commission and formal determinations made by it.

Section 17 of the act above quoted further strengthens me in this conclusion for in it the legislature has provided for the penalization of any of your agents who may disclose any information acquired by him in respect to the transactions, property or business of any public utility.

I am, therefore, of the opinion that your first question should be answered in the negative, and the answer to your first question disposes of your second one also.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXES AND TAXATION — FOREIGN CORPORATIONS — MANNER OF COMPUTING — FULLY DISCUSSED.

July 22d, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: — Your letter of July 19th is received in which you ask for a construction of section 87 of the Langdon Tax Commission bill, act of May 10, 1910.

In this connection I beg leave to inform you that the language of this section has heretofore been construed by this department in an opinion rendered by Hon. Wade H. Ellis, Attorney General to Hon. Carmi A. Thompson, Secretary of State, under date of June 14, 1907, from which opinion I quote as follows:

"The language of the statute to be construed in this connection is as follows:

'Every foreign corporation, incorporated for the purposes of profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, shall, within

thirty days after the passage of this act, or, in case of a company hereafter coming into this state, then before it proceeds to do any business in this state, under the oath of the president, secretary, treasurer, superintendent or managing agent in this state of such corporation make and file with the secretary of state, a statement, in such form as the secretary of state may prescribe, containing the following facts:

1. The number of shares of authorized capital stock of the company, and the par value of each share.

2. The name and location of the office or officers of the company in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.

3. The value of the property owned and used by the company in Ohio, where situate, and the value of the property of the company owned and used outside of Ohio.

4. The proportion of the capital stock of the company which is represented by property owned and used (and) by business transacted in Ohio.

From the facts thus reported, and any other facts coming to his knowledge bearing upon the question, the secretary of state shall determine the proportion of the capital stock of the company *represented by its property and business in Ohio,* and shall charge and collect from the company, for the privilege of exercising its franchises in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation, represented by property owned and business transacted in Ohio."

"Foreign corporations have no inherent right to exercise corporate powers within this state, and may only be admitted to transact their business here under the conditions imposed by the statute. This doctrine is established in this state by the supreme court in the following language:

'Foreign corporations can exercise none of their franchises or powers within this state except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly, under its legislative power, may impose.'

Western Union Telegraph Co. v. Mayer, 28 O. S. 521.

"Other jurisdictions have upheld a similar doctrine.

Delaware R. R. Tax case, 18 Wall. 206; Attorney General v. Bay City Mining Co., 99 Mass. 148; Ducat v. Chicago, 10 Wall. 410; Pembina Mining Co. v. Penn. 125 U. S. 191; Horn Silver Mining Co. v. New York, 143 U. S. 305.

It remains then only to determine the meaning and intent of the language of the statute, and however arbitrary or capricious it may seem or whatever of hardship in special instances may result from the operation of the law it must be upheld.

This statute, known as the 'Willis Law,' requires that foreign corporations for the privilege of exercising their corporate powers in Ohio, shall pay one-tenth of one per cent. upon the proportion of their authorized capital stock which is represented by property owned and used and business transacted in this state. It will be seen, first, that the tax is not one-tenth of one per cent. upon the property owned in Ohio; second, it is not one-tenth of one per cent. upon the property used in Ohio; and third, it is not one-tenth of one per

cent. upon the business transacted in Ohio. It is one-tenth of one per cent. of that part of the total authorized capital stock which represents the proportion which the property owned and used and the business transacted in Ohio bears to all the property owned and used and all the business transacted everywhere. In a literal construction of the statute, therefore, we may make use of the following algebraic proportion: The property and business in Ohio is to the total property and business as the capital stock in Ohio is to the total capital stock; the unknown quantity to be determined being the capital stock in Ohio. Thus if a foreign corporation has property and business in Ohio of the value of $10,000, a total of property and business of the value of $100,000, and a total authorized capital stock of $200,000, the proportion of such capital stock subject to the Willis tax would be ascertained by the following sum:

$10,000 : $100,000 :: x : $200,000.

The unknown quantity x is thus $20,000, and such corporation would pay one-tenth of one per cent. upon $20,000 for the privilege of doing business in this state."

It will be noted that the language of the statute construed by former Attorney General Ellis in the above quoted opinion is in its essentials the same as that of section 87 of the act of May 10, 1910, and the reasoning contained in that opinion, therefore, is in every way applicable to said section 87. It should be borne in mind, however, in this connection, that said section 87 authorizes your commission to "determine the proportion of the authorized capital stock of the company represented by its property and business in this state," and your commission is, by the terms of said section, invested with a reasonable discretion in such determination. It will be necessary, therefore, for you, in making such determination, to decide whether this method of figuring the proportion of authorized capital stock of a company represented by its property and business in this state will result in an amount which fairly represents the amount of capital stock of such company used by it within this state within the purview of said section 87. In other words, I am of the opinion that your commission may lawfully, in making such determination, give more weight to either of the factors of the above ratio than to the other if by doing so you will in your opinion be able more accurately to determine the proportion of authorized capital stock of the company under consideration which is represented by property and business in this state.

With the above additions and qualifications, I am of the opinion that the method laid down by Attorney General Ellis in his opinion of June 14, 1907, is the proper one to be used in making the determinations provided in section 87 of the Act of May 10, 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXATION — LANGDON TAX ACT — GROSS RECEIPTS OF PUBLIC UTILITIES.

All sums earned or charged by public utilities for business done in Ohio are "gross receipts" within the meaning of the Langdon Tax Act — various receipts of various companies held to be "gross receipts."

October 6th, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:— Your communication of recent date is received in which you request my opinion upon the following questions:

1. *The Hillsboro Light and Fuel Company,* an Ohio corporation, in its annual statement of gross receipts to this commission, reports its entire receipts as $25,735.00, and advises that this is all the receipts of the company from its business as a lighting company, but states that "the company is also engaged in the sale of coal and the manufacture and sale of ice, the gross receipts from these branches of the business not being included in the statement enclosed." This company is only authorized by its charter to manufacure and sell electricity and gas for heating, lighting and power purposes.

Query: Should this company include in its report as a part of its gross receipts its receipts from the sale of coal and the manufacture and the sale of ice?

2. *The Buckeye Pipe Line Company* contends that the only items in the detailed statement of its gross receipts given below, which should be considered in fixing the amount of its gross receipts, are the two items shown in the detailed statement, as follows:

Transportation	$2,002,404
Storage	128,227

and that all the other items therein contained should not be considered as a part of the receipts of the company from business.

It will be noted in this connection that there is included in these items an item of "Coal to employes, $522.00;" rentals from "Lima office and tank farm, $5,583;" and "rent of land, $5.00." Rent receipts from employes, being, as the commission understands it, from rental of certain houses owned by the company and rented to its employes — $877.00. Interest, $11,039; receipts from pasturage and hay, $53.00.

Query: Should the tax commission only consider the amounts reported by the Buckeye Pipe Line Company under the head of "transportation" and "storage" as the "gross receipts" of that company, or should it include in the "gross receipts" of that company all of the items given above?

Detailed statement of receipts of the Buckeye Pipe Line Company, excluding therefrom all receipts derived from Interstate business.

ITEMS.

Sales of Merchandise and Supplies:

Tools sold	$3,324 00
Material sold	21,510 00
Old tank iron sold	151 00
Total	$24,985 00

Empty barrels	$235 00
Scrap iron	2,866 00
Empty sacks	63 00
Scrap rubber	36 00
Coal to employees	522 00
Pipe, fittings, etc	484 00
Tank iron	18 00
Scrap iron and junk	2,566 00
Pumps, engine and dynamo	1,825 00
Automobile	500 00
Total	$9,115 00

Rentals:

Lima office and tank farm rentals	$5,583 00
Rent receipts from employees	877 00
Rent of land	5 00
Total	$6,465 00

Service Work for which a price has been charged:

Transportation	$2,002,404 00
Storage	128,227 00
Total	$2,130,631 00

Miscellaneous sales:

Logs, refund of freight and pole rental, etc	$154 00

Other Items:

Interest	$11,039 00
Mileage refund	55 00
Pasturage	23 00
Hay sold	30 00
Total	$11,147 00

3. *The Northwestern Ohio Natural Gas Company* contends that receipts from the following sources should not be considered by the commission as a part of the gross receipts of the company, viz:

Oil earnings	$10,161 60
Miscellaneous earnings	1,747 22
Interest	741 71
Shop earnings at Toledo	36,498 65
Total	$49,149 18

The oil earnings are from sales of petroleum collected from the company's gas wells and the shop earnings at Toledo cover work done for consumers practically at cost.

Query: Should the commission include the above items as part of the gross receipts of the above company?

4. *The Mountain State Gas Company* contends that receipts from:

Sales of merchandise	$198 08
Service work for which a price has been charged.	125 85
Total	$323 93

should not be considered as receipts.

Query: Should the commission include the above items as part of the gross receipts of the above company?

5. *The River Gas Company* makes a like contention for similar items as those in the above statement of the Mountain State Gas Company, amounting to $1,730.26.

Query: Should the commission include the above item as part of the gross receipts of the above company?

6. *The Cleveland Gas Light & Coke Company* contends that an item for

Service work for which a price has been charged and miscellaneous sales	$18,039 00	an item of
Interest	3,418 00	an item of
Rentals	6,795 00	
Total	$28,252 00	

should not be counted.

Query: Should the commission include the above items as part of the gross receipts of the above company?

7. *The People's Gas Light Company* contends that items amounting to $9,667.00, made up of sales of merchandise and miscellaneous sales, should not be counted.

Query: Should the commission include the above item as part of the gross receipts of the above company?

8. *The East Ohio Gas Company* contends that items amounting to $168,251.00, covering items for sales of merchandise, rentals, miscellaneous sales and interest, should be deducted.

This company also makes a contention which is stated as follows:

"For the year ending May 1st, 1909, the company reported $181,-022.00 more than it should have reported. This amount is shown by report of Mr. J. H. McGiffert, Special Examiner, made to the Auditor of State after his examination of the books of The East Ohio Gas Company. Mr. McGiffert informed the officials of the said company that they could deduct this amount from the report for the year 1910, and there is a resolution of the old board in their minutes to the effect that they would allow such deductions be made where over-payments had been made. I think it should be made, and it would leave the total taxable receipts of The East Ohio Gas Company $6,099,709
Less 181,022

Amount taxable ..... $5,918,687"

Query: Should the commission include the items for sales of merchandise, rentals, etc., in the gross receipts of The East Ohio Gas Company, and should the commission allow such company to make the deduction for over-payment contended for by that company?

9. *The Coshocton Gas Company* of Coshocton, Ohio, makes the following contention concerning its gross receipts which, the company states in its annual statement filed with the commission, amount to $27,725.00 derived from intrastate business.

> "These facts may explain the situation — Natural gas is brought to Coshocton by The Buckeye State Gas & Fuel Company, a corporation owning a pipe line from the Utica field in Licking county, and delivered to the Coshocton Gas Company for distribution in Coshocton under a written contract. By the terms of this contract the Coshocton Gas Company, among other provisions, is to collect the money and pay to The Buckeye State Gas & Fuel Company 70% of the gross amount received for all gas sold and retains for itself the remaining 30%.
>
> "Consequently, the Coshocton Gas Company has reported and reports this year its proportion of these receipts, to-wit, 30%.
>
> "The Buckeye State Gas & Fuel Company has been seeking to avoid payment of its share of this amount, but our position is that under the existing agreement the Coshocton Gas Company must report for the amount it actually receives, i. e., 70%. It seems to me clear that the Coshocton Gas Company is under no obligation contractual or otherwise, to bear the burdens that should be borne by The Buckeye State Gas & Fuel Company."

It appears that the same contention existed last year and that the auditor of state increased the amount of its receipts $50,111.00, the tax upon which amounted to $501.11, which the company has not paid.

The questions suggested are: Should this company report its entire receipts without deduction on account of the payment of 70% to the Buckeye State Gas & Fuel Company, and, likewise, should the Buckeye State Gas & Fuel Company include in the statement of its gross receipts as a part of the same the receipts from the Coshocton Gas Company?

In reply thereto I beg leave to submit the following opinion:

The above quoted questions involve a consideration of the following sections of the Act of May 10, 1910, the provisions of which are applicable to such questions I quote below:

Section 53:

"In the case of all public utilities, except railroads, street, suburban and interurban railroads, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government."

Section 55:

"The commission shall ascertain and determine, on or before the first day of September, the entire gross receipts as aforesaid, of each electric light, gas, natural gas, pipe line, water-works, express, telegraph, telephone, messenger or signal, union depot, heating, cooling and water transportation company for business done within Ohio for the year then next preceding the first day of May, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission, in such instance for the purposes of this act, shall be the gross receipts of such electric light, gas, natural gas, pipe line, water-works, express, telegraph, telephone, messenger or signal, union depot, heating, cooling, water transportation companies for business done within Ohio for such year."

Section 60:

"The commission shall, on or before the first day of October, report to the auditor of state, the amount of the gross receipts so determined, of electric light, gas, natural gas, pipe line, water-works, express, telephone, telegraph, messenger or signal, union depot, heating, cooling and water transportation companies, * * * for the year then next preceding the first day of May. * * *"

Section 61:

"It shall be the duty of the auditor of state, in the month of October, annually, to charge for collection from each electric light, gas, natural gas, water-works, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year then next preceding the first day of May, by taking one and two-tenths per centum of all such gross receipts."

Section 65:

> "In the month of November, the auditor of state shall charge for collection from each pipe-line company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission, as the gross receipts of such company on its intra-state business for the year then next preceding the first day of May by taking four per centum of all such gross receipts."

The ultimate question here involved is what meaning shall be given to the term "gross receipts" as used in the above quoted sections. The following definitions of that term are given by the lexicographers:

> "Gross receipts, Receipts without any reduction."
> "Receipts, Money received." — English's Law Dictionary.
> "Receipt, the amount or quantity of what is received from other hands."
> "Gross, whole, entire, total, specifically, without reduction, as for charges or waste material." — Century Dictionary.

In Philadelphia, etc., Railroad Company vs. Commonwealth, 104 Pa., 115, the court held that a "tax on gross receipts" of a common carrier was a tax on the money of the carrier after it had reached the treasury of the corporation, and in Commonwealth vs. United States Express Company, 157 Pa., 584, it was held that when a tax is levied upon "gross receipts" an express company has no right to deduct from the amount on which it pays taxes, the amounts paid various railroad companies for transporting express matter, even though the railroad companies have paid all the taxes accrued in respect to their gross earnings, including the amount received from such express company; and in this case the supreme court of Pennsylvania adopted with approval the interpretation of the term "gross receipts" as laid down by the supreme court of that state in Philadelphia Railroad Company vs. Commonwealth, supra.

The syllabus in People ex rel vs. Roberts, 52, N. Y. Supp., 859; 32 App. Div. 113, reads as follows:

> "Under Laws of 1896, c. 908, section 184, providing that every steam surface railroad company shall pay an annual tax 'upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within the state, but shall not include earnings derived from business of an inter-state character,' the gross earnings of a company of every kind are taxable excepting only those derived from inter-state commerce.
> "A corporation taxed on its earnings can not complain that a part of the earnings was derived from a business in which it is not authorized to engage. The question of double taxation is one of expediency, for the consideration of the legislature, and not of power, for the consideration of courts."

This case was affirmed by the supreme court of appeals of New York in 157 N. Y. 677, without report.

The provisions of the statutes of New York under which the above decision was rendered are no more general in their scope than those of section 53

of the Act of May 10, 1910, above quoted. In interpreting the same provision of the statutes of New York the Appellate Division of the Supreme Court of that state in People ex rel vs. Roberts, 32 App. Div. (N. Y.) 113, held that the term "goss earnings" as used in that section of the statutes includes "all receipts arising from or growing out of the employment of the capital of a company, whether that capital is employed in the transportation or transmission business or otherwise, and the court in that case held that the receipts of a railroad company from stocks and bonds of other corporations held by it were correctly classed as a part of its gross earnings as a railroad corporation, and as such taxable under the New York statute, the provisions of which are above given.

In Commonwealth vs. Brush Electric Light Company, 204 Pa., 249, at page 252, the supreme court of Pennsylvania in an opinion rendered by Mr. Justice Brown uses the following language:

> "By section 23 of the Act of June 1, 1889, P. L. 420, electric light companies are taxed eight mills upon the gross receipts from their business. The appellant, such a company, claims exemption from this tax upon certain items in its gross receipts, because they are not derived from electric lighting. They are for electric power furnished to individuals and corporations for manufacturing purposes and for sales of electric supplies, such as lamps, drop lights, fans, etc. The contention of the appellant is, that, as it is incorporated as an electric light company, only its gross receipts from electric lighting are taxable. But such are not the words of the statute. They are clear and unambiguous, as they must be, if the commonwealth is entitled to the taxation imposed; Boyd .v. Hood, 57 Pa. 98. The tax is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company for the purpose of enlarging and swelling the volume of its business, it furnishes not only electric light, but electric power to manufacturers and sells electric supplies. Having so extended its business beyond the mere furnishing of light by electricity, the company has largely increased its revenues, and it would be a strained construction of the words of the statute if the gross receipts from its business should be interpreted as meaning only its gross receipts from electric lighting, simply because it is called an electric light company. It is taxed on what it does. The statute imposes the tax not upon a portion of its receipts—those derived from a particular commodity it supplies to the public—but upon all of its receipts from its general business conducted under its franchises. Having, under what it regards as its franchises, not questioned by the commonwealth, enlarged its business by extending the same beyond the mere furnishing of light, and having realized largely increased revenue from so doing, its plea for abatement of the tax claimed by the state is ungracious, and cannot avail it in the face of the statute declaring what it shall pay. This, in a very clear opinion, to which nothing can be profitably added, was the view of the learned judge below, and the judgment is affirmed."

The identity of the provisions of the laws of Pennsylvania under which the above opinion was rendered, with the provisions of section 53 of the Act of May 10, 1910, above quoted, should be noted.

The Appellate Division of the Supreme Court of New York in pointing out the distinction between "gross earnings" and "gross receipts" in People ex rel vs. Morgan, 99 N. Y. S., 711, 114 App. Div. 266, where the comptroller had included as part of the gross earnings of a gas company, under the provisions of section 186 of Chapter 8 of the Laws of 1896, the total amount of money received by such company from sales of gas, although such total sums included the cost of raw materials used in the making of such gas, on page 267 used the following language:

> "The Comptroller has thus fixed the tax, not on the "gross earnings" of the relator as required by the statute, but on its gross receipts. Capital of a corporation which must first be invested before it begins to earn anything cannot be said to be a part of the earnings of such corporation merely because it is turned into cash and thus in one sense becomes a receipt of the corporation. Earnings do not include capital but are the productions or outgrowth of capital. In some cases like the one now under consideration the capital must be supplemented by labor and such other expenditures as may be incidental to the development of the manufactured product from the raw material. Such incidental expenditures are doubtless part of the "gross earnings." If the coal in question had been used under the boilers for developing heat, such coal like labor would be merely an incidental expenditure in the process of converting the capital from one form into another, and should probably be included as a part of the "gross earnings" of the relator. But the evidence is that the coal in question was not used for generating heat, but was of a different kind and was converted into gas. In fixing the "gross earnings" of the relator there should, therefore, have been deducted from the gross receipts the cost of the raw material, which amounted to the said sum of $947,546.28."

The provisions of the law under which this tax was laid required the gas company to

> "pay to the state for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual tax which shall be five tenths of one per centum upon its gross earnings from all sources within this state."

The above decisions are the only ones which I have been able, by a careful search of the authorities, to discover in which the courts have interpreted the meaning of the term "gross receipts" and "gross earnings," as used in the taxing laws of the various jurisdictions with a view to determining what items should be included in "gross receipts" or "gross earnings" of corporations coming within the provisions of such laws.

Under the above authorities the various items concerning which you ask in your questions above quoted should, in my opinion, be excluded from or included in the "gross receipts," of the companies spoken of, in accordance with the following list which I have categorically arranged:

> Query 1. Should the Hillsboro Light & Fuel Company include in its report as a part of its gross receipts, its receipts from the sale of coal and the manufacture and sale of ice?

Answer. Yes. Because such receipts were "earned or charged * * * for business done within this state" within the meaning of section 53 of the Act of May 10th, 1910, and the fact that such company was not authorized to engage in the business of selling coal and manufacturing and selling ice does not, in my opinion, alter the fact that the receipts from such business are a part of the "gross receipts" of that company within the meaning of section 53.

See People ex rel vs. Roberts, and Commonwealth vs. Brush Electric Light Company, supra.

Query 2. Should the tax commission only consider the amounts reported by the Buckeye Pipe Line Company under the head of "transportation" and "storage" as the "gross receipts" of that company, or should it include in the "gross receipts" of that company all of the items given in your second question?

Answer. The committee should include the amounts of all items reported by the Buckeye Pipe Line Company as shown by th edetailed statement given in your question 2. The sums set forth in such detailed statement by that company were, in my opinion, "earned or charged * * * for business done within this state" within the meaning of section 53 of the Act of May 10th, 1910, and should, therefore, properly be included in the gross receipts of that company as found by your commission.

See People ex rel vs. Morgan, People ex rel vs. Roberts and Commonwealth vs. Brush Electric Light Co., supra.

Query 3. Should the commission include the items given in this question as part of the gross receipts of the Northwestern Ohio Natural Gas Company?

Answer. Yes; for the same reason as given in the answer to question 2, supra.

See People ex rel vs. Roberts, Commonwealth vs. Brush Electric Light Co., supra.

Query 4. Should the commission include the items given in this question as part of the gross receipts of The Mountain State Gas Company?

Answer. Yes; for reasons and under the authorities heretofore discussed.

Query 5. Should the commission include the sum of $1,730.26 reported as accruing from sales of merchandise and service work for which a price has been charged by the River Gas Company as part of the gross receipts of that company?

Answer. Yes; for the same reasons as above.

Query 6. Should the commission include the items given in question 6 as part of the gross receipts of the Cleveland Gas Light & Coke Company?

Answer. Yes; for the same reasons as above.

Query 7. Should the commission include the items given in question 7 as part of the gross receipts of the People's Gas Light Company?

Answer. Yes; for the same reasons as above.

Query 8. Should the commission include the items for sales of merchandise, rentals, etc., given in question 8 as part of the gross receipts of the East Ohio Gas Company?

Answer. Yes; for the same reasons as above. In regard to the second contention for a reduction in the amount of its gross receipts made by the East Ohio Gas Company I am of the opinion that such deduction should be made if the commission is satisfied that the facts alleged by the company exist. It would be manifestly unjust and inequitable to compel this company to pay more taxes than the law requires, and I am inclined to the opinion that this method of remitting the excess of taxes paid by the East Ohio Gas Company on its last year report of gross receipts would come within the power conferred on your commission by section 80 of the Act of May 10th, 1910. It should be noted, however, that the old law under which this company has heretofore been taxed imposed a tax of only one per cent. on such gross receipts, where as the act of May 10th, 1910, imposes thereon a tax of one and two-tenths per cent. The commission should, therefore, so calculate the gross receipts of this company that the state shall not lose the amount of taxes represented by the two-tenths of one per cent. of the omitted gross receipts.

Query 9. Should the Coshocton Gas Company report its entire receipts without deduction on account of the payment of 70% to the Buckeye State Gas & Fuel Company, and likewise, should the Buckeye State Gas & Fuel Company include in the statement of its gross receipts, as a part of the same, its receipts from the Coshocton Gas Company?

Answer. Yes. In the above quoted authorities the situation here presented has arisen in the state of New York, and the decision of the court of last resort of that state is found in the opinions above quoted. I am, therefore, of the opinion that both companies should report as suggested in my affirmative answer to your questions for, as I take it, the contract here is one of sale between the two companies.

The above determination of your question may appear to work a hardship upon these companies, but that is not a question which should concern your commission. The legislature, in enacting the above quoted sections of the Act of May 10, 1910, has fixed the method by which the franchise taxes on these corporations shall be computed and that method must be followed by your commission.

The question of the justice or of the injustice of the method is one to be resolved by the legislature, and when the intention of the legislature is discovered in regard to the manner in which such taxes should be computed, such intention must prevail.

I am, therefore, of the opinion, as above stated, that your commission should answer the contention of the various companies, included in your questions, as outlined above.

Very truly yours,
U. G. DENMAN,
Attorney General.

TAXATION — EXEMPTION FROM — COLLEGE.

November 28th, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: — You have submitted to this department for an opinion a letter addressed to you by the Auditor of Butler County, Ohio, enclosing an application addressed to him by the President and Secretary of the Oxford College for Women. The facts disclosed by the correspondence are as follows:

> Prior to October 15, 1910, the institution known as Oxford College was operated by a corporation chartered for profit. On that date said corporation sold its entire assets including all of its real and personal property to the Oxford College for Women, a corporation not for profit incorporated on the 7th day of June, 1906, for the purpose of conducting a college for the education of women. This corporation now makes application to the county auditor for exemption from taxation, and the question having been referred to you by the county auditor you submit the following inquiries in regard to the same:
>
> 1. In whom is authority vested to determine the question raised by the application?
>
> 2. Is the Oxford College for Women entitled to any exemption from taxation, and if so, as to what property?

The transfer of the title and possession of the property in question having taken place on October 15th, 1910, it is safe to assume that the real property was valued and assessed by the real estate assessor of the village of Oxford in which it is located, and was included in his return made to the county auditor under section 5569, General Code, and not excluded and separately listed by the assessor as provided in section 5570. The lien for taxes for the current year having been attached on the day preceding the second Monday in April, no exemption from the payment of such tax can now be claimed, but the exemption, if any, applies only to the payment of taxes for the year 1911 collectable in December of that year, and in June of the following year, and to the taxes for succeeding years during which the facts giving rise to the exemption continue to exist. So with respect to the personal property, moneys and credits of the first corporation returned as of the date preceding the second Monday in April, 1910. The lien for these taxes attached on that date and no exemption can be claimed for them. The valuation of the personal property involved, upon which a tax corresponding to that based upon the valuation of the real estate, made during the past year by the quadrennial assessor, will be paid, will not be fixed until the return is made in April, 1911.

Under section 2588, General Code, the county auditor is expressly vested with authority to "correct all errors which he discovers in the tax list and duplicate * * * when property exempt from taxation has been charged with tax * * *."

This power is manifestly calculated to provide for the transfer of specific property from the general tax list to the exempt list when the same has been erroneously placed on the former by the assessor, or as the result of return of personal property, moneys and credits by the owner of the same. Whether or not it enables the county auditor to place on the exemtp list property properly listed as subject to tax, but which has become exempt since the date of the listing is more doubtful. It is clear, however, that if no other procedure can be found

to provide for such contingency this provision should be invoked for that purpose. The only other provision of law for the determination of the question of exemption of specific property from taxation is that found in section 80 of the act to create a Tax Commission, 101 O. L. 399, which provides in part as follows:

> "The commission may remit taxes and penalties thereon, found by it to have been illegally assessed, * * *. It may correct an error in an assessment of property for taxation or in the duplicate of taxes in a county. No such taxes, assessments or penalties in excess of one hundred dollars shall in any case be remitted until after at least ten days' notice of the application to have the same remitted shall have been served upon the prosecuting attorney and the county auditor of the county where such taxes or assessments were levied, and proof of such service has been filed with the commission. * * *
>
> "It may receive complaints and carefully examine into all cases where it is alleged that * * * the law (has been) in any manner evaded or violated, and may cause to be instituted such proceedings as will remedy improper administration of the taxation laws of the state."

This section is palpably a substitute for section 258, General Code, repealed by section 123 of the Tax Commission Law. Said section 258, General Code, imposed upon the auditor of state, and upon the governor, auditor of state and attorney general powers similar to those vested in the commission by section 80 of the Tax Commission act above quoted.

While the machinery provided for by section 80 is more appropriate for the remission of taxes already assessed, and which would otherwise be a lien upon the property involved, yet in my judgment the grant of power to the commission is broad enough to authorize the commission to order specific property transferred from the general list or returns of the assessors to the exempt list upon the ground that it is exempt from taxation, and before the grand duplicate has been made up or levies of taxes have been charged thereon against such property. It is to be observed, however, that the commission may not remit taxes in excess of one hundred dollars without following the procedure outlined in section 80. It is apparent that in the case at hand no taxes have been assessed against the property since it has become exempt, if at all.

It is clear to me that section 2588, General Code, and section 80 of the Tax commission law read in connection with one another lead to the conclusion that the Tax Commission should not undertake to remit taxes or to correct duplicates and tax lists until the county auditor has refused to act under section 2588. In other words, the power conferred upon the auditor by section 2588, which refers specifically to the tax list, while not clearly applicable to cases like the one at hand, is more appropriate than that conferred upon the Tax Commission by section 80 of the act of 1910 and both powers being fairly appropriate for the correction of a tax list upon which no taxes have been levied, yet they are to be regarded as cumulative rather than as co-ordinate—the power of the Tax Commission being appellate rather than original.

I am, therefore, of the opinion that the application of the Oxford College for Women to the county auditor is properly made, and that it invokes the power possessed by that officer under section 2588, General Code.

The question as to whether or not the property of the institution known as Oxford College for Women is exempt from taxation may be more than a

mere question of law. This is the precise question which the county auditor will be obliged to decide. It is probably, strictly speaking, improper for me to advise you definitely thereon. Inasmuch, however, as the county auditor has submitted the question to you and has sought your advice thereon, and inasmuch further as the Tax Commission may have similar questions for determination in the future, I take it that I may with propriety state the law relating to exemption of the property of educational institutions from taxation so that you may use the same for your guidance in determining this and related questions.

The Constitution of the state of Ohio, Article 12, section 2, provides in part as follows:

> "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money * * *; but burying grounds * * * *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 exempt from taxation * * *."

As is apparent on the face of this section it is not self executing. It is a grant of power to the general assembly, which the general assembly may choose to exercise within the limits prescribed. Thus the general assembly may exempt "institutions of purely public charity" from taxation, but it need not exempt all of such institutions; it may classify such institutions and exempt them by classes, and it may classify the subjects of taxation of such institutions, such as their real property, their personal property, their moneys, credits and investments, etc., and exempt some and refuse to exempt others. All this is apparent upon the face of section 2 of Article 12, and it is borne out by the history of legislation and judicial decisions under this constitutional provision.

Prior to the adoption of the General Code of 1910, the authority granted to the general assembly by section 2 of article 12 of the Constitution was exercised through section 2732 and succeeding sections of the Revised Statutes. Section 2732 itself was amended several times but it is not necessary in this connection to trace its history. The following exemptions created by section 2732 R. S., are of interest:

> "First, * * * all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning not used with a view to profit * * *.
>
> "Sixth. All buildings belonging to institutions of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations * * * and all moneys and credits appropriated solely to sustain, and belonging exclusively to such institutions and military organizations * * *."

Although the section was a long one, the foregoing are the only provisions directly applicable to institutions of learning. I quote these provisions not only because they have been construed by the supreme court, but also as a basis for comparison with the General Code of 1910 as will hereafter more fully appear.

The first case in which the constitutional provision and the statute above quoted were construed was that of Gerke v. Purcell, 25 O. S. 229. It was there held in the language of the second branch of the syllabus:

> "In section 2, article 12, of the constitution, * * * the word 'public' is used, in some instances, to describe the *ownership* of the property, in others as merely descriptive of the use to which the property is applied. As applied to school houses, it is used in the former sense; * * *"

And in that of the fifth branch of the syllabus, that:

> "Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the constitution, which authorizes such institutions to be exempt from taxation."

So it is apparent that the general assembly has the power to exempt privately owned institutions of learning not carried on with a view to profit, on the ground that the same are "institutions of purely public charity."

The court further held as to the construction of the statute (Sec. 2732 R. S.) then S. & S. 761 in the language of the eighth branch of the syllabus that,

> "In the description of the property exempted from taxation in section 3 of the tax law, * * * the word public as therein applied to school houses, colleges, academies, and other institutions of learning, is descriptive of the *uses* to which the property is devoted. The schools and instruction which the property is used to support must be for the benefit of the public; and when private property is thus appropriated without any view to profit, it constitutes a 'purely public charity' within the meaning of the constitutional provision."

This case remains unaffected by any subsequent decision, and it establishes the rule that a college maintained by a private enterprise, but without a view to profit, is a "public *college*" within the meaning of the first sub-division of section 2732 above quoted.

I have already pointed out that in Gerke v. Purcell, *Supra,* the court held that a college privately owned and maintained without a view to profit is an "institution of purely public charity" within the meaning of the *constitution.* There might be some question as to whether this broad phrase so employed in the constitution, and re-enacted in the statute, is intended in the latter to include public colleges and academies, inasmuch as some provision is made for this class of institutions in the first sub-divisions of section 2732 above quoed and discussed. This question, however, was settled by the supreme court in the case of Little v. Seminary, 72 O. S. 417, in which it was held in the language of the syllabus that:

> "The sixth subdivision of section 2732 Revised Statutes * * * exempts from taxation an endowment fund of a college which belongs exclusively to it, and which is devoted solely to deriving an income for its support."

Section 2732 R. S., became sections 5349 to 5360 inclusive, General Code. Section 5349 incorporated all of the first sub-bidivision of old section 2732, and the language of the new section is substantially identical with that of the old, so that it is unnecessary to make any comment with respect to the same, excepting that the rules laid down in Gerke v. Purcell are still applicable.

The sixth sub-division of section 2732 R. S., is partly included within section 5353 and partly within section 5354, General Code, which are in part as follows:

"Section 5353. "* * * *property* belonging to institutions of public charity only shall be exempt from taxation."

Section 5354. "Buildings belonging to and used exclusively *for armory purposes* by lawfully organized military organizations * * * and moneys and credits appropriated solely to sustain, and belonging exclusively to such organizations shall be exempt from taxation."

Assuming that the above quoted provisions of the General Code are of meaning identical with the corresponding provisions of the Revised Statutes, I am of the opinion that, under existing laws, an institution of learning privately owned and operated without a view to profit, is both a "public college" and an "institution of public charity only" within the meaning of the exemption statute.

Very truly yours,

U. G. DENMAN,
Attorney General.

TAXATION — FLORISTS NOT TAXABLE AS MERCHANTS.

Florists are not merchants within meaning of Section 5381 General Code, when they propagate their own plants.

October 6th, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: — Your communication of recent date is received together with copy of letter from the President of the Board of Review of Washington Court House, Ohio, upon which you request my opinion. The letter is as follows:

"Mrs. L. Buck, florist, by reason of annexation of territory now makes her first return for taxes in the city. She has never made any return of averaged merchandise. She propagates her own plants, but buys very little for re-sale; her establishments cover some four acres, from which she subsequently replants and pots her flowers and takes them into her green-house. In the winter, for instance, she will 'slip' some ten or fifteen thousand geraniums, and place same in pots; some sixty per cent. of these will later be marketable at from four to seven cents per plant.

"Should there be a return by her as a merchant in view of the fact that section 5381, defining a merchant, seems to contemplate that the personal property has 'been purchased with a view to being sold at an advanced price or profit'?

"We understand this question is being litigated in Clark County."

In reply thereto I beg leave to submit the following opinion:

The question involved here is whether the florist named in the above quoted letter is a merchant within the meaning of section 5381 of the General Code, and must, therefore, make a return of her merchandise for taxation as provided in section 5382 of the General Code.

Section 5381 of the General Code reads as follows:

"A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has

> been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

The supreme court in Engle vs. Sohn & Company, 41 O. S., 691, at page 694, in pointing out the distinction between a merchant as defined by Section 5381 of the General Code and a manufacturer as defined by section 5385 of the General Code, used the following language:

> "In both definitions there is the common element of purchasing personal property, with a view of making a gain or profit. But the definition of a manufacturer contemplates the attainment of such object by adding to the value of the property after purchase, by some process or combination with other materials, while the merchant is supposed to get his advanced price or profit by selling the article as it is, without subjecting it to any change by hand, by machinery, or by art. The material entering into the manufactured article may be modified, more or less, in its identity, as it passes through the several stages of a manufacturing process; but the merchant deals in the manufactured article itself, or its constituents, by buying and selling them in the same condition in which he purchases them. His business is that of exchanges, and not of making or fabricating from raw materials."

In the above quotation the supreme court has specifically pointed out the distinctive features of the occupation of merchant within the meaning of section 5381, supra, and I do not think that the florist in question can be held to be a merchant within the meaning of section 5381 General Code as the same is interpreted by the supreme court in the above quotation, for such florist, I take it from the letter which you enclose, propagates her own plants from the seeds, and does not buy plants for the purpose of re-sale at a profit. Under such circumstances it seems to me that should she be held to be a merchant within the meaning of section 5381 then all market gardeners and even perhaps farmers must be held to be merchants, a thing clearly not contemplated by the legislature in the enactment of section 5381.

I am, therefore, of the opinion that the florist in question is not a merchant within the meaning of the above mentioned section, and, therefore, is not required to make the return provided for by section 5382 of the General Code.

I am unable to find any report of any decision of a case involving this question either arising in Clark County, as suggested in the letter from the President of the Board of Review, or any place else. I enclose herewith letter enclosed by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXATION—LANGDON TAX BILL—TRANSCRIPTS OF EVIDENCE AND PROCEEDINGS AT HEARINGS HELD BY TAX COMMISSION OF OHIO, WHO ENTITLED TO DEMAND—FEES TO BE CHARGED FOR SUCH TRANSCRIPTS—HOW DISPOSED OF BY TAX COMMISSION.

Only "parties" to hearings and investigations had before Tax Commission of Ohio entitled to demand transcripts of evidence and proceedings at such hearing. Tax Commission should charge fee of eight cents for each one hundred words of such transcripts. Fees derived from furnishing such transcripts should be recovered into state treasury on or before Monday of each week, and detailed verified statement of same should be filed with the auditor of state at same time.

October 6th, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: — Your letter of September 26th is received in which you request my opinion upon the following statement of facts and questions:

"The Superintendent of the Adams Express Company demands transcripts of the evidence and proceedings taken by the stenographer appointed by the Commission, in certain hearings before the Commission relative to the assessment of the property of the American, Adams, Wells Fargo and Pacific Express Companies. While these hearings were all held upon September 15th, 1910, they were independent proceedings and the Adams Express Company was a party to the proceedings only in so far as they related to the valuation of its property.

"Before complying with such demand or furnishing the transcripts, the Commission desires your opinion upon the following questions:

"1. Is the Adams Express Company entitled to have furnished it upon its demand therefor, a transcript of the proceedings had in an investigation relating to the assessment of its property?

"2. Is the Adams Express Company entitled to have furnished it upon demand a transcript of any proceedings had in investigations relating to the assessment of the property of other express companies, the Adams Express Company not being a party to such proceedings?

"3. If said company is entitled to have furnished it any such transcript or transcripts what fee if any must the Commission charge and collect therefor?

"4. If any such fee is collected, what disposition must be made of it by the Commission?"

In reply thereto I beg leave to submit the following opinion:

Section 5469 of the General Code, being Section 25 of the Act of May 10th, 1910, as the same appears in 101 O. L., page 403, reads as follows:

"A transcribed copy of the evidence and proceedings, or any specific part thereof, on any investigation, taken by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript of all the testimony on the investi-

gation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand, to any *party* on payment of the fee therefor, as provided for transcripts in courts of common pleas."

The answers to your first and second questions require an interpretation of the word "party" as used in the above quoted section of the General Code. The legislature in using the word "party" in section 5469 of the General Code must, under the well known rules of statutory construction, be deemed to have intended that such word be given its commonly accepted meaning in this connection, and in determining what that meaning shall be it is necessary, therefore, to seek a definition given to it by the courts. The following is the definition of the word "parties" as given by the authorities:

"Parties. In the larger legal sense, are all persons having a right to control the proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies."

1 Greenleaf Ev., section 535,
Green v. Boue, 158 U. S., 503,
6 Words & Phrases Judicially Defined, 5203.

Under the above definition I am of the opinion that your first question must be answered in the affirmative, and that the Adams Express Company is entitled to have furnished it, upon a demand therefor, the ranscript of the proceedings had in the investigation relating to the assessment of its property. I am also of the opinion that the answer to your second question must be in the negative, and that the Adams Express Company is not entitled to have furnished it, upon demand, a transcript of any proceedings had in the investigation relating to the assessment of the property of other express companies, the Adams Express Company not being a party to such proceedings. In other words, the Adams Express Company was a party to the proceedings spoken of in your first question and was not a party to the proceedings spoken of in your second question.

In regard to your third question, I am of the opinion that the fee provided to be paid by any party for a copy of the transcript spoken of in section 5469 of the General Code, supra, is that provided to be paid to clerks of courts of common pleas by the following quoted provisions of sections 2900 and 290 of the General Code:

Section 2900:

"For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more; * * *."

Section 2901:

"For * * * making out copies of process, pleadings, records, files, or any proceedings in a cause with the seal annexed, when required by a party or the law, eight cents for each one hundred words; * * *"

The answer to your fourth question is found in section 24 of the General Code, which reads as follows:

> "On or before Monday of each week, every state officer, department, board, or commission shall pay to the treasurer of state all moneys, checks, and drafts received for the state, during the preceding week, from fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed verified statement of such receipts."

Very truly yours,
U. G. DENMAN,
Attorney General.

TAXATION—QUADRENNIAL EQUALIZATION—COUNTY BOARDS MAY TRAVEL WITHIN COUNTY FOR PURPOSE OF VIEWING PROPERTY, AND MUST DO SO IF TAX COMMISSION SO ORDERS.

August 11th, 1910.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 3rd in which you submit for my opinion thereon the following question:

> Have Boards of Equalization authority to travel within the territory comprised within their jurisdiction for the purpose of viewing property, the valuation of which is subject to equalization by them? What, if any, authority over such boards in this matter has the Tax Commission of Ohio?

Without quoting the statute defining the powers and duties of the county and city boards of equalization I beg to state that I am clearly of the opinion that they have discretionary power to act as you suggest. The power to "equalize" carries with it the power to employ any means which may be necessary to the acquisition of the information on which the equalization is based. Indeed there could be no better way of acquiring the knowledge which the members of the boards of equalization should have in order intelligently to discharge the powers and duties of their offices.

Under section 81 of the Act of May 10, 1910, the Tax Commission of Ohio is empowered and directed to

> "issue such orders and instructions to the different taxing officers as will carry into effect the provisions of law relating to taxation, and shall enforce the same agreeably to the provisions of this act."

And also to

> "prepare and transmit to the auditors of the several counties * * * such instructions as it deems conducive to the best interests of the state upon a subject affecting taxation, the execution of which devolves upon any county or local officer."

It is further provided by said section that,

> " * * * Each such officer shall obey and observe all such orders and instructions, and upon failure shall be subject to the penalties herein provided."

Under this section the Tax Commission of Ohio undoubtedly has the power to order members of all boards of equalization in the state to visit the various taxing districts within their several jurisdictions, and personally to view the property the valuation of which is subject to equalization by them. The effect of such an order would be to foreclose the discretion otherwise existing in the boards of equalization; what had previously been a *power* would become a *duty*.

Such an order of the Tax Commission could be enforced by the penalty prescribed in Section 111 of the Act of 1910, which is as follows:

> "Whoever violates any provision of this act * * * or neglects or refuses to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal, shall be fined not less than twenty-five dollars nor more than one thousand dollars for each offense."

Yours very truly,

W. H. MILLER,

First Assistant Attorney General.

(To the Railroad Commission.)

RAILROAD COMMISSION—AUTHORITY TO REQUIRE THROUGH TICKETS TO BE SOLD.

July 21st, 1910.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you enclose correspondence relating to the Erie Railroad Company's neglect and refusal to make a through rate and ticket from Galion to Loudonville via Mansfield, thereby necessitating re-checking of trunks and excess baggage at Galion, with additional charge for excess baggage.

In reply thereto I beg to say that there is no statutory provision whereby it is mandatory that this or other railroads in Ohio should sell through tickets, carrying baggage and excess baggage over connecting lines.

Section 512 of the General Code provides that,

> "When passengers or property are transported over two or more connecting lines of railroad between points in this state, and the railroad companies have made joint rates for transportation of such passengers or property, such rates and all charges in connection therewith shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful; * * *"

While it appears from the inquiry, and is a fact, that if a ticket may be purchased at Galion to Loudonville instead of from Galion to Mansfield, and then from Mansfield to Loudonville a re-checking of baggage would not be required, and therefore, the cost of excess baggage would be but one-half of what it is, yet under this section it will be seen that the question of transportation of persons or property over connecting lines, as result of joint rates for such transportation, is not mandatory but optional with the railroad. However, the subject has received further attention from the legislature. Section 540 General Code provides that,

> "Whenever railroads refuse or neglect to establish a joint rate or rates for the transportation of persons or property, the commission may, upon notice to the railroads and after opportunity to be heard, fix and establish such joint rate or rates. If the railroads party thereto fail to agree upon the apportionment thereof within twenty days after service of such order, the commission may, upon a like hearing, issue a supplemental order declaring the apportionment of such joint rate or rates which shall take effect of its own force as part of the original order."

It will be observed that the provisions of this section are slightly at variance with said section 512 General Code, in that section 512 leaves the question of joint rate transportation optional with railroads to be determined by expediency and facility, while section 540 empowers the railroad commission, and in my opinion section 512 to the contrary notwithstanding, to fix joint rates upon the neglect and refusal of the railroad so to do in the manner provided for in the section.

Yours very truly,

U. G. DENMAN,

Attorney General.

RAILROAD COMMISSION—FREE TRANSPORTATION BY RAILROADS —FULLY DISSCUSED.

July 21st, 1910.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit to me for an opinion thereon the following inquiries:

1. May a railroad company carry the property of its own employes free of charge, or at reduced rates?
2. May a railroad company carry the property of the employes of other railroads free of charge or at reduced rates?
3. May a railroad carry the property of the employes of an express company operating over its line free of charge, or at reduced rates?
4. May a railroad carry the property of the employes of other express companies not operating over its line free of charge, or at reduced rates?
5. May a railroad carry the property of the employes of an express company operating over a different division of its lines or system free of charge, or at reduced rates?
6. May an express company carry the property of its own employes free of charge, or at reduced rates?
7. May an express company carry the property of the employes of another express company free of charge, or at reduced rates?
8. May an express company carry the property of the employes of a railroad over whose line it operates, free of charge, or at reduced rates?
9. May an express company carry the property of the employes of railroads, other than those over whose line it operates, free of charge or at reduced rates?
10. May an express company carry the property of the employes of a roailroad over whose line it operates, but of a different division, free of charge, or at reduced rates?

In reply thereto I beg to say that the answers to these several inquiries are to be obtained from a consideration of section 515 of the General Code, as amended by the General Assembly of Ohio May 10, 1910.

The section as amended is as follows:

"Nothing in this chapter shall prevent the carriage, storage or handling of freight free or at reduced rates, for the United States, the state, any political subdivision or municipality thereof, for charitable purposes, to and from fairs and expositions for exhibition thereat, or the property of railway employes for their own exclusive use or consumption or that of their families; or the issuance of mileage, commutation or excursion passenger tickets, if obtainable by any person applying therefor without discrimination, or of party tickets, if obtainable by all persons applying therefor under like circumstances and conditions."

In amending the section as aforesaid the legislature changed the language, to-wit, "or household goods the property of railway employes" to read "or the

property of railway employes for their own exclusive use or consumption or that of their families."

Section 501 of the General Code, section 2 of the Railroad Commission act, provides that,

> "The term railroad as used in this chapter * * * shall mean and embrace express companies * * * ."

So that this section 515 is equally applicable to express companies. An analysis of the language constituting the amendment makes clear that the legislature gave to railroads and express companies within the state a wide latitude in free transportation of the character designated in said statute.

I am of the opinion that a proper construction of this amended section requires that your inquiries all be answered in the affirmative.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Board of Veterinary Examiners.)

STATE BOARD OF VETERINARY EXAMINERS — MANNER OF ISSUING CERTIFICATES TO PRACTICE.

December 1st, 1910.

MR. DAVID S. WHITE, *Secretary Ohio State Board of Veterinary Examiners, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you state that the Ohio State Board of Veterinary Examiners prepared and submitted to applicants for certificates entitling them to enter upon the practice of veterinary medicine and surgery in this state, pursuant to section 1174-1 General Code of Ohio, a blank form of application on which was propounded for answer twelve separate inquiries and requests, the twelfth being, "Name 12 citizens and residents of Ohio, giving post office address of each, for whom you did veterinary work prior to May 21st, 1894." You then inquire whether your board may be compelled to issue certificates under this exemption statute to those persons who refuse to submit affidavits corroborating answers to question twelve of the application.

The section to which you refer provides that,

> "Any person who within six months after the passage of this act, submits satisfactory evidence to the state board of veterinary examiners that he was engaged in the practice of veterinary medicine and surgery in this state prior to May 21st, 1894, and who pays a fee of $2.50 to said board shall be entitled to practice veterinary medicine or surgery in this state and shall receive a certificate from the said board signed by the members thereof; and no person shall, after six months following the passage of this act, practice veterinary medicine and surgery in this state without first having obtained from the state board of veterinary examiners a certificate entitling him to engage in such practice."

In section 1174 of the General Code is found the names of the branches in which applicants shall be examined for certificates, and the manner in which they shall be examined and the grade required to be made for certificates of those who are not entitled to be given a certificate pursuant to said section 1174-1.

In order to procure the certificate under section 1174-1 the applicant must have practiced veterinary medicine and surgery prior to May 21st, 1894, and upon application to the state board for certificate under this exemption statute he must submit "satisfactory evidence" to the board that he did so practice veterinary medicine and surgery in this state prior to May 21st, 1894, etc.

Any person who held himself out to the public as a veterinary surgeon and did, to some extent at least, practice veterinary medicine and surgery prior to May 21st, 1894, and submits "satisfactory evidence" to the board to that effect completes his qualification for the exemption certificate subject, of course, to the payment of the fee and some other minor matters of detail. Now the board asks the applicant under this waiver clause for the names of twelve persons for whom he practiced veterinary surgery prior to May 21st, 1894, and I infer from your inquiry that some applicants have perhaps given names that are fictitious

or not obtainable by your board for verification or further information concerning the qualification of the applicant. To support the names given, you have asked that the applicant furnish you affidavits as to the names being bona fide, and seemingly this has been refused by the applicant.

The statute confers a broad discretion upon this board. The evidence submitted must be "satisfactory evidence" to the board. In the case presented the board considers such affidavits as necessary in order that the evidence in a particular case be satisfactory to the board. Courts of equity have long since established the rule that they will not interfere with the discretionary powers conferred upon a board or commission by a legislature unless there is a flagrant abuse and misapplication of that discretion and have exercised the discretion in an arbitrary manner to the prejudice of the parties interested. I do not believe the request of the board herein comes within the rule established by our courts. I do not read the inquiry as meaning that twelve affidavits must be procured as corroborating the answers, it may be two affidavits or five affidavits.

I, therefore conclude, and express the opinion, that the board is justified in asking for further evidence of the good faith and correctness of the applicant in the furnishing of the twelve names asked for in inquiry No. 12 in the application for certificate contained.

I return herewith to you blank forms of application and affidavits submitted.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Board of State Charities.)

BOARD OF STATE CHARITIES — NO FUND PROVIDED TO PAY FOR INVESTIGATING RESIDENCE OF NON-RESIDENT INSANE PERSON.

February 17th, 1910.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date in which you submit the following for my opinion:

> Sections 632a and 632b of the Revised Statutes, 99 O. L. 323, provides a system of investigating residences of non-resident insane persons by the Board of State Charities, and where the legal residence has been positively established such insane persons may be transported at the expense of the State of Ohio to the place of legal residence. You desire to know from what fund such transportation expenses may be paid.

Section 632b of the Revised Statutes, which provides that the expense shall be paid by the state, is in part as follows:

> "* * * at any time after investigation is made, as aforesaid, a non-resident person, whose legal residence has been positively established, before or after admission in or commitment to a state institution, may be transported at the expense of the State of Ohio to such place of legal residence."

The entire act relating to investigating the residences of non-resident insane persons does not mention what fund is to be drawn on to pay the transportation expenses, but the act merely states that such persons may be transported at the expense of the State of Ohio. I do not think this expense may be paid from the current expense fund of any benevolent institution or from the contingent fund of the State Board of Charities, but I am of the opinion that it will be necessary for the general assembly to make a specific appropriation for such expenses as provided in section 22 of article 2 of the Constitution of Ohio.

Yours very truly,

U. G. DENMAN,
Attorney General.

BENEVOLENT INSTITUTIONS — LIABILITY OF RELATIVES FOR SUPPORT OF INMATES — CONSTRUCTION OF EXEMPTION IN FAVOR OF HONORABLY DISCHARGED SOLDIERS, ETC.

August 11th, 1910.

The Board of State Charities, MR. H. H. SHIRER, *Secretary, Columbus, Ohio.*

GENTLEMEN: — I beg to acknowledge receipt of your letter of August 9th, requesting my opinion as to the effect of section 1815-10, General Code, as enacted April 18, 1910. Your specific questions are as follows:

"1. An honorably discharged soldier is the husband of a patient in a state hospital. Can he be ordered to pay for the support of his wife in case it is found that he is abundantly able to do so?

"2. An honorably discharged soldier is the father of a patient in a state hospital. Can he be ordered to pay for the support of this patient if found able to do so?

"3. A soldier's widow is a patient in a state hospital and receives a pension. This pension and other property is in the custody of a lawfully appointed guardian. Can the guardian be ordered to pay for the support of said patient?"

I quote sections 1815-9 and 1815-10 of the act of April 18, 1910, which sections I am satisfied, upon careful examination of the act, are the only ones concerned in the solution of the questions submitted by you:

Sec. 1815-9. "It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

Sec. 1815-10. "Sections 1815-1, 1815-2, 1815-3, 1815-4, 1815-5, 1815-6, 1815-7, 1815-8 and 1815-9 of this act shall not apply to honorably discharged soldiers and sailors of the United States who are inmates of the institutions in this act."

It is my opinion that under section 1815-10, above quoted, no exemption exists to the provisions of section 1815-9 unless the inmate himself is an honorably discharged soldier or sailor. The status of the inmate's relative is of no importance whatever in this connection.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

BENEVOLENT INSTITUTIONS — PAY PATIENT LAW — FULLY DISCUSSED.

September 8th, 1910.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date in which you submit the following for my opinion:

"First. A young man when twenty-two years of age was committed to a state hospital. He has no estate of his own. His father admits that he is able to support, but holds that he is not liable because his son was committed after he became of age.

"Second. A married woman became insane at the age of twenty-five. Her husband cannot pay for her support on account of inability to work regularly because of being crippled through a recent accident. Her father has means but claims that he cannot be compelled to pay for her support because his daughter is of age and because of marriage her husband only can be held liable for her support.

"Is one or both of these persons liable according to section 1815-9?

"Third. A guardian reports that he has a fund of $750, held in trust for an aged ward who has been an inmate of a state hospital for many years and undoubtedly belongs to the incurable class. He has no wife, children or other near relatives dependent upon this fund for support. The small income barely pays taxes and furnishes clothing for the patient. The guardian is willing and desires to use part of the principal, if it is lawful to do so, to pay for the support of his ward."

Part of "An act to amend section 1815 of the General Code, relating to the support of inmates in benevolent institutions at the expense of the state", is as follows:

"* * * Sec. 1815-2. Within thirty days after the passage of this act and thereafter within thirty days after the close of each fiscal year, the board of state charities shall determine the amount per week which relatives, guardians and friends shall pay for the support of patients in each of said institutions. The amount shall not be greater than the average gross per capita cost of the preceding year; provided, that in no case shall the amount exceed four dollars per week.

"Sec. 1815-3. * * * Said agent shall investigate the financial condition of the inmates now in the aforesaid institutions, or hereafter committed or admitted thereto, and of the relatives liable for the support of such inmates, in order to determine the ability of any inmate or such relatives to make payment in whole or in part for the support of the said inmate; provided, that in all cases due regard shall be had for others who may be dependent for support upon the estate of said inmate.

"Sec. 1815-4. * * * The board, or a committee thereof, appointed for that purpose, shall determine whether such relatives shall be required to pay for the support of such inmates or whether such charges shall be made against the estate of such inmate. * * *

"Sec. 1815-7. In case the estate of any inmate is sufficient for his or her support, without hardship to any others who may be dependent thereon, and no guardian has been appointed for such estate, the agent shall petition the probate court of the proper county to appoint a guardian.

"Sec. 1815-9. It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions, a wife for a husband, a father or mother for a son or daughter, or both, for a father or mother."

The object of the above quoted act is to provide for persons who have either a wife, husband, child or ward confined in a benevolent institution of this state and when, after investigation, it is found that the estate of such inmate is not sufficient to pay the expense of confinement, but that such person related as wife, husband, child or guardian has sufficient funds to pay part or all of the expenses of such inmate, such person shall be required to do so. In no case is much of a burden placed upon any one as the amount that may be charged is limited by section 1815-2. The persons required to pay are morally bound to support such inmates and it is but right that they should be required to support those who should be the natural object of their bounty and not leave them to be supported by the public.

In construing this law it is important to look to the history of legislation of this nature. The first statute of this kind was passed in England in 1601, 43 Elizabeth, Chap. 2. This statute provided that the father, mother, grandfather and grandmother of poor, old, blind, lame and impotent persons shall maintain them. This statute, being of such ancient origin, should probably be regarded as in force and to have become a part of our common law. You will therefore note that the law passed by our last general assembly, insofar as relates to parents supporting indigent inmates of benevolent institutions, is declaratory of the common law and should be liberally construed. Bearing this construction in mind, you will note section 1815-9 General Code, above quoted, holds a husband liable for a wife when an inmate of a benevolent institution of this state, and a wife for a husband, a father or mother for a son or daughter, and a son and daughter, or both, for a father or mother. This section places an absolute liability upon a parent to support a child, conditioned only upon financial conditions of such parent. The fact that a child was of age at the time of commitment to a benevolent institution will not exempt a parent from paying the expenses of such child, nor will a parent be exempt from liability merely because a daughter is married. True, the statute also holds the husband liable, but the parent is also held liable and in case the husband is not financially able to pay such expense and a parent is able to do so, such parent must pay. However, in case the husband is able to pay part of the expense, he must do so and the parent will then be held only for the balance. I have assumed in both cases that the parent is financially able to pay the expenses.

I am, therefore, of the opinion that, in the first and second inquiries presented by you, the parents are liable according to Section 1815-9 of the General Code.

Answering your third inquiry, I call your attention to the part of sections 1815-4 and 1815-7, above quoted. As in the case cited by you, the inmate has no wife or other near relative dependent upon his estate for support, I am of the opinion that your board, under section 1815-4, may determine whether or not the expense of such inmate shall be made against his estate and, if your board decides in the affirmative, I am of the opinion that you may charge the same to the principal of the fund in the hands of the guardian of such inmate.

I desire to advise that I will be glad at any time to meet with you and discuss the numerous questions which I am sure are being presented to your board relative to putting this law into operation.

Yours very truly,
W. H. MILLER,
Asst. Attorney General.

BLIND RELIEF—TIME OF PAYMENT—EFFECT OF REMOVAL TO ANOTHER COUNTY—DEATH BEFORE PAYMENT.

March 23rd, 1910.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "1. A man was regularly granted an allowance by the blind relief commission, payments to be made at the close of each quarter

for the preceding three months; on March 1st he removes to another county but claims that he is entitled to a pro rata amount from January 1st to date of removal. Is his contention correct or does his removal within the quarterly period forfeit claim to any amount during that period?

"2. Does one, by removal to another county, lose all claim for similar relief in the county to which he has removed until one year has expired?

"3. A woman is granted allowance by the blind relief commission subject to the same regulations as in the first case submitted; on March 6th the woman dies. Is the person who cared for her entitled to receive the amount due from January 1st to March 6th?"

This department, under date of January 13, 1909, rendered an opinion to Hon. J. C. Williamson, Prosecuting Attorney at Mt. Gilead, to the effect that payments for blind relief should be made at the end of the quarter. However, this does not mean that if a person, who is entitled to blind relief, removes to another county prior to the time that payment is due for the entire quarter, thereby barrs himself from all relief. I am of the opinion that such person would be entitled to a pro rata amount, that is, would be entitled to relief for the actual period which he resided in the county, which amount would be payable at the end of the quarter. Therefore, the person mentioned in your first inquiry would be entitled to pro rata amount of relief from January 1st to date of removal.

Answering your second question, section 2966 of the General Code provides:

"In order to receive relief under these provisions, a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year."

You will note the above quoted section requires that one to be entitled to blind relief must be a resident of the county for one year. I am, therefore, of the opinion that a blind person, by removing to another county, is not entitled to blind relief in the county to which he has removed until one year has expired.

Answering your third question, Sections 2966 to 2970, inclusive, of the General Code of Ohio, relate to blind relief. These sections provide relief for the poor and therefore should be liberally construed so as to make them answer the purpose for which they were intended. I, therefore, am of the opinion that if the person, who cared for the blind person before death, would have a cause of action against the blind person if living, the blind relief commission should pay, from the amount that would be due the blind person, the amount due for care of the blind person, for the reason that the amount that would have been received by the blind person, if living, from the commission, would have been applied to pay for such care.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF COUNTY VISITORS—TERM OF OFFICE.

May 18th, 1910.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 17th in which you submit the following for my opinion:

> Section 633-15 Revised Statutes provided that two members of the board of county visitors be appointed each year between the first day of March and the first day of April for a term of three years. section 633-15 Revised Statutes is now section 2971 of the General Code, and provides that between the first day of March and the first day of April the probate judge shall appoint six members of the board of county visitors, but no term of office is indicated anywhere in this or other sections.
>
> Query: Shall the probate judge appoint six members to serve indefinitely, or shall he continue under the provisions of the old law?

I beg to advise that under old section 633-15 the board of county visitors consisted of six members, and the term of office of each was definitely fixed.

Section 633-15 is now repealed, and section 2971 of the General Code covers the same subject matter, and provides in part as follows:

> "Between the first day of March and the first day of April the judge of the probate court in each county shall appoint six persons, not more than three of whom shall have the same political affiliation, who shall constitute a board of county visitors, for the inspection of all charitable and correctional institutions supported in whole or in part from the county or municipal funds. * * * "

This section provides that six members shall be appointed between the first day of March and the first day of April. I do not think it was the intention of the general assembly to have the members serve indefinitely, but, on the other hand, each year, between the first day of March and the first day of April, the probate judge is to appoint a new board, and the term of office of each member of the board would, therefore, be from date of appointment until the date between the first day of March and the first day of April upon which the probate judge makes his new appointments.

It is further provided in the same section (2971 General Code) that all vacancies in the board shall be filled in the manner provided by the original appointment for the *unexpired term only.* You will note that the words "unexpired term," as above used, has reference to a definite term. This also leads me to the conclusion that the term of the members of the board of county visitors is for one year.

Very truly yours,
U. G. DENMAN,
Attorney General.

(To the Dental Board.)

DENTAL LAW—EXEMPTIONS.

Instructor in dental college, licensed in another state, but not in Ohio not liable to prosecution under dental law.

January 13th, 1910.

DR. F. R. CHAPMAN, *Secretary Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 13th, enclosing letter of Dr. W. H. McGehee, from which I have ascertained the following facts, upon which you desire my opinion, viz.:

Dr. McGehee is licensed to practice dentistry in the state of Virginia, between the dental board of which state and that of the state of Ohio there is no reciprocity agreement. The Doctor contemplates engaging in the work of instruction in a dental college in the state of Ohio, such work including demonstrations in operative dentistry. For such work he would, of course, receive a salary. Is it lawful for him to do so without securing a license from your board?

Section 18 of the act regulating the practice of dentistry, 99 O. L. 66-79 would seem to apply to the case of Dr. McGehee in two respects, viz.:

1. In his work in the dental college he "performs dental operations" and "treats diseases or lesions of human teeth or jaws, etc.," for a "salary" as therein prohibited.

2. I have no doubt but that Dr. McGehee will continue the use of the letters "D. D. S." in connection with his name.

However, section 20 of the act provides that,

> "Nothing in this act applies * * * to a legal practitioner of dentistry of another state, making clinical demonstrations before a * * * dental college."

While a strict construction of this section would seem to confine its meaning to single demonstrations as against continuous employment in a dental college, I am clearly of the opinion that the spirit of this proviso would make it applicable to the case at hand.

I am, therefore, of the opinion that Dr. McGehee would not violate the law by engaging in the work of instruction in a dental college as described by him.

Yours very truly,
U. G. DENMAN,
Attorney General.

DENTAL BOARD MAY NOT WAIVE CLINICAL PART OF STATE EXAMINATION.

April 29th, 1910.

HON. L. L. YONKER, *Sec'y Ohio State Dental Board, Bowling Green, Ohio.*

DEAR SIR: I am in receipt of your letter of April 27th in which you submit the following for my opinion:

> Last June an applicant before the State Dental Board failed to pass the required 75 per cent in the theoretical branches, but passed

the 80 per cent in the clinical. At the October examination he failed again in the theoretical. You now assume that if this applicant comes before you the third time he comes as a new applicant, making another application and paying the full fee.

Query: May the Dental Board, if they see fit, waive that part of the examination which he successfully passed and only require him to try the theoretical?

I beg to call your attention to Section 1322 of the General Code, which is as follows:

"An applicant for a license to practice dentistry shall appear before the state dental board at its first meeting after the filing of his application, and pass a satisfactory examination, consisting of practical demonstrations and written or oral tests, or both, in the following subjects: anatomy, physiology, chemistry, materia medica, therapeutics, and metallurgy, histology, pathology, bacteriology, prosthetics, operative dentistry, oral surgery, anesthetics, orthodontia, and oral hygiene."

You will note the above section enumerates what an examination shall consist of. I assume by clinical work you refer to practical demonstrations, and by theoretical work you refer to the written or oral tests. You will note the above section requires an examination to consist of both. If your board should divide the subjects, the applicant would not be given an examination within the meaning of the above section, and I am, therefore, of the opinion that your board is without authority, at the coming examination, to examine the applicant referred to in your inquiry only in theoretical work, but are required to examine such applicant in both theoetical and clinical work.

Your assumption that the above applicant will be required to make new application and pay the full examination fees at the coming examination, is correct.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Medical Board.)

MEDICAL BOARD — MANNER OF DETERMINATION OF STANDING OF MEDICAL INSTITUTIONS.

September 21, 1910.

DR. JAMES A. DUNCAN, *Member, Ohio State Medical Board, Toledo, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 17th, enclosing copy of letter addressed to you by Dr. John Scudder and submitting for my opinion thereon the following question:

> May the state medical board determine in advance the standing of particular medical colleges, or may the action of the board respecting the standing of such institutions be taken only upon presentation to it of a diploma from such institution by an applicant before it? How, in short, should the action of the board enjoined upon it by law respecting the standing of medical colleges be taken?

The following provisions of the General Code are in point: Section 1270:

> "* * * The applicant * * * must produce a * * * diploma from a legally chartered medical institution in the United States, in good standing *as defined by the board,* at the time the diploma was issued * * * "

Section 1272:

> "If the state medical board finds that * * * his diploma * * * granted by a legally chartered medical institution in the United States in good standing as determined by the board * * * the board shall admit such applicant to an examination."

I am aware that former Attorney General advised the then Ohio State Board of Medical Registration and Examination that its action respecting the standing of a medical institution could only be predicated upon the presentation to it by an applicant of a diploma issued by such institution. While I have not compared the present law with the one under which the opinion was written, suffice it to say that, in my judgment, the opinion as applied to the present law is only in part correct. The two sections above quoted impose not one but *two* sets of powers and duties upon the state medical board, viz:

1. The adoption of a definition of what constitutes a medical institution in good standing. This definition must be framed generally and, in my opinion, is beyond the power of the board to adopt a resolution specifying by name various institutions as being either of good standing or as failing to conform to such a standing. The rule must be general and uniform.

2. The determination upon a particular diploma presented by an applicant as to the good standing of the institution issuing the same measured by the definition adopted by the board itself, and in force at the time the diploma was issued.

That the "definition" under Section 1270 is not the same thing as the "determination" to be made under Section 1272 is clear from the fact that the former

section requires the applicant merely to produce a diploma from an institution in good standing as defined by the board *at the time the diploma was issued*, while the latter section requires the determination or finding of the board to be made at the time the application is presented to it.

Putting it in another way, the board must adopt a rule defining "good standing"; but it can not investigate the standing of a particular college as measured by such rule until the particular application is before it for consideration. When such application is before it for consideration, however, it must determine the good standing of the particular college, not by any view as to the present standing of the college but by the application of the rule adopted by the board to the college or institution as it existed at the time the diploma was issued. More specifically, the question raised by an application accompanied by a diploma is as follows:

"Was the institution issuing this diploma in good standing as defined by this board at the date on which the diploma was issued?"

I have reached the foregoing conclusion not only upon consideration of the sections involved, but also because a contrary ruling would permit the state medical board to act retroactively with respect to the specific credentials. Such a legislative intention is never presumed.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Pharmacy Board.)

PHARMACY LAW — APPLICATION OF.

Purchasing agent of the Ohio Horticultural Society not criminally liable under the pharmacy law for purchase of chemicals from manufacture, etc.

February 15th, 1910.

DR. FRANK H. FROST, *Secretary Ohio State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR: — You have submitted to me for my opinion thereon the following question presented by a letter addressed to you by Mr. F. H. Ballou, Secretary of the Ohio State Horticultural Society.

> The Ohio Horticultural Society has established a purchasing agency in charge of a person to whom the members of the society address orders for chemicals and poisons to be used as insecticides. This purchasing agent buys such chemicals and poisons in wholesale lots from manufacturers. The manufacturers in turn ship the orders in separate lots to the individual members of the society or in such separate lots to the purchasing agent who then distributes them to the several members to whom they are addressed, the selection of the goods from the stock being made by the manufacturer at the manufactory.
>
> *Query:* Does this method of doing business violate the pharmacy law.

Section 77 of the act "To revise and consolidate the laws relating to the state board of health, etc.", 99 O. L. 492-507, provides in part that,

> "No person not a legally registered pharmacist shall open or conduct a pharmacy or retail drug or chemical store * * * . No person not a legally registered pharmacist shall compound, dispense or sell any drug, chemical, poison or pharmaceutical preparation * * * ."

Manifestly the purchasing agent cannot be convicted of conducting a retail drug store, nor in my opinion does he act, under the scheme of business above detailed, in violation of the other provisions above quoted. In the first place he appears, in the light of the assumed facts, to be the agent of the members of the society to purchase on their account, and not the agent of the manufacturer to sell, consequently he cannot be found guilty of *selling* anything.

Again the technical question as to the place of the sale may be eliminated for the reason that in the phrase "compound, dispense or sell", the word "sell" is, in my opinion, to be limited in meaning by the application of the rule of *ejusdem generis,* so that a person would not be regarded as selling within its meaning unless he selects from a stock of poisons the particular poison desired by the purchaser. In short I can conceive of no view of the case in which the purchasing agent could be held accountable under the pharmacy law.

If there is a violation of the law in question under the above statement of facts, it could only occur in the manufacture. In my judgment the law necessitates the employment of registered pharmacists and assistant pharmacists by

wholesale or manufacturing druggists for the purpose of handling sales thus made directly to the consumer, or rather made otherwise than to a retail druggist.

I take it, however, that the question submitted relates to criminal liability of the purchasing agent alone. The above quoted provisions of the pharmacy law are the only ones in that law applicable to the question at hand.

It is my opinion, therefore, that the purchasing agent of the Ohio Horticultural Society, conducting his business on the plan above described, does not violate the pharmacy law.

I herewith return the letter of Mr. Ballou.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Armory Board.)

ABSTRACT OF TITLE TO PROPOSED ARMORY SITE IN POMEROY—INFORMATION AS TO.

July 6th, 1910.

COL. BYRON L. BARGAR, *Secretary State Aarmory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title and deed of county commissioners of Meigs County for a certain tract of land situated in the village of Pomeroy which it is proposed to convey to the state for armory purposes. I am requested to direct my opinion as to the sufficiency of the deed to you.

I have carefully examined the abstract of title and find therein no serious defects. The title appears to stand in the name of the board of county commissioners of Meigs County and their successors, although the statute section 2433 General Code, formerly section 870 Revised Statutes, requires that "the title of such real estate (purchased for county purposes) shall be conveyed in fee simple to the county." I regard this matter, however, as unimportant. No examination has been made in the federal courts for pending suits or judgments. No examination has been made for municipal assessments.

Subject to the foregoing qualifications, I am of the opinion that the title of the board of county commissioners of Meigs County to the property sought to be conveyed by them to the state is free and clear of encumbrance.

The deed recites that the county commissioners have been paid the sum of two thousand ($2,000.00) dollars "by certain public-spirited citizens of the county of Meigs", and the same is given as a consideration for the conveyance. There is no recital, however, as to any determination by the commissioners concerning the policy of making the sale. Section 880 Revised Statutes, at present section 2447 General Code, provides that,

> "If in their opinion the interest of the county so requires, the commissioners may sell any real estate belonging to the county, and not needed for public use."

In my opinion, this section makes necessary formal action on the part of the commissioners, determining that the interest of the county requires the sale of the real estate in queston. This determination should be spread upon the minutes of the commissioners in the form of a resolution, and the fact of such action should not only be made to appear upon the abstract of title, but should also be recited in the deed.

I advise, therefore, that you do not accept the deed of the board of county commissioners of Meigs County until the provisions of the statute are complied with.

Yours very truly,

W. H. MILLER,

First Assistant Attorney General.

MUNICIPAL CORPORATIONS—STATE ARMORY BOARD—WITHOUT AUTHORITY TO DONATE LAND TO.

May 16th, 1910.

HON. B. L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Referring to your letter of May 13th in which you submit a draft of deed by which the village of Manchester proposes to donate lands to

the State of Ohio for armory purposes, asking the opinion of this department as to the sufficiency of the proposed conveyance.

An Act to provide for the carrying into effect of provisions of Article 9 of the Constitution of Ohio, 100 Ohio Laws, page 25, authorizes the State Armory Board to receive gifts or donations of land, money or other property for the purposes of aiding in the purchase of building, furnishing or maintaining of any armory building, but requiring that "all lands acquired shall be deeded to the State of Ohio." This act is sufficient authority for your board to accept the land which the village of Manchester desires to donate to you for armory purposes, but there is no authority whatever for the village of Manchester to donate its lands for such purposes. A municipal corporation has only such powers as has been given to it by the legislature. Authority to donate lands to the State Armory Board for armory purposes is not one of the powers given to a municipal corporation.

I am therefore, of the opinion that, although your board has authority to accept the donation of land from the village of Manchester, and the deed conveying the same is in regular form, the village of Manchester is without authority to make a deed donating land to your board.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARMORY BOARD MAY NOT DETERMINE RESPONSIBILITY OF BIDDERS.

October 3rd, 1910.

COL. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date requesting my opinion as to the construction of section 5258 General Code, formerly section 3 of the State Armory Law, so called, 100 O. L. page 25. Said section provides in part as follows:

> "The board shall advertise for sealed bids for the erection of such armory * * *. Upon the day specified in the advertisement the bids received shall be opened by the board, and the lowest bid which complies with the plans and specifications submitted may be accepted. The board may reject any and all bids and re-advertise for bids."

Your questions are as follows:

> "1. Under this provision, is the Board required to accept the lowest bid or none?"
> "2. Or may the Board accept the lowest responsible bid?"

I have carefully examined the authorities relating to the discretion of administrative boards and other public officials charged with the construction of public improvements, and with the duty of inviting competitive bidding therefor and awarding the contract. I have, however, failed to find any case in which a statute precisely like the one under consideration has been construed. While the provision respecting the acceptance of the lowest bid which complies with

the plans and specifications is in form a grant of power, it amounts, in my judgment to a mandatory limitation upon the power of the board, that is to say, the power to accept the lowest bid is not by implication to be extended to the acceptance of any other bid upon the principle that the expression of one thing is the exclusion of all others. Putting it another way the word "may" should be read "shall." The doubt as to the meaning of the section arises by reason of the last sentence. It is quite apparent that the General Assembly has thereby conferred upon the board power to reject bids, and it will be observed that the statute does not enumerate the causes for which bids may be rejected. Therefore, such causes must be gathered by implication from the entire section.

On the one hand it is clear that the board may reject any number of bids less than the whole number submitted and accept the lowest bid of those remaining unrejected. In my judgment, however, the board in taking such action may not predicate the same upon the irresponsibility of the bidder, or his supposed inability to perform the work in a workman-like manner. The power to do this must appear in the statute, and as has already been observed, the section not only does not contain any such specific grant of power but really contains a provision having an exactly opposite meaning. There are other reasons for which a bid may be rejected, one of them is apparent from the section itself, viz., failure to comply with the plans and specifications. This fact together with other considerations suggests the true rule as to what causes may be acted upon by the board in rejecting the bid as follows: Any irregularity or insufficiency in any bid *apparent on the face thereof,* is a proper ground for rejection of such bid. In order to pass upon the responsibility of the bidder or his ability to complete the work in a proper manner, the board would of necessity have to rely upon sources of information other than the face of the bid. This under the section they would have no right to do.

As above stated I have found no cases directly in point and therefore cite none. I deem it proper to state, however, that my conclusion is based upon a careful examination of all of the authorities, and that in my opinion the State Armory Board in rejecting any bid under section 5258 General Code may not determine the responsibility of the bidder, his ability to complete the work satisfactorily or any other matter not apparent upon the face of the bid.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARMORY BOARD — ABSTRACT OF TITLE OF PROPOSED SITE AT NORWALK.

July 15th, 1910.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of June 10th submitting deed from F. B. Case and wife to the State of Ohio conveying the following premises, situated in the city of Norwalk, County of Huron and State of Ohio and being part of In-lot number Twelve hundred and thirty-four (1234) fronting on the northerly side of Monroe street in said city, described as follows: beginning at a point on the north line of said Monroe street 15 feet east of the Gilger Theater, thence easterly along the north line of said Monroe street, 65 feet; thence northerly parallel with the east line of said In-lot 150 feet; thence westerly parallel with the north line of said Monroe street, 65 feet; thence

southerly parallel with the east line of said In-lot 150 feet to the place of beginning, and being the same premises conveyed to the State of Ohio by deed dated June 1, 1910, by F. B. Case and wife.

I have carefully examined the abstract and find no serious defects in the title as disclosed thereby. The affidavits furnished at my instance disclose that Charles J. Battell, who owned the property involved about the year 1861 was a bachelor. Charles B. Stickney, who owned the property between the years 1872 to 1881, was personally known to a member of this department and was a bachelor. Accordingly I have ignored the failure of the abstract to disclose this fact.

I find that the property stands on the tax duplicate of Huron county, Ohio, in the name of the State of Ohio by virtue of the conveyance effected by the deed submitted to me. The title conveyed by this deed is subject to the encumbrance created by the following language: "If at any time said premises shall cease to be use as a *site* for an armory or other public building then said premises shall revert to the said F. B. Case, the grantor, his heirs or assigns."

In this connection I refer you to section 5256, General Code, which authorizes the Armory Board to receive gifts or donations of land. Said section provides in part that:

> "The land so acquired shall be deeded to the state of Ohio, and the property received under the provisions of this section from any source shall become the property of the state."

I doubt the power of the board under this section to accept a qualified or defeasible title on behalf of the state, and submit this point for your consideration in that connection.

Taxes for the last half of the year 1909 amounting to $2.86 and taxes for the first half of the year 1910, amount undetermined, are a lien. No examination has been made in the federal courts for pending suits and judgments. No examination has been made of the records of the city of Norwalk for special assessments.

Subject to the foregoing qualifications I beg to advise that the title of the State of Ohio under the deed in question is good.

Yours very truly,
U. G. DENMAN,
Attorney General.

ARMORY BOARD—ABSTRACT OF LANDS AT BOWLING GREEN, OHIO.

July 20th, 1910.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the accompanying abstract of title to lots Nos. 208 and 209 in Alfred Thurstin's Addition to the city of Bowling Green, Wood county, Ohio, prepared by Robert Dunn, attorney and abstracter, under date of July 2, 1910, and from such examination, assuming that lots 111 and 112 and lots 208 and 209 of Thurstin's addition are the same lots, said abstract shows a good marketable title of record at the date thereof in Earl W. Merry, subject to the 1909 taxes, amounting to $46.10 and the 1910 taxes undetermined.

I have also examined the accompanying deed purporting to convey said lots to the city of Columbus and believe the same is sufficient to convey the premises

to the state, but suggest that the plat book and page of the addition might be inserted in the description in the deed. I am herewith returning to you the abstract and deed.

Very truly yours,
U. G. DENMAN,
Attorney General.

STATE ARMORY BOARD—CONSTRUCTION OF ARMORY

Compensation of architect employed by State Armory Board in construction of armory included within maximum amount of $15,000 which may be expended in such construction.

November 17th, 1910.

COL. BYRON L. BARGAR, *Secretary State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter requesting my opinion upon the following question:

> "The maximum amount for the building of a one company armory is $15,000.00. Does this amount necessarily cover architect's fees and expenses, or may such fees and expenses be paid in addition to $15,000.00 for the construction of one such armory?"

Section 5257 of the General Code provides that,

> "When the board deems it to the best interests of the state and advisable to erect an armory * * * it shall cause plans, specifications and estimates to be prepared for an armory at the place it has so selected, and proceed to erect such armory as hereinafter provided in this chapter."

Section 5261 of the General Code provides in part that,

> "The maximum amount to be expended by the state for the building or purchase of an armory for a company or single organization, shall not exceed fifteen thousand dollars, * * *."

I am of the opinion that said maximum amount of $15,000 includes the compensation of the architect. The following reasons for such a holding appear:

1. The limitation of section 5261 is upon the amount to be expended "for the building or purchase of an armory." If an armory were purchased it would be acquired complete, while if the word "building" is to be construed in its narrowest sense it would not include all of the proceedings necessary to the acquisition of an armory in this manner. In other words the fact that the limitation is both upon the building and the purchase tends to indicate that the $15,000 limit is upon the amount of money that may be expended in any way for the acquisition of an armory for the state.

2. The section relates to the powers of the board, a public agency. It is held that power to "build" an edifice includes the power to have plans and specifications prepared and to employ an architect for that purpose. (Peterson v. N. Y., 17 N. Y. 449). It is true that the duty to cause plans, specifications and estimates to be prepared is specifically imposed upon the board by the above

quoted provision of section 5257. However, it will be observed that the board is required to have a separate set of plans, specifications and estimates prepared for each armory to be constructed by it, and that the board is not required or authorized to employ an architect upon a continuing salary for the purpose of preparing plans and specifications.

In this same connection it has been held that under the laws of this state, as well as other states, an architect performing services in the way of the preparation of plans and specifications and superintendence of construction of a building is entitled to a laborer's lien upon the premises. (Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 66 Fed. Rep. 683). See generally 2 Am. & Eng. Enc. of Law, page 824 and cases vited in the note.

It will be observed that some of the cases cited in the note above referred to create a distinction between the services of an architect acting as superintendent and his services in the preparation of plans and specifications. It is not clear, however, that this is the law in Ohio, and even if it were, I am of the opinion that under the state armory law no such distinction exists. I cite the mechanic's lien decisions for the purpose of showing that in law the services of the architect constitute a part of the services necessary for the construction or building of an edifice. That is to say, the architect stands in the same situation with respect to the construction of the building as does any laborer who performs services thereon.

For both the foregoing reasons I am of the opinion that the limitation of $15,000 imposed by section 5261 General Code includes every initial expense incurred by the state armory board for the acquisition of an armory for a company or single organization, and that in case such acquisition is by way of construction the compensation of the architect who prepares the plans, specifications and estimates and superintends the construction of the building on behalf of the board must be included in said $15,000.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATE ARMORY BOARD MAY ACCEPT CONDITIONAL FEE.

July 23rd, 1910.

COL. BYRON L. BARGAR, *Secretary State Armory Board, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 22nd referring to my recent opinion as to the title conveyed to the State of Ohio by the deed of F. B. Case for a site for an armory. You state that the grantor refuses to execute a proper conveyance releasing the condition of the deed, and in view thereof request my opinion upon the following questions:

> "1. Is it within the powers of the Board to accept any but a fee simple title?
>
> "2. Is it within the powers of the Board to accept the title tendered by Mr. Case in this deed, and erect thereafter an armory on the site?"

I deem it proper to state that the former opinion was designed merely to call your attention to the incumbrances created by the condition in the deed,

upon the supposition that the same could be removed by further negotiation with the grantor; I did not at that time express an unqualified opinion as to the powers of the board in acquiring title for the State by donation. Your present inquiry makes it necessary for me to investigate carefully the provisions of law relating to the powers of the State Armory Board.

Section 5256, General Code, provides:

> "The board may receive gifts or donations of land, money or other property for the purpose of aiding in the purchase, building, furnishing or maintaining of an armory building. All lands so acquired shall be deeded to the state of Ohio, and all property received under the provisions of this section from any source, shall become the property of state."

It is elementary that the State Armory Board, being a public agency of limited powers, cannot bind the state by a contract beyond the scope of its actual authority. The effect of accepting a deed which provides for a reversion to the grantor in case the property is not used for a given purpose, is to all intents and purposes the same as if a contract had been made binding the State to use the property for a certain purpose and for no other purposes.

Standing by itself the section above quoted certainly does not confer upon the Armory Board the power to accept a qualified title as, upon the principles above suggested, it must be construed in favor of the State. However, the section does not stand alone, but is a portion of an act known as the State Armory law. Section 5260, General Code, also a portion of that act is in *pari materia*. It provides as follows:

> "The board shall have like powers to condemn and appropriate land for public use, as the state board of public works. Land to build armories upon is hereby declared to be a public necessity."

This section must be considered in determining the exact scope of the authority of the armory board to make contracts on behalf of the state. It is not sufficient in itself, of course, to determine this question, as it refers to another law. The powers of the board of public works in the appropriation of property for a public necessity (as distinguished from a public exigency) are not defined in the General Code. The procedure is outlined in section 442 et. seq. Said section 442, General Code, provides that the board of public works in appropriating property shall first make and subscribe a certificate which shall contain a full description of the *property* intended to be appropriated without prescribing whether or not anything less than a fee simple title may be appropriated. Standing by itself this section might be construed either as a grant of power limited to the appropriation of a fee or as permitting the appropriation of a right or interest less than a fee. Indeed, it seems that the latter interpretation is the correct one inasmuch as it has been decided that the state can take only such interest as is necessary for the public use.

McArthur v. Kelly, 5 Ohio 140.
Giesy v. Ry. 4 O. S. 308.

The meaning of said section 442 is then at least doubtful, and we are justified in referring to the pre-existing law for its interpretation. This upon the principle that, a revision or codification not being presumed to change the law, ambiguous or doubtful phrases in it may be construed by reference to the prior acts.

Section 218-21 R. S., defining the scope of the power of the board of public works in appropriating private property, provided in part as follows:

> "When the public use of the property will be temporary, or at intervals only, or when for any other reason it may be unnecessary or inexpedient to appropriate the fee simple therein, or absolute right thereto, an easement, or right, commensurate with the use to be made thereof, may be appropriated * * *."

It follows from the foregoing that the Armory Board as well as the board of public works has the power to *appropriate* on behalf of the state less than a fee simple title. This being the case, in my opinion the Armory Board as well has the power to accept by donation less than a fee simple title.

I have not the deed for the Norwalk armory site before me, and am, therefore, unable to quote its condition. I am of the opinion, however, that your board has discretionary power to accept the title as qualified thereby, and to erect thereafter an armory on the site conveyed by it.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Embalming Board.)

BOARD OF EMBALMING EXAMINERS — MANNER OF ISSUING LICENSE.

Embalming board may not issue licenses upon affidavit even though application had been made prior to repeal of law authorizing same.

June 24th, 1910.

HON. W. H. BATEMAN, *Secretary Ohio State Board of Embalming Examiners, Zanesville, Ohio.*

DEAR SIR: — Referring to your correspondence relative to the power of the Ohio State Board of Embalming Examiners to grant a license without examination but upon an affidavit of Mr. Frank Marek, as was formerly provided in section 4412-16 of the Revised Statutes of Ohio, I beg to advise that I have carefully gone over the files which we have in this matter and I find there is some conflict in the statement of facts in this case. The records of your board show that on March 16, 1907, Mr. Marek paid an examination fee of $5 to your board and was examined for an embalming license on April 16 and 17, 1907, at Columbus, Ohio, and failed in the examination. Mr. Marek claims that at the time he filed his application for license he offered to file with your board an affidavit to the effect that he had been in actual practice of embalming for more than five years prior to April 30, 1902, and that he was informed by the board that he would have to take an examination as the board could not accept his affidavit of practice in lieu of an examination.

Under the above statement of facts, your board desires to know whether or not they have power to issue a license to Mr. Marek under old section 4412-16, Revised Statutes of Ohio.

I call your attention to the fact that section 4412-16, Revised Statutes of Ohio, which formerly authorized your board to issue a license upon affidavit of five years' practice prior to 1902, has been repealed and the present law (sections 1335 to 1348, inclusive, General Code), which governs your board in the issuing of licenses, only permits a license to be issued upon examination. The state embalming board is a creature of statute and has only such powers as are conferred upon it by statute and, as the present law only authorizes the board to issue a license upon examination, I am of the opinion that the board is without authority to issue a license to Mr. Marek upon an affidavit of five years' practice, as was formerly permitted under section 4412-16 Revised Statutes. By comparing the original embalming law, as passed in 1902, and the embalming law in its present form, it clearly appears to have been the intention of the general assembly, by enacting that part of 4412-16 Revised Statutes which authorized a license to be issued upon affidavit of practice, and, by omitting that feature in the present law, to give a limited time for persons who have practiced embalming prior to 1902 to present their claim to the board for a license upon affidavit. There was no assurance given by the general assembly that the embalming law would for any definite time authorize a license to be issued in that manner. If Mr. Marek's contention that the embalming board, at the time he filed his application for a license, informed him that he would be required to take an examination and that a license would not be issued to him upon affidavit, is correct. Mr. Marek at that time should have taken some action to determine if the information given to him was correct and should not have waited until the embalming law had been changed by taking from the embalming board the authority to issue a license upon affidavit.

In this connection, it is to be borne in mind that the law favors the diligent and not the negligent.

I have carefully examined the brief filed by Mr. Marek's attorneys and do not agree with their contention that Mr. Marek's "case" was "pending" before your board at the time the new law went into effect and that therefore he is entitled to a license under the old law. In my opinion Mr. Marek's application for a license by affidavit was never before your board. Nowhere do I find that Mr. Marek filed an affidavit with your board. He filed an application for a license and took the examination and failed, and, after such failure, took no further action until 1910, which was two years after the law, providing that licenses to practice embalming could only be issued upon examination, was passed.

In this connection, I desire to add that even if Mr. Marek's application for a license by affidavit "was pending" before the embalming board at the time section 4412-16 R. S. was repealed, the embalming board would, nevertheless, under the present law, be without authority to grant Mr. Marek a license upon affidavit. Mr. Marek's attorneys, in their brief, particularly called my attention to section 26 of the General Code, which is as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This section was formerly section 79 of the Revised Statutes of Ohio. The Court, in construing this section in the case of Commissioners of Union County v. Green, 40 O. S. 329, used the following language:

> "In our view the terms 'actions, prosecutions, or proceedings' are used in the statute with reference to judicial matters, and relate to the prosecution or defense of civil and criminal actions and can have no just application to the statutory proceeding under consideration."

I am, therefore, of the opinion that section 26 of the General Code has no application whatever to the matter before us.

I consider the only question in this case to be, whether or not the embalming board of Ohio may, under the present law, issue a license to any one upon affidavit and without such applicant submitting to and passing an examination as provided in the present law, and I am of the opinion that the board is without such authority and that all applicants must submit to and pass the examination provided for in the General Code. I therefore suggest that your board decline to issue a license upon the application of Mr. Marek for a license to practice embalming upon affidavit of five years' practice.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Various State Institutions.)

(To the Boys' Industrial School.)

BOYS' INDUSTRIAL SCHOOL — PROBATION CASES — ACTION TO BE TAKEN BY SUPERINTENDENT.

January 4th, 1910.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your communication of January 3rd, in which you enclose letter received from the assistant prosecuting attorney of Franklin County requesting that you forward the necessary papers for placing a young man on probation who was committed to your institution. I note that you advise that your institution has never had anything to do with these cases until the boys have been actually committed to the school.

I beg to advise that section 3 of House Bill No. 395, (O. L. 339), has no application whatever to the Boys' Industrial School. This section applies only to the penitentiary and to the Ohio State Reformatory.

Section 10 of the above act, however, applies to the Boys' Industrial School and from a reading of the same I am of the opinion that it is not necessary for your institution to do anything with probation cases until the boys have been actually committed to the school. The assistant prosecuting attorney evidently construed section 3 to apply to the Boys' Industrial School, which is not the case, as such section applies only to the penitentiary and the Ohio State Reformatory.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL — INCIDENTAL EXPENSES.

Boys' Industrial School may collect for dental and optical work from counties under incidental expenses, but may not collect traveling expenses.

April 11th, 1910.

HON. F. C. GERLACH, *Superintendent, Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "Under 'incidental expenses' would we be allowed to collect from counties for dental and optical work for boys who are homeless or boys whose parents are unable to pay for such necessary work?"

In reply I beg to say, Section 1816 General Code, is as follows:

> "In case of failure to pay incidental expenses, or furnish necessary clothing, the steward or other financial officer of the institution may pay such expenses, and furnish the requisite clothing, and pay

therefor from the appropriation for the current expenses of the institution, keeping and reporting a separate account thereof. The account so drawn, signed by such officer, countersigned by the superintendent, and sealed with the seal of the institution, shall be forwarded to the auditor of the county, from which the person came, who shall pay the amount of such bill from the county funds to the financial officer of the institution and charge the amount to the current expense fund.

The county auditor shall then collect the account in the name of the state, as other debts are collected."

Section 1815 of the General Code provides that,

"All persons admitted into a benevolent institution, except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state. They shall be neatly and comfortably clothed, and their traveling and incidental expenses paid by themselves, or those having them in charge."

It will be observed that Section 1815 requires the clothing, traveling and incidental expenses to be paid by the inmates or those having them in charge, while Section 1816 requires the auditor of the proper county to pay for the necessary clothing and incidental expenses, upon failure on the part of the inmate, or those having him in charge to pay the same.

The only question is, are you authorized to include the expense of dental and optical work for boys in your institution in your "incidental expense account" against the county. It is my judgment that the expense of necessary dental and optical work for the boys in your institution is as much incidental to their welfare as medical treatment for other diseases, and that you will be authorized to include the expenses of the same in your incidental expense accounts with the various counties.

Your letter contains this further statement,

"Quite frequently when boys are eligible to parole and we write their parents for the necessary transportation, we find they are paupers and they are unable to furnish same, or we find the boys are homeless or there is no one to furnish their transportation."

but you submit no inquiry thereon. I take it, however, that you intended to inquire whether or not your institution could pay for the transportation of such boys, and charge the same against the county from which they were committed.

Section 2093 General Code provides that,

"The expenses incurred in the *transportation* of a youth to the school shall be paid by the county from which he is committed, to the officer, or person delivering him, upon the presentation of a certain statement of accounts thereof."

This section, however, only provides for the transportation of a youth to the school when properly committed thereto.

While Section 1815, above referred to, requires clothing, traveling and incidental expenses to be paid by the inmates themselves, or those having them in charge, yet the provision in Section 1816 which requires the auditor of the proper county to pay such expenses, upon failure of the inmate, or those having

him in charge, to do the same, omits traveling expenses and only requires the county to pay the necessary clothing and incidental expenses. I am, therefore, of the opinion that you are without authority to include in your incidental expense account any item for transportation.

Very truly yours,
U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—AUTHORITY OF GOVERNOR TO MAKE REQUISITION ON GOVERNOR OF OTHER STATES FOR RETURN OF ESCAPED INMATE.

Only those inmates of boys' industrial school convicted of felony by common pleas court or transferred from penitentiary may be returned to institution upon requisition in case of escape into another state.

July 13, 1910.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 7th, embodying the following request:

> "Please advise if requisition papers can be issued by the Governor of Ohio upon the Governor of another state, for a boy who has escaped from this institution to an adjoining state."

The Constitution of the United States, Article 4, section 2, provides in part

> "Whenever the executive authority of any stete * * * de- *other crime* who shall flee *from justice* and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime * * * ."

This section creates the right of the Governor of a state to issue a requisition for the return of a fugitive. It will be noted in the first place that its provisions apply only to persons charged with *crime fleeing from justice.* Persons not charged with crime and fleeing from process or restraints other than those imposed by *justice* are not within its intendment.

This section, which is not self executing is supplemented by the act of congress, section 5278 United States Compiled Statutes, which is in part as follows:

> "Whenever the executive authority of an ystate * * * demands any person as a fugitive from justice, of the executive authority of any state * * * to which such person has fled, and produces a copy of an *indictment found or affidavit made before a magistratc of any state,* charging the person demanded with having committed *treason, felony or other crime* * * * it shall be the duty of the executive authority of the state * * * to which such person has fled to cause him to be arrested * * * and to cause the fugitive to be delivered."

The General Code of Ohio, section 109 et seq., formerly section 95 Revised Statutes, attempt to prescribe the powers and duties of the governor as executive authority of the state of Ohio in making and honoring requisitions. Section 109 provides in part that:

> "On application the governor may appoint an agent to demand of the executive authority of another state or territory a person charged with *felony* who has fled from justice in this state."

But so far as this is a limitation upon the power of the governor as created by the Constitution of the United States and the above cited act of congress, said section 109 is void. State v. Hudson, 2 N. P. 1, affirmed by the Supreme Court 52 O. S. 673. That is to say, the general assembly of the state of Ohio has no power to add to or subtract from the power of the governor as the executive authority of the state of Ohio under the federal constitution and laws of the United States, although it may enact such laws as may appear to be in aid of the legislation of congress. Exparte Ammons 34 O. S. 518.

Therefore, I am disposed to ignore that sentence of section 111 General Code which provides that,

> "Fugitive *convicts* shall also be surrendered and demanded upon certain evidence duly authenticated, satisfactory to the governor."

which, were it valid, might indicate by exclusion that the governor would have no power to demand the return of any person fleeing after trial, unless such person should be a "convict." Hence it is unnecessary in the discussion of the question raised by you to determine the meaning of that word.

Persons confined in a state institution under conviction of crime are held to be "fugitives from justice" and "persons charged with crime" within the meaning of the federal constitution and statutes. 12 Am. & Eng. Ency of Law, 604, and cases cited.

Are youths confined in the Boys' Industrial School, as a result of being "charged with crime," and escaping therefrom, "fugitives from justice"?

I quote the following provisions of the General Code as throwing light upon the manner in which the institution receives its inmates:

Section 2084 General Code.

> "Male youth not over sixteen nor under ten years of age may be committed to the boys' industrial school by any judge * * * *on conviction of an offense against the laws of the state.*"

Section 2085 General Code.

> "Such youth convicted of a crime or offense, the punishment of which in whole or in part is confinement in jail or the penitentiary at the discretion of the court giving sentence, instead of being sent to the jail or penitentiary may be committed to the boys' industrial school."

In my opinion those of the inmates of the boys' industrial school whose commitment papers show them to have been sent there in pursuance of these sections are "persons charged with crime" and should they escape into another

state, they would be deemed "fugitives from justice" subject to return upon the requisition of the governor of Ohio. (See Poage v. State, 3 O. S. 230 where confinement in a house of correction upon conviction of a felony was held to be "punishment" as for crime).

I imagine, however, that you have comparatively few such youths in the institution as, under the juvenile act, which I shall quote, it is no longer possible for a court of general criminal jurisdiction to try youth under sixteen for a crime other than a felony.

Section 2086 General Code.

> "Such youth against whom a crime is charged before a grand jury, if the charge is supported by sufficient evidence to put him on trial, may be committed by the court to the boys' industrial school on the recommendation of the grand jury, without presenting an indictment."

The procedure thus described is not criminal in its nature. True the formal charge of crime has been made, but the grand jury by its action removes the case from the sphere of criminal procedure. Otherwise this section would be unconstitutional, for if the commitment to the boys' industrial school under authority thereof should be regarded as *punishment for crime,* then the right of trial by jury would be infringed by it. So, the confinement of a youth on recommendation of the grand jury is not "justice"; it is benevolent guardianship.

Prescott v. State 19 O. S. 184.

Section 2095 General Code.

> "* * * the governor may cause any juvenile offender confined in the penitentiary or a house of refuge or sentenced to the penitentiary to be transferred to the boys' industrial school."

Persons thus transferred, are upon the principles above stated, "persons charged with crime," and may become "fugitives from justice" subject to return upon requisition.

The juvenile act, under which I assume that you acquire a large number of those in your charge contains the following provisions:

Section 1642 General Code.

> (The) "courts of common pleas, probate courts, insolvency courts and superior courts * * * shall have jurisdiction over and with respect to delinquent * * * minors, under the age of seventeen years * * * ."

Section 1643 General Code.

> "When a child under the age of seventeen years comes into the custody of the court under the provisions of this chapter, such a child shall continue for all necessary purposes of discipline and protection a ward of the court, until he * * * attains the age of twenty-one years * * ."

Section 1644 General Code:

"For the purpose of this chapter, the words 'delinquent child' includes any child under seventeen years of age who violates a law of this state or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits a policy shop or place where any gambling device is, or shall be, operated; or who patronizes or visits saloons or dram shops where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority; or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes; or who visits or frequents any theater, gallery or penny arcade where lewd, vulgar or indecent pictures are exhibited or displayed. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided."

Section 1647 General Code:

"Any person having knowledge of * * * delinquent * * * children may file with the clerk of the court of the judge exercising the jurisdiction, an affidavit setting forth the facts, which may be upon information and belief."

Section 1648 General Code:

"Upon the filing of the affidavit a citation shall issue requiring such minor to appear * * * ; or the judge may in the first instance issue a warrant for the arrest of such minor * * * . *When a person charged with violating a provision of this chapter shall have fled from justice in this state, such judge shall have all the powers of a magistrate under the laws of this state relating to fugitives from justice.*"

I deem it proper here to state that in my opinion this provision neither enlarges nor restricts the essential nature of the juvenile court proceedings. If they are determined to be not *criminal* this provision is, under the decisions above cited, simply void as to interstate rendition.

Section 1649 General Code.

"The county commissioners shall provide a special room *not used for the trial of criminal cases* * * * *for the hearing of juvenile cases.*"

Section 1650 General Code.

"On the day named in the citation or upon the return of the warrant of arrest * * * the judge shall proceed in a summary manner to hear and dispose of the case, and the person arrested or cited to appear *may be punished* in the manner hereinafter provided."

Section 1644 General Code.

"In case of a delinquent child the judge may continue the hearing from time to time et seq., * * * ; or the judge may commit such child, if a boy, to a training school for boys * * * or to any state institution which may be established for the care of delinquent boys * * * . A child committed to such institution shall be subject to the control of the trustees thereof who shall have power to parole such child on such conditions as it may prescribe, and, on the recommendation of the trustees, the superintendent shall have power to discharge such child from custody."

Section 1647 General Code.

"When a minor under the age of seventeen years is arrested, such child instead of being taken before a justice of the peace or police judge shall be taken directly before such juvenile judge * * * who shall proceed to hear and dispose of his case * * * ."

Section 1648 General Code.

"When a complaint is made or filed against a minor the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency * * * and every fact that will tend to throw light upon his life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require and take charge of any child before and after the trial as the judge may direct."

Section 1681 General Code.

"When any information or complaint shall be filed against a delinquent child under those provisions, charging him with a *felony*, the judge may order such child to enter into a recognizance for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any person charged with a felony."

Many of the other provisions of the juvenile act are interesting in this connection, but enough have been quoted, it seems to me, to indicate clearly that being "juvenile delinquent persons" is not a "crime" except in case of felony. In the summary procedure prescribed in the foregoing sections a child is surrounded with none of the constitutional protections afforded to persons charged with crime. In fact, the intent is plain, clearly to separate juvenile delinquent cases from criminal cases.

I am, therefore, of the opinion that youths committed to the boys' industrial school as juvenile delinquent persons, under the juvenile act, and escaping therefrom into another state, may not be returned on requisition. Inasmuch as you do not receive boys accused of felony upon direct commitment of the probate judge, it may be safely stated that no boys committed to the school by the juvenile courts as such can be returned after they flee into another state. In this connection I may also remark that I am informed that your institution has received

some boys committed as juvenile dependents under the juvenile act. This department has previously held that such commitments are void and that the officers of the boys' industrial school may lawfully refuse to recognize them. It is clear, however, that such boys, if any, confined in the school, are not "persons charged with crime."

I have reached the conclusion above stated with respect to boys committed under the juvenile act, because of its similarity to previously existing laws and to the compulsory education law. These laws also provide for commitment of "juvenile delinquent persons," and it has already been held that being a "juvenile delinquent person" under such laws, does not constitute a criminal offense. In re Kruse, 2 Cin. Sup. Ct. Rept. 71; Prescott v. State, 19 O. S. 184.

I shall not quote the provisions of the compulsory education act but content myself with the statement that youths committed thereunder may not be returned from another state into which they have fled from the boys' industrial school upon requisition by the governor. I know of no other provisions of law authorizing commitment to the boys' industrial school.

I, therefore, am of the opinion — to summarize — that of the possible inmates of the boys' industrial school, only those confined therein after conviction of a felony by the common pleas court, including those transferred thereto from the penitentiary, may be returned to the institution upon requisition in case they escape into another state. All others are secure from apprehension.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUVENILE COURT WITHOUT JURISDICTION TO COMMIT BOYS OVER SEVENTEEN YEARS OF AGE TO BOYS' INDUSTRIAL SCHOOL.

February 16th, 1910.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> The juvenile law fixes the maximum commitment age to this institution at seventeen years. It is not an uncommon occurrence, however, to have boys committed here and their age given as sixteen, when as a matter of fact they are more than seventeen. The object as to this misrepresentation as to age is to keep the boy from being committed to the Mansfield Reformatory.
>
> *Query:* By what means, if any, can this violation of the true spirit of the law be prevented or corrected?

In reply I beg to say, if, as a matter of fact, in any particular instance the boy is more than seventeen years of age the juvenile court is without jurisdiction to commit him to the Boys' Industrial School, and your institution would be justified in refusing to receive the boy. Of course the burden would be upon you to show that he was above the required age.

The presumption is that the commitment papers are regular and lawful but this presumption can be overcome by evidence. In other words you will have

to be guided in each particular instance by the facts as known by you. If you know, and can show, that any boy committed to your institution under the juvenile act is above the lawful age, you will not be required to receive him.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOYS' INDUSTRIAL SCHOOL MAY MANUFACTURE PRODUCTS FOR OTHER STATE INSTITUTIONS.

December 31st, 1910.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I have your letter of December 28th in which you submit to me for an opinion the following question:

> Do the laws of Ohio permit the Boys' Industrial School to manufacture products for other public institutions of the state?

Section 2098 of the General Code provides:

> "The board may purchase all needed materials for manufacture, sell the products thereof and of the farm. Proceeds of sales may be used for the purposes of the institution, but detailed reports of all receipts from such or other sources, except appropriations, shall be reported quarterly to the auditor of state."

Section 1826 of the General Code provides:

> "Any article of food, raiment or use, produced or that may be produced in any benevolent, correctional or penal institution, which may be used by any other such institution, or the inmates thereof, shall be supplied therefor so far as practicable."

Section 1827:

> "When such institution supplies a product, the steward shall make charge thereof against the institution so supplied at the lowest prevailing wholesale prices and render a bill therefor, payment of which shall be made from the funds appropriated for the institution so receiving such supplies, which amount shall be paid into the state treasury to the credit of the institution which supplied the product. The steward of each institution shall include in his report, in a separate schedule, a full statement and account of such supplies."

I believe that the above quoted sections cover fully the question you ask. Section 2098 gives the board of trustees the authority to manufacture, and sections 1826 and 1827 prescribe the manner in which the products of such manufacture shall be disposed of to other state institutions.

I am, therefore, of the opinion that the law of Ohio does permit your institution to manufacture products for other public institutions of the state, and to dispose of them in the manner prescribed in the foregoing sections.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—CONTRACT FOR AIR COMPRESSOR AND BOILER—MANNER OF LETTING.

June 6th, 1910.

HON. F. C. GERLACH, *Superintendent, Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> At the last session of the legislature there was appropriated for the Boys' Industrial School the following items: $5,000 for air compressor; $7,500 for 500 horse-power boiler. Inasmuch as the air compressor and boiler to be installed should be duplicates of the ones now in use, I desire to know if, in the purchase of the same, it will be necessary to advertise for bids.

In reply I beg to say section 2314 of the General Code provides that, before entering into contract for the erection, alteration or improvement of a state institution or building, or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, full and accurate plans and specifications for the same shall be made.

Section 2316 provides for public notice of the time when and place where sealed proposals will be received for performing labor and furnishing material as required in said plans and specifications.

Section 2317 provides that the notice required in section 2316 shall be published weekly for four consecutive weeks next preceding the day named for awarding the contract in the newspaper having the largest circulation in the county where the contract is to be let, and in one or more daily papers having the largest circulation and published in each of the cities of Cincinnati, Cleveland, Columbus and Toledo.

Section 2318 provides that on the day named in the notice, the sealed proposals shall be opened and the contract awarded to the lowest bidder.

If the air compressor and boiler will cost more than $3,000, then the above provisions contained in the public building statutes must be complied with. That is, plans and specifications must be made, notice given by publication for four consecutive weeks, and the contract awarded to the lowest bidder.

However, if, in the opinion of the officers of the institution, the acceptance of the lowest bid is not in the best interests of the State, they may, with the written consent of the governor, auditor of state and secretary of state, accept a higher bid.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Columbus State Hospital.)

COLUMBUS STATE HOSPITAL—MANNER OF EXPENDING APPROPRIATION.

November 29th, 1910.

DR. C. F. GILLIAM, *Superintendent, Columbus State Hospital, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 18th in which you submit for my opinion thereon the following question:

> The last session of the general assembly appropriated the sum of eleven thousand nine hundred and seventy dollars for two (2) 350 horse power water tube boilers. The contract for the installation of these boilers has been discharged and the amount due thereon from the state paid, leaving a balance unexpended in the appropriation account. Certain safety appliances were not included in the contract for the installation of these boilers, but the same are desirable, and it is the wish of the board of trustees of the State Hospital to purchase such safety appliances at competitive bidding, and to pay for the same and the installation thereof out of the balance of the appropriation. May this lawfully be done.

I understand from your statement of the question that the safety appliances are in fact a part of the equipment of the boilers, not necessary to be sure, but reasonably appropriate. I know of no reason why, under these circumstances, you may not use the balance of this appropriation account for the installation of these appliances, especially since you have observed the requirements of the law relating to public buildings in advertising for competitive bids.

It is my opinion that the action contemplated by the board of trustees may lawfully be taken.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Girls' Industrial Home.)

GIRLS' INDUSTRIAL HOME—POWER OF SUPERINTENDENT AND PROBATION OFFICER TO RETURN INDENTURED INMATE.

February 9th, 1910.

HON. S. D. WEBB, *Superintendent, Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 3rd enclosing form of warrant of arrest for use by the probation officer of your institution in returning thereto girls who have been indentured and whose return is considered necessary. You inquire concerning the procedure in such cases, and further as to the power of such officer under such warrant to arrest a fugitive inmate beyond the borders of the State.

I beg to direct your attention to certain provisions of sections 773 and 886 of the Revised Statutes, viz:

> Sec. 773. " * * * any inmate at the girls' industrial home who escapes from said institution may, if captured before the expiration of the time for which she was committed be returned to the home by the trustees of the institution and there kept. * * * ."
>
> Sec. 776. " * * * if the person (to whom the indenture is made), for any cause, desires to be relieved from the contract, the trustees, upon application, *may cancel the indenture* and resume the charge and management of the girl, and have the same power and authority over her as before the indenture was made."

In this connection section 778 provides that the trustees shall be the guardians of every girl so bound or held to service; while section 779 provides that, "the superintendent, with such subordinate officers as the trustees appoint, shall have the general charge and custody of the girls; * * * ."

The joint effect of the above quoted sections, in my judgment, is to make necessary, in case the return of the girl is desired, the cancellation of the indenture. Thereupon the officer of the institution is vested with power to arrest and return the girl if she has escaped from the control of the person to whom she has been indentured. The use of a form of warrant is to be commended. An officer of the institution, with or without process will have no authority to exercise any powers outside of the territorial limits of the State of Ohio.

Yours very truly,
U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME.

Superintendent required to receive all girls regularly committed by probate courts.

January 31, 1910.

HON. S. D. WEBB, *Supt. Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "During the last week, we have received two girls here, that were badly infected with the scabies (itch). These girls were sent here in

regular manner by the Probate Judges of their respective counties. Owing to our crowded condition I am compelled to refuse to accept any more that come here in this condition, providing the law will permit me to do so. Kindly advise what my power is in the matter, and if I can refuse to receive a girl when our physician finds her in this condition."

Sections 769 and 770 of the Revised Statutes provide the method for commitment of a girl above the age of nine years and under the age of sixteen years to the Girls' Industrial Home, when it is shown that such girl "has committed an offense, punishable by fine or imprisonment, other than imprisonment for life, or that she is leading a vicious or criminal life."

Section 770 is in part as follows:

> "At the time named in the aforesaid order the probate judge shall hear such testimony as is presented before him in relation to the case; if it appears to his satisfaction that the girl before him is a suitable subject for the industrial home, *he shall commit her* to that institution, and issue his warrant to the sheriff of the proper county, or to some suitable person to be appointed by him, commanding him to take charge of the girl, and deliver her without delay to the superintendent of the home."

Section 12 of the Juvenile Act, 99 O. L. 192, authorizes a probate judge to commit a delinquent child "if a girl over the age of nine years, to the Girls' Industrial Home at Delaware", and further provides that a child so committed to such institution,

> "shall be subject to the control of the board of trustees thereof, and such board shall have power to parole such child on such conditions as it may prescribe, and on the recommendation of the board of trustees the superintendent shall have power to discharge such child from custody;"

The statutes above cited are the only ones which provide for the commitment of girls to the Girls' Industrial Home, and in both instances the probate judge is authorized to order a commitment and issue a warrant to convey to the Girls' Industrial Home. No such authority as is given to superintendents of insane asylums whereby said superintendents are authorized to refuse the acceptance of inmates into said insane asylums, is given to either the board of trustees or the superintendents of the Girls' Industrial Home.

It follows, therefore, that you as superintendent of the Girls' Industrial Home are without authority to refuse to accept any girl regularly committed to your institution. If, however, a girl is a "delinquent" and committed to the Girls' Industrial Home, under authority of section 12 of the Juvenile Act, as above quoted, such girl is, after her acceptance, subject to the control of the board of trustees of the institution, and may, in the discretion of the board of trustees, be paroled or finally discharged at any time.

Yours very truly,

U. G. DENMAN,
Attorney General.

CHILDREN OF EMPLOYEES OF GIRLS' INDUSTRIAL HOME MAY NOT BE SCHOOLED AT STATE EXPENSE.

January 25, 1910.

HON. S. D. WEBB, *Supt. Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "We have employed at this institution some men who have families consisting of two to three children of school age. Application has been made to me for their admission in the school for this institution.
>
> *Query:* Can I legally permit them to enter said school?"

In reply I beg to say, the statutes governing the management of the Girls' Industrial Home contain no provision whereby children other than those regularly committed to such home may be schooled therein at the public expense.

Yours very truly,

U. G. DENMAN,

Attorney General.

GIRLS' INDUSTRIAL HOME — WOMAN MAY NOT BE PHYSICIAN. —ONE PERSON MAY NOT BE ASSISTANT PHYSICIAN AND MATRON.

March 24th, 1910.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR: — I am in receipt of your letter of March 18th in which you submit the following for my opinion:

> "The law provides that a woman employed in this institution must be recognized as an assistant physician. Dr. Kennedy is the physician in this institution and does all the work herself, and is not an assistant to any one; yet all legal papers have to be executed by attaching her name as Assistant Physician. The law further provides that her salary is to be fifty dollars per month.
>
> *Query:* Has the board of trustees of this institution any legal right to pay her any more money for services as such physician? If she performs the duties of matron at the hospital in connection with her duties as assistant physician, can she be paid an additional salary for such services? May she receive both a matron's and a physician's salary?"

Section 1840 of the General Code is as follows:

> "Upon nomination by the superintendent, the board of trustees may appoint a steward, matron, physicians, assistant physicians, one of whom may be a female, and other needed officers, and may remove such appointees and other employes at pleasure. * * *"

You will note this section provides that one of the assistant physicians may be a female, and by inference prohibits the employing of a woman for the position of any other physician than that of assistant.

Section 1842 provides as follows:

> "* * * the compensation of assistant physician shall not exceed six hundred dollars for the first year of service, but for each subsequent year such compensation may be increased not more than two hundred dollars over that of the preceding year, but not in any case to exceed twelve hundred dollars per annum."

This section specifically limits the salary of assistant physician.

I am, therefore, of the opinion that Dr. Kennedy, who is a woman, may not be employed as physician in your institution, but may only be employed as an assistant physician, and that her compensation for such services must be regulated by the above quoted section 1842.

I am also of the opinion that she may not perform the duties of matron at the hospital of the Industrial Home in connection with her services as assistant physician and receive any compensation for the same, and I am further of the opinion that you can not combine the offices of matron and assistant physician, and pay both salaries to one person. Section 1840 of the General Code above quoted contemplates one person appointed to each office.

Yours very truly,
U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME — AGE OF GIRLS TO BE COMMITTED.

July 13th, 1910.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 6th enclosing copy of House Bill No. 278, the general purport of which is to reduce the age of girls which may be committed to the girls' industrial home from seventeen to sixteen years, except in certain cases. You state that you have every reason to believe that in many cases probate and juvenile judges and other authorities have committed girls to your institution, the age of whom, in fact, exceeded the statutory limit, but that in such cases the commitment papers recite that the age of the girl is less than the statutory limit. In some of these cases, however, you say that you are able to detect traces of palpable erasures, and substitutions of ages below the limit for those beyond the limit. You request my opinion as to whether in case of such apparent erasures you may legally refuse to receive the girl from the officer having her in custody.

Although I assume from your letter that you have no doubt as to your duty in case the commitment papers are regular on their face, I have carefully examined the law relating thereto, and find upon examination of the authorities that the superintendent of a correctional institution has no right to question the commitment papers presented to him. I do not believe that an apparent erasure and substitution of the sort you mention is a defect in a commitment paper. So

long as the exact terms of the mittimus, as signed by the court, are apparent from the face thereof, and the same conform to the law you have no choice, and must accept the girl and receive her as an inmate into your institution.

Yours very truly,
U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME—COMMITMENT TO—IN ABSENCE OF COUNTY BOARD OF VISITORS, VOID.

August 16th, 1910.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 15th in which you request my opinion on the following question:

> "Is it necessary, in order to legally commit a girl to this Home, that the county board of visitors be notified of the action of the officials of said probate or juvenile court at or before the trial?"

In reply thereto I beg to state that section 2975, General Code, section 633-18 Bates' Revised Statutes, provides as follows:

> "The probate judge or other officer in each county, whenever proceedings are instituted before him to commit a child under sixteen years of age to the Boys' Industrial School or the Girls' Industrial Home, shall have notice of such proceedings given to the board of county visitors of the county * * *"

Although the effect of this section has never been determined by the supreme court, common pleas courts have, as you suggest, generally held that it is jurisdictional, and that failure to comply with it in advance of proceedings to commit children under sixteen years of age to the Boys' Industrial School and the Girls' Industrial Home invalidates such proceedings.

Girls' Industrial Home v. Steffen, 7 N. P. 409.

This decision having stood unchallenged for a number of years I am of the opinion that the rule thereby laid down must be followed, and that commitments to the Girls' Industrial Home, upon proceedings had without notice to the board of county visitors, are void.

Yours very truly,
W. H. MILLER,
Ass't Attorney General.

GIRLS' INDUSTRIAL HOME—AGE OF GIRLS THAT MAY BE COMMITTED.

December 2, 1910.

HON. S. D. WEBB, *Superintendent, Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—I have received your letter in which you state that Lette Terry of Pickaway County, was, on June 10th, 1909, committed by the probate judge

of that county to the Girls' Industrial Home; that, at the time of said commitment, she was under sixteen years of age; that on October 10th, 1910, she was sent under said sentence to said Home and was received and accepted by the Home, being, at that time, over sixteen years of age. You desire to know what you can now do with Lette Terry, and, also what powers and duties you have under section 1563-1, passed by the general assembly May 11, 1910, regarding the age of commitment of girls to the Girls' Industrial Home.

Concerning your first inquiry as to what you ought to do with Lette Terry, I refer you to Section 2112 of the General Code, which is as follows:

> "A girl duly committed to the home shall be kept there, disciplined, instructed, employed and governed under the direction of the trustees, until she is either reformed or discharged, or bound out by them according to their by-laws, or has attained the age of twenty-one years. With the approval of the governor, after a full statement of the cause, the trustees may discharge and return to the parents, guardian or probate judge of the county from which she was committed, who may place her under the care of the infirmary directors of the county, any girl whom they think ought to be removed from the home. In such case, they shall enter upon their record the reason for her discharge, a copy of which, signed by the secretary, shall be forthwith transmitted to the probate judge of the county from which the girl was committed."

I am of the opinion that said girl, in the case presented by you, having been *committed* to the Home before reaching the age of sixteen years, although not received in the Home until after that age was reached, should be managed, detained and discharged in accordance with the provisions of the above section, as the age at the time of commitment by judge controls, rather than the time of reaching the Home.

Concerning the commitment of girls over sixteen years of age to the Girls' Industrial Home, as referred to above, Section 1653-1, passed May 11th, 1910, in the latter part of the section provides:

> "nor shall any child, under ten years or over sixteen years of age, be committed to the Girls' Industrial Home, except as provided in Section 2111 of the General Code."

I am of the opinion that the legislature intended that girls, under the age of ten years and over the age of sixteen years, should not be committed to the Girls' Industrial Home, and that your powers in this regard are to refuse to accept them, except as provided in Section 2111 of the General Code.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio Penitentiary.)

PENITENTIARY—DUTY OF BOARD OF MANAGERS UNDER LAW RESPECTING SUPPORT OF FAMILIES OF THOSE CONVICTED OF NON-SUPPORT AND APPROPRIATION IN PURSUANCE THEREOF.

Under Section 13019 General Code and appropriation of 1910, 101 O. L. 175-190, board of managers of Penitentiary should pay to trustee of person confined therein under conviction for non-support a sum equal to forty cents per day for each working day, beginning with February 15, 1910.

August 30, 1910.

HON. GEORGE U. MARVIN, *Secretary, Board of Managers, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 29th, requesting my opinion upon the following facts:

> "Benjamin F. F. Brodt was a prisoner in this institution from January 20, 1909, to June 23, 1910, when he was pardoned by Governor Harmon. He was sentenced to serve three years for neglect and refusal to provide for three minor children. His wife, as trustee of the children, has represented to the board of managers here a bill of $177.20 as allowance for the maintenance of the children from January 20, 1909, to June 23, 1910, under the law enacted by the legislature for the support of children thus situated. This is at the rate of forty cents a day for each working day during the time the father was in prison.
>
> "The board is in doubt about its power in the matter. To what portion of this is Mrs. Brodt, as trustee, entitled, if any? When did the operation of the law begin? If the appropriation given by the legislature is not sufficient to meet all of the claims what claims shall be paid?"

The following are the pertinent provisions of the law:

Section 13019 General Code.

> "The board of managers of the penitentiary * * * to which a person is sentenced and confined under this subdivision of this chapter, shall credit such person with forty cents for each working day during the period of such confinement, which shall be paid, or cause to be paid, by such board of such trustee."

The word "of" in the last line of the foregoing section is evidently a mistake and should be read "to". This section was Section 7 of the act of April 28, 1908, 99 O. L. 228, 229. This act went into effect on the date of its passage and, in my opinion, it imposed upon the board of managers a mandatory duty. That is to say, it was the duty of the board of managers, from the date of the enactment of this law, to credit each person confined in the penitentiary with forty cents per day for each working day for the purpose of paying the sum so determined, to the trustee duly appointed, in accordance with the other provisions of the above cited act.

The actual payment of money to the trustee could not, of course, be made without an appropriation by the general assembly. No such an appropriation, I am informed, was, in fact, made until the last session of the general assembly. The general appropriation bill, so-called, approved May 11, 1910, carried the following item in favor of the board of managers of the Ohio Penitentiary:

> "Maintenance of families of those convicted of non-support, twenty-five hundred dollars."

Section 2 of the appropriation bill, 101 O. L. 175-190, provides in part that,

> "The moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 15, 1910."

The law itself — not the board of managers by its voluntary or discretionary action — created the liability, if any, existing by virtue of the act of 1908. Your statement of facts discloses that the person in question was confined in the penitentiary during a period of time subsequent to the enactment of the original law and, in part prior to the approval of the appropriation bill. In my opinion, therefore, the state became liable, under the law, to pay the amount ascertained by the application of the statutory rule, and the sole question is as to whether this liability can lawfully be discharged out of the appropriation in question. I assume, of course, that the appointment of the trustee was in all respects regular.

While, under section 13019 above quoted, the duty of the board of managers to pay to the trustee does not become fixed until the date of the release of the prisoner, yet I am of the opinion that for the purpose at hand each working day is to be regarded as creating a separate and distinct liability, and that, therefore, the amount to be paid may be lawfully separated. This being the case I am inclined to the belief that section 2 of the appropriation bill above quoted, indicates a legislative intent that the money thereby appropriated shall not be expended for the purpose of discharging liabilities existing prior to February 15th, 1910, and that such liabilities include such portions of liabilities under section 13019 as may have accrued, so to speak, prior to that date.

From all the foregoing I am of the opinion that it is now the duty of the board of managers to pay to the trustee the sum of forty cents per day for each working day from February 15th, 1910, to the date of the release of the prisoner. It is also the duty of the board of trustees to credit the prisoner with forty cents per day for the remainder of his period of confinement, but this sum may not be paid until the general assembly, by an appropriation, specifically authorizes the same. In other words, the appropriation of 1910 is not available for the payment of per diem dues, so to speak, accruing prior to February 15, 1910.

You ask also what shall be done if the appropriation of twenty-five hundred ($2500.00) dollars is not sufficient to meet all of the claims arising under this statute between the present time and the next meeting of the general assembly. It is my opinion that the claims should be met in full and paid out of the appropriation in the order in which they become payable; that is to say, as the various convicts are from time to time released. The board of managers may and should, of course, inquire into the legality of the appointment of the trustee and require from him the report and accounting mentioned in section 13016 General Code. If all the requirements of the statute are complied with, however, the board is not permitted to discriminate upon any other ground as between trustees for different prisoners' families. The amounts determined under section 13019, should,

therefore, be paid in full as they become due until the appropriation is exhausted. Claims, if any, remaining unpaid upon the exhaustion of the appropriation must be provided for by future action of the general Assembly.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OHIO PENITENTIARY — FUNERAL EXPENSES OF EXECUTED PERSONS — MANNER OF PAYING.

April 16th, 1910.

HON. GEORGE U. MARVIN, *Secretary, Board of Managers, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: — Your communication under date of April 14th is received in which you submit the following inquiry:

> "Charles Davis was executed here on March 11, 1910, and at the request of his friend, Mr. George Stewart, his body was turned over to C. D. White & Son for burial. Stewart now refers the bill, amounting to $48.00 to this board for payment."
>
> *Query:* Is the board of managers of the Ohio Penitentiary authorized by law to pay this expense?

In reply thereto I beg to say section 13733 of the General Code is as follows:

> "The body of the executed person shall be returned for burial to friends in any county in the state that make written request therefor, if made to the *warden* the day before or on the morning of the execution. He may draw his order on the auditor of state, and he on the state treasurer, for paying the transportation and other funeral expenses, not to exceed fifty dollars; and if no request is made by such friends therefor, such body shall be disposed of as provided by law for such cases."

Under the statement of fact, as presented in your communication the request of Mr. George Stewart, as the friend of Charles Davis, was made as provided in the above section "on the morning of the execution," and the section provides that when such request is made the *warden*, and not the board of managers of the penitentiary, is authorized to draw his order on the Auditor of State "for paying the transportation and other funeral expenses."

I am, therefore, of the opinion that if the warden is satisfied that the bill presented for funeral expenses in the sum of $48.00 is correct, he is authorized to draw his order on the Auditor of State for that sum of money, and upon receipt thereof to pay such funeral expenses.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OHIO PENITENTIARY — COMPENSATION OF CHIEF AND ASSISTANT PHYSICIAN.

June 11th, 1910.

HON. GEORGE U. MARVIN, *Secretary, Board of Managers Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "Dr. J. W. Clark and Dr. A. J. Shoemaker, Chief and Assistant Physicians of this institution, have presented to the Board of Managers a bill of Twenty-five ($25.00) Dollars for professional services rendered to a female prisoner of the penitentiary during the time she was at Mount Carmel Hospital for confinement.
>
> "Query: Is the board authorized to compensate Dr. Clark and Dr. Shoemaker for this service?"

In reply I beg to say section 2180 of the General Code authorizes the warden of the penitentiary to appoint a physician who shall receive a salary not in excess of Thirteen Hundred and Twenty ($1,320.00) Dollars a year.

Section 2181 of the General Code authorizes the employment of a day assistant physician at a salary not in excess of Ten Hundred and Twenty ($1,020.00) Dollars a year.

The duties to be performed by the physician and assistant physician are not defined in the Code. I presume, however, that their services are performed under the direction of the warden, and in accordance with the rules and regulations made by the board of managers. If this be true and the physicians performed the services under instructions from the warden or the board of managers, it is my judgment that the annual compensation provided by law covers the services, and that they are not entitled to any additional compensation.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio State Reformatory.)

OHIO STATE REFORMATORY—EXPENSES OF FIELD OFFICERS—MUST BE ITEMIZED.

June 9th, 1910.

HON. F. H. MARQUIS, *Secretary, Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "The Board of Managers of the Ohio State Reformatory have under consideration the question as to the best method of paying the traveling expense of the field officers while looking after inmates on parole and persons under suspended sentence to the reformatory.
>
> "Your opinion is requested as to whether or not it would be legal to pay said field officers a fixed per diem allowance for traveling expenses, and maintenance while on duty in the field instead of paying their expenses by voucher based upon an itemized statement of expenses actually incurred."

In reply I beg to say that section 9 of an Act entitled, "An Act to provide for probation of persons convicted of felonies and misdemeanors," approved May 9th, 1908, 99 O. L., page 341, provides that,

> "The auditor of state shall issue his warrant on the state treasurer to pay from the appropriation for conviction and transportation of convicts, the salaries and necessary expenses of the field officers, upon presentation of itemized vouchers properly approved by the board of managers."

This provision authorizes the payment of the salary and *necessary* expenses, and further provides for itemized vouchers to be approved by the board of managers.

I am, therefore, of the opinion that the board of managers of the Ohio Reformatory is without authority to pay any fixed per diem in lieu of actual expenses incurred by the field officers of said institution. The field officers must keep an accurate and itemized account of all the expenses actually incurred, and from that itemized account an itemized voucher is to be made which is to be approved by the board of managers.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio Soldiers' and Sailors' Orphans' Home.)

MECHANIC'S LIEN — NOT ENFORCIBLE AGAINST THE STATE.

May 9th, 1910.

HON. D. Q. MORROW, *President Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Hillsboro, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> The board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home is constructing a sewage disposal plant for that institution, and an attempt is being made by a sub-contractor and material man to enforce a mechanic's lien on the amount due from the state to the contractor.
>
> *Query:* Is the board of trustees required by law to recognize the lien and pay to the sub-contractor the sum of money claimed thereon out of the money due the contractor under the terms of the original contract?

In reply I beg to say this department has heretofore advised the Auditor of State that a sub-contractor's lien for labor and material in the construction of buildings or other improvements for the State is not enforcible as against the state. This conclusion is based upon the fact that the Auditor of State is required by law to issue vouchers for work done and material furnished to the contractor to whom the State has awarded the contract under the provisions of the "Public Building Statutes". Such vouchers issued by the Auditor of State are based upon estimates prepared by the board of managers or trustees of the institution or its architect. In as much as a suit may not be brought against the State for the enforcement of a mechanic's lien there is no method by which a court can decree its enforcement, and, as above stated, in the absence of such decree the Auditor of State is without authority to recognize the lien.

Very truly yours,

U. G. DENMAN,
Attorney General.

OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—EXTRA COMPENSATION TO INSTRUCTOR OF PRINTING.

December 21, 1910.

HON. D. Q. MORROW, *President Board of Trustees, Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR: — I have before me your letter of recent date in which you submit to me for an opinion the following question:

> Can the board of trustees allow extra compensation to the instructor of printing of the Ohio Soldiers' and Sailors' Orphans' Home for extra work done by him during extra hours?

Section 1936 of the General Code provides for the establishment of certain schools at the home, and provides further that the superintendent may employ proper teachers, and for cause dismiss them.

Section 1946 General Code fixes the compensation of these teachers so employed by the superintendent at thirty-five dollars per month for the first year and forty dollars a month for subsequent years. This compensation is clearly paid to these teachers for their work of instruction.

In the case you submit to me for an opinion, you state that the trustees had authorized the employment of additional help for the purpose of publishing the annual report of the board, and that the superintendent and instructor of printing concluded to have the instructor do the extra work during extra hours. There is nothing in the statute prohibiting the instructor of printing, or any other teacher at the home receiving extra compensation. It is true that the statute fixes their compensation for teaching and they could receive no extra pay for extra work in that line. However, the trustees had provided for the extra work of getting out the annual report of the board and the work has been done by the instructor of printing during extra hours. From your statement of facts I conclude that this did not interfere with his work as instructor. The work was wholly outside and foreign to the work of teaching printing. It is certainly not against public policy to allow this man compensation for extra work done during extra hours that was authorized to be done.

I am, therefore, of the opinion that the board of trustees may allow the instructor of printing compensation for this extra work done by him during extra hours.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the State School for the Blind.)

BLIND, STATE SCHOOL FOR, ADMISSION TO.

Legal residents only, not citizenship, qualification for admission to State School for Blind.

January 5, 1910.

HON. EDWARD M. VAN CLEVE, *Supt. Ohio State School for the Blind, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of December 30, 1909, enclosing a communication addressed to you by Hon. J. R. McCleary, Probate Judge of Jefferson County, in which he states that a certain unnaturalized person of foreign birth, aged twenty-five years, and unmarried, who has lived in Jefferson County for more than one year, has become blind as the result of an accident. The probate judge desires to know whether the person so described may be admitted to the State School for the Blind, and your inquiry, based on the judge's letter, is as to whether or not the person referred to is a citizen of this state, and eligible from that view-point to admission as a pupil in the school.

The laws of this state do not require *citizenship* as a qualification for admission to any of its benevolent institutions. Section 665 Revised Statutes, in defining the authority of the trustees of your institution to admit pupils, provides in part, that

> "The trustees * * * are authorized to receive into the institution such blind and pur-blind persons, *residents* of the state,, as they and the superintendent are satisfied * * * are * * * suitable * * * to receive instructions * * * ."

This section, in common with similar sections in the acts pertaining to other state institutions, has been modified to a certain extent by the adoption of Section 632a Revised Statutes, 99 O. L. 323, which provides that,

> "No person who has not gained a legal residence in the State of Ohio shall be admitted to any benevolent institution of this state."

In an opinion addressed to Hon. H. H. Shirer, Secretary of the Board of State Charities, under date of April 26, 1909, this department held that the word "legal" as qualifying the term "residence" signifies a continuation of the condition defined by the principal term for the period of one year. This opinion related to the construction of Section 632a above quoted. Thus the residence of a person is the place which he inhabits regardless of the duration thereof; but a *legal* residence is not established until a person having the same shall have lived in the jurisdiction in question for twelve months. However, *citizenship* is not necessary in order to establish such a legal residence.

It appears from the facts submitted by the probate judge that the person described by him has acquired a legal residence in this state and in Jefferson County.

I am, therefore, of the opinion that, so far as his qualification in this respect is concerned, he may be admitted to the Ohio State School for the Blind.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio University.)

ABSTRACT OF TITLE TO OHIO UNIVERSITY LANDS APPROVED.

July 12th, 1910.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR: — You have submitted to me an abstract of title to the following described real estate situated in the village of Athens, Athens county, Ohio, and being inlots Nos. 12, 13, 14, 15, 16 and 17 and outlots Nos. 5, 19, 20, 21, 22, 23, 24, 25 and 26, in E. H. Moore's Richland Subdivision of a part of farm lot No. 61 in sections 9 and 15, Township 9, range 14, Ohio University lands, and interlying unopened streets and the land lying between said lots and the middle of the Hocking River, all being a part of said original farm lot No. 61. You have also submitted a deed prepared for the signature of the President and Secretary of the board of trustees of the Methodist Episcopal Church of Athens conveying the fee simple title to the same to the president and trustees of the Ohio University.

You have requested me to examine the title disclosed by the abstract and to approve the deed if proper. Pursuant to this request I have carefully examined the abstract of title. At the outset of my examination I determined that in order that the trustees of the Methodist Episcopal Church might convey the title, if any, possessed by that church, they should be authorized to do so by appropriate proceedings under the statute. I have notified the abstracter, Mr. L. G. Worstell, of my opinion in this respect, and complying with my suggestion he has secured such action on the part of the trustees and has forwarded to me an abstract of the court proceedings in question, with the request that the same be attached to the abstract already in my hands.

On examination of the proceedings thus abstracted, I am of the opinion that the trustees of the Methodist Episcopal Church are now authorized to convey such title as may be possessed by that body to the president and trustees of the Ohio University.

The history of the legal title of original farm lot Number 61, Ohio University lands, as disclosed by the abstract is very obscure. It is recited at the beginning thereof that,

> "There is no deed, lease or other instrument of record in any of the offices of Athens county, showing how the title passed from the Ohio University until a suit was filed, September 2, 1850, by the Chillicothe Branch Bank of the State of Ohio against John Coates, et al, next hereinafter abstracted. Although it is stated in said proceedings that the title passed by lease from the Ohio University to Silas Bingham and through him by various assignments and conveyances to John Coates, who is alleged to have been the owner at that time, and that the counterpart of said lease was on file in the office of the Auditor of the Ohio University, the same cannot now be found on file in that office."

The court proceedings thus referred to consist of a bill in chancery filed September 2, 1850, wherein the Chillicothe Branch Bank of the State of Ohio was petitioner and John Coates, Arthur Coates and George C. Coates, brothers, among others were defendants. The question framed by the pleadings with regard

to the property in question is as to the location of the legal or equitable title to said farm lot No. 61. John Coates, against whom the judgment, sought to be enforced by the suit, was taken, claimed unequivocally that he had no legal or equitable title to said lot; Arthur Coates disclaims all knowledge as to the matter and George C. Coates, answering by leave, claimed title to the property. This litigation was quite protracted, and it was not until 1867 that a decree was rendered.

The following is the pertinent portion of the decree:

> "and the court *by the consent of all parties* further finds * * * that the said George C. Coates was not at the commencement of this cause nor is either in law or equity the owner of said Lot No. 61, * * *, and that the said John Coates was * * * the owner both in law and equity of said Lot No. 61, but that the said George C. Coates had equitable claims against the same, to the sum of $2,400.00, which the court finds to be a lien thereon."

Under this *consent* decree the sheriff sold the property for the satisfaction of the judgment against John Coates to E. H. Moore, subject to the lien in favor of George C. Coates. Immediately thereafter the president and trustees of the Ohio University conveyed the fee simple title to the said E. H. Moore by deed which recites that said Moore is the "present owner and holder of the leasehold title of said premises" and that he "has this day * * * released and relinquished the same to the said president and trustees and has paid to the treasurer of said board of trustees the * * * annual rent reserved in said lease * * *," and has made upon consideration "of the premises and of the payment of said sum of $383.17."

A few months later George C. Coates brought suit against the Chillicothe Branch Bank of the State of Ohio and E. H. Moore alleging that the consent decree in the former suit was collusive and fraudulent. This action was also pending for a long time, being taken to the supreme court and reversed on error. During its pendency the said Geore C. Coates died and the action was revived and continued in the names of his heirs and his widow. Finally in 1881 this cause was also settled and the heirs and widow, with the exception of one son, confirmed the title of E. H. Moore, acknowledged satisfaction of the equitable lien of the decedent, and formally released all right, title and interest. The son who did not join in this decree had previously executed a warranty deed in full of his claim to the said E. H. Moore.

E. H. Moore was, therefore, in my opinion, the holder of all the legal title which could be secured from the president and trustees of the Ohio University and from John Coates or George C. Coates, inasmuch as in spite of the possibility of error in the recital of the deed from the president and trustees of the Ohio University they are nevertheless estopped thereby, while the heirs of George C. Coates are estopped by the record. There is, however, no satisfactory evidence as to the non-existence of a permanent leasehold, renewable forever in some person other than John or George C. Coates, and the rights of such person would not be prejudiced in any way by the court proceedings referred to. However, the property appears to have been in the adverse possession of E. H. Moore and those claiming under him since 1867, although the litigation concerning it was not concluded until 1881. I, therefore, have no hesitancy in stating as my opinion that the successors of E. H. Moore have a perfect title, at least by prescription, to the premises in question. I find no defects in the title as disclosed by its history since lot 61 came into the possession of E. H. Moore.

No examination has been made by the abstractor in the federal courts for pending suits or judgments. No examination has been made of the records of the village of Athens for special assessments. The taxes for the year 1910 are, so far as disclosed by the abstract, unpaid and a lien.

Subject to the foregoing qualifications, which are of minor importance, I am of the opinion that the title of the trustees of the Methodist Episcopal Church to the premises above described is free and clear of incumbrances.

The deed submitted to me should be redrafted so as to contain appropriate recitals with reference to the court proceedings authorizing the trustees to sell to the Ohio University. When so redrafted and executed by the trustees, I advise that the same be accepted by you.

I am informed that the purchase of this property is to be made from the funds of the Ohio University derived from its own revenues, and not out of an appropriation made by the General Assembly of the state of Ohio. If this is the case the deed is properly made to the president and trustees of the Ohio University, otherwise it should be made to the State of Ohio.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Institution for Feeble-Minded Youth.)

FEEBLE-MINDED YOUTH — INSTITUTION FOR — CUSTODIAL DEPARTMENT, WHAT IS.

August 31st, 1910.

DR. E. J. EMERICK, *Superintendent Institution for Feeble-Minded Youth, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 23rd and to apologize for the delay in answering the same, caused by unforeseen pressure of work in this department.

You state that you have certain patients regarded as "custodial cases", who are not kept separately in the institution, but who are given the same instruction as certain of the pupils deemed capable of receiving instruction of the kind afforded by your institution. You request my opinion as to the authority of the trustees and superintendent of the institution to charge such portion of the expense of maintaining such persons against the counties from which they are sent, as is authorized under section 1898 General Code.

You also inquire as to the rule to be adopted by the superintendent and trustees in charging for persons in the custodial department from Cuyahoga County which has no county infirmary.

The following sections of the General Code are in point:

Section 1894:

> "The object of the institution is to train and educate those received so far as to render them more comfortable, happy and better fitted to care for and support themselves * * *"

Section 1895:

> "The custodial department shall be entirely and especially devoted to the reception, detention, care *and training* of idiotic and feeble-minded children and adults * * * and shall be so planned as to provide separate classifications of the numerous groups embraced under the terms idiotic and imbecile or feeble-minded * * *"

Section 1896:

> "The processes of an agricultural training shall be primarily considered in this department * * * Such other industries as the trustees and the superintendent deem necessary and useful for the welfare of the inmates, and as tending to their proper employment, or as contributing to their development, discipline and support, from time to time, may be added."

Section 1898:

> "For each person over the age of fifteen years *in the custodial department* from any county in the state, the trustees and superintendent may charge against such county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, as shown by the annual report of the board of state charities * * *"

Section 1901:

> "The trustees shall receive as inmates of the custodial department, feeble-minded children, residents of this state, under the age of fifteen years, who are incapable of receiving instruction in the common schools of the state, and adults of the same class, over this age, *who are public charges.*"

Having regard to the joint operation and effect of the foregoing sections, I am of the opinion with respect to your first question that the trustees and superintendent of the institution may charge the sum authorized to be charged by section 1898 above quoted for each person above the age of fifteen years who would be a public charge against the county from which he is admitted to the institution, regardless of whether or not such person is there kept separately from what may be termed the pupils of the institution. That is to say, if the welfare and mental ability of a person admitted under section 1901 as an inmate of the custodial department so demand, the trustees have authority to treat such person as a pupil, and such treatment will not remove him from the custodial department of the institution. Therefore, such persons being still regarded as within the custodial department, the trustees and superintendent are authorized to make the annual draft against the county provided for in section 1898.

Answering your second question I am of the opinion that the intent of the law should be carried out and that the amount authorized to be charged against Cuyahoga County for the support of each of its custodial cases is the per capita cost to the county of supporting inmates in the institution which takes the place of a county infirmary for such county, whatever that institution may be termed, and under whatever authority it may be conducted. I assume, of course, that the annual report of the Board of State Charities will disclose the identity of such an institution as well as the per capita cost to the county of maintaining inmates therein.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

INSTITUTION FOR FEEBLE MINDED—GENERAL CODE SECTIONS 1899, 1901, 1902, 1903 CONSTRUED.

Applicant not limited to 15 years. Applicant when able must pay for keeping.

March 31st, 1910.

DR. E. J. EMERICK, *Superintendent Institution for Feeble Minded, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you inquire if the board of trustees of the institution for feeble minded may charge for the keeping of inmates, both under and over the age of fifteen years, and when charge is made under contract with the applicant, has the institution still a right to collect for the clothing of those under that age? You also inquire if the trustees have a right to take pay cases of any age where there is ability to pay, and if so will the receiving of an inmate over the age of fifteen, and under contract for maintenance, in any way interfere with the control of the institution over the inmate?

In reply thereto I beg to say that by the provisions of section 1903, General Code, (Sec. 674g R. S.) it is the duty of the probate judge of the county in

which the application is made to ascertain the ability of the applicant, parent or legal guardian thereof to pay the expenses to be incurred by the institution in keeping the inmate, and if the court find such ability to pay in whole or in part, he shall so state in approving the application for admission; and if there is ability to pay all expenses incurred in keeping the inmate, the same shall be charged to the estate of the applicant or the person with whom the contract was entered into for the admission of the inmate, and in that event no charge should be made of the county from which the inmate comes for clothing or other article.

Section 1898 General Code (Sec. 674c R. S.) provides that,

> "For each person over the age of fifteen years in the custodial department from any county in the state, the trustees and superintendent may charge against such county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, as shown by the annual report of the board of state charities. * * *"

But in connection with this section should be read section 1899 General Code (Sec. 674c R. S.), which provides that,

> "In each case where a parent, guardian, relative or friend of an inmate is under contract and able to pay, and does pay for the maintenance of such inmate, no charge or draft shall be made upon the treasurer of the county wherein such inmate has a legal residence. * * *"

Section 1901 of the General Code (Sec. 674c R. S.) provides that,

> "The trustees shall receive as inmates of the custodial department, feeble-minded children, residents of this state, under the age of fifteen years, who are incapable of receiving instruction in the common schools of the state, and adults of the same class, over this age, who are public charges. * * *"

Section 1902, General Code (Sec. 674f R. S.) provides that,

> "Feeble-minded adults of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as govern admission to the state hospitals for the insane."

It will be seen from these sections that the class of adults mentioned therein are admissible to the institution, and without regard to age, but subject to examination by the court as to their ability to pay for their support as provided in section 1903 General Code. The fact that an inmate is over fifteen years of age, or that such inmate is admitted under special contract for maintenance does not restrict the authority of the institution over such inmate. There is no provision in the statutes prohibiting the admission of applicants over fifteen years of age into the custodial department, but children under the age of fifteen years shall at all times have the prior right to all the privileges which the institution affords.

Yours very truly,

U. G. DENMAN,

Attorney General.

(To the Athens State Hospital.)

ATHENS STATE HOSPITAL—ABSTRACT OF TITLE TO CERTAIN LANDS.

July 19th, 1910.

DR. O. O. FORDYCE, *Superintendent, Athens State Hospital, Athens, Ohio.*

DEAR SIR:—I have carefully examined the accompanying abstract of title to three hundred acres of land in Lease-lots Nos. 41, 57, 58, 59 and 60 in Sections Nos. 8, 9, 14 and 15, Town. 9, Range 14 Ohio University leasehold land in Athens County, Ohio, prepared by E. D. Sayre, Abstractor, July 15, 1910.

While said abstract shows many irregularities, I am of the opinion that on account of the lapse of time and adverse possession, the same shows a good marketable title of record at the date thereof in William S. Bower, Charles J. Bower and wife, Emma L. Crunbacker and husband, subject however to the mortgage to the Freedman's Aid and Southern Education Society of the M. E. Church, the amount of which is not shown, and which should be satisfied of record; also the oil lease given to William Clark should be satisfied, and the taxes amounting to $63.23.

I have also examined the deeds accompanying said abstract, conveying said premises to the State of Ohio, and believe the same are sufficient to convey the title.

I am herewith returning abstract and deeds.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO SANITORIUM MUST REPORT TO BOARD OF STATE CHARITIES.

March 1st, 1910.

DR. C. B. CONWELL, *Superintendent, The Ohio State Sanatorium, Mt. Vernon, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 15th, in which you advise that you have received, from the secretary of the state board of charities, various blanks to be filled out, and you desire to know whether it will be necessary for the Ohio State Sanatorium to comply with the request of the secretary of the state board of charities.

I beg to call your attention to section 781-37 of the Revised Statutes, which is as follows:

> "The control and management of said sanatorium shall be vested in the board of trustees in accordance with the provisions of sections 636 and 654 both inclusive, of the Revised Statutes of Ohio, relative to other state benevolent state institutions, and said section shall apply to said board of trustees so far as the same may be applicable."

You will note this section specifically provides that the Sanatorium shall be governed by the same sections as other state benevolent state institutions. Sec-

tion 656, relative to the powers and duties of the board of state charities is, in part, as follows:

> "They (the state board of charities) shall investigate the whole system of public charities * * *, examining into the condition and management thereof, especially of * * * state institutions * * *, and the officers in charge of all such institutions * * shall furnish the board or its secretary such information as they may require. * * * "

You will note that the above quoted section applies to all state institutions and the report which the secretary of the state board of charities requests you to fill out is done in pursuance of the above quoted section and I am of the opinion that it will be necessary for you to comply with the secretary's request.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Members of the General Assembly.)

BOYS' INDUSTRIAL SCHOOL—EXPENSE OF OFFICER TRANSPORTING YOUTH.

Officer transporting youth to Boys' Industrial School not entitled to personal traveling expenses in addition to mileage.

March 26th, 1910.

HON. MARSHALL N. DUVALL, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a question as to the proper construction of section 2093 of the General Code, which is in part as follows:

> "The expenses incurred in the transportation of a youth to the (Boys' Industrial School) shall be paid by the county from which he is committed, to the officer or person delivering him, upon the presentation of his sworn statement of accounts thereof. He shall receive as compensation five cents per mile each way from his home to the school by the nearest route. * * *"

In Richardson v. State ex rel., 66 O. S. 108-112, the statute (897 R. C.) applying to the fees and expenses of county commissioners was under consideration, and particularly that portion of it which provides that:

> "when necessarily engaged in attending to the business of the county * * *, and when necessary to travel on official business out of his county, (he) shall be allowed in addition to his compensation and mileage as hereinbefore provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty." The court, per Williams, C. J., say, on page 112:
>
> "This clause is not entirely free from ambiguity. It is doubtful whether, in order to entitle the commissioner to the expenses for which it provides, it is indispensable that he should, when the expenses are incurred, be engaged * * * in traveling outside of the county * * * however, that question may be resolved, the expenses authorized to be paid a commissioner under the provision of the statute in question, are, we think, *official* expenses only, as distinguished from those which pertain to his personal comforts and necessities. * * * the purpose of the provision was to reimburse him when, in the language of the statute, the money 'had been actually paid in the discharge of his official duty.' For his personal expenses of any kind he can claim nothing beyond his per diem and mileage. It is a fair inference that if it had been intended to reimburse the commissioner for expenditures of this character, the legislature would have expressed that intention in plain terms. It is well settled that the compensation of public officers can not be enlarged, by implication, beyond the terms of the statute. Debolt v. Trustees, 7 O. S. 237; Clark v. Commissioners, 58 O. S. 107."

According to this authority it would seem that the word "expenses," as used in section 2093, General Code, would be held to mean those sums paid by the officer on account of the railroad fare, meals, etc., of the youth in his custody

and also on account of any other items not personal to the officer. The phrase "he shall receive as compensation five cents per mile" seems to indicate that the mileage is not intended as a reimbursement for expenses, but rather as in the nature of fees. However, examination of the whole opinion in the Richardson case will disclose that this is not held to be the primary meaning of the word "mileage," and inasmuch as the word "compensation" may mean not only remuneration for official services but also reimbursement for personal expenses, I am of the opinion that the double significance should be given to it in this connection.

In my judgment the personal traveling expenses of the officer are all to be included within the mileage allowed him and may not be separately paid.

Yours very truly,

U. G. DENMAN,
Attorney General.

JOINT RESOLUTION NOT SIGNED BY PRESIDING OFFICER OF SENATE VOID.

July 8th, 1910

Be it resolved by the General Assembly of the State of Ohio:

DEAR SIR:—I beg to acknowledge receipt of your letter of June 7th, requesting my opinion as to the power of the Commissioners of Public Printing to print "Howe's Historical Collections of Ohio" under the following facts:

> "On February 8, there was offered in the Senate S. J. R. No. 17 —Mr. Gillette:
>
> WHEREAS, The State of Ohio, owns the copyright, electrotype, engravings and all other apparatus and matter necessary and requisite for the publication of Howe's Historical Collections of Ohio, centennial edition; and by exhaustive research, study and investigation, much valuable information has been gathered and preserved thereby, of great value to the people of Ohio, and the same should be disseminated in a proper manner among the public schools, libraries and citizens thereof; therefore,
>
> *Be it Resolved by the General Assembly of the State of Ohio,* That the commissioners of public printing be and are hereby directed and authorized to contract for on behalf of the state, for the printing from said plates and engravings, etc., (16,000) sixteen thousand sets and binding thereof, in style and manner similar to and fully equal in quality as to binding, paper and workmanship to that furnished under House Joint Resolution No. 30, adopted March 19, 1906, in sets of two volumes, at a cost not to exceed one dollar per set; that said printing and delivery shall be done under the direction of the Commissioners of Public Printing.
>
> *Resolved,* That when said history is printed and bound, as aforesaid, the same shall be delivered to the secretary of state, and the following distribution and disposition made thereof:
>
> To each member of the seventy-eighth General Assembly one hundred sets, and to the clerk and sergeant-at-arms of the Senate, and to the clerk and sergeant-at-arms of the House of Representatives fifty sets each, to each officer and clerk of said General Assembly, and

to each legislative correspondent, one set; and the remaining to be sold by the secretary of state at two dollars ($2.00) per set, and the proceeds to be paid into the state treasury to the credit of the general revenue fund.

This was messaged by the Senate to the House on March 17th, with the following endorsement:

Mr. Speaker: The senate has adopted the following joint resolution in which the concurrence of the House of Representatives is requested.

S. J. R. No. 17 — Mr. Gillette. Relative to the printing of 16,000 sets of Howe's Historical Collections.

Attest: John R. Malloy, Clerk.

Following this message another message was received from the Senate as follows:

Mr. Speaker: The Senate has reconsidered its vote by which it adopted S. J. R. No. 17 — Mr. Gillette, relative to the printing of 16,000 sets of Howe's Historical Collections and requests the return of said Joint Resolution.

Attest: John R, Malloy, Clerk.

But note, that the joint resolution was in possession of the House and the Senate not having it in its possession had no right to do anything with it.

The question being presented to the House of Representatives it refused to accede to the request of the Senate for the return of S. J. R. No. 17.

On March 22, the House of Representatives adopted said resolution (S. J. R. No. 17) and messaged their action to the Senate and received a receipt from that body March 23rd, as having received it.

This message to the Senate saying the House had concurred was, for reasons, not officially presented to the Senate until the day of final adjournment, on May 10th, and at such a late hour as to preclude enrollment and signature of same, although it had been messaged and receipted for on March 23rd.

So said S. J. R. No. 17 — Mr. Gillette, was not enrolled and signed as provided by law notwithstanding the records show that it was favorably acted on by both Houses.

The information was given that the Senate refused to have said joint resolution enrolled for the reason that they had re-considered their vote, although they did not have the paper in their possession.

An appropriation of $18,000 was made for the publication of Howe's Historical Collections in an act known as H. B. No. 536 — Mr. Ritter, and S. J. R. No. 17 — Mr. Gillette, directs by whom and how this money shall be expended."

The Constitution of this State, Article II, section 17 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 facts stated by you raise the simple question as to whether this provision is directory merely, so that failure to comply with it does not impair the validity and effect of a bill or joint resolution, or mandatory so that no bill or joint resolution is effective without compliance therewith. This question has already been decided in this state in the case of State v. Kiesewetter, 45 O. S., 254. The syllabus in the case is in part as follows:

> "A bill enttled 'A bill to provide for the publication of volume 6, Geology of Ohio,' was introduced into the senate * * * and was designated 'S. B. No. 326.' It was * * * duly passed in the Senate and transmitted to the House; there amended, duly passed, and returned to the senate, where the amendments were agreed to, and the amended bill duly passed. The bill was not copied upon the journal of either house, nor signed by the presiding officer of either house. * * * Held:
>
> 1. A printed bill, bearing title and number identical with the one described, deposited in the state library in accordance with section 59 of the Revised Statutes, cannot be received in evidence to prove the contents of the bill in question.
>
> 2. The bill not being authenticated, as required by section 17, of article 2 of the constitution, which 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', did not become a law."

In the opinion by Judge Spear, page 257 the following comment with respect to section 17, article 2 is made:

> "No judicial interpretation has been given to this section so far as we are informed. The preceding section, which provides that every bill shall be fully and distinctly read on three different days, * * * has been considered by this court, and the views of the court upon it are well stated by Swan, J., in Pim v. Nicholson, 6 Ohio St., 177, as follows: (Here follows a quotation from the court's decision cited in which it is held that former section 16 of article 2 was directory.)
>
> "It is entirely clear that section 17 cannot be treated as a mere guide to the action of the general assembly in order to the more full enlightenment of the members in the performance of their duties, or as a check upon them, as the signing of a bill by the presiding officer in no substantial way effects the action of the members, or relates to the passage of the bill through either party. The members, as such, have performed every duty regarding a bill prior to the time when the duty of signing by the presiding officers may be performed. This signing in open session * * * has a much more important purpose. It authenticates a bill, and affords a sure means of identification. No official copy is required of a bill introduced, nor is it required to be copied on the journal, and a legal standard of comparison is wanting, The signatures of the presiding officers, therefore, furnish the evidence that that which the journals show, by title and number, passed the general assembly, is this identical measure. * * * This verification by the officers designated by the constitution is the conclusive evidence to the secretary of state that the act so signed is a law, and entitled to be filed as such in the office of that officer, and, under

his direction to be published, duly certified by him, for the information and guidance of all the people of the state. The signing is, therefore, for the benefit of the people in their examination to ascertain what is, and what is not law. It is apparent that the reasoning which led this court to declare section 16 to be directory, does not apply to section 17, and that the cases referred to are not authority in the case at bar. * * *

At the trial the state librarian was offered by the relator as a witness, and it was proposed by the testimony of this witness to identify a copy * * * deposited in the state library * * * . The testimony is believed not to be competent. It was an effort to introduce parol proof, and, in effect, to try the validity of a law upon the testimony of witnesses. * * *

Whether a provision imperative in its terms should be treated as directory or as mandatory, has been held to be a matter of expediency, though Judge Cooley, in his work on constitutional limitations, observes that 'courts tread upon very dangerous ground when they venture to apply the rules which distinguishes directory and mandatory statutes to the provision of a constitution.' Another author says that 'the question is in the main governed by considerations of convenience and justice.' Giving effect to the more liberal view, it may be said that if no advantage would be lost, or right destroyed, or benefit sacrificed either to the public, or to an individual by such a holding, the provision might be regarded as directory. Or, if less injury would result by disregarding than by enforcing the provision according to its letter, then it could with propriety be treated as directory merely. * * * Cooley on Constitutional Limitations, 93; Maxwell on Interpretataion of Statutes, 452; The State v. Covington, 29 Ohio St. 117. In the light of these considerations, we inquire whether section 17, before quoted, should be regarded, in this case, as merely directory, or as embodying a positive requirement? And this is a practical question: Where a bill has received the sanction of a majority of each house of the general assembly, but has not been signed by the presiding officer of either house, * * * can it be treated as law by the courts?

We are reluctantly led to the conclusion that it cannot. The advantages to be derived by a recognition of this bill as a law would, we think, be far outweighed by the perils which might follow the establishment of so dangerous a precedent. * * * In a case where the subject-matter of a bill thus defeated is vital to the public business of the state, the authority of the governor to call together the general assembly, and give opportunity for all needed requirements to be observed, is ample. On the other hand, the importance of furnishing to the people, sources of information, certain in their character, and convenient of access, as to what is, and what is not law, is obvious. * * * Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction would be wise which leaves so important a matter in doubt or confusion.

It is urged that to give controlling effect to section 17 would be to clothe the presiding officers of the general assembly with a veto power, and such a result cannot have been intended by the convention which framed the constitution. Certainly that body did not so intend; but we think the result feared is not likely to follow. * * * The

> obvious answer to this objection is, that confidence must be reposed somewhere; it is not to be presumed that men selected to fill places of such high trust will intentionally violate the constitution, and prove false to their oaths. * * *
>
> If a case were presented where a bill, lacking only the signature of the presiding officer of one house, had been filed by the secretary of state, published under his authority as a law and recognized as such by all other branches of the state government, and acquiesced in for years, a different question would be before us.

The court acknowledges the existence of a different rule in certain jurisdictions, citing Leavenworth v. Higginbotham, 17 Kas., 62; Cottrell v. The State, 9 Nebraska, 125, and cites in support of its decision a number of cases from various jurisdictions.

The decision above quoted cannot be distinguished from the case presented to me by you on the ground that it involved the validity of a bill as law, while your question relates to the effect of a joint resolution. The constitutional provision applicable to both questions applies both to bills and to joint resolutions. The people in adopting the constitution must have harbored the same intent with respect to both.

For the foregoing reasons I am of the opinion that Senate Joint Resolution No. 17, providing for the printing of a certain number of sets of the publication known as Howe's Historical Collections of Ohio," has not been adopted by the general assembly so as to give it force and effect, and that, therefore, the commissioners of public printing are without authority or power under said joint resolution.

Very truly yours,
U. G. DENMAN,
Attorney General.

CORONER — POSTMORTEM EXAMINATIONS — AUTHORITY TO HOLD.

March 22nd, 1910.

HON. A. J. CRAWFORD, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR: — You have made of me oral inquiry as follows:

> Has a coroner, when duly elected and qualified in a county of this state, the legal authority to hold a post-mortem examination without the aid of persons or another physician, and to make a special charge against the county which elects him for such services?

In reply thereto I beg to say that section 2856 of the General Code provides that,

> "When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. * * *".

In the exercise of his official discretion, the coroner may make such examination as is necessary to determine the cause of the death into which he is inquiring; but his fees for such services must not exceed those allowed by section 2866 General Code. Our courts have construed this section as giving to the coroner the right to employ a physician or surgeon to conduct a post-mortem examination in cases in which, in the sound discretion of the coroner, such examination is necessary in order to determine the cause of the death.

Section 2495 provides that,

> "The county commissioners may allow a physician or surgeon making post-mortem examinations, at the instance of the coroner or other officers, such compensation as they deem proper".

While it is the clear duty of the coroner to hold an inquest, not only to ascertain the cause of the death, but 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, it is equally clear that the coroner is not authorized by these statutes to hold unnecessary inquests or post-mortem examinations, thereby incurring needless expense to the public.

> "The coroner must act in good faith — not capriciously or arbitrarily. He may not act where there is no ground to suspect that violence was the cause of the death".
>
> State ex rel v. Bellows, 8 Ohio Circuit Decisions, 376; 62 O. S. 307.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP DEPOSITORY — MANNER OF SELECTING BANK NOT LOCATED IN TOWNSHIP.

Township trustees may not enter into verbal contract for deposit of funds nor contract with bank outside of township when bank located in township, without complying with section 3323, General Code.

March 18th, 1910.

HON. CHAS. A. BOWERSOX, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR: — Your letter of March 9th is received, in which you ask my opinion upon the following question:

> May township trustees, under the township depository act, make a special verbal contract with any bank outside of their township, when there is a bank in their township, without properly advertising and requiring that the interest be paid as provided in the statute? In other words, in a certain case certain township trustees made an arrangement with a bank outside of their township, in which a bank was located, agreeing to take a certain rate and to leave the money on deposit for six months; i. e., that only money which had been on deposit in such bank for six months was to have interest paid on it.

In reply thereto, I beg leave to submit the following opinion:

The sections of the General Code governing the questions you ask, are 3320, 3321, 3323, 3324 and 3325, (Section 1513 R. S. O., in part), and read as follows:

> Section 3320. "The trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions.
>
> Section 3321. "The trustees of the township shall determine in such resolution the method by which such bids shall be received, the authority which shall receive them, the time for which such deposits shall be made, and all the details for carrying into effect the authority herein given, but all proceedings in connection with such competitive bidding and the deposit of such moneys shall be conducted in such manner as to insure full publicity and shall be open at all times to public inspection."
>
> Section 3323. "In a township in which but one bank is located, the funds of the township shall be deposited in such bank at a rate of interest not less than two per cent on the average daily balance, but when the trustees have reason to believe that such bank is not a safe depository, or when such bank refuses to pay at least two per cent interest, or where there are two banks in a township, and either one or both refuses to pay at least two per cent interest on such deposits or in a township in which no bank is located, after the adoption of the resolution, providing for the deposit of the funds, the trustees may enter into contract with one or more banks within the county that are conveniently located and which offer the highest rate of interest on the average daily balance, and in no case be less than two per cent for the full time the funds are on deposit."
>
> Section 3324. "Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and the treasurer of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such treasurer and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."
>
> Section 3325. "Such resolutions and contract shall set forth fully all details necessary to carry into effect the authority herein given. All proceedings connected with the adoption of the resolution and the making of the contract shall be conducted in such manner as to insure full publicity and shall be open at all times to public inspection. All interest money derived in pursuance of these provisions shall be property of the township, and deposited as other funds."

The section of the above quoted provisions, which is particularly applicable to the questions which you ask, is section 3323 of the General Code and I am of the opinion that, under the above quoted sections, and especially under section 3323, the township trustees, to whom you refer in your letter, should have deposited the township funds in the bank located in their township, unless the trustees had "reason to believe that such bank is not a safe depository," or unless such bank refuses to pay at least two per cent interest on the average daily balance. And,

after having decided either of the above two questions as against the bank located in the township, I am of the opinion, that it was the duty of the township trustees, under the above quoted sections, to advertise for bids from other banks conveniently located in the county in which the township is situated, that they could not enter into a legal contract with any such bank except after such advertisement and submission of bids, and that the statutes make it mandatory upon such township trustees, upon so advertising, to accept the bid of the bank offering "the highest rate of interest on the average daily balances," which, in no case, could "be less than two per cent for the full time the funds are on deposit."

It follows, therefore, and I am of the opinion that such township trustees had no power to enter into a contract with such outside bank by virtue of which the township is to receive no interest on money which is not left on deposit in such bank for six months, and I am further of the opinion that, under the provisions of section 3325, above quoted, all contracts for the deposit of township funds should be in writing and "set forth fully all details necessary to carry into effect the authority" given to the township trustees by the above quoted sections.

Yours very truly,

U. G. DENMAN,

Attorney General.

TOWNSHIP DITCH APPEAL—JURY FEES NOT PART OF COST IN.

July 6th, 1910.

HON. CHARLES A. BOWERSOX, *Member General Assembly, Bryan, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 29th in which you request my opinion as to whether jury fees in township ditch appeals are a part of the costs to be taxed against and paid by the appellant in case the report of the jury confirms the decision of the township trustees.

In my opinion jury fees are no part of the costs and should be paid out of the county treasury. Section 4541 R. S., at present section 6633 General Code, applies to township ditch appeals and provides as follows:

> "If the report of the jury is in favor of the appellant, all costs made on such proceeding in the court shall be taxed to and paid by the appellant * * * The jurors shall be allowed $1.50 per day each, with mileage from their respective residences to the probate court at the rate of five cents per mile."

Section 6632 in *pari materia* with the foregoing section provides that costs shall be taxed in such proceedings "as provided by law in similar cases."

As a matter of fact costs authorized by law to be taxed "in similar cases" do not include jury fees. This is true of all civil proceedings in the common pleas court except where specifically provided otherwise, and it is particularly true of the appeal to the probate court from the decision of the county commissioners in county ditch cases. See sections 6527 and 6535, General Code.

Indeed, as a general rule, the term "costs" is held to have a definite meaning and one which excludes jury fees. See State v. Commissioners, 6 O. D. 240; 14 C. C. 26. Accordingly, I am of the opinion that the mere fact that section 6633 provides both for the taxation of costs and for the fees payable to jurors in township ditch appeals is not sufficient to lead to the inference that such jury fees are to be included in the costs. In order to overcome the presumption arising from the

ordinary meaning of the term "costs" the General Assembly would have to provide explicitly that jury fees should be included in the costs of a given action.

I am, therefore, of the opinion that jury fees in township ditch appeal cases should be paid out of the county treasury, and should not be included in the costs taxed against the appellant in case the jury sustains the finding of the township trustees.

Yours very truly,

U. G. DENMAN,
Attorney General.

BURIAL OF INDIGENT SOLDIERS — COUNTY COMMISSIONERS MAY NOT ARBITRARILY AFFIX COSTS BELOW $75.

August 9th, 1910.

HON. JOE GILLIGAN, *Member of the General Assembly, Cincinnati, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date, in which you submit the following for my opinion:

> The county commissioners of some counties of this state claim the right to make the price of burial of indigent soldiers what they see fit regardless of what the law may be. Some have the price fixed at sixty dollars and will not allow any more. I desire to know whether or not county commissioners have such a right.

I beg to call your attention to an act in 99 Ohio Laws, page 99, which is an act authorizing the burial of honorably discharged Union soldiers who served in the War of the Rebellion of 1861. Section 1 of such act is as follows:

> "That it shall be the duty of the county commissioners of each county in the state to appoint two suitable persons in each township and ward in their respective counties, other than those prescribed by law for the care of paupers and the custody of criminals, whose duty it shall be to contract with the undertaker selected by the friends of any of the persons hereinafter mentioned, and cause to be interred, in a decent and respectable manner, in any cemetery or burial ground within the state, other than those used exclusively for the burial of paupers and criminals, the body of any honorably discharged soldier, sailor or marine having at any time served in the army or navy of the United States, or the mother, wife or widow of any such soldier, sailor or marine, or any army nurse who did service at any time in the army of the United States, who shall hereafter die, not having the means to defray the necessary funeral expenses, at a cost not to exceed seventy-five dollars.
>
> "The committee so appointed shall use certain forms of contracts herein prescribed and hereafter described, and abide by the regulations provided by this act. Such committee so appointed shall hold their appointment so long as they serve to the satisfaction of the county commissioners. Whenever a vacancy occurs in such committee, said commissioners shall appoint a suitable person or persons to fill such vacancy. The members of said committee shall receive

one dollar each from the general fund of said county for each service so performed. It shall be the duty of said committee to see that undertakers furnish all items specified in contract, and that in no case where the benefits of this act are claimed shall the entire cost of said funeral exceed the amount herein agreed upon."

You will note in this section that the legislature authorizes the expenditure of not to exceed seventy-five dollars for the burial of the persons mentioned. It is the duty of the commissioners to appoint two persons in each township and ward whose duty it shall be to contract with the undertaker for the burial of soldiers. Such persons may not contract for funeral expenses in excess of seventy-five dollars. The discretion as to the expense is placed in the persons appointed by the commissioners and not in the commissioners themselves. If it is necessary to expend seventy-five dollars for burial purposes, the persons appointed by the commissioners have authority to do so and their discretion cannot be controlled by the county commissioners. The general assembly of this state has seen fit, by enacting the above quoted section, to provide for a decent and fit burial for the Veterans of the Civil War and the cost of the same undoubtedly in some cases would be seventy-five dollars. To permit the county commissioners of any county to only authorize the expenditure of sixty dollars would, in effect, annul the act of the legislature in cases where the cost of burial would necessarily run to seventy-five dollars.

I am, therefore, of the opinion that the discretion as to cost of burial of veterans of the Civil War is placed in the persons appointed by the county commissioners and such discretion is limited by a maximum cost of seventy-five dollars, and that the discretion of such persons cannot be controlled by any acts upon the part of the county commissioners.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

TEACHERS' PENSION FUND—PAYABLE OUT OF FUND CREATED BY BOARD OF EDUCATION FOR THAT PURPOSE.

September 22nd, 1910.

HON. L. H. SCOTT, *Member of General Assembly, Cadiz, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 17th, in which you submit the following for my opinon:

> Is the ten dollars a month teachers' pension payable out of state, county or township funds or must it be paid out of the fund created by the board of education from teachers' assessments?
>
> In case no such fund is created is there any source of revenue to draw from?

I beg to call your attention to section 7883 of the General Code, which is as follows:

> "Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, ten dollars for each year of service as teacher, except that in no event shall the pension paid to a teacher exceed three hundred dollars in any one year. Such pensions shall be paid monthly during the school year."

The above quoted section provides the pension to which your inquiry refers. You will note from a reading of the entire teachers' pension act, sections 7875 to 7896, inclusive, of the General Code, that the pension referred to in the above quoted section is only to be paid from a pension fund created by the board of education and from no other fund.

I am, therefore, of the opinion that a pension for retired school teachers is only to be paid out of the fund created by the board for such purpose, and in case no such fund is created it would be impossible for the board to draw upon any other source of revenue.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Prosecuting Attorneys.)

CRIMINAL PROCEDURE — ERROR — SENTENCE.

Time spent by convict in jail upon return from penitentiary pending determination of error proceedings is no part of sentence.

August 23rd, 1910.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 9th, in which you request my opinion upon the following facts:

> "On the 21st day of March, 1906, Vernon Williams (serial number 36842) was sentenced by the Common Pleas Court of Logan County to serve a term of seven years in the penitentiary on a charge of robbery.
>
> "After he had been conveyed to the penitentiary a petition in error was filed and the sentence was suspended, and Williams was returned to the jail of Logan County to await the action of the Circuit Court of said county.
>
> "In October, 1906, the Circuit Court affirmed the judgment of the Court of Common Pleas. Williams spent four months and twenty-eight days in jail after his return from the penitentiary awaiting the action of the Circuit Court.
>
> "The warden of the penitentiary declines to allow the prisoner credit for the time spent in the Logan County jail, and contends that Williams must stay in the penitentiary four months and twenty-eight days in excess of his short time. This hardly seems fair to the prisoner."

The dates named in your letter indicate that the provisions of the Revised Statutes govern your question. Section 7362a is in point. It provides in part as follows:

> "In all cases of conviction for felony, except for murder in the first degree, where the defendant has been committed to the penitentiary and sentence has been or may be suspended * * * the warden of the penitentiary * * * shall * * * cause the defendant to be conveyed to the jail of the county in which he was convicted and committed to the custody of the sheriff thereof, to be safely kept, *unless admitted to* bail, pending the decision of the petition in error * * * when, if the judgment be affirmed, * * * the defendant shall be conveyed by the sheriff to the penitentiary to serve the balance of his term of sentence * * *"

The italicized portion of the above quoted provision indicates clearly that the time spent by the prisoner in the custody of the sheriff during the pendency of the error proceedings is no part of his sentence. Prisoners in confinement under sentence for felony are not entitled to be released on bail.

It is, therefore, my opinion that the warden is correct in his contention, and that the time spent by the prisoner in the county jail is not to be credited upon his sentence.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

COUNTY AUDITOR MAY NOT ACT AS CLERK OF BOARD OF EQUALIZATION. DEPUTY AUDITOR MAY NOT ACT IN SUCH CAPACITY.

November 18th, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter in which you request my opinion upon the following question:

> "In counties in which the auditor is clerk of the board of equalization can he as such clerk receive compensation for the work done and pay the same into the fee fund, and if so, what would be the amount of that compensation per day?"

Section 5594 of the General Code, applying to the quadrennial board of equalization, provides in part that,

> "The auditor, surveyor and commissioners of each county shall compose the county board of equalization * * * The auditor shall keep a full and accurate record of the proceedings and orders of the board."

Under this section it is my opinion that it is the duty of the auditor as a member of the board to keep the records of the board, or, as you express it, to act as clerk of the board. For this service he is entitled to no additional compensation.

Under section 5597 the auditor as a member is entitled to three dollars a day for each day necessarily employed in the performance of his duties, and the sum so ascertained is, in my opinion, payable into the fee fund of the county auditor, although it may not be retained by the auditor personally. But neither the auditor nor his fee fund is entitled to any compensation for services in connection with the quadrennial county board of equalization excepting this three dollars per day.

As to the annual county board of equalization, section 5580 of the General Code provides that,

> "The county commissioners and county auditor shall constitute a board for the annual equalization of the real and personal property, moneys and credits in each county * * *"

Section 5581 of the General Code provides that,

> "The auditor shall appoint such * * * clerks as the board deem necessary, who shall receive not to exceed three dollars per day for their services for the time actually employed, which shall be paid out of the county treasury."

Under section 5597 above cited, the auditor as a member of the annual county board of equalization is entitled to the same fee of three dollars per day which, however, must be credited to his fee fund.

It will be observed that section 5580 above quoted does not make it the duty of the auditor to act as clerk of the annual county board of equalization, but that said annual board may employ clerks under favor of section 5581. Inasmuch

as the auditor is himself a member of the board and the appointing authority under section 5581, I am clearly of the opinion that the auditor can not appoint himself as clerk of the annual county board, nor can he appoint one of his deputies to serve in that capacity.

I am, therefore, of the opinion that neither the county auditor nor his fee fund may receive any money on account of clerical services performed in behalf of the annual county board of equalization.

Yours very truly,
U. G. DENMAN,
Attorney General.

STATUTES OMITTED IN GENERAL CODE NOT NECESSARILY REPEALED—SPECIAL LEGISLATION NOT INCLUDED IN GENERAL CODE.

June 10th, 1910.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> There is in Zanesville what is known as the joint city and county workhouse of the city of Zanesville and Muskingum county which up to the time of the passage of the General Code was governed by section 1536-384 to 1536-406 inclusive of the Revised Statutes. These sections have been omitted as special statutes from the General Code.
>
> The last provision of the General Code is as follows: "All sections, parts of sections, acts and parts of acts, inconsistent with this act and not included herein are repealed."
>
> *Queries:*
>
> 1. Does this last provision of the General Code repeal the special Muskingum county act as contained in sections 1536-384 to 1536-406 inclusive of the Revised Statutes above cited?
>
> 2. If this special act is repealed, is this joint workhouse governed by the general statutes on workhouses?
>
> 3. Does section 4128 of the General Code apply to a joint city and county workhouse, such as this, or does it apply alone to workhouses owned and operated by municipalities?

In reply I beg to say the last provision contained in the General Code, to-wit: "All sections, parts of sections, acts and parts of acts, inconsistent with this act and not included herein are repealed," does not operate as a repeal of existing statutes on the sole ground that such statutes are omitted from the General Code. This provision only repeals such sections and parts of sections, acts and parts of acts which are *inconsistent* with the act, and not included therein. Therefore, while the special act authorizing the county commissioners of Muskingum county to unite with Zanesville in the location and maintenance of a workhouse as contained in sections 1536-348 to 1536-406 inclusive of the Revised Statutes is left out of the General Code, it is not for that reason repealed unless the same be *inconsistent* with the provisions of the General Code. It was left out of the code because it was a special act and the Codifying Commission under the act "To provide for the revision and consolidation of the statute laws of Ohio" were only authorized "to revise and consolidate the *general* statute laws of the state."

It follows, therefore, that the Muskingum county special act is not affected by the adoption of the General Code. In other words, it stands now as it stood before, still bearing the infirmity of being special legislation because by the terms of the act it can only apply to Muskingum county.

Your second question is contingent upon the repeal of the Muskingum county act, and therefore need not be answered.

In answer to your third question, section 4128 of the General Code is as follows:

> "When a person over sixteen years of age is convicted of an offense under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is authorized by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, may sentence the offender to the workhouse, if there is such house in the county. When a commitment is made from a city, village, or township in the county, other than in the municipality containing such workhouse the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to forty cents per day for the time of the commitment, to be placed in the hands of the superintendent of the workhouse for the care and maintenance of the prisoner."

The language of this section is general and applies to any county in which a workhouse is established, regardless of the fact that such workhouse is owned and controlled jointly by the county and municipality or by a municipality alone.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY—MAY NOT BE APPOINTED DELINQUENT PERSONAL TAX COLLECTOR.

December 1st, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I have before me your letter of November 28th, in which you submit to me the following question for an opinion:

> "Can the prosecuting attorney of a small county, in which he is not required to give all his time to that office, be appointed delinquent personal tax collector?"

Replying to the above question, I beg to say that, under section 5696 of the General Code, (old section 2856 R. S.), the county commissioners are required at their September session, annually, to cause the list of persons delinquent in the payment of taxes on personal property to be publicly read. Said commissioners may, if they deem the same necessary, authorize the treasurer to employ collectors to collect the same or any part thereof. While the county commissioners have authority, under the above section, to employ a delinquent personal tax collector, yet I am of the opinion that the prosecuting attorney cannot be employed as such collector for the reason that section 2917, General Code, (old section

1274 R. S.), requires the prosecuting attorney to be the legal adviser of the county commissioners and all other county officers and county boards and that he shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party. Under this provision it is the duty of the prosecuting attorney to prosecute and defend all suits and actions to which any of the county officers may be a party.

Under section 5697, General Code, (old section 2859 R. S.), in addition to other remedies provided by law for the collection of delinquent personal taxes, the county treasurer is especially authorized to enforce the collection by civil action in the name of the treasurer, and the prosecuting attorney is required, under section 2917, to prosecute the suits. Section 2917 also requires the prosecuting attorney to advise the county commissioners in all matters connected with their official duties. The prosecuting attorney may, therefore, be required to pass upon and approve the contract made by the county treasurer under the authority of the county commissioners with the collector provided for in Section 5696.

I am, therefore, of the opinion, inasmuch as the official duty of the prosecuting attorney is to represent the county treasurer in all suits brought for the collection of delinquent personal taxes and to advise the county treasurer and county commissioners in the making of contracts for the employment of collectors, that the duties to be performed by a collector appointed under Section 5696 are incompatible with those of prosecuting attorney and that a prosecuting attorney is not, therefore, eligible to the appointment of collector under section 5696, General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY INFIRMARY—LIABILITY OF COUNTY FOR DAMAGES CAUSED BY SEWER OF INFIRMARY POLLUTING WATERS OF COUNTY DITCH AND DAMAGING FARM THEREBY.

November 30, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—You ask:

> "Whether or not a county is liable under section 2408, General Code, for damages caused by sewage from the County Infirmary which polluted the waters of a county ditch, which latter runs through a farm of a certain farmer living in the vicinity of the Infirmary."

Section 2408 of the General Code provides in part that:

> "The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain and defend all suits in law or in equity, involving an injury to any public, state or county road, bridge, ditch, drain or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such

road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county or any money or other property due the county. * * * "

The above is a codification of section 845, Revised Statutes, which provides in part as follows:

"The board of county commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and of bringing, maintaining and defending all suits, either in law or in equity, involving an injury to any public, state or county road, bridge or ditch, drain or watercourse established by such board in its county, and for the prevention of injury to the same, and any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair, and to ask, demand and receive, by suit or otherwise, any real estate or interest therein, whether the same is legal or equitable, belonging to the county or any sum or sums of money or other property due to such county, * * *."

Since, in Section 845 the word "and" is used following the words "any court of judicature," it is seen that the first clause of Section 845 R. S. and Section 2408, General Code, provides only a very general power to sue the county by its board of county commissioners without making any reference to the question of the liability of the county. The language immediately following the first clause authorizes suits "involving an injury to any * * * ditch, drain or watercourse established by such board in its county, and for the prevention of injury to the same." This language seems to refer to injury to rather than to damage from a ditch, etc., and does not seem to make the county liable in a case such as that presented by you.

The most striking part of Section 2408, so far as your question is concerned, is the language "the board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such *road or bridge* in proper repair." This is the only reference in this section relating to the liability of the county and, according to well known rules of statutory construction, the specific reference to liability in the case of a road or bridge, together with the omission of any reference to liability in the case of a road, ditch, drain or watercourse, negatives the idea of liability as to ditch, drain or watercourse. This conclusion is strengthened in this particular case by the fact that the words "ditch, drain or watercourse" are employed in the first part of the section but not referred to in that part of the section which relates to the liability of the county.

It appears, therefore, from the facts presented by you, that the board of county commissioners of your county in its official capacity is not made specifically liable under Section 2408 of the General Code.

Very truly yours,

U. G. DENMAN,
Attorney General.

DETENTION HOME — MANNER OF ESTABLISHING, ETC.

November 29th, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR: — You state that you are thinking of establishing a detention home in your county, which contains a population of less than forty thousand. You ask whether the commissioners of your county could, under sections 1670 and 1671 of the General Code, "proceed to establish such a home and provide the necessary persons to care for the same and to care for the children in such home."

The above sections of the General Code provide as follows:

> "Section 1670. Upon the advice and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners may provide by purchase or lease, a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of seventeen years may be detained until final disposition, which place shall be maintained by the county as in other like cases. In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron who shall have charge of such home, and of the delinquent, dependent and neglected minors detained therein. Such superintendent and matron shall be suitable and discreet persons, qualified as teachers of children. Such home shall be furnished in a comfortable manner as nearly as may be as a family home. The compensation of the superintendent and matron shall be fixed by the county commissioners. Such compensation and the expense of maintaining the home shall be paid from the county treasury upon the warrant of the county auditor, which shall be issued upon the itemized voucher, sworn to by the superintendent and certified by the judge."
>
> "Section 1671. When such detention home is provided by the county commissioners, and upon such home being recommended by the judge, the commissioners shall enter an order on their journal transferring to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to purchase or lease such home and properly furnish and conduct it and pay the compensation of the superintendent and matron. The commissioners shall likewise upon the appointment of probation officers, transfer to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to pay them, and such transfers shall be made upon the authority of this chapter. At the next tax levying period, provisions shall be made for the expenses of the court."

From a consideration of these sections it appears that the distinction made by the law between "counties having a population in excess of forty thousand" and other counties consists in the provision that "in counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron." This specific provision for the appointment of a superintendent and matron in such counties negatives the right to appoint a superintendent or matron in counties containing a population of forty thousand or less. It appears to me that in making this classification according to population, the general assembly

felt that in counties containing over forty thousand population, it might be advisable to have regular persons, such as a superintendent and matron, permanently in charge of such a home throughout the year, whereas in the smaller counties, the general assembly felt that, owing to the small number of children who would probably be involved, it was inadvisable to have persons permanently employed throughout the year. There is nothing, however, in the law which indicates that a county containing a population of forty thousand, or less, may not "purchase or lease such home and properly furnish and conduct it." This would include providing the necessary persons to care for this home and for the children from time to time.

I am, therefore, of the opinion that your county may proceed to establish a detention home and provide, from time to time, as necessity warrants, the necessary persons to care for the same and to care for the children in said home, but I am also of the opinion that you are without power to provide a superintendent or matron for such home.

Yours very truly,
U. G. DENMAN,
Attorney General.

MEMBERS OF GENERAL ASSEMBLY — METHOD OF REIMBURSING FOR MILEAGE.

November 25th, 1910.

HON. GRANVILLE W. MOONEY, *Speaker House of Representatives, Austinburg, Ohio.*

DEAR SIR: — I have your letter of the 18th inst., in which you submit for my opinion thereon the following facts and inquiry:

> "At the close of the last session of the general assembly one of the members, Hon. A. R. Phillips, drew only a part of his mileage, my recollection being that he drew for three trips instead of the full number allowed by law.
>
> "He now asks me to draw a voucher for the balance. You will remember in a former question regarding the mileage law there seemed to be some doubt as to the meaning of the phrase in the statute reading 'to be paid but once.'
>
> "Will you kindly advise me whether I have a right to issue a supplemental voucher for the balance of mileage not included in the original voucher?"

In reply thereto I beg to say that section 40 of the Revised Statutes, as in effect April 16, 1906, and which section as since amended is now section 50 of the General Code, controls as to the payment of this mileage. The provision of the section relating to the mileage being:

> "* * * and also twelve cents per mile each way for traveling from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid but once in any regular or special session * * * ."

There has been no judicial construction of this provision of section 40 of the Revised Statutes as it existed during the term of Mr. Phillips. The construction

which has been placed upon this provision of this section has, so far as I am able to learn, been, without exception, that under its terms a member was allowed to draw mileage but once during a regular or special session of the general assembly.

There is room for questioning the correctness of this construction of the statute, but inasmuch as this section, in the form it existed in 1906, is no longer the law relating to mileage of members of the general assembly, and the further fact that all the other members of the general assembly to which Mr. Phillips belonged have uniformly accepted the construction that mileage was "to be paid but once" during a general or special session of the legislature, and there being both reason and authority therefor, I express the opinion that that construction should prevail.

Therefore, I advise that Mr. Phillips, having received voucher for three trips at twelve cents per mile each way, is not legally entitled to further mileage, and his request for additional voucher should be denied.

Yours very truly,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—ONE MILE TURNPIKE MONEYS AND CONTRACTS.

County treasurer is custodian of funds arising from sale of bonds for purpose of constructing one mile turnpike. Both county commissioners and commissioners of such turnpike may enter into contracts for construction thereof.

August 4th, 1910.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date, submitting to me for my opinion thereon the following questions:

> 1. Who as between the county treasurer and the county commissioners of a "one mile turnpike" is the custodian of the fund arising from the sale of bonds for the purpose of constructing such turnpike?
>
> 2. Who as between the county commissioners and the road commissioners is authorized to make and enter into contracts for the construction of such a "one mile turnpike"?

I have carefully examined the brief submitted by Mr. Ernest L. Finley in connection with his letter to this department and his correspondence with the Bureau of Inspection and supervision of public offices, and I have also consulted a member of that department in connection with this inquiry.

Answering your first inquiry I am of the opinion that the proceeds of an issue of bonds for the purpose of constructing a road under the one mile assessment law, or for the purpose of liquidating any indebtedness on account thereof, should be placed in the county treasury.

Section 7283 General Code, formerly section 4808 Revised Statutes, expressly provides that such bonds shall be "payable at the county treasury", while other related sections clearly indicate the legislative intent to make the county treasurer custodian of the fund. It is true that there are sections requiring the road commissioners to make an accounting of moneys in their hands, especially section

7303 General Code, formerly section 4827 Revised Statutes. However, such commissioners still have custody of amounts collected in lieu of road labor. (Sections 7259, 7266 General Code). And all moneys received by donation for the construction of the road. (Sections 7248 General Code, section 4782 Revised Statutes).

It cannot be said, therefore, that because the road commissioners are obliged to account for moneys in their hands and to pay over balances etc., they must be deemed to have custody of the proceeds of a bond issue.

Answering your second question I beg to state that section 4782 R. S., section 7248 General Code and section 4800 R. S., and section 7273 General Code both provide for the making of contracts for the construction of one mile assessment pikes. The one confers this power upon the road commissioners and the other upon the county commissioners. As suggested by you the statutes may be reconciled by giving to the one last enacted, section 7273 General Code, a directory meaning. This would result in making both statutes permissive. It would appear, however, that in case the county commissioners should elect to make the contract and purchase the materials themselves, this election would foreclose the right of the road commissioners to take like action. On the other hand, if the road commissioners prior to any election on the part of the county commissioners, proceed to make contracts and purchase materials for the construction of a road, they would have power to complete their undertaking. The situation is analogous to the case of courts of concurrent jurisdiction; the authority first acting acquires power to finish its undertaking.

Yours very truly,
U. G. DENMAN,
Attorney General.

MANNER OF COUNTY OFFICERS REPORTING FEES DUE OFFICE—SECTION 2983, GENERAL CODE, CONSTRUED.

November 30th, 1910.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 19th in which you submit the following for my opinion:

> Does section 2983 of the General Code of Ohio, as found in 101 Ohio Laws 199, 200, *first,* refer to calendar or official year, the official year ending and commencing February 8 and 9 of each year; *second,* shall reports subsequent to the first be only for the current year and from the end of the previous report, or shall the report be from the beginning of his term of office until the date of filing of the particular statement?

I beg, first, to call your attention to section 2983 of the General Code as found in 101 Ohio Laws 199, which is as follows:

> "At the end of each quarter, each such officer shall pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during such quarter, for his official services, which money shall be kept in separate funds by the county treasurer,

> and credited to the office from which they were received, and he shall also, at the end of each year of his incumbency in office and at the close of the term for which he shall have been elected, make and file a sworn statement with the county commissioners, of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind, which are due his office and unpaid."

You will note that this section specifically requires that an officer shall make a report at the end of each *year* of his incumbency in office. This, to my mind, clearly means that an officer must report one year after taking office, although this construction would seem to render the latter part of the section, "and at the close of the term for which he shall have been elected," useless, for the reason that if he made a report "at the end of each year of his incumbency in office," he would necessarily make a report "at the close of the term for which he shall have been elected." However, I believe that the proper construction to be placed upon this section is that an officer under this section must make a report at the end of each year of his incumbency in office and that the phrase 'at the close of the term for which he shall have been elected" was used advisedly by the legislature as, in a number of cases, officers, on account of failure of successor to qualify, and other reasons, continue in office for such length of time as to bring the end of his office at a different date than at the end of a particular year of his incumbency of the office. The rule of statutory construction is also to be borne in mind, that every word of an act is to be given meaning if possible.

Answering your second question, the report of officers under section 2983, General Code, shall contain a sworn statement of all the costs, penalties, percentages, allowances and perquisites of whatever kind *which are due his office and unpaid.* This part of the section is quite clear and will require an officer to report at each date when a report is due under section 2983 all fees, etc., which are due his office and unpaid without any limitation as to how long such fees, etc., have been due his office and unpaid, or as to whether or not such fees, etc., have heretofore been reported under section 2983.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXATION — EXEMPTION FROM — INSTITUTION OF PUBLIC CHARITY ONLY.

November 17th, 1910.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of October 23rd requesting my opinion upon the following question:

> "The Allegheny Conference of the Wesleyan Methodist Church, which comprises territory in western Pennsylvania and eastern Ohio, are about to purchase property in Canton for the purpose of establishing here what they term a 'Rescue Home' for fallen women. This home is to be conducted entirely for benevolent purposes, and no charge is to be made for the keeping of the inmates. All the property is to be held by the Wesleyan Methodist Church."

"I desire your opinion as to whether or not property used for this purpose would be exempt from taxation?"

Replying thereto I beg to state that in my opinion the institution in question is an "institution of public charity only" within the meaning of section 5353 General Code, formerly section 2732 Revised Statutes as the same has been construed by the supreme court of this state. See Humphreys v. Little Sisters of the Poor, 29 O. S. 201.

Yours very truly,
U. G. DENMAN,
Attorney General.

CHILDREN'S HOME MAINTAINED BY PRIVATE CHARITY — ASSISTANCE FROM COUNTY.

July 26th, 1910.

County commissioners may not make donation to a children's home which is maintained by private charity but may make arrangements with home for care of children committed to it under juvenile act.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 15th which is as follows:

> "The Holloway Orphans' Home is an incorporated society in Dayton that for several years has done most worthy work in caring for neglected and destitute colored children. The building in which the work is carried on is used by permission of the owners free of rent; and the management is conducted by colored people, two women being in charge, who have at present forty-four children in the home, twelve of whom are fed from the bottle. The institution is a great help to the county in relieving the children's home from the care of these children. In fact it would be impossible for the children's home to take all of these children and care for them. The Holloway Home is sustained entirely by private charity and is in need of financial aid; and, in view of the benefit to the public, the county commissioners are ready to assist the institute if they have any legal authority to do so.
>
> Sections 929-1 et seq (Revised Statutes) would probably give the requisite power; but these sections are omitted from the General Code, although they are not expressly repealed. In your opinion does this leave the law in such shape that the commissioners have power to act under it?
>
> In case the facilities of the children's home are inadequate to care for all the children that would be entitled to admission, and in order to prevent sending such children to the county infirmary, is the authority given under section 3092, General Code, as follows: 'but within their respective counties, in the manner deemed best for the interest of such children,' sufficient to warrant the commissioners contracting for such care and support with the Holloway Home?"

Sections 929-1 et seq., R. S., referred to by you do not authorize county commissioners to give financial aid to a private children's home in the manner sug-

gested by you. The power attempted to be conferred by section 929-1 R. S., is to, "aid any such institution to *purchase land, erect buildings,* either by subscriptions with others * * * or by direct aid or donation or otherwise * * *."

The power conferred by section 929-2 R. S., is conferred only upon such county commissioners as have *already* aided in the *purchase* of land for the *erection* of buildings.

Section 929-3 R. S., is similar to section 292-2 in this respect. In other words, these two sections cannot be followed unless the county commissioners have contributed money toward the purchase or erection of a building for a private association.

Inasmuch as your county commissioners desire not to aid in the purchase or erection of a building, but to donate money for the support of a private institution, it is clear that these sections afford no authority for such action. It is therefore, unnecessary for me to consider the question as to the repeal by the General Code of these and related sections, although I am inclined to the opinion that these sections are in law repealed. It is also unnecessary for me to consider the question of the constitutionality of these sections, which question would not arise at all until their applicability to the question at hand and their present force and effect were first determined.

'I, therefore, conclude that sections 929-1 et seq., R. S., do not now and never did authorize the county commissioners to make a donation of the sort described by you.

Section 3092, General Code, referred to by you provides in part as follows:

> "In any county where such (children's) home *has not already been provided,* the board of commissioners shall make temporary provisions for such children * * * by leasing suitable premises for that purpose * * * but the commissioners may provide for the care and support of such children * * * in the manner deemed best for the interest of such children, and they shall levy an additional tax, which shall be used for that purpose only."

This is a revision of section 931e Revised Statutes. In both the original and revised section it is apparent that the power of the commissioners to exercise their discretion as to the manner in which dependent children shall be cared for does not exist where a children's home has already been provided. At the most the commissioners would have power under this section to aid in the support of a private institution *temporarily* during the time necessary for the construction or enlargement of a children's home. Permanent and continued aid to such a private institution caring for children who would otherwise be proper inmates of the children's home cannot be extended under its favor.

I have carefully examined the sections of the General Code which relate to children's homes and orphans' asylums, and find therein nothing authorizing county support of a private charitable institution.

Section 3100, General Code, provides that the trustees may place children in private families "through well known and established private institutions, duly incorporated under the laws of this state, which have as their object the fitting for and placing of children in families," but this section clearly does not apply to the question submitted by you.

I am, therefore, of the opinion that there is not authority of law under which the county commissioners may make a donation to a children's home maintained by private charity. However, the commissioners may in their judgment

enter into an arrangement with the trustees of such institution for the care of such children as may be committed thereto in accordance with the laws relating to children's homes or under the juvenile act. Such arrangements, however, could be prospective only, and would have to be made by contract duly entered into between the commissioners and the trustees.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF REVIEW — COMPENSATION FOR ACTING AS CITY BOARD OF EQUALIZATION.

July 26, 1910.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 19th in which you request my opinion upon the following question:

> "Are the members of the city board of equalization provided for by section 5624 of the General Code to receive the same compensation as was fixed by the county commissioners under section 5621 for the city board of review?"

In my opinion the effect of section 5624 General Code, which is in part as follows: " * * * the board of review * * * shall sit as a board for the equalization of the value of such real property * * * ", simply imposes ex-officio duties upon the members of the board of review as such. In the discharge of such ex-officio duties they are entitled to such compensation as is provided by the action of the county commissioners under section 5621 General Code for services as members of the board of review.

You also inquire as to the compensation of the county surveyor as a member of the county board of equalization. I herewith enclose copy of my opinion to the Auditor of State relating to that matter.

Very truly yours,
U. G. DENMAN,
Attorney General.

COUNTY BOARD OF EQUALIZATION — UNDER GENERAL CODE, COUNTY COMMISSIONERS MAY RECEIVE COMPENSATION FOR SERVING.

June 9, 1910.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> In the case of Ohio ex. rel. Unverferth vs. Owen, recently decided by our supreme court, it was held that county commissioners were not entitled to compensation for services as members of the Board of Equalization. Since this case was decided, however, the general assembly has adopted the General Code and in so doing have incor-

porated therein Section 897 Revised Statutes (the Commissioners' Salary Law) as Section 3001 of the General Code, also Section 2813a Revised Statutes, Section 5597 General Code, in which section it is provided that,

> "each member of the quadrennial county board, including the county auditor and county surveyor, and each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as a member of the board of revision, the sum of three dollars."

Query: Inasmuch as the General Code now contains a section whereby county commissioners are placed upon a flat salary, and provides that such salary "shall be in full payment of all services rendered as such commissioners," and also contains a section which provides a per diem for county commissioners while acting as members of the Board of Equalization, may a county commissioner receive the per diem provided in Section 5597 General Code in addition to the salary provided in Section 3001 of the General Code?

In reply I beg to say that the case of Ohio ex. rel. Unverferth vs. Owen was not reported. The decision, however, was not based entirely upon the fact that the statute placing the county commissioners upon a flat salary was a later enactment than the statute providing the per diem compensation while acting as members of the county board of equalization. The Commissioners' Salary Law provides that the salary therein fixed shall be in full payment for all services rendered as such commissioners, while the provision in Section 5597 of the General Code fixes a per diem compensation for services rendered as a county board of equalization; that is, the Commissioners' Salary Law fixes a salary for all services rendered as county commissioners. Now if the services rendered by the commissioners as members of the county board of equalization is to be regarded as a part of their duty to be performed as county commissioners, then the salary provided in the County Commissioners' Salary Law covers the services. On the other hand, if the board of county equalization is a separate and distinct board from the board of county commissioners, then, following the decision of the supreme court in the case of State ex. rel. Cline vs. Cannon, the law creating such board is unconstitutional.

I am, therefore, of the opinion that county commissioners performing the duties of a county board of equalization are not entitled to any compensation other than that fixed by the County Commissioners' Salary Law.

Very truly yours,
U. G. DENMAN,
Attorney General.

SOLDIERS' BURIAL COMMITTEE—ENTITLED TO COMPENSATION FOR PASSING UPON ALL CASES PRESENTED TO IT.

December 9th, 1910.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 21st requesting my opinion upon the following question:

"Where the soldiers' burial committee appointed under section 2950 of the General Code, have made the inquiry provided under section 2952, and decided that the family of the deceased soldier is able to defray the expense of the funeral, are the members of the committee entitled to the compensation authorized by section 2951?"

Section 2951 of the General Code provides in part that,

"The members of such (soldiers' burial) committee shall receive one dollar each from the general fund of the county for each service so performed."

The ambiguity in this phrase arises from the fact that the ordinary meaning of the phrase "so performed". would relate only to services provided for in preceding sections, whereas many of the services required of members of the committee, including the one concerning which you inquire particularly, are provided for in succeeding sections of the same act without any further provision for compensation.

This ambiguity, however, is more apparent than real. While section 2950 requires the committee to

"contract * * * with the undertaker, selected by the friends of the deceased, and cause to be interred in a decent and respectable manner, the body of any honorably discharged soldier * * * not having the means to defray the necessary funeral expenses,"

And while section 2951 of the General Code requires the committee to

"use the forms of contract herein prescribed, and abide by the regulations herein provided"

neither of these sections prescribes the procedure to be followed by the committee in discharging these duties. They must, therefore, be read in connection with section 2952 which provides in general for inquiry by the committee into the means of the family of the deceased, and the making of a report to the county commissioners.

The phrase "each service" must refer to each particular case with which the committee has to deal. Inasmuch then as the committee must follow section 2952 in dealing with all cases coming to their notice, it follows that the service for which they may receive compensation consists in part, at least, of the inquiry which they are required to conduct in section 2952.

From all these considerations I am of the opinion that the members of the committee are entitled to compensation for passing upon each case presented to them, regardless of whether or not they find each such case worthy of relief.

Yours very truly,

U. G. DENMAN,
Attorney General.

FINDING OF BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES IN FAVOR OF OFFICER DOES NOT CARRY RIGHT TO INTEREST.

December 8th, 1910.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR: — Your communication is received in which you submit to me for my opinion thereon the following inquiry:

> "In 1906 the examiners from the Bureau of Inspection and Supervision of Public Offices found that the county auditor of Wood county, Ohio, had collected, as part of his salary, fees in excess of those prescribed by law in amount of $1,206.25; that the county auditor under protest returned to the county treasury this money; in 1910 it was found that the auditor had properly collected and appropriated the fees and was entitled to the same; he now asks six per cent interest on this money from 1906 to 1910. Can the auditor collect this interest?"

In reply I beg to say that the county has no authority expressly given by statute for the payment of interest on this or similar funds, concerning the ownership of which there is a dispute. This interest, if paid, must come from public funds raised by taxation to be expended for public purposes. The payment of this interest would not come within this scope of disbursement of public money. Equity is not applicable here. In my opinion the auditor's claim for interest does not belong to any of the classes of county liabilities which bear interest, and, therefore, while he has been denied the use of this money, by reason of his own surrender thereof, he is precluded from the recovery of interest thereon.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF EQUALIZATION, REVISION AND REVIEW — VARIOUS QUESTIONS.

Minutes of board of review acting as board of equalization should be kept separately.

City board of review must act as board of revision.

Quadrennial board of equalization must complete its work before first Monday of October of the quadrennial year.

Board of revision may reduce aggregate valuation below amount fixed by board of equalization, and approved by tax commission, but not below aggregate value as returned by assessor.

Clerical errors in valuation of real property — how corrected.

November 11th, 1910.

HON. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter enclosing a list of questions pertaining to the powers and duties of the board of review of the city of Toledo as a board of equalization and as a board of revision with respect to which you request my opinion. The following are the questions submitted by you:

"1. Shall the minutes of the board of review, acting as a board of equalization, be kept separate from those of the board of review and be recorded in a book for that purpose?

"2. Has the board of review any power to act as a board of revision?

"3. Calling attention to sections 5594 and 5595, what is the proper construction as to the time limit for equalization?

"4. If, acting as a board of equalization, the board of review should add to the duplicate returned by the quadrennial board of assessors, can the amount so added and approved by the tax commission be used as a fund from which as a board of revision, it may deduct over valuations on complaints filed with it which it may find to be true after due investigation?

"5. Can this board or the county auditor rectify manifest and acknowledged clerical errors even though it reduce the aggregate valuation returned by the quadrennial board of assessors?"

Section 5624 General Code provides that,

"Boards of review, within and for their respective municipalities, shall have all the powers and perform all the duties provided by law for all other municipal boards of equalization and revision. * * * At the conclusion of the quadrennial appraisement of real property in such municipal corporation the board of review therein shall sit as a board for the equalization of the value of such real property".

Answering your first question it is my opinion that the minutes of the board of review sitting as a board of equalization should be kept separate from those of the board of review acting in its general capacity under section 5618 General Code, "for the equalization of real and personal property, moneys and credits within such municipal corporation * *". Though the board is the same, the functions are separate, and the proceedings should be separately recorded.

Answering your second question I am of the opinion that a city board of review must act as a board of revision. The general scheme of equalization and revision set forth in Chapter II of Title 1, part second, General Code, being sections 5579 etc., contemplates that there shall be a board of revision which shall hear complaints and correct and adjust valuations of individual properties upon such complaints. (See section 5601 General Code.) These powers and duties within municipalities are quite clearly conferred upon municipal boards of review by the above quoted provision of section 5624. Said section in addition to the language above quoted also provides as to such boards of review that,

"They may hear complaints and equalize valuations of real and personal property, * * within their respective municipalities. Upon the appointment of a board of review in a municipality *all other boards of equalization and revision therein shall be abolished.*"

Answering your third question I beg to state that section 5594 General Code, relating to the quadrennial county board of equalization provides in part as follows:

"The board shall convene at the office of the county auditor on the third Monday of July one thousand nine hundred and ten, and every fourth year thereafter, and shall close its session on or before the *first Monday in October* then next following" * *.

Section 5595 General Code provides in part as follows:

> "The quadrennial county board of equalization shall complete its work of equalization *on or before the fourth Monday of February* of the year next following the beginning of the equalization."

While these sections as portions of the General Code became the law simultaneously, yet on the face thereof they create an ambiguity. This department has already held as to such ambiguities apparent in the General Code that the same may be resolved by reference to the corresponding sections of the Revised Statutes. This is because a revision or modification of the laws of a commonwealth is not presumed to change the law. Said sections 5594 and 5595 General Code were respectively sections 2813 and 2813a of the Revised Statutes. An examination of said sections of the Revised Statutes disclose that the same provisions were incorporated in them. Further examination discloses that sections 2813 and 2813a were passed and signed on the same day, to-wit. April 16, 1900. It further appears, however that section 2813 was signed subsequently to section 2813a. The question thus presented was decided by the supreme court in State ex rel v. Halliday, 63 O. S. 165. The decision therein was to the effect that section 2813 being the law of later enactment *pro tanto* amended section 2813a, and that the effect of such amendment was to eliminate from section 2813a the provision respecting the limitation upon the time within which the then decennial county board of equalization should complete its work of equalization and to substitute therefor the corresponding provision of section 2813.

From all the foregoing it is apparent that the inclusion in the General Code of the first sentence of section 5595 was an error, and that the same should be completely disregarded. It is, therefore, my opinion that the quadrennial county board of equalization is required by law to complete its work on or before the first Monday in October of the years in which the real estate is appraised for taxation.

With respect to your fourth question I beg to state that section 5601 General Code already referred to as defining the powers of the board of revision provides in part as follows:

> "The board of revision shall investigate all such complaints * * * against any valuation filed * * * *and may increase or decrease any valuation complained of and no others.* The board in all respects shall be governed by the laws governing the valuing of real property, and shall make no change in any valuation complained of *except in accordance with such laws and subject to the laws regulating and respecting the limit of equalization.*"

The Tax Commission act, so called, 101 O. L. 399, sections 107 and 108, page 426, provide in part as follows:

> Section 107. "The commission shall on or before the first day of April following (the first Monday of November, 1910, and every fourth year thereafter) determine whether the real property * * * in the state shall have been assessed at its true value in money, and if * * the real property * * is not on the duplicate at its true value in money, the said commission may increase or decrease the valuation * *".
>
> Section 108. "When the commission has determined the true value of the real property * * the commission shall transmit to

> each county auditor a statement of the amount to be added or deducted from the valuation of the real property of each taxing district in his county * * * . The county auditor shall forthwith add to or deduct from *each tract or lot of real property* in his county the required per cent. or amount on the valuation thereof as it stands, *after it has been equalized* by the county and city boards of equalization * *".

These two sections indicate clearly, in my judgment, that the work of the tax commission is to be performed after the work of the boards of equalization has been completed and before the work of the boards of revision has begun. The functions of both the boards af equalization and the tax commission with respect to adjusting values pertain to the valuation of groups or blocks of real estate irrespective of ownership or private boundaries. The function of the board of revision on the contrary relates to the consideration and adjustment of values of *specific tracts.*

I am, therefore, of the opinion that the conclusion of the tax commission is not final, and that so far as its findings in themselves are concerned, the board of revision may by decreasing the valuation of one or more specific tracts in the district thus decrease the aggregate for the district as approved and determined by the tax commission. I understand your question, however, to assume that this may be done and to place stress rather upon the question as to whether a reduction thus made may lawfully extend below the aggregate value of the real property of the district as returned by the assessors. I call attention again to section 5601 above quoted, and particularly to that provision thereof which makes the board of revision "subject to the laws regulating and restricting the limit of equalization." This phrase can have but one meaning. It must refer to the limitations set forth in section 5598 General Code, one of which is as follows:

> "It (the quadrennial county board of equalization) shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors with the additions made thereto by the auditor as hereinbefore required."

It is, of course, apparent that under section 5624 General Code the powers of the board of review sitting as a board of revision within the municipal corporation are co-extensive with those of the quadrennial county board of revision in the counties outside of the municipality.

To summarize my conclusions with respect to your fourth question I beg to advise that if the board of review sitting as a quadrennial board of equalization within the municipality raises the aggregate value of the real property of the city as returned by the assessors, and if the tax commission having acted leaves the aggregate valuation of the real property of the city at a sum higher than that fixed by the assessors, then the difference between such finding of the tax commission and the aggregate value as returned by the assessors with the additions made thereto by the auditor may be, to employ the language of your inquiry "used as a fund from which, acting as a board of revision, it may deduct over valuations on complaints filed with it." If however, on the other hand, after the board of equalization and the state tax commission have concluded their work, the aggregate valuation of the property of the city is equal to that returned by the assessors, then the city board of review acting as a board of revision may not by reducing individual valuations further reduce such aggregate valuation. Indeed, the board would be without any authority in such case to reduce valuations unless upon complaint of the county auditor under section 5601 it should at

the same time raise specific valuations so that the ultimate effect of all of its proceedings would be to leave the aggregate valuation as high or higher than the amount returned by the assessors.

With respect to your fifth question I beg to state that the board of review, as such, has no authority to rectify manifest and acknowledged clerical errors as such, and thus to reduce the aggregate valuation as returned by the board of assessors. However, the county auditor, under section 2588 "may from time to time correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with the tax * * * or description of lands * * * or when property exempt from taxation has been charged with taxes, or in the amount of such tax or assessment."

And under section 5571 General Code the auditor may,

> "correct any errors which he may discover in the name of the owner, in the *valuation,* description, or quantity of any tract or lot contained in the list of real property in his county; but he shall not make any deductions from the valuation of any tract or lot of real property, except such as have been ordered, either by the state board or by the county board of equalization, or upon the written order of the auditor of state. Such written order shall only be made upon a statement of facts submitted to the auditor of state in writing."

Upon careful consideration of these two sections, I am of the opinion that section 5571 governs the correction of errors apparent upon the returns of the assessors as such. It is one of the sections relating to the making up and filing of the assessors' returns, and it uses the word "valuation" which is not used in section 2588.

It will be seen that under section 5571 the auditor has no power to reduce the *valuation* as such, though the same may be the result of a clerical error, except upon the order of the state board, the county board of equalization or the auditor of state. Acting under such orders, however, he may, in my opinion, so correct a particular valuation as to cause a reduction in the aggregate valuation of the real property in the district as returned by the assessors.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY NOT ENTITLED TO FEES FOR COLLECTING FORFEITED RECOGNIZANCES.

August 10th, 1910.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — I beg to apologize for the delay in answering your letter of July 11th receipt whereof is acknowledged. In some unaccountable manner the same became mislaid and has only this day been found. You submit therein the following question:

> Is the prosecuting attorney entitled to a percentage of amounts recovered by him for the use of the county on forfeited recognizances?

Since the enactment of the General Code in which numerous provisions respecting fees of various county officers, compensation of whom is now provided for by general salary laws, are retained, this department has been repeatedly called upon for an expression of opinion as to whether such retention by act of the General Assembly has the effect of neutralizing the implied repeal of such sections providing for fees, which had previously been affected by the enactment of the salary laws.

It has been the uniform holding of this department, in response to such inquiries, that the enactment of the General Code effected no change in the law in this respect. For instance, section 3003 of the General Code provides as to the salary of the prosecuting attorney in part, that,

> "* * * such salary shall be paid * * * from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters,"

and section 3004 provides that the

> "reasonable and necessary expenses of the prosecuting attorney may be paid from the county treasury in addition to his salary."

If there are still in the statutes, by re-enactment in the General Code, any provisions authorizing the prosecuting attorney to receive any fees or perquisites of any nature, such provisions would be inconsistent with and repugnant to those above quoted.

Reading the two sections together would disclose a patent ambiguity which could be resolved only by recourse to the pre-existing law, which recourse is always permissible upon cardinal principles of statutory construction, to remove ambiguities in a *code* which is not presumed to change the law.

Such examination of the pre-existing law in the case at hand would disclose the fact that the salary law pertaining to prosecuting attorneys, was passed subsequently to the enactment of the various statutes prescribing fees for him. The question would then be as to whether or not the enactment of the salary law, by implication, repealed such previous law. As you doubtless know, this department at the time of the enactment of the Conroy Law, so-called, held that that law did repeal by implication all provisions authorizing the payment of percentages and fees to prosecuting attorneys.

As is apparent from the foregoing, that opinion must either be followed or rejected in determining the question submitted by you. Upon consideration I am disposed to follow the former opinion and to advise you that the enactment of the General Code did not revive those statutes inadvertently included therein which seem to authorize the payment of fees and percentages to prosecuting attorneys.

I know of no law passed at the last session of the general assembly other than the General Code affecting the question submitted by you. However, the session laws are not as yet in print and such a law may have been enacted without my knowledge.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

STATE MEDICAL BOARD—REVOCATION OF CERTIFICATE—DISQUALIFICATION OF MEMBER OF BOARD.

April 12th, 1910.

DR. J. M. STEPHENSON, *Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 8th submitting for my opinion thereon the following question:

> "On April 5th, 1910, a doctor of Chillicothe, Ohio, was charged with gross immorality. The attorneys for the defense objected to me sitting, as a member of the board, in this case. The only reason given was because I was prejudiced and had taken a part in getting evidence against the defendant
>
> "Can members of the State Board be barred from hearing cases from their own communities and towns by alleged prejudice by the defense?"

The statutes defining the powers and duties of the State Medical Board do not specifically provide that a member who has taken an active part in instituting proceedings against a delinquent physician for the purpose of having his certificate revoked shall not sit as a member of the board in hearing the application for such revocation; nevertheless it is a general rule of public policy that an executive or judicial officer having an interest in a controversy to be decided by a board of which he is a member ought not to participate in such decision if he may lawfully withdraw from the board.

In the case submitted by you I am satisfied that you might take such action without jeopardizing the legal sufficiency of the action of the board, inasmuch as section 1275, General Code (formerly section 32 of the Act found in 99 O. L. 498), provides that

> "upon notice and hearing, the board, by a vote of not less than five members, may revoke a certificate * * *"

and section 1267, General Code, formerly section 24 of the Act referred to, provides that,

> "five members of the board shall constitute a quorum."

It being apparent that the unanimous action of the board is not necessary in revocation cases, I am of the opinion that you might lawfully withdraw from it.

While I believe that a member of the board should not sit in a case in which he has an interest, still the fact of such interest must be determined by the member himself There is no proceeding analogous to an affidavit of prejudice whereby the party may *compel* a member of the board to forsake his position temporarily. However, if, upon objection being made, such a member is satisfied that he has already formed such an opinion as would preclude him from giving impartial consideration to the question to be decided by the board, such member ought, in my judgment, to withdraw.

Very truly yours,

U. G. DENMAN,
Attorney General.

ELECTIONS — MEMBERS OF BOARDS OF DEPUTY STATE SUPERVISORS OF — COMPENSATION FOR CONDUCTING PRIMARY ELECTIONS.

Members of board of deputy state supervisors of elections entitled to sum equal to three dollars for each election precinct in the county for conducting each primary election; such compensation, while in the nature of salary, attaches to performance of services in connection with primary election; member performing such service entitled to compensation therefor though he resigns before expiration of official year.

August 11th, 1910.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 3rd requesting my opinion as to the following question:

> "How should members of boards of deputy state supervisors of elections be paid for conducting primary elections?
>
> "Should they be paid a gross sum based on the number of precincts after each primary for their services in conducting the primary, or should it be paid quarterly or otherwise than in a gross sum? A member of the board in this county which has fifty precincts and whose term began August 1, 1910, resigned April 25, 1910, because he was a candidate, and another person was appointed on the board. To what compensation is the member who resigned entitled? It was my opinion that such compensation should be paid in gross, and the member who was appointed to fill the vacancy received $100 for the primary in May, the other members having already been paid $100 each for holding the September primary."

The following sections of the General Code are in point:

Section 4990:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county. * * *"

Section 4991:

> "All expenses of primary elections, including * * * compensation of members and clerks of board of deputy state supervisors * * * shall be paid in the manner now provided by law for the payment of similar expenses for general elections * * *"

Section 4822:

> "Each deputy state supervisor shall receive, *for his services* the sum of three dollars for each election precinct in his respective county * * *. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year * * * Such compensation shall be paid quarterly

from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof."

Section 4804:

"On or before the first Monday in August of each year, the state supervisor of elections shall appoint for each such county two members of the board of deputy state supervisors of elections, who shall each serve for a term of *two years* from such first Monday in August."

This department has heretofore held that the "year" within and for which annual compensation is to be paid to a public officer is the year beginning on the date of the commencement of his term of office. Thus the annual compensation provided under the first three sections above quoted, for members of the board of deputy state supervisors of elections is computed and paid for the year commencing on the first Monday of August. Now, it is obvious that the compensation for conducting primary elections is payable only in alternate years. The primary for municipal officers held in September of the odd numbered years is within the same official year of the board of deputy state supervisors of elections as the primary for state and county officers held in May of the even numbered years. As the term of office of each deputy state supervisor of elections is two years, it is obvious that in one of the years of his term each supervisor will receive two kinds of annual salary, one for conducting one general election and services incident thereto, and the other for conducting two primary elections and services incident thereto. (Leaving out of consideration, of course, the compensation receivable by deputy state supervisors in counties containing registration cities under sections 4942 and 4943 General Code.) In the other year of his term each supervisor will receive only one of these two annual salaries, unless special primary elections are held in accordance with law in such year.

I have used the term "annual salary" because I deem the question as to the exact nature of the compensation payable to the deputy state supervisor under the primary election law unimportant. It is true that, by the joint operation of the sections above quoted, the compensation is to be paid quarterly, and hence may be deemed to be in one sense of the word a "salary." On the other hand, the law specifically provides that the compensation receivable under the primary election law "shall be for services in conducting primary elections," evincing the intention to make the compensation contingent upon the performance of services, and hence, in the nature of a fee. It is true also that the compensation provided by section 4822 above quoted is probably to be regarded as a "salary" in view of the minimum amount receivable annually, and it is also true that section 4990 which contains no such provision may for that reason be distinguished therefrom. All of these matters, however, are immaterial. It has been held by the supreme court of this state in *ex parte* Lawrence, 1st O. S. 431, that,

"Where the duties of an office are specified and limited in their character, and in continuance during the year, an annual salary prescribed by law as the compensation, will be payable and apportioned with reference to the duties performed, and not to the lapse of time."

This case is decisive of the point that the compensation receivable under section 4990, whether the same be denominated salary or fees, is to be paid to

the member of the board who renders the services, even though it is payable quarterly like an annual salary. Accordingly, a resigned member is entitled to receive his salary on account of such services, after his resignation and after he has been succeeded in office by another.

A question is suggested by the peculiar language of section 4990, and although you do not ask for a decision thereon, the facts stated by you render consideration of the same necessary. I call attention to the fact that section 4990 provides that each member shall receive two dollars for each election precinct for his services in conducting primary elections. It might be urged that, inasmuch as both primary elections come within the same official year, the compensation of two dollars thereby provided for, must be deemed to be in full for conducting both elections. The authorities in your county have taken the opposite view, that the two dollars for each precinct is receivable by each member for each election, making four dollars per precinct in all receivable in the year in which primary elections are held. In my opinion, this latter view is correct.

Making all due allowance for the principle that statutes authorizing the disbursement of public moneys are to be strictly contrued against the person entitled to receive the same thereunder, It seems to me that the statute clearly means that the two dollars for each election precinct is a compensation attaching to the specific services rendered in connection with each separate election and not to the services in connection with both elections. This is made clear by section 4991 above quoted which includes the compensation of the supervisors "within the expenses of primary elections" from which it must be inferred that the compensation of each deputy supervisor for his services with respect to each election is to be separately computed. Furthermore, by another provision of section 4991, not above quoted,

> "The county commissioners * * * or other taxing bodies duly organized, shall make necessary levies to meet"

such expenses including the compensation of the members of the board of deputy state supervisors. While the two primary elections are both held in the same official year of the deputy state supervisors of elections they are held in different years with respect to the distribution and expenditure of moneys raised by taxation.

While section 4990 is not free from doubt I am of the opinion, for the foregoing reasons, that it authorizes the payment to each deputy state supervisor of elections of a sum equivalent to two dollars for each election precinct in the county for each primary election conducted during his membership in the board, and that further, such compensation though payable quarterly from the county treasury, should be paid to the member in office at the time a given primary election was conducted, although he may subsequently resign, and that, again, such resigned member is not entitled to receive anything on account of the conducting of a primary election held after he ceases to be a member of the board.

Very truly yours,

W. H. MILLER,
First Assistant Attorney General.

LOCAL OPTION—APPLICATION OF FINES.

Secret Service Officer may not be employed by municipal corporation to secure evidence of violations of local option laws outside of corporation.

August 3rd, 1910.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 1, requesting my opinion as to the authority of council to set aside under section 6139, General Code, a portion of the fines collected in the municipality for the violation of the local option law, for hiring secret service officers to secure the enforcement of such law *within the county* outside of, as well as within the municipality.

This department has already held that the secret service officer employed under authority of section 6139, General Code, is a member of the public safety department of a city, employing him; by parity of reasoning such officer employed by a village would be within the department of the village marshal. In other words, the municipality may not confer upon such officer powers which may be exercised within a territory outside of its own territorial jurisdiction.

The safety department and the department of the village marshal are presumed to exercise their duties and powers within the limits of the corporation excepting possibly in cities having a police court. It is true that the mayor of a village and the mayor of a city not having a police court, have jurisdiction throughout the county in criminal matters, but this jurisdiction pertains to the magisterial functions of the office and not to the executive function as conservator of the peace and chief head of the department of public safety.

See sections 4250 and 4255, General Code.

There is another reason for denying to a municipality the power to authorize its local option laws secret service officer to operate at large in the county. Section 6139, which I deem it unnecessary to quote, does not expressly authorize such a course to be taken, it simply provides that the council "may use any part of the fines * * * for hiring detectives or secret service officers to secure the enforcement of such law." The natural and primary meaning of this phrase would be that which would add to it the qualifying clause "within the municipality;" if that were not the plain primary meaning thereof, however, there are other considerations which lead to the same conclusion. The theory of our local option laws is one of local self-government. If various townships and municipalities within a county have adopted local option as separate units it is for the authorities of each of them to secure the enforcement of such laws within their several jurisdictions. If the county has voted for local option as a unit then it is the duty of the prosecuting attorney of the county, with the aid of his secret service officer, to secure evidence as to the violation of this and other laws throughout the county generally.

From all the foregoing I am of the opinion that section 6139, General Code, cannot be construed to permit council of the municipal corporation to employ secret service officers to secure the enforcement of the county local option laws outside of the municipal corporation.

Very truly yours,

W. H. MILLER,
First Assistant Attorney General.

TAXATION—QUADRENNIAL APPRAISEMENT—NOTICES OF—SHOULD BE SENT OUT AS SOON AS WORK OF APPRAISEMENT IS COMPLETED.

August 8th, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 21st requesting my opinion in relation to some five questions, all of which pertain to the taxation laws of this state.

I have not yet reached a conclusion satisfactory to myself with relation to your first question. I have had this question under advisement for some time at the instance of the Tax Commission of Ohio. That department will, in due time, promulgate rules for the guidance of taxing officers.

With respect to your second question, I beg to enclose herewith copy of my opinion of August 3rd addressed to Hon. F. M. Stevens, Prosecuting Attorney, Elyria, Ohio, which answers the same.

Your third question is answered by my opinion to Hon. E. M. Fullington, Auditor of State, a copy of which is enclosed.

Your fourth question is one of those involved in my opinion of August 3rd to the Bureau of Inspection and Supervision of Public Offices. I enclose copy thereof.

Your fifth question is as follows:

"When should notices of appraisal be sent out?"

Two notices of the sort mentioned by you are provided for by the General Code. Section 5546 thereof provides for pamphlets showing the valuations by wards in cities and by townships and villages elsewhere. These can not, of course, be sent out before the appraisement has been completed, but there is no provision of law requiring them to be sent out before the returns have been made. In my judgment, however, these notices should be sent out as soon as the work of appraisement is completed.

Section 5555, General Code, provides that the various assessors, before making their returns to the county auditors, shall deliver to each owner or agent, by mail or otherwise, "a true and certified copy of the valuation of each tract or lot, also of any building or buildings thereon." These notices may be sent out at any time before the making of the return. If they have not already been sent out, however, and the return has been made, they should, in my judgment, be sent out at this time.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

MUNICIPAL CORPORATIONS—TAX LEVY—IRREGULARITIES IN MAKING.

Council of municipal corporation may pass levy made by it over disapproval of tax commission but if no such action is taken its certificate to county auditor is invalid; auditor may properly inquire into the validity of such levy.

August 3, 1910.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 23d in which you state that citizens of Galion, Ohio, have filed objections with the Auditor of

Crawford county to the tax levy made by the council of the city of Galion on the ground that the levy as originally prepared by council was disapproved by the tax commission of said city, but that council nevertheless certified the same to the Auditor. You request my opinion on the following questions raised thereby.

1. What is the effect of the disapproval of the tax commission?
2. What is the power and duty of the Auditor with respect to a levy certified to him, and may he properly determine the legality of the same?

Section 4526 General Code, formerly section 49 expressly defines the effect of the disapproval of the tax commission upon the validity of the levy as follows:

> * * * "it (the tax commission) may approve or reject any part or parts thereof, and the parts rejected by such board shall not become valid levies unless the council of such municipality shall thereafter, by three-fourths vote of all members elected thereto, adopt such levy or part thereof. * * * "

If then council attempts to certify a rejected levy to the Auditor without, so to speak, thus passing it over the veto of the tax commission, the same is not a valid levy, but it is clear that the action of the tax commission is of no effect if council does by a three-fourths vote of all members elected thereto formally adopt the levy after such disapproval by the tax commission.

Certain of the duties of the county auditor with respect to municipal levies are expressly provided for by section 3794 General Code, as follows: * * *

> " * * * if he finds that the tax levy so certified to him exceeds the aggregate limit throughout by law * * * the auditor shall immediately notify the council * * * and within ten days after the receipt of such notification council shall revise its levy so as to bring it within the law."

Obviously this provision has no application to the question at hand. I find no express provisions in the statutes defining the general powers and duties of the county auditor which authorize him to reject a tax levy which has not been regularly made when the same has been regularly certified to him. However, if a levy is not regularly made it is not a valid levy and it is obvious that no person or public officer could acquire rights thereby by virtue of which they could compel the auditor to carry it into effect. This would be true whether or not the auditor is to be regarded as a "ministerial officer". However, it has been held in this state that something more than mere ministerial power is inherent in the position of the auditor and that it is his power, and upon complaint made, his duty to refuse to carry out his part of the machinery of taxation where prior proceedings are tainted with illegality.

It is my opinion therefore, that the county auditor should consider the question as to the legality of the levies certified to him by the council of the city of Galion and if he finds the same to be illegal, measured by the rule above indicated, he should reject the same. In this connection permit to suggest that if the Auditor does reject any or all of the municipal levies the council would still have power to act. In my opinion the provisions as to time in the taxing laws involved in your inquiry are directory.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

MUNICIPAL CORPORATIONS—ORDINANCE MAKING TAX LEVY MUST BE PUBLISHED.

August 9, 1910.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I beg to apologize for the delay which has occurred in answering your letter of July 11th. The same was unaccountably mislaid in this office. You request my opinion therein as to whether the ordinance making the annual levy of taxes for the support of the municipal corporation must be published as an ordinance of a general nature.

Sections 3793 and 3794 General Code, provide that the action of council in levying municipal taxes shall be by ordinance. The courts have, broadly speaking, construed the provision of former section 124 M. C., sections 4228 and 4229 General Code, that ordinances "of a general nature" shall be published as therein provided as follows: An ordinance is of a general nature, when it is a necessary and indispensable part of a proceeding, the ultimate object of which is to create a liability against the general treasury of the municipality or against its taxpayers as a whole."

This being the effect of the ordinance prescribing the tax levy, it is my opinion that it should be published once a week for two consecutive weeks as provided by Section 4229 General Code.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

ELECTION PRECINCTS—SUBDIVISION OF—DOES NOT NECESSITATE ELECTION OF ASSESSOR IN EACH SUB-DIVISION UNLESS BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS SO ORDERS.

August 4th, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 30th in which you state that the opinion heretofore sent to you as responsive to your previous letter was not applicable to the question submitted by you

It seems that the board of deputy state supervisors of elections, in pursuance of the powers conferred upon them by sections 4845 and 4846 of the General Code, have divided a certain township into two election precincts, and that such township does not contain a municipal corporation or any portion thereof. Inasmuch as the former opinion related to the powers of the county commissioners with respect to the creation of assessor districts in townships composed in part of municipal corporations it is apparent that the same does not apply to your question which is as follows:

> At the time of the subdivision of the township into precincts, the board of deputy state supervisors of elections did not order the election of an assessor in each of said new precincts. Shall assessors be elected in each precinct, or shall one assessor be elected for the township at large?
>
> Have the county commissioners power to order the election of an assessor in each of the new precincts?

Answering your second question first I beg to state that upon careful examination of the General Code I am of the opinion that county commissioners have no authority with respect to the creation of assessor districts in townships not composed in part of municipal corporations. Without quoting any of the sections I may say that section 3351 referred to by you is the only section conferring any power whatever upon the county commissioners in the premises, and that section applies only to the creation of assessor districts in townships composed in part of a municipal corporation.

Your first question is more difficult to answer. It involves the construction of sections 3349 and 4850 General Code. The first of these sections is a portion of the chapter relating to the election, powers and duties of assessors, and is in part as follows:

> "One assessor of personal property for the township shall be elected, biennially in each township * * * . If the township is divided into two or more election precincts, one such assessor shall be so elected for each precinct in which such election is held."

The second of the two sections above referred to is a part of the chapter relating to the creation and subdivision of election precincts. It was formerly a part of section 2966-15 R. S., a very long and somewhat confused section. The remainder of said section 2966-15, of which that portion now included in said section 4850 General Code was the last provision, is now included in sections 4845 to 4849 inclusive, General Code. Said sections provide in general for the subdivision of municipalities, townships, wards and precincts into new precincts. That is to say, these sections provide the power and the procedure for subdividing any precinct. The material provision in section 4850, coming at the end of these provisions, as follows:

> "* * * the division of any election precinct into two or more subdivisions as hereinbefore provided shall not require the election of an assessor in each subdivision, but in all such election precinct subdivisions there shall be elected one assessor for each original precinct unless such supervisors at the time of the division shall order that an assessor be elected in each precinct."

It is very difficult to reconcile the above quoted provision of section 3349 and section 4850. Reference to the prior law permissible in all cases to explain ambiguities in a code or revision enacted for the purpose of consolidating all the laws of a state, is helpful in this instance.

At the time of the enactment of the General Code there was absolutely no provision for the election of an assessor in a township. True, assessors have always been deemed to be primarily township officers, and their election was provided for in original section 1448 R. S., as amended in 97 O. L. 185-187. Said section 1448, as then amended, provided in part that,

> "There shall be elected in each township, one township clerk, one trustee * * * *and one assessor for the township*, or if the township is divided into two or more election precincts, then for each precinct in which such election is held."

The *same act* at page 225, amended section 2966-15 and included in the amendment the provision above quoted from section 4850 General Code. In other words, at that time, and for some time previous, as at present, the two apparently

inconsistent provisions respecting the election of assessors in precinct subdivisions of a township existed side by side. In 1906, however, the General Assembly again amended section 1448 Revised Statutes, 98 O. L. 171-172 and *omitted* from the catalogue of township officers to be elected all reference to the assessor. So far then as the statute relating to the election of township officers is concerned there was from that time until the enactment of the General Code (the section not having been amended in the mean time) absolutely no provision of law constituting the assessor a township officer or providing for his election outside of municipal corporations and townships containing municipal corporations excepting the above quoted provision of section 2966-15, section 4850 General Code. This, as will be seen, did not refer directly to townships as such, but merely to original election precincts; furthermore, it did not require or command the election of any officer — the general purport of the section did not relate to any such matter — on the contrary it simply purported to define the powers of the board of deputy state supervisors of elections in subdividing precincts.

The anomaly thus presented must be deemed to have induced the General Assembly in enacting the General Code to re-enact the repealed portion of former section 1448 Revised Statutes and to provide explicitly for the election of an assessor in each township and in each precinct of a township.

These sections are not strictly *in pari materia* for reasons above indicated; however, they are to be construed together and harmonized if possible. Section 3349 must be given some effect, and, in my opinion, it must be given the following meaning, towit, in all township precincts assessors must be elected for such precincts unless the board of deputy state supervisors of elections has not so ordered at the time of subdividing the township into precincts. This construction does away with the apparent conflict between the two sections. It preserves the law as it undoubtedly was before the adoption of the General Code, — and for that reason alone, — the adoption of the Code, not being presumed to change the law in any instance, is to be adopted.

In my judgment, therefore, until the General Assembly shall correct this apparent error the subdivision of a township not containing a municipal corporation into precincts should not be regarded as necessitating the election of an assessor in each of the precincts thus created unless the board of deputy state supervisors, at the time of making such subdivision, so orders.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

SCHOOLS — TAXATION — SPECIAL ASSESSMENT AGAINST SCHOOL PROPERTY CANNOT BE COLLECTED.

March 31st, 1910.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR: — Your letter of March 23rd is received in which you ask my opinion on the following statement of facts:

> "The Treasurer of the Board of education of this city presented his warrant to County Treasurer Burns, recently, for his share of the school funds. Treasurer Burns gave him the amount of the warrant less the amount of certain street assessments that had been on the duplicate for a number of years.

"The Board of Education is now demanding the whole amount and claiming that a street assessment against a Board of Education cannot be collected.

"I have advised County Treasurer Burns to 'stand pat' under section 2666 of the General Code et seq. He has asked me, however, to write to you for an opinion.

"What is your opinion under the circumstances?"

In reply thereto I beg leave to submit the following opinion:

In the case of City of Toledo vs. Board of Education, 48 O. S. 83, the facts were that the City of Toledo had improved, by grading and paving, a street running in front of a school building in that city. A proportional amount of the expense was assessed by the city against the abutting school property. The board of education having refused to pay this assessment, this action was brought by the city against the board on behalf of the contractor who had made the improvements praying that an account be taken of the amount due by reason of the assessment, including penalty and interest thereon; that judgment be entered therefor against the board of education; that said amount be declared a first lien on the premises which were assessed, and be ordered to be paid within a short day to be fixed by the court; that in default of such payment said premises be sold, as upon execution at law, to pay the same, and that plaintiff have such other and further relief as might be equitable and just. To the petition in this case, praying as aforesaid, the board of education filed a general demurrer which was overruled and a personal judgment rendered against the board of education and declared a lien upon the school property by the common pleas court. On error this judgment was reversed by the circuit court and the petition below dismissed. The supreme court in a *per curiam* decision, on page 87, uses the following language:

"The plaintiff, the City of Toledo, for the use of the contractor, is not entitled to the relief prayed for, nor, under the prayer for general relief, can a judgment be rendered against the board of education for the payment of the amount of the assessment out of the contingent fund of the board, authorized to be raised by section 3958 Revised Statutes. The amount must be paid out of the general fund of the city."

It will be seen from the above quoted language of the court, in reference to the prayer in the petition in this case, that the supreme court held that the City of Toledo was not entitled to a judgment for the assessment, and a foreclosure and sale of the school property. This, of course, followed, although such section was not considered by the supreme court in its decision, from section 3973 R. S. O. then and now in force, and which has not been amended since its original enactment in 70 O. L. 195. This section reads as follows:

"All property, real or personal, vested in any board of education, shall be exempt from taxation, and from sale on execution, or other writ or order in the nature of an execution."

The supreme court also held that the city was not entitled to a writ of mandamus ordering the board of education to pay the amount of the assessment out of the contingent fund of the board authorized to be raised by section 3958 Revised Statutes.

Section 3958 R. S. O. as then in force read as follows:

> "Each board of education shall annually, at a regular or special meeting, to be held between the third Monday in April and the first Monday in June, determine by estimate as nearly as practicable, the entire amount of money necessary to be levied as a contingent fund for the continuance of the school or schools of the district, after the state funds are exhausted, to purchase sites for school houses, to erect, purchase, lease, repair and furnish school houses, and build additions thereto, and for other school expenses." (81 O. L. 178.)

This section, by the enactment of the Harrison School Code, passed April 25th, 1904, 97 O. L. 349, was amended so as to provide for a separation of the various funds for which levies of taxes shall be made by boards of education, and to provide that a separate levy be made for each fund. By the amendment of this section, on February 13, 1906, 98 O. L. 9, these features were unchanged, and the section stands on the statute books at the present date as follows:

> "Each board of education shall, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, fix the rate of taxation necessary to be levied for all school purposes, after the state funds are exhausted; said levy shall be divided by the board of education into four funds, namely, first, tuition fund; second, building fund; third, contingent fund; fourth, bonds, interest and sinking fund, and a separate levy shall be made for each fund."

It is clear from the decision of the supreme court in City of Toledo vs. Board of Education, supra, that if the street assessments concerning which you speak in your letter were for improvements made prior to April 25, 1904, then such assessments can not be collected as against your board of education, but if such assessments were made for improvements made subsequent to April 25, 1904, it would appear that they present a different question.

It would appear that the decision in the 48th Ohio State was based upon the fact that the funds raised by the board of education by local taxation under section 3958, were impressed with a trust for the benefit of the schools, and that, therefore, street assessments being for "public" rather than for "school" improvements could not be paid out of such fund; and that our courts have so interpreted the reasoning of that decision is shown by the language of Judge Moore in the case of Board of Education vs. Cincinnati, 8 Ohio Decisions, 581:

> "* * * by the law of the state, all funds arising from sale of school lands, trust funds, or otherwise obtained for educational purposes, in addition to money raised by general taxation, all go into a common school fund, and are distributed by the state auditor to the various school funds throughout the state, and there is no separate account kept of any one fund, or any information as to its source, and, in the case at bar, the property sought to be charged comes as one common fund without any distinction. We, therefore, assume that there is in the school funds and property of the city of Cincinnati, trust funds, preserved by the Constitution of the state, to be used only for the support of common schools; and street improvements being a public improvement, foreign to the purposes for which the funds and property were intended to be applied, can not be held to be a proper charge upon such property."

In the case of Columbus (Board of Education) vs. W. G. Bowland, Treasurer, et al, 15 Ohio Decisions, Nisi Prius 334, it was contended that the amendment of section 3958 in 1904 materially changes the question decided by the supreme court in 48 O. S. supra. In speaking of this contention Judge Bigger, on page 335, uses the following language:

> "It is claimed that since the passage of the new school code which separates the fund provided for school purposes into separate funds this is no longer applicable. That prior to the passage of that act all the revenue of the board of education being placed in the one fund and a part of that fund being composed of trust funds applicable only to the payment of superintendent and teachers this prevented any portion of the fund from being applied to the payment of assessments. But as the trust fund is now by law separated from the contingent fund, that there is no longer any difficulty in holding a board of education which is empowered to acquire, possess and dispose of real property liable for an assessment for street improvements.
>
> "Whatever may have been the reason of the supreme court for the decision, which is not disclosed in the opinion, it is settled that prior to the passage of the new school code (97 O. L. 334) at least a valid assessment for street improvements could not be levied against school property. If the separation of the fund into separate funds so that the trust fund can now be distinguished from the other funds of the board will have the effect of rendering assessments hereinafter levied against school property valid, I am clearly of opinion that it cannot have that effect as to those assessments which were levied prior to the passage of the new school code. Statutes are not to be given a retrospective operation unless the legislative intention, that they shall so operate is clearly expressed."

It would appear, therefore, that the question of the liability of a board of education for street assessments against its school property is now an open one in this state, and one upon which none of our courts have ever rendered a decision, so far as I have been able to find.

This question has proved a vexing one to the courts of all the states of the union, and one which has been decided both in the affirmative and the negative, by the courts of the various states, to such an extent and for such a variety of reasons that the decisions are in hopeless confusion.

This question is taken up and ably discussed, with a full citation of authorities, by Page & Jones in their work on Taxation by Assessment (1909) at section 586 of Volume 1. See also

2 Dillon's Municipal Corporations (4th Edition),
Section 777, note 1, page 955,
2 Cooley on Taxation (3rd Edition) pages 1234, 1235, 1236 and notes,
35 L. R. A. 39, note 4,
28 Cyc., 1117.

In Poock, Treasurer, vs. Ely, 4 O. C. C. Reports, 41, it was held that lands donated by congress to the legislature of this state for school purposes are exempt from assessment for the expense of local improvements, on the ground that these lands are not private property, but a public trust to be managed and administered for the benefit of the public schools of the state.

This question, therefore, being an open and doubtful one, and one upon which the courts of last resort of our various states have expressed such a diversity of opinion, I hesitate to express an opinion in regard to it. But I am inclined to the opinion that the weight of reason, and perhaps the weight of authority also, is for the holding that such assessments can not be collected as against school property. This question is ably discussed by Justice Hemingway of the supreme court of Arkansas, in Board of Improvement vs. School District of Little Rock, 56 Ark. 354, and his logic in the decision of that case seems to me irrefutable. Justice Heminway, on page 358 of that case, uses the following language:

> "Although a special tax or assessment is not usually embraced within the meaning of the general term 'tax,' the rule under which public property is presumed to be exempt from one justifies the presumption as to the other. In speaking of the latter, Judge Cooley says: some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the State and its municipalities and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon the public property, and it is, therefore, a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact.' Cooley on Taxation (2nd ed.) p. 172."
>
> "It is uniformly conceded that this rule is correct when applied to general taxation; the reason sometimes given for it is the improbability that the legislature would levy a tax upon that which results from a tax, and must be replaced by a tax, and which is used for governmental purposes; another reason is found in the rule of statutory construction which presumes that the legislature never intends to affect or transfer any governmental right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Whichever be the true reason of the rule, it is well settled; and we think it should apply alike to special, and to general tax laws.
>
> "If it be argued that the reasoning upon which the rule is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the tax while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the State House and other State institutions relieves every taxable subject in the State from the burden of taxation, but it deprives the particular county or school district in which they are situate of the entire county or school tax; and so the exemption of county property from State taxes benefits the county only, and deprives the

> entire State of revenue; still, in all such cases, it is held that exemption is implied wherever liability is not expressed or necessarily implied. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to special assessments."

and again on page 360 he says,

> "It is argued that even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The Constitution provides that the State shall ever maintain free public schools, and in performing this duty it exercises a function strictly public and governmental. It created school districts and imposed upon them in part this duty, and in order to discharge it they own school houses. They have no other duty than to perform for the State this public function, and only that they may do it is the house held. The State may abolish them, take the property, and undertake directly or through other agencies, this public function. The means of controlling the property would thereby be changed, but its use would be unchanged; and there is nothing in the policy of the law to exempt the property while held and controlled by the State, which would deny the exemption while held by the State's agent and used in the performance of its duties. Green v. U. S. 9 Wall. 655, and authorities above cited."

This language seems to me in every way applicable to the question which you present, and the more so inasmuch as it would appear from the decision in the Arkansas case that the legislature of Arkansas had never specifically exempted school property from taxation, whereas, by sections 3973 and 2732 R. S. O., our legislature has so exempted such property.

The argument made in Columbus (Board of Education) vs. Bowland, supra, that by the separation of the funds made by Section 3958 R. S. O., the "contingent fund" is no longer impressed with such a trust for school purposes as would prevent the payment of such a special assessment therefrom, it seems to me is rendered invalid by the fact that under Section 22b-2 et seq., R. S. O., and by section 2834 R. S. O., the various funds which are provided for by section 3958 are not fixed and determined in their nature and application for all time and for all purposes, for by these provisions the board of education is empowered, under certain circumstances, to transfer money from one of these funds to another. It, therefore, seems to me that the trust with which these funds are impressed for public school purposes still inheres in such contingent fund, and that, therefore, the implied reasoning of the supreme court in City of Toledo vs. Board of Education, *supra,* is still applicable to the case under discussion, and with the same force and effect.

In considering this question I have taken it for granted that the council of the municipality has not certified the proportion of the estimated costs and expenses of the street improvements involved in your question, due from the school property, to the county auditor, as provided in section 63 of the Municipal Code.

I am, therefore, inclined to the opinion, as I have said above, that special assessments for street improvements can not be collected as against the abutting property of a board of education, but this question is one of such grave importance throughout the state, and one with which so much doubt is connected,

that I suggest your bringing a test case and pushing the same as rapidly as possible to a decision by the supreme court.

I have received a number of inquiries from various legal officers throughout the state regarding this same question since the receipt of your letter, and I would welcome a decision by our courts upon this question.

Yours very truly,
U. G. DENMAN,
Attorney General.

CONTRACT—INTEREST OF COUNTY OFFICIALS IN LEGAL ADVERTISING NOT CRIMINAL.

April 5th, 1910.

HON. ISRAEL H. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 23rd, submitting for my opinion thereon the following inquiry:

> "In your opinion, does section 6969, Revised Statutes of Ohio, apply to a county official who owns a newspaper and publishes legal advertising for the county in said paper?"

The provisions of section 6969, Revised Statutes, are embodied in sections 12910 and 12911, General Code. The General Code sections have changed the provisions of the old law in a measure, such change being made in order to correct an obvious error in the former statute. Both of the sections, however, preserve intact the description of the public contract in which it is unlawful for public officers and agents to have an interest, viz.:

> "A contract for the purchase of property, supplies or fire insurance for the use of the county."

I know of no definition of any of these terms broad enough to include legal advertising. The statute is penal and will be strictly construed against the state.

I am, therefore, of the opinion that said section 6969, Revised Statutes, does not apply to a county official publishing legal advertising for a county in a newspaper owned by him.

Yours very truly,
U. G. DENMAN,
Attorney General.

TAXATION—QUADRENNIAL APPRAISEMENT.

Power of county commissioners and auditor to limit expense which may be incurred in excess of one-twentieth of one per cent. of total tax valuation in city; payment of bills incurred in violation of such limitation.

August 10th, 1910.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 5th in which you request my opinion upon the following facts:

"In the appraisement of the real property in the city of Wellston, the county commissioners and the county auditor duly passed a resolution at their March meeting providing for the expenditure of a sum so exceeding said one-twentieth of one per cent. but placed no amount certain in such resolution. Later, at their June meeting (June 8, 1910) they passed a resolution wherein they recited that they deemed it necessary to limit the further expenditure of money for the making of said appraisement, and placed the sum for the completion of said work at $70.00. The appraisers presented bills at the July meeting of said board for sums exceeding the amount so fixed, for work done after the passing of such resolution limiting the expenditure of money at such sum. Can the commissioners allow such bills in whole or only in such proportionate parts as the amount provided for will permit?"

Section 5545, General Code, being section 7 of the quadrennial appraisement law as amended in 1910, provides in part that,

"The total cost of a quadrennial appraisement in a city shall not exceed the sum of one-twentieth of one per cent. of the total tax duplicate thereof, for the year next preceding that in which such quadrennial appraisement is made, unless such excess has been authorized by the board of county commissioners and auditor of the county in which the city is situated prior to the incurring thereof and has been incurred in accordance with such reasonable provisions and regulations as have been prescribed by the board of county commissioners and county auditor."

In my opinion the authority to prescribe "reasonable provisions and regulations" is sufficient to authorize the commissioners and the auditor to fix a limitation upon the amount in excess of one-twentieth of one per cent. of the total tax duplicate of the city which may be expended by the appraisers. Such regulation must, of course, be adopted "prior to the incurring" of the additional expense. As your statement of facts discloses, however, that all the bills in question were incurred after the supplementary action of the commissioners and the auditor was taken, no question arises by virtue of the fact that the limitation was not imposed at the time the original authorization was made.

It follows, therefore, that no expenditure in excess of the amount fixed by the commissioners and the auditor could lawfully be made and money can not be withdrawn from the treasury in pursuance of such an expenditure.

Your precise question is as to whether bills presented, the total amount of which exceeds the amount allowed by the commissioners and the auditor, shall be paid pro rata from the available funds or in order of their priority.

Your question seems to assume that the county commissioners are to "allow" these bills. This it will be observed is erroneous, as another provision of section 5545 is as follows:

"* * * Such compensation (of clerks and assistants) shall be paid out of the county treasury *upon the order of the board of assessors and the warrant of the county auditor.* Such incidental expenses as the board deems necessary, *shall be paid out of the county treasury in like manner.*"

In other words, this provision constitutes warrants for incidental expenses approved by the board of assessors "law vouchers," payable without the allowance of the commissioners.

From the foregoing it follows that the treasurer would be obliged to issue his warrant upon the order of the board of assessors whenever such order was presented to him until the amount of what may be called the appropriation available for that purpose is exhausted. Therefore, the bills should be paid in the order of their presentation, not to the commissioners but to the treasurer. If, however, as I presume is the case in the specific instance, the bills are all presented to the treasurer at once, then they should be paid in the order of their approval by the board of assessors. In the event that all the bills were approved by the board of assessors at the same time so far as the endorsement of approval on each of them shows, and all are presented to the treasurer at the same time, then the treasurer should refuse to pay any of them until the board of assessors designates the order in which they shall be paid.

The foregoing rules would obtain only when the commissioners and the auditor, at the time of authorizing the additional expenditure, failed to provide against a contingency such as has arisen. It would have been competent for the commissioners and the auditor to provide that under circumstances such as have been supposed the bills should be paid prorata by warrants issued by the treasurer. It is now, however, too late for the commissioners and the auditor to take such action.

Very truly yours,
W. H. MILLER,
First Assistant Attorney General.

MUNICIPAL CORPORATIONS — INTEREST IN EXPENDITURES — STOCKHOLDERS.

March 12, 1910.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR: — In your letter of March 10th, receipt whereof is acknowledged, you enclose a communication addressed to you by E. E. Jackson, legal adviser of the village of Rockford. Mr. Jackson submits the question as to whether section 45 M. C., prohibits members of council from being interested in the expenditure of municipal funds as stockholders of a corporation contracting with the municipality for lighting the streets of the village.

Such an interest is clearly prohibited by section 45 M. C. as well as by various other provisions of the Revised Statutes. That portion of said section which authorizes the council to contract with any person for lighting the streets, etc., is not to be construed as an exception to the requirement that no member of council shall be interested in any municipal expenditure, but only as an exemption from the requirement that the certificate of the auditor shall be furnished in case of such contract. Such an interest as that described in Mr. Jackson's letter is also prohibited by section 120 M. C. I know of no remedy in case the interested members refuse to part with their interest or to resign from council. The contract clearly may not be entered into, and from a practical view the municipality will have to suffer as long as such members continue to serve.

Very truly yours,
U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY — STENOGRAPHER — EMPLOYMENT OF.

April 4th, 1910.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to whether or not the provision in section 1298 Revised Statutes, to wit,

> "The prosecuting attorney shall be allowed the reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice."

authorizes the prosecuting attorney to employ a stenographer in criminal cases when, in his opinion, it would be in furtherance of justice to do so.

In reply I beg to say that, under the provisions of Section 1546 of the General Code, the authority to appoint official stenographers is vested in the court of common pleas.

I am, therefore, of the opinion that the prosecuting attorney is without authority, under the provisions of Section 1298 Revised Statutes above quoted, to employ a stenographer in criminal cases. The prosecuting attorney is, however, authorized under the provisions of Section 2915 General Code to appoint

> "such assistants, clerks and stenographers as he shall deem necessary for the proper performance of the duties of his office."

Such clerks and stenographers are to be paid, however, out of the aggregate sum fixed by the judge of the court of common pleas, as provided in Section 2914 General Code.

Very truly yours,

U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS — TOWNSHIP DITCH SUPERVISOR — LIMITATION AS TO TIME FOR ENTERING AND CLEANING DITCHES — DAMAGE TO CROPS CAUSED BY CLEANING — NO COMPENSATION PROVIDED.

April 22, 1910.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of the following inquiries which you submit to this department for opinion:

> 1. What limitation as to time is there in the statutes relative to the authority of a township ditch supervisor entering lands and cleaning ditches as provided in Section 6706 of the General Code?
>
> 2. The statutes relating to the cleaning of ditches do not provide compensation to property owners for necessary damage done to crops, land, etc., caused by the township ditch supervisor entering the land and cleaning out ditches, as provided in Section 7606, General Code. Are such statutes unconstitutional for that reason, as such damage would amount to a taking of property, for which there is no compensation provided?

Answering your first question, I beg to call your attention to the following sections of the General Code:

Section 6706.

"If a land owner, coroprate road, railroad, township or county, notified to clean the ditch or water course under the provisions of this chapter, neglects or refuses to comply therewith within thirty days, the ditch supervisor, after giving ten days' notice by posting notices in three conspicuous places in said township, shall sell the work of cleaning said section or sections to the lowest responsible bidder, take a bond as provided in the next preceding section, and certify the cost thereof to the county auditor, as provided therein. The ditch supervisor shall certify the amount due the contractors, for the work done, to the township trustees, who shall order it paid out of the township fund."

Section 6715.

"The ditch supervisor may also enter upon improved or unimproved lands, drained by ditch improvements, for the purpose of cleaning or repairing a ditch, if he gives notice, written or printed, to land owners whose addresses are known, at least six weeks before, that he intends at such time to clean said ditch."

Section 6716.

"The ditch supervisor, at the time provided in the next preceding section, shall give like notice to all land owners, whose addresses are not known, by publication in a newspaper of general circulation in the county for two consecutive weeks."

Section 6706 is the only statutory limitation as to the time when a township ditch supervisor may sell the work of cleaning sections of ditches which have been apportioned to a land owner to clean, and Sections 6715 and 6716 are the only statutory limitations as to the time when he may enter the land to clean such ditch. I am also of the opinion that the limitations contained in Sections 6715 and 6716, as to the ditch supervisor entering the land to clean ditches, also apply to persons to whom the work of cleaning the ditch is sold under Section 6706.

Answering your second question, I beg to advise that this department will not pass upon the constitutionality of statutes unless such statutes are clearly unconstitutional or the enforcing of the same would work irreparable injury. I may add, however, that all statutes are presumed to be constitutional until judicially construed otherwise. I may also suggest that the method of providing for township ditch supervisors cleaning ditches is a police regulation and is calculated to prevent a conflict of rights and to insure to each property owner the uninterrupted enjoyment of his own property. There is a clear distinction between the regulation of property in the exercise of the police power and the appropriation of property for the use of the public. Compensation is not a condition of the exercise of the police power, even when attended with pecuniary loss, as each member of a community is supposed to be benefited by that which promotes the general welfare. But, on the other hand, where property is taken by eminent domain, a reasonable compensation must be provided therefor.

Very truly yours,

U. G. DENMAN,

Attorney General.

JUSTICES OF THE PEACE—REAL ESTATE APPRAISERS—COMPATIBLE OFFICES.

April 5th, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 25th, in which you submit the following for my opinion:

> May one who is justice of the peace also hold the office of real estate appraiser?

I beg to advise that I have made a careful search of the General Code and am unable to find any statute prohibiting one man from holding the two offices. The one office is not in any way a check upon the other, nor do the duties of the two offices conflict.

I am, therefore, of the opinion that these two offices are compatible and one man may hold both.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE ASSESSORS—COMPENSATION FOR SERVICES RENDERED PRIOR TO JANUARY 31st, 1910.

April 11th, 1910.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication enclosing a copy of an opinion rendered the county auditor of Lucas County by Hon. Lewis E. Mallow, Assistant Prosecuting Attorney, is received.

The inquiry submitted by you, and upon which Mr. Mallow has rendered an opinion, is as to whether or not village assessors of real property are now entitled to compensation for services rendered prior to January 31st, 1910, being the date of the passage of Senate Bill No. 1, which said bill provided for compensation for village assessors.

Mr. Mallow holds that "there is no authority for payment of any compensation to village assessors prior to the passage of the act above referred to." He bases his opinion upon the fact that prior to the passage of Senate Bill No. 1, on January 31st, 1910, there was no statutory compensation for village assessors, and that said act does not in any way assume to provide compensation for services rendered prior to its enactment.

I believe Mr. Mallow's construction of the law to be technically correct; that is, village real estate assessors have no enforcible claim against the county for compensation for services rendered prior to January 31st, 1910.

I am not satisfied, however, in this case, with the application of the rule that "absence of statutory compensation presumes gratuitous service." It is a matter of common knowledge in this instance that the failure on the part of the legislature to provide compensation for village assessors was an oversight, and not intentional, and this is borne out by the additional fact that they took the first opportunity to correct the omission. It clearly follows, therefore, that any presumption of intention upon the part of the legislature to require village as-

sessors to render their services gratuitously is, at the best, fictitious. The fact is, they entertained no such intention, they simply omitted the compensation of village assessors without intention or knowledge. While it is true that the various counties are not legally bound to compensate village assessors for services rendered prior to January 31st, 1910, yet, in my judgment, a failure to do so would be unconscionable. These assessors began their work at the proper time believing, of course, that they would receive compensation for the services rendered, and they ought to be paid.

I am not so much concerned myself about the legal liability. The law provides for the election of assessors and the appraisement of real property, and it is at the best a forced construction of the law that will defeat compensation tor services honestly rendered.

I am sending a copy of this opinion to the Bureau of Inspection and Supervision of Public Offices.

Yours very truly,

U. G. DENMAN,
Attorney General.

TURNPIKE DIRECTOR LAW — FULLY DISCUSSED.

January 28th, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the effect of the decision of the supreme court in the case of Thorniley, Auditor, v. The State ex rel Dickey, upon the appointment of road supervisors and superintendents, in Geauga County.

In reply I beg to say, the supreme court in this case declared the "turnpike director law", as provided in section 4896 and succeeding sections of the Revised Statutes, to be unconstitutional, for the reason that the same was not of uniform operation throughout the state.

While section 4889 was not involved in this case, yet it bears the same infirmity, to-wit, the lack of uniform operation, as it only applies to certain enumerated counties among which is Geauga.

It follows, therefore, that the county commissioners of Geauga County in the repair of improved roads should be guided by the provisions of section 4819-1, 99 O. L., page 360. This section applies to all the counties in the state, and is, therefore, of uniform operation.

Very truly yours,

U. G. DENMAN,
Attorney General.

COMMON PLEAS JUDGE — TERM OF OFFICE — DATE BEGINS.

December 23rd, 1910.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR: — I have your letter of December 14th in which you submit to me the following question for an opinion:

"When does the term of office of Stephen M. Young, who was elected judge of the court of common pleas for the first sub-division of the fourth judicial district at the last general election November, 1910, and who was nominated to succeed Judge S. B. Alexander, commence?"

Section 1532 of the General Code relates to an act entitled "An act fixing the terms of judges of the court of common pleas prescribing when they shall be elected, and extending certain of their terms, so as to effect the purpose of section 1, article XVII of the constitution," which was enacted by the general assembly for the purpose of conforming the election of common pleas judges to the constitutional provisions relating to biennial elections, and which became a law April 11, 1906, 98 O. L. 119, and is as follows:

"Each judge of the court of common pleas shall be chosen in an even numbered year, and hold his office for six years, commencing on the first day of January following his election."

Section 1532 of the General Code was taken from section 2 of the act above quoted (Revised Statutes 481z) and the act is not, in fact, repealed by the above section of the General Code. You will note that on page 11 of the General Table in Volume 3 of the General Code, that section 481z Revised Statutes is revised by the General Code section 1532. For other disposition or amendment of this act reference is made in the General Table to the Appendix. The Appendix referred to is not in existence in printed form or in any compact form, but simply means those sections of the Revised Statutes which are not repealed by the General Code, as they existed on the statute books of this state. The act of April 11, 1906 (98 O. L. 119) is, therefore, still in force as a whole, and is the law which governs the particular question at hand. The solution of this question depends upon the date of the beginning of Judge Alexander's term. He was, of course, elected for a term of five years. You do not state the date on which Judge Alexander's term began but I assume that it was either May 8, 1905, or May 8, 1906. If Judge Alexander were elected in November, 1904, and his term of office began May 8, 1905, the expiration of his term under section 2 of the above quoted act would be extended to January 1, 1911, and the question would be effectually disposed of. Section 2 of the act applies only to "existing terms," and if Judge Alexander's term began May, 1905, his term at the time of the passage of the act was an "existing term" and came within the operation of the statute. If Judge Alexander were elected at the November election of 1905. for five years, his term began May 8, 1906.

Section 2 of the act provides that,

"The term of any judge expiring in the year nineteen hundred and six, whose successor has been elected prior to the passage of this act shall not be so extended."

If Judge Alexander were elected in November, 1905, the term of his predecessor would not be extended to January 1st, 1907, under the provisions of the act but would expire in May, 1906. Judge Alexander's term, therefore, if he was in fact elected in November, 1905, began in May, 1906, and as his term was not an "existing term" at the time the act became effective, his term would not be extended by the act nor would it be effected in any way by it.

Section 15, Article LV of the Constitution of 1851 provides:

> "The general assembly may increase, or diminish, the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the sub-divisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution, shall vacate the office of any judge."

Under this section of the Constitution Judge Alexander's term can not be shortened. His term will not expire, if his term began in May, 1906, until May, 1911.

I am, therefore, of the opinion:

1. That if Judge Alexander was elected in November, 1904, his term will expire December 31st, 1910, and Judge Young's term will begin January 1, 1911.

2. If Judge Alexander was elected in November, 1905, and his term of office began in May, 1906, that his term of office will expire in May, 1911, and Judge Young's term will begin in May, 1911, on the expiration of the term of Judge Alexander.

Yours very truly,

U. G. DENMAN,

Attorney General.

TOWNSHIP TRUSTEES—LEASE OF TOWNSHIP PROPERTY TO MUNICIPAL CORPORATIONS.

April 4th, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 19th in which you submit the following for my opinion:

> "The trustees of Black River Township of this county have requested of me my opinion as to the legality of their giving a ninety-nine year lease to the city of Lorain of a one-half interest in real estate which they have, the city of Lorain to erect a new fire station thereon and to set aside one room for the use of the township for voting purposes.
>
> *"Query:* Is there any authority that would authorize such procedure on the part of the township trustees?"

Section 3260 of the General Code is in part as follows:

> "The trustees shall fix the place of holding the elections within their township or of any election precinct thereof. For such purpose they may purchase or lease a house and suitable grounds, or by permanent lease *or otherwise acquire a site, and erect thereon a house.* * * *"

This section, especially the underscored part thereof, places considerable discretion in the township trustees as to the manner of obtaining a place for holding elections, and from the above inquiry I understand that to be the object of the trustees in desiring to lease the above land to the city of Lorain.

I am, therefore, of the opinion that section 3260 of the General Code authorizes the township trustees to enter into the lease with the city of Lorain referred to in your inquiry. Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF REAL ESTATE ASSESSORS—TIME WORK MAY BE BEGUN.

January 18th, 1910.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your communication is received in which you inquire as to whether or not the board of assessors of real property elected for the city of Youngstown may begin their work prior to the 10th day of January, 1910.

In reply I beg to say sections 4 and 5 of the quadrennial appraisement law are as follows:

> "Section 4. The auditor of each county shall on or before the tenth day of January, 1910, and every fourth year thereafter, make out and deliver to the assessor of each township in his county, and to the board of assessors of each city in his county, an abstract from the books in his office, containing a description of each tract and lot of real property, situate within such township or city as the case may be, with the name of the owner thereof, if known, and the number of acres or quantity of land contained therein as the same shall appear on his books; and also a map of each township and village within each township and of each city within his county, with such plat books as may be necessary to enable the township assessor and the board of city assessors to make a correct plat of each section, survey and tract in their respective districts."
>
> "Section 5. The assessors elected under this act shall begin the valuation of the real property in their respective districts on or before the fifteenth day of January after their election and shall complete the same on or before July 1st following.

It is provided in section 4 that the county auditor shall deliver to the board of assessors the abstract, maps and plats on or before the 10th day of January; and section 5 provides that the assessors shall begin their work on or before the 15th day of January. If, as a matter of fact, the abstracts, maps and plats to be furnished by the auditor are prerequisite to the commencement of the appraisement by the assessors, then the assessors could not begin their work until after the auditor had performed his duty relative to the abstract, maps and plats, and these may be furnished by the auditor on or before the 10th day of January. If, on the other hand, there is work that can be performed by the assessors without the use of said abstract, maps and plats then, under the wording of section 5, the assessors may begin such work without regard to the date upon which the auditor is required to furnish the maps, etc. In other words, if it is necessary for the assessors to have these maps and plats before they can commence their work, such commencement will be dependent upon the auditor delivering the same. If these maps are not necessary then the assessors may begin at any time after qualification. Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — REPAIR OF IMPROVED ROADS — SECTION 7422 G. C. MANDATORY.

May 18th, 1910.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to whether or not the provisions of section 7422 and succeeding sections of the General Code, wherein it is provided that the county commissioners in letting contracts for material and work for the repair of improved roads in the county, are mandatory, or whether or not the county commissioners, in making repairs on improved roads, where the amount of the repair does not exceed $300.00, may buy the material and hire the labor as they see fit without regard to the provisions for advertisement and competitive bidding as is provided in sections 7427, 7428 and 7429 General Code.

In reply I beg to say section 7425 of the General Code requires the commissioners to cause the surveyor of the county to make written reports on or before the first day of April annually of the amount and nature of the repairs needed on the various roads for the ensuing year.

The next section, 7426, sets out what the report shall contain.

Section 7427 General Code requires the county commissioners to fix a day on which they will let to the lowest and best bidder the job of furnishing and delivering the materials so estimated in the report in such amounts and in such places as is decided upon.

Section 7428 General Code requires the county commissioners to give notice once a week for three weeks in a paper of general circulation of the county of the time and place of receiving bids for furnishing and delivering the material, and the next section, 7429, provides that the county commissioners shall enter into a contract with the successful bidder and require a good and sufficient bond for the faithful performance of said contract.

In my judgment the provisions of all these sections are mandatory and must be complied with by the county commissioners in the repair of all improved roads in the county.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

BOARD OF TRUSTEES OF COUNTY CHILDREN'S HOME OR COUNTY COMMISSIONERS MAY STOP TRESPASSING UPON LANDS OF HOME.

May 9th, 1910.

HON. PHIL B. SMYTHE, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the right of the board of trustees of the county children's home, or the board of county commissioners of Licking County, to exclude people from running over and trespassing upon the lands of the children's home.

In reply thereto I beg to say, section 12522 of the General Code provides a penalty of not less than one dollar nor more than five dollars for entering un-

lawfully upon the *lands or premises of another,* when forbidden so to do by the owner or occupant, his agent or servant. Under this section an affidavit may be sworn to by any person having knowledge of the fact before any magistrate in the county.

Section 12490 of the General Code provides a penalty of not more than one hundred and fifty dollars or imprisonment not to exceed thirty days, or both, against any person who

> "without lawful authority, cuts down, destroys or injures a vine, bush, shrub, sapling or tree, standing or growing upon the *land of another,* or severs from the *land of another,* injures or destroys a product standing or growing thereon, or other thing attached thereto."

This section may also be enforced before any magistrate of the county upon the filing of an affidavit by a person having a knowledge of the facts.

Section 12483 of the General Code provides a penalty of not more than one hundred dollars or imprisonment not to exceed thirty days, or both, to be enforced against any person who

> "wantonly or maliciously throws or lays down, opens, prostrates or injures a fence enclosing land, the property of another, or the bars or gate in such fence."

This section is enforcible in the same manner as the preceding sections above cited.

Section 12487 provides a penalty of not more than one hundred dollars to be enforced against any person who

> "maliciously injures or defaces a church edifice, school house, dwelling house, or *other building,* its fixtures, books, or appurtenances, or commits a nuisance therein, or purposely and *maliciously commits a trespass upon the enclosed grounds attached thereto.*"

This section is also enforcible in like manner as the above sections cited. The above or the specific sections of the General Code providing penalties against trespass and injury to property, all of which are available to protect the lands and buildings of the children's home of Licking County against injury from trespassers.

In addition to the remedies as above set out section 1821 of the General Code authorizes the Governor, upon the application and recommendation of the board of trustees of a "benevolent or correctional institution," to commission not to exceed three employes designated by the superintendent to be special policemen thereof. This section, as originally passed and as it appears in the Revised Statutes, applied only to state institutions, but under the wording of the section as incorporated in the General Code, it is made to apply to any benevolent or correctional institution.

Section 1822 of the General Code provides that such policemen when so commissioned by the Governor

> "shall take an oath of office, and may protect the property of such institution, suppress riots, disturbances, and breaches of the peace, and enforce laws for the preservation of good order. Upon view or information they may arrest, without warrant, any person

trespassing upon the grounds, or destroying property of the institution, or violating a law of the state, and bring such person before the mayor or justice of the peace within the township, to be dealt with according to law."

Very truly yours,
U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE—NOT ENTITLED TO TRIAL FEE UNLESS DEFENSE INTERPOSED.

March 15th, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 12th in which you submit the following for my opinion:

> "Section 621 Revised Statutes (section 1746 General Code) provides that a justice of the peace shall be entitled to fees,
>
> '* * * for sitting in the trial of any cause, civil or criminal, *where a defense is* interposed, whether tried to a justice or to a jury, one dollar; * * *'
>
> Under the above section where a person is arrested on an affidavit charged with a misdemeanor, is brought into court and waives the right of trial by jury and pleads guilty, and the justice finally disposes of the case by sentence, is the justice of the peace in this case entitled to the dollar provided for in the above statute for sitting in trial?"

You will note from the above section it is a condition precedent that before a justice will be entitled to the fee of one dollar for sitting in the trial of a case, that a defense be interposed. In law a defense is that which is offered and alleged by the party proceeded against in an action or suit as a reason in law or fact why the plaintiff should not recover or establish what he seeks. In the case which you have submitted the state is, in fact, the plaintiff, and in this case the defendant has not put anything forward to defeat the action of the state.

I am, therefore, of the opinion that a defense has not been interposed and that, therefore, the justice of the peace will not be entitled to the fee of one dollar for sitting in the trial as provided in the above section.

Yours very truly,
U. G. DENMAN,
Attorney General.

POOR RELIEF IN CITIES TO BE FURNISHED BY DIRECTOR OF PUBLIC SAFETY.

March 16th, 1910.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "Section 3476 of the General Code provides as follows: 'Subject to the conditions, provisions and limitations herein, the trustees of

each township *or the proper officer of each municipal corporation therein,* respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it.' Does this section mean that the trustees of Wooster Township shall have exclusive purisdiction over the poor of Wooster Township outside of the corporation in Wooster City, and the corporate authorities of Wooster City have exclusive jurisdiction over the poor in the corporate limits of Wooster City, or does the jurisdiction of the township trustees embrace not only the township proper outside of the city but also that part of the township within the city limits?"

You will note that the above quoted section provides that the trustees of each township *or* the proper officer of each municipal corporation therein, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it. It is necessary, from the above section, to know the proper officer of each municipal corporation who is required to furnish relief and, in this particular case, the proper officer of a city. And I call your attention to section 4094 of the General Code, which is as follows:

"Upon complaint being made or information given to such director, that a person residing in the city requires public assistance or support, the director shall inquire into the condition and necessities of such person and if satisfied that relief ought to be granted at public expense, and that the person requires temporary or partial relief only, and that for any cause it would not be prudent to remove him to the city infirmary, the director may afford relief, at the expense of the city, without such removal. The director of public safety has the power of removing paupers settled in some other county in this state which, by law, is conferred on county infirmary directors."

Section 4094 places the duty of furnishing relief, to the persons referred to in section 3476, upon the director of public safety.

I am, therefore, of the opinion that section 3476 in effect makes it the duty of the director of public safety to furnish the relief to the poor in the corporate limits of Wooster City and that the trustees of Wooster Township have exclusive jurisdiction over the poor of Wooster Township outside the corporation of Wooster City.

Yours very truly,

U. G. DENMAN,
Attorney General.

VALENTINE ANTI-TRUST LAW—WHAT CONSTITUTES VIOLATION OF.

January 21st, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication of January 19th is received with which you enclose letters written by the Riverside Milling Company of Elyria, Ohio, and the Washburn Crosby Co., of Akron, Ohio, respectively to J. W. Dahlka of Oberlin, Ohio, a customer of the Riverside Milling Company and Koepp Bros., of Elyria, Ohio, a customer of the Washburn Crosby Co.

The letter written by the Riverside Milling Company to Dahlka relates to the sale of "Crescent" Flour by the said Dahlka at a lower price than the same brand of flour is sold by other merchants.

The letter written by the Washburn Crosby Co., to Koepp Bros., relates to the sale of "Gold Medal" flour by the said Koepp Bros., in one-fourth barrel sacks at $1.65 while "the prevailing retail price of 'Gold Medal' flour set by the majority of dealers in Elyria is $1.90."

The import of both of these letters is to prevail upon the said Dahlka of Oberlin, Ohio, and the said Koepp Bros., of Elyria, Ohio, to maintain the standard retail price for the two brands of flour handled by them respectively. The Washburn Crosby Company says in its letter to the Koepp Bros., that:

> "in the future we will not be able to furnish you with Gold Medal unless you will be guided by the spirit of our other Gold Medal buyers in Elyria and charge the same retail price for Gold Medal that they do. We believe that you will see this matter in the same light that we do and will understand our calling your attention to this act."
>
> "Gold Medal flour has too great a selling power behind it to have any dealer satisfied to get other than his legitimate profit from handling the goods. It will be to your advantage to maintain the price of your competitors as *Gold Medal flour is a commodity that women will have regardless of the price.*"

It is evident from the above quotation from the Washburn Crosby letter that said company is attempting to compel the said Koepp Bros. of Elyria to maintain a fixed or standard price for Gold Medal flour. It is also apparent that there is an arrangement or an agreement between the Washburn Crosby Company and the retailers of Gold Medal buyers in Elyria to maintain a standard price for this particular brand of flour and thereby prevent competition, all of which is in direct violation of the anti-trust laws of this state. (Section 4427-1 and succeeding sections of the Revised Statutes.)

Sections 4427-4 and 4427-5 of the anti-trust laws are as follows:

> "Section 4427-4. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty ($50) dollars nor more than five thousand ($5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense."
>
> "Section 4427-5. In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created."

It is clear to me that the action of the Riverside Milling Company and the Washburn Crosby Company, as disclosed in these two letters comes squarely

within the provisions of the above section 4427-4 and in my judgment a criminal prosecution as is therein provided will be more effective than any proceeding by way of civil suits.

It is apparent to me that an investigation will disclose the fact that many of the retail dealers in Elyria are in a combine with the manufacturers of Gold Medal flour to prevent competition in the sale thereof, and I therefore suggest that you take the matter up at once; and I desire to say further that if I can be of any assistance to you I will gladly furnish you such help from this office as you may desire.

I return herewith the letters which you sent to me.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—INMATE NOT ENTITLED TO FEES AND MILEAGE FOR BEING WITNESS IN CRIMINAL CASE.

December 31st, 1910.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 29th, requesting my opinion on the following question:

> Is a person confined in the Boys' Industrial School and subpœnaed in a criminal case under section 13665 of the General Code, entitled to witness fees and mileage?
> Said section 13665 of the General Code provides:
> "When it is necessary to procure the testimony of a person imprisoned in the *penitentiary, a workhouse or prison*, on the trial of an issue upon an indictment * * * the court * * * may order a subpœna to be issued, directed to the warden of such penitentiary or superintendent or keeper of such workhouse or prison, commanding him to bring the person named therein before the court."

It will be observed that the Boys' Industrial School is neither named nor described in the foregoing section, it being neither a penitentiary, a workhouse or a prison. In rendering this opinion, therefore, I do not hold that it was proper to subpœna this person under authority of the section above quoted. I shall simply assume the validity of the process and the legality of the payment to the guard of his compensation and expenses under section 13667 of the General Code.

Said section 13667 provides in part that,

> "* * * The expenses of the officer in transporting him to and from such court, including compensation for the guard or attendant of such prisoner not exceeding the per diem salary of such a guard for the time he is kept from the penitentiary, shall be allowed by the court and taxed and paid as other costs against the state."

The procedure defined in sections 13665 to 13667 inclusive is a special one. Its processes are exclusive and the fees therein provided for are the only ones

which may be paid. The witness in such a case attends not by virtue of the subpœna but because he is in the custody of the officer. The force of the subpœna is exerted upon the superintendent of the institution, and his representative alone is entitled to the fee, as well upon the logic of the case as because section 13667 makes no provision whatever for fees of the witness.

The foregoing conclusion is strengthened by consideration of section 3014 of the General Code which provides for witness fees in criminal cases. The section is as follows:

> "Each witness attending * * * *under* * * * *subpoena* before the court of common pleas * * in criminal causes, shall be allowed the following fees * * *"

I have already pointed out that the *witness* in this case does not attend *under subpoena.*

For the foregoing reasons I am of the opinion that a witness who is brought from a state penal or reformatory institution by virtue of the provisions of section 13665 of the General Code, is not entitled to fees and mileage.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—DAMAGE CAUSED BY CHANGE OF DRAINAGE OF ROAD CONSTRUCTED UNDER STATE HIGHWAY LAW—LIABILITY OF COUNTY.

December 31st, 1910.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I have your letter stating that a resident of your county claims damages for a change of drainage affecting his land caused by change in grade in a road constructed under the state highway law.

You ask whether parties holding such claims should look to the state or to the county for the payment of damages.

Section 1185 of the General Code provides that:

> "The county commissioners of a county may make application to the state highway commissioner for *aid from an appropriation by the state* for the construction and repair of highways."

Section 1189, General Code, provides that upon receipt of such application the highway commissioner approves or disapproves of such application to determine whether the improvement is of sufficient importance to justify the giving of state aid to the county for such purpose.

Section 1191, General Code, sets forth that the county shall construct all bridges and culverts at its own expense.

Section 1193, General Code, provides that when the state highway commissioner has prepared plans, specifications, etc., for a state highway improvement, he shall transmit the same with his approval thereof to the county.

Section 1194, General Code, makes it optional with the county whether or not such improvement shall be undertaken by providing that,

"*The county commissioners* by a majority vote *may adopt a resolution that such highway be constructed.*

The county, therefore, may make the final determination as to whether they shall construct a given improvement and accept the aid of the state in the completion of such improvement.

Section 1195, General Code, provides that:

"If the lines of a highway improvement deviate from an existing highway, the officials making application for such improvement must provide the requisite right of way by condemnation proceedings, or otherwise, prior to the commencement of work, and *also secure proper releases from damages to property by reason of a change of grade.*"

It appears from the above sections, especially from section 1195, that the county is clearly liable for any damages which may accrue by reason of a change of grade.

That the state of Ohio is liable in no case for damages is clearly set forth in section 1203, General Code, which provides specifically that:

"In no case shall the state be liable for damages sustained by reason of the construction of an improvement under this chapter."

I am, therefore, of the opinion, without giving any consideration to the merits of the claims for damages set forth in your letter, that in a case of liability for damages sustained by reason of a change in grade caused by the construction of a state highway improvement, the county, and not the state, is liable for such damages.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY MUST ACT AS LEGAL ADVISER FOR ROAD SUPERINTENDENT.

December 31st, 1910.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your letter is received in which you state that one of your road superintendents recovered a judgment before a justice of the peace in Franklin Township, your county, against a certain person for failure to comply with the two day road labor laws which judgment was by said party appealed to the common pleas court. You ask me for an opinion as to whether or not it is your duty, as prosecutor, to represent said road superintendent in the common pleas court.

Section 2916 of the General Code contains the general duties required of prosecuting attorneys. Section 2917, following, provides that the prosecuting attorney shall be the legal adviser of county and township officers. The latter part of this section is as follows:

"He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Chapter 7 of Division 2 of the General Code pertains to road superintendents. Section 3370 of said Chapter provides that road superintendents are appointed and employed by the trustees of the township; that, before entering upon his duties, the road superintendent is required to take an oath of office and is required to give bond for the faithful performance of his duties.

Section 3371 following, gives the trustees full power and authority to remove or dismiss the road superintendent at any time and his employment is subject to the will of the township trustees.

Section 4 of Article 10 of the constitution of Ohio provides that township officers shall be elected by the electors of each township at such time and for such term as may be provided by law. It clearly appears that under the provisions of the constitution and the ruling of the court in the case of State vs. Kendle 52 O. S. 346, that within the meaning of the law a road superintendent is not a township officer and therefore does not come within the statute entitling him to the necessary legal services of the prosecuting attorney in litigation in which the road superintendent is engaged. If, however, the litigation is that of the township trustees, this department has previously held that it is the duty of the prosecuting attorney to render necessary legal services in all litigation in which the township officers are engaged without extra compensation.

As there seems to be no special provision for the procuring of legal services in cases of this kind and as the road superintendent is an employee of the township trustees and is by the statutes given the power to bring suits and collect fines and penalties arising under the provisions of said chapter 7 of the General Code, I am of the opinion that it is the duty of the township trustees to provide the necessary legal services in all litigation brought by the road superintendent.

Yours truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONER—ANNUAL REPORT MAY NOT BE PUBLISHED TWO YEARS AFTER DATE WHEN MADE.

April 19th, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of the 13th, in which you state that in September, 1908, the county commissioners caused their annual report to be published in two papers of opposite politics, and supposedly of general circulation in the county, but after considerable litigation it was finally determined by the circuit court that one of the papers was not of general circulation throughout the county; that now, some twenty months after the date when the publication should have been made, the proprietor of a rival newspaper, who filed the suit in which the ineligibility of his competitor was decided, has demanded that publication of this annual report be made in his paper.

You request my opinion as to whether the county commissioners can now be compelled to publish such annual report in the demandant's newspaper.

In my opinion the commissioners can not be compelled to make such publication for the following reasons:

First. Though the disqualified newspaper may not have been of general circulation, it does not follow that the newspaper owned by the person making the present demand is entitled to it; there may be other newspapers of the same political party, and of general circulation in the county. The utmost that could be done would be to compel the commissioners again to designate a newspaper of that political party.

Second. Section 917 Revised Statutes, which was enforced in 1908, provides that the annual report of the county commissioners

> "shall be published annually * * * in two newspapers of different political parties * * * of general circulation in said county."

The purpose of the statute being to apprise the taxpayers of the county of the proceedings of the county commissioners for the "next year preceding the time of making such report." There is no public interest which would be served by making a second publication of a two-years' old report at this time. From the standpoint of such public interest a present publication would be an unwarranted expenditure of public money, and, in fact, I believe that even if the commissioners desire to make such publication at this time they could be enjoined.

Very truly yours,
U. G. DENMAN,
Attorney General.

BLIND RELIEF—WHEN PERSON RECEIVING SOLDIERS' RELIEF ENTITLED TO.

November 15th, 1910.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date requesting my opinion on the following questions submitted to you by the blind commission of Van Wert County:

> 1. Does the law authorize the giving of aid to any person not totally blind?
> 2. Are we authorized to extend aid to old soldiers, their widows or dependents?

With respect to your first question I have already held in an opinion under date of June 12, 1909, that total blindness is not a necessary qualification for relief under the law in question. (Annual Report of Attorney General, 1909, page 568.) A copy of this report will be sent to you within a few days.

With respect to your second question I beg to state that section 2965 General Code, applying to the duties of the blind commission provides in part that:

> "Any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life, who has not

> sufficient means of his own to maintain himself, and who, unless relieved *as authorized by these provisions* would become a charge upon the public or upon those not required by law to support him, shall be deemed a needy blind person."

It is clear from the provisions of this section that two facts must concur in order to constitute one a needy blind person, viz.:

1. Inability to provide himself with the necessities of life. 2. Ineligibility to any other kind of relief.

It is clearly the intent of the section that persons shall not receive relief under the blind law who are kept from becoming public charges by proceedings under some other statute. The soldiers' relief law, so called, sections 2930 to 2942 General Code, provides for a fund for the relief of the "honorably discharged soldiers, indigent soldiers, sailors and marines of the United States, and the indigent wives, parents, widows and minor children under fifteen years of age, of such indigent or deceased soldiers, sailors or marines, to be disbursed as hereinbefore provided." The aid to be extended under this law is available to any such person "who in the opinion of such relief committee require aid, and are entitled to relief under these provisions."

In my opinion, therefore, if a blind person is receiving aid from the soldiers' relief committee or has been recommended for such aid, and the amount thereof is sufficient to keep him from becoming a public charge, he cannot receive further aid from the blind commission; but if the amount received by such person from the Soldiers' Relief Commission, or for which he has been recommended by the Soldiers' Relief Committee is insufficient to keep him from becoming a public charge he may still receive relief under the blind relief law.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — COMPENSATION FOR ACTING AS BOARD OF EQUALIZATION — OFFICERS OF CENTRAL COMMITTEE NEED NOT BE MEMBERS.

June 10th, 1910.

HON. E. S. MCNAMEE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "Has the supreme court passed upon the question as to whether or not the county commissioners and auditor as members of the annual board of equalization and as members of the quadrennial board of equalization, and of the board of revision, are entitled to the compensation provided in section 5597 of the General Code?"

The supreme court has recently decided the case of State ex rel Unverferth vs. Owen, in which it is held that county commissioners may not receive the additional compensation provided for their services while acting as county board of equalization. This case, however, is not reported.

You also submit this inquiry:

> "The Republican Central Committee for Harrison County was elected at the primary May 17, 1910, said committee met and organized on the 24th day of May by electing O. C. Gray, Chairman, E. B. Kirby, Secretary, and Charles E. Stewart, Treasurer. None of the three foregoing officers are members of the Central Committee.
>
> "*Query:* If these three men are ineligible to hold said offices, the Central Committee desires to know what it shall do to remedy the situation, as the fifteen days have elapsed."

Section 9 of the Primary Election Law approved April 28th, 1908, 99 O. L., page 214, contains this provision:

> "Within fifteen days after their election all such committees (which includes county central committees) shall meet and organize by the election of a chairman and secretary, and may select an executive committee."

You will observe that this provision contains no direction as to whether said chairman and secretary shall or shall not be members of the committee.

I am of the opinion, however, that in the absence of direction the officers of the committee should be selected from the body thereof. The provision that the said committee shall organize within fifteen days is, in my judgment, directory; that is, if for any reason the committee should fail to meet and organize within the fifteen days, such failure would not invalidate a subsequent organization.

Yours very truly,

U. G. DENMAN,
Attorney General.

PARTITION FENCES — DUTY OF TOWNSHIP TRUSTEES.

December 2, 1910.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR: — I have your letter containing the following inquiry and asking this department for an opinion on the same:

> Can the township trustees, under Section 5910 of the General Code, in assigning a line fence, give one land owner more rods than the other and burden the one having the fewer number of rods with the burden of maintaining the water-gate?

Section 5910 of the General Code, is as follows:

> "When a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the aggrieved person may complain to the trustees of the township in which such land or fence is located. Such trustees, after not less than ten days' written notice to all adjoining land owners of the time and place of meeting, shall view the fence or premises where such fence is to be built, and assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him so as to be good and substantial."

I am of the opinion that the duties of the township trustees under this section are of a judicial nature, and, in any controversy over the division of partition fences, it is their duty to take into consideration everything connected and pertaining to the building and maintaining of the partition fence, and the statute provides that they are to assign in writing to each person his equal share thereof. This, in my opinion, does not mean the equal number of rods, but does mean that after the taking into consideration of all the conditions of the making and maintaining of the fence, that each party is to be assigned his equal share and if, perchance, one end of the fence requires the making and maintaining of a water-gate across a stream, it is the duty of the trustees to take this fact into consideration and, having ascertained the whole amount, to assign, in writing, to each land owner his equal share thereof.

Very truly yours,
U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SERVICE — APPROVAL OF PLATS OF VILLAGES WITHIN THREE MILES OF CITY.

November 25, 1910.

HON. F. J. ROCKWELL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR: — I have before me your letter of November 19th, in which you submit to me the following question for an opinion:

> "Must lands allotted in the Village of Kenmore have approval of Director of Public Service of the City of Akron endorsed on the plat before it can be recorded?"

I also have, and carefully note, your opinion addressed to Mr. John C. Moore, County Auditor, and believe the conclusions drawn by you are well taken and that your construction of the governing statute is correct.

I am of the opinion that Section 3586, General Code, gives the village council of Kenmore the right to approve the plat and that, there being no platting commissioner in the Village of Kenmore, nothing further is required by the statute than the approval of the village council.

I am further of the opinion, referring to Section 4346, R. S., as amended 101 O. L. 205, that the statute does not contemplate the platting of lands located within the corporate limits of a village, but governs only the platting of lands within a city where, of course, the Director of Service is the platting commissioner, and the platting of lands located within three miles of such a city. In my opinion the words in Section 4346, as amended,

> "Provided that the approval of the platting commission of a city shall not be required unless such city is the nearest to the lands sought to be allotted,"

point finally to the fact that the section does not refer to lands situate within corporate limits of a village, even though the village is situate within three miles of a city where there is a platting commissioner.

Very truly yours,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY TRANSFER MONEY FROM GENERAL TO AUDITOR'S FEE FUND.

November 22nd, 1910.

HON. C. L. NEWCOMER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I have before me your letter of October 28th, in which you submit to me the following question for an opinion:

> Can the commissioners transfer money from the general fund to the auditor's fee fund?

I have already rendered an opinion covering the act of the general assembly passed March 22nd, 1906, 98 O. L., pages 89 to 97 inclusive, and the amendment thereto which took effect January 1, 1907, fixing the salaries of the various county officers, which opinion is in printed form and a copy of which is enclosed herewith.

The opinion above referred to was rendered on October 5, 1909, and on April 30, 1910, sections 2983 and 2984 of the General Code, and being sections 7 and 8 of the aforesaid act, were again amended, 101 Ohio Laws, 199, 200, and the time within which transfer could be made by the county commissioners from the various funds of the county to the county officers' fee fund was extended from April 1, 1910, to April 1, 1911, excepting, however, that section 2984 of the General Code, as amended, provides that the aggregate amounts so transferred to the fee fund of any such officers, with the exception of the county clerk, probate judge and sheriff, shall not exceed the aggregate amounts into or *authorized to be paid* into the general fund from the fee fund of such officer during such period.

The purpose of the law as amended April 30, 1910, is to require the fees collected by the county officers, with the exception of the county clerk, probate judge and sheriff, to pay the salaries of all the employes of their offices, including also salaries of the officers themselves, out of fees collected by them in their respective offices. The law provides, however, that the commissioners may transfer funds from any fund in the county to the county officers' fee fund, but that the sums transferred shall not exceed the amount which has already been paid into the general fund by the county officers' fee fund during the period in which the transfer is made to the county officers' fund. It further provides that the transfer can be made from any fund in the county to the county officers' fee fund if the sum so transferred does not exceed the sum which is to be paid into the general fund from the said county officers' fee fund during said period.

I am, therefore, of the opinion that in the case mentioned by you the county commissioners have the right to transfer the sum of $665.00 from the general fund to the auditor's fee fund, provided the amount has already been paid by the auditor's fee fund into the general fund, or is to be paid into the general fund by the county auditor's fee fund during the quarter in which the transfer is made.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — COMPENSATION FOR DITCH WORK.

County commissioners may not receive per diem fee for ditch services unless they have performed a substantial day's work.

November 21st, 1910.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date, requesting my opinion as to the right of county commissioners to receive compensation for ditch work for days in which they have performed other services, such as sitting as members of the quadrennial county board of equalization.

Section 3001 of the General Code provides in part as follows:

> "In counties where ditch work is carried on by the commissioners in addition to the salary herein provided each commissioner shall receive three dollars for each day *of time* he is actually employed in ditch work, the total amount so received * * * not to exceed three hundred dollars in any one year."

The italicized portion of the above quoted section is somewhat obscure in its meaning. This obscurity, however, is cleared up by reference to a corresponding section of the Revised Statutes, section 897, which is in part as follows:

> "But in counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each county commissioner shall receive three dollars per day for the time they are actually employed in ditch work, etc."

What is the effect of the inclusion of these phrases in the two sections? Without them both sections would read substantially as follows:

> "Each commissioner shall receive three dollars per day for services in connection with ditches."

Such a provision would undoubtedly mean that the fee of three dollars should not be paid excepting for days in which ditch services were rendered. It is reasonable to suppose, therefore, that the general assembly, in including this phrase in section 897 of the Revised Statutes, had in mind something other than a mere reiteration of what was already there, viz.: an implied provision to the effect that the three dollar fee should not be paid for days in which ditch work was not performed by the commissioners.

If then the provision that the three dollars shall be paid for each day of the time the county commissioner is actually employed in ditch work, does not mean simply that he is entitled to a three dollar fee for each separate twenty-four hours in which some ditch work is performed, there is only one alternative meaning which can be imagined. That meaning is that the time actually put in by the commissioners in ditch work during a month when accurately accounted for and the total amount ascertained shall be divided into periods, equivalent to days, and a fee of three dollars allowed each commissioner for each day's work so ascertained.

A third possible meaning, viz.: that the commissioners, when engaged in ditch work, must undertake no other county work whatever, and must devote

a whole day to such work, may be dismissed as out of the question; there are many kinds of ditch work which in the very nature of the case take but a short time, and there are many other kinds of ditch work, such as the hearing of petitions and remonstrances, the amount of time to be consumed in which is not within the control of the county commissioner.

Although for reasons before stated there seems to be some ground for holding that the general assembly intended that the commissioners should not be allowed per diem fee for anything less than a day's work, yet such a conclusion does not in itself suffice to answer your question. The question as to what constitutes a day's work remains unanswered. There is no provision in the statutes defining what shall constitute a day's work. The eight hour law, so called, does not apply to public officers.

Spafford v. State, 10 C. C., N. S. 135.

In spite of the fact that there is no statutory rule by which a "day's work" is measured, and in spite of the fact that there is no express provision of law directing the commissioners to keep account of the time spent by them in particular undertakings, I am of the opinion that, in order to carry out the manifest intention of section 3001 of the General Code, commissioners must show on their minutes the amount of time spent by them in ditch work, with reasonable accuracy. Thus, on days in which they are engaged in acting as members of the board of equalization, and on which they interrupt such board to attend to some ditch work, they must show the approximate amount of time spent in such ditch work. The compensation payable to them under section 3001 then should be proportionately divided, and they would be entitled to receive such a proportion of the sum of three dollars as the time consumed by them in ditch work bears to a reasonable day's work.

I am, therefore, of the opinion that, while county commissioners are entitled to some compensation for ditch services rendered on days in which they sit as members of the board of equalization, yet they are not entitled to the full amount of the three dollar compensation provided by section 3001 of the General Code, but only to such compensation as is reasonably adequate under the provisions of that section to compensate them for the services actually rendered.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXES AND TAXATION — CEMETERY PROPERTY.

House and land owned by cemetery association not used for cemetery purposes not exempt from taxation.

June 24th, 1910.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio*

DEAR SIR: — I beg to acknowledge receipt of your letter of June 21st, in which you submit the following to me for my opinion:

> "We have in this county a private cemetery known as the Bloomfield Cemetery, consisting of a lot of five acres; on one acre of this lot there is a dwelling house built by the cemetery trustees for the express purpose of being used as a tenement house for the man em-

ployed to attend the cemetery. This house and five acres has never been used for any other purpose nor ever been a source of revenue to the cemetery association.

"*Query:* Is this house and one acre of land taxable?"

I beg to call your attention to Section 5350 of the General Code, which is as follows:

"Lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by a person, company, or corporation with a view to profit, or for the purpose of speculating in the sale thereof, shall be exempt from taxation."

In construing this section we must bear in mind that tax exemptions must be expressed in clear and unmistakable terms and cannot be shown by doubtful or ambiguous language. This rule is supported by the following cases: *8 Ohio, 197; 19 Ohio, 110; 46 O. S., 159; 77 O. S., 177.*

You will note the above section only exempts lands used exclusively as graveyards, etc. In this connection I desire to call your attention to the 25th Ohio State, 242, 56th Ohio State, 324, and the 77th Ohio State, 180, which cases hold that the use to which the property is devoted determines its right to exemption. You will notice this section only exempts lands used exclusively as graveyards, while the house and one acre which you inquire about is primarily used for residential purposes.

I also desire to call your attention to the fact that where the general assembly intended to exempt buildings, houses, etc., such words were specifically used and it was not left in doubt.

Section 5352, General Code, exempts buildings belonging to counties, and also the ground.

Section 5353 exempts lands, houses and other buildings.

Section 5354 exempts buildings belonging to and used exclusively for armory purposes.

Section 5355 exempts fire-engine buildings.

I am, therefore, of the opinion that the house and one acre of land owned by the cemetery association is not exempt from taxation and should be placed upon the tax duplicate.

Yours very truly,
U. G. DENMAN,
Attorney General.

COMMITTEE TO EXAMINE REPORT OF COUNTY COMMISSIONERS — STENOGRAPHER EMPLOYED BY MAY NOT BE PAID OUT OF THE COUNTY TREASURY UNDER SECTION 2514 GENERAL CODE.

November 17th, 1910.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of November 12th, requesting my opinion upon the following question:

"The commissioner's report of this county was examined by a committee appointed by the common pleas court as provided by section 2510 of the General Code.

"This committee found it necessary to take advantage of the provisions of section 2513 of the General Code and examined witnesses. The committee considered it necessary to have a stenographer present to take the testimony.

"Do the provisions of section 2514 of the General Code reach the expense connected with the employment of such stenographer? In other words, can the per diem expenses of said stenographer be paid out of the county treasury under the provisions of section 2514?"

None of the sections which you cite expressly authorize the employment of a stenographer by the committee appointed by the court to investigate the report of the county commissioners.

Section 2514 provides that,

"The clerk of the courts shall certify all costs arising under such proceedings to the auditor of the county who shall draw warrants upon the county treasurer for the payment thereof * * *"

This section, in my judgment, must be read in connection with section 2513 which provides the procedure for securing the attendance of witnesses. This section, in effect, empowers the committee to file precipe with the clerk of the court of common pleas who shall issue subpoenas directed to the sheriff from the county, who shall serve and make return thereof according to law.

In my opinion the "costs" contemplated by section 2514 include merely the fees of the clerk of courts for issuing and of the sheriff for serving such subpoenas, together with the fees of witnesses whose attendance is thus compelled. The term is not, in my judgment broad enough to include the compensation of a stenographer employed by the committee for the purpose of transcribing the testimony.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF ELECTIONS—MAY NOT COMPENSATE POLICE FORCE FOR TAKING CARE OF POLLS ON ELECTION DAY.

December 2nd, 1910.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your letter asking for my construction of section 4888 of the General Code. You state that on election day it requires the entire police force, both day and night men, to take care of the polls, and that it was customary for the board of elections to pay each patrolman extra compensation for this work, and you inquire whether or not the board of elections had a legal right to pay the patrolmen this extra compensation.

Section 4888, General Code, relates to the duty of city police and is as follows:

"To enforce the provisions of the preceding section, the officer or authority having command of the police force of such city, on the

requisition of the board of deputy state supervisors, shall promptly detail for service at the polling place in any precinct of such city such force as the board may deem necessary. On every day of election such officer or authority shall have a special force in readiness for any emergency."

The above section provides that the officer or authority having command of the police force shall, on the requisition of the board of deputy state supervisors of elections, provide for service such patrolmen as the board may require, and it also provides that such officer shall have sufficient patrolmen in readiness for any emergency. This section certainly does not authorize the payment of patrolmen by the board of elections. I know of no provision of law requiring the board of elections to make such payments but am of the opinion that the expense incurred by the patrolmen on election day should be borne by the municipality.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXES AND TAXATION — EXEMPTION OF PARISH, ETC.

The use to which property is devoted determines its right to exemption; residences of priests not exempt as use is not exclusively religious.

August 9th, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry for my opinion:

> "The Italian people of Niles sometime ago organized a church society which is under the dispensation of the Roman Catholic diocese for this part of the state, Bishop Farrelly, presiding. This society subsequently purchased three city lots in the city of Niles, to-wit, lots 2496, 2497 and 1768. Of these three lots which lie side by side, 2497 is the center lot and on this at the time of the purchase there was a rather large residence and barn. It was and is the intention of the society to convert this residence into a free school and to erect on 2496, which is a corner lot lying east of 2497, a church. 1768 lies west from 2497 and is a vacant lot. Owing to a lack of funds the project has not been carried out but it is in contemplation and preparation is being made for it. Some time since this society did some remodeling of the house and prepared a portion of it for use as a chapel or church and are so using that portion at this time. The balance is used in part as apartments for the resident priest and in part as an office for a physician who is generally engaged in the practice of medicine. I have heretofore indicated what it is intended to do with this property.
>
> Question, is lot 2497 entitled to be exempt from taxation as church property and the same question as to the other two lots? 2496 and 1768 are at present vacant and yielding no income."

I beg to call your attention to the following cases: 8 Ohio, 197; 19 Ohio, 110; 46 Ohio State 159; 77 Ohio State 177.

All of the above cases support the rule that tax exemptions must be expressed in clear and unmistakable terms and cannot be shown by doubtful or ambiguous language.

25 Ohio State 242, 56 Ohio State 324 and 77 Ohio State 180 hold that the use to which the property is devoted determines its right to exemption.

I beg to call your attention to section 5349 of the General Code, which is in part as follows:

> "Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation. * * "

The above section is the only section exempting property which could possibly exempt the property referred to in your inquiry. Bearing in mind the rules, 1st, that the use of the property determines its exemption, and 2nd, that the exemption must be expressed in clear and unmistakable terms, you will note that the only possible ground for an exemption will be on account of a certain part of this property being used for religious purposes. It is true that it is the intention of the church to eventually devote this property to educational purposes, but at present such is not the use to which the same is devoted.

Watterson v. Halliday, 77 Ohio State 150, holds that parish houses, otherwise known as the residence of priests and bishops of the Roman Catholic church, are not exempt from taxation as the use to which such property is devoted is for residential purposes and not exclusively for religious purposes. I am also of the opinion that this case applies with equal force to that portion of the property used as an office of a physician who is in the general practice of medicine.

In conclusion, I am of the opinion that the only part of this property that is exempt from taxation is that portion of the property which is used exclusively for religious purposes.

Yours very truly,

U. G. DENMAN,
Attorney General.

COURT STENOGRAPHER — EMPLOYMENT OF BY PROSECUTING ATTORNEY.

June 9, 1910.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> Under an amendment of Section 1547 of the General Code, passed April 7th, 1910, court stenographers or their assistants shall not be related to or in the employ of either the court or prosecuting attorney. Under an order of the court making an allowance for stenog

rapher in the prosecuting attorney's office, I have appointed the official court stenographer to the position of stenographer in my office.

Query: Is said stenographer to be regarded as an employe of the prosecuting attorney?

In reply I beg to say that I have examined Section 1547, as amended in 101 Ohio Laws, page 110, and it is my opinion that it would be in violation of the law to appoint the official stenographer to the position of stenographer in the office of the prosecuting attorney.

Very truly yours,
U. G. DENMAN,
Attorney General.

RESIDENCE — ABSENCE FROM STATE WITHOUT INTENTION OF CHANGING RESIDENCE — EFFECT OF.

July 29, 1910.

HON. R. W. HORTON, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR: — I am in receipt of your letter of July 20th, in which you submit the following to me for opinion, and under section 1950 of the General Code:

> May a woman who was taken out of the State for the benefit of her health, but with no intention of making the place to where she was taken her home, be admitted to the State Hospital for the Insane? If not under same section may proceedings be had before the State Board of Charities for her admission?

Section 1950 of the General Code is as follows:

> "No person shall be admitted into any such hospital, who is not an inhabitant of the state, except by authority of the board of state charities as provided by law. Within the meaning of this section, no person shall be considered an inhabitant who has not resided in the state one year next preceding the date of his or her application. No person is entitled to the benefits of the provisions herein except those whose insanity occurred during the time of his or her residence in the state. The trustee may direct the discharge of a person when they deem it expedient."

You will note that this section defines an inhabitant to be one who has resided in the state one year next preceding the date of his or her application. From the use of this language I am of the opinion that a person to be admitted to any Insane Hospital of this State must have been a legal resident of the state for one year preceding the date of the application and mere temporary absence from the state with no intention of changing one's residence as stated in your inquiry would not be sufficient to change one's residence.

I am therefore of the opinion that a resident of this State who has been absent from the State of Ohio for a period of one year and such absence being caused by ill health and no intention on the part of the person to change his or her residence, but on the other hand with the intention of returning to his or her place of residence is entitled to admission to a Hospital for the Insane in this State under Section 1950, General Code.

Very truly yours,
U. G. DENMAN,
Attorney General.

REAL ESTATE ASSESSORS — COMPENSATION — COUNTY COMMISSIONERS.

County commissioners may fix a different compensation for the various real estate assessor.

July 22, 1910.

HON. FRANK W. MOULTON, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of June 28th, requesting my opinion as to the legality of the following proceedings:

> "The commissioners of Scioto county in pursuance of this section (Sec. 6, Senate Bill No. 99, 100 O. L. 81-83), as they viewed it fixed the salaries of the township assessors of real estate at different prices. The assessors of six or seven townships were allowed $3.50, and others $4.00, and still others $4.50, and in the city of Portsmouth, their compensation was fixed at $5.00 per day."

Section 6 of the so-called quadrennial act as originally enacted provides in part as follows:

> "The county commissioners of each county shall fix the salary of the township assessors and the board or boards of city assessors in their respective counties, which salary shall not be less than three dollars and fifty cents per day and not to exceed one hundred and fifty dollars per month for the time necessarily employed in the performance of their duties * * * ."

The following are the possible meanings of said section:

1. The per diem "salary" fixed by the county commissioners must be the same as to all persons holding the office of real estate assessor in any sub-division of the county including municipalities.

2. The compensation fixed by the commissioners must be the same within each class of assessors, as among township assessors, village assessors and city assessors but may be different as to such classes.

3. The commissioners may fix one compensation for all township and city assessors but may fix a different compensation for village assessors. (The reason for this distinction will be hereafter made apparent.)

4. The commissioners may separately fix the salary or compensation of each township assessor, and each village assessor but in fixing the compensation of members of boards of city assessors they must make the compensation of all such members equal.

5. The county commissioners in fixing salaries under this and related sections may in their discretion fix a different salary for each and every real estate assessor and member of board of assessors in the county.

I have carefully examined said section 6 in its original form as above quoted, and find therein nothing which clearly indicates any one of the above meanings. The clause is utterly ambiguous. By the act of January 31, 1910 separate authority was given to fix the "salary" of village assessors. This provision simply serves to make it clear that prior to the adoption of the General Code the commissioners could at least discriminate between village assessors

on the one hand and the other assessors on the other hand. The exact meaning of the two sections taken together remains obscure, however.

One of the well recognized guides in statutory interpretation is that afforded by what is known as legislative construction. It is true that this rule is not to be followed except where other means of resolving an ambiguity are not afforded. In this case, however, there are no such other means. There was no prior statute and the revision of 1910 is the only construction which has been placed upon the meaning of these sections of the quadrennial appraisement law. The general assembly in adopting the code is not presumed to have intended a change in the law. The object of the codification being *inter alia* to do away with ambiguity, it follows that in case a section of that code is clear as to its meaning and supplants a previously existing section which was hopelessly ambiguous, the meaning thus adopted by the general assembly must be regarded as the correct meaning of the previous statute.

The two sections in question are now embodied in section 5368 General Code, which is in part as follows:

> "The county commissioners of each county shall fix the salary of *each* township, village and city assessor in such county * * * ."

There is no doubt as to the meaning of this provision. Under it the commissioners may not only discriminate as between townships but they may even discriminate as among members of a board of city assessors.

Upon the principles above stated, I am of the opinion that the law embodied in the General Code section was the law at the time the commissioners were required to fix the compensation of assessors, i. e., in January, 1910. From all the foregoing it follows that the action taken by the county commissioners of Scioto county was lawful.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION — CONTRACT WITH TEACHER — QUALIFICATIONS OF — WEAK SCHOOL DISTRICT.

A board of education may contract with teacher whose certificate only runs seven months for period of eight months and such teacher may draw salary for seven months but not for eight months unless new certificate filed.

"Entire time of service" refers to service for which warrant drawn and not period of contract.

Weak school district to receive state aid must be open eight months.

August 9th, 1910.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: — I am in receipt of your letter of August 4th, in which you submit the following for my opinion:

> The Marion special school district of this county has an applicant for the school whose certificate will expire one month before the term of school will expire. This school district desires and expects, under the law, to obtain state aid for the coming year 1910-11.

Query: 1. May the said board of education legally contract with the said teacher for the full period of eight months?

2. If the answer of the above is in the affirmative, may the teacher draw pay for the seven months which his certificate covers?

3. What does the term "entire time of service", as used in section 7786, G. C., cover?

4. Will the contract for eight months, and seven months actually teaching, fulfill the requirements of the law for state aid?

I beg to call your attention to section 7830, of the General Code, which is in part as follows:

> "No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, township or special school district who has not obtained from a board of school examiners having legal jurisdiction a certificate of good moral character, * *".

The above quoted section has been construed in the cases of School District No. 2 v. Dillman, 22 Ohio State 194, and Youmans v. Board of Education, 13 O. C. C. 207. In these cases the court in substance held that the provision of the statute that no person shall be "employed" as a teacher unless he has first obtained the certificate required by law, does not render invalid a contract for employment made with the teacher before he obtains the requisite certificate, *providing he obtains it before entering upon the duties of his employment.* The real mischief intended to be guarded against is the teaching of a school by an incompetent person. The protection guaranteed runs to the benefit of the pupils. In the case at hand, the teacher has the certificate required by law to teach seven months and desires to contract to teach eight months. The contract made between the board of education and the teacher for the period of eight months, to my mind does not in any way infringe upon the spirit of this statute. The teacher is competent, as is evidenced by his certificate for seven months and is, therefore, capable of not only entering into the contract with the board of education for eight months, but of entering upon the duties of his employment and teaching for a period of seven months, and at the end of that period it will be necessary for such teacher to receive a new certificate before he may teach and draw compensation for the last month covered by the contract.

Section 7786 of the General Code is as follows:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the state commissioner of common schools and the board of education, a legal certificate of qualification, or a true copy thereof, covering the *entire time of the service*, and a statement of the branches taught. But orders may be drawn for the payment of special teachers of drawing, painting, penmanship, music, gymnastics, or a foreign language, on presentation of a certificate to the clerk, signed by a majority of the examiners, and the filing with him of a true copy thereof, covering the time for which the special teacher has been employed, and the specialty taught."

"Entire time of service", as used in this section, undoubtedly refers to the time of service required by the order drawn on the treasurer for the payment

of services and not to the entire time of the employment. I am led to this opinion not only by the express language of the statute, but also because of the fact that certain reports which are required to be filed by the teacher with the clerk before compensation can be made, cannot be filed by a teacher until at the end of the school year. I am clearly of the opinion that it was not the intention of the General Assembly, in enacting section 7786 of the General Code, to prohibit a teacher from receiving any compensation until at the end of the school year. Therefore a clerk of a board of education may draw an order on the treasurer for the payment of the teacher referred to in this inquiry, for the seven months covered by the certificate at present held by such teacher and it will not be necessary for such teacher to file a certificate with the clerk covering the entire period of employment, to-wit seven months, before any compensation may be paid.

An act to provide for state aid for weak school districts is found in 98 Ohio Laws page 200. From a careful reading of this act I am of the opinion that it will be necessary for boards of education to keep their schools open for a period of eight months. A contract of employment with a teacher for eight months will not be a sufficient compliance with the above act unless the school is actually kept open for a period of eight months.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — ACTING UNDER SECTION 7610 G. C. AUTHORITY TO ISSUE BONDS — BOARD OF EDUCATION.

County commissioners acting under 7610 G. C. may perform all duties enjoined upon boards of education and in the same manner as a board of education; may call an election to issue school bands; may sell, deliver and provide levy to pay for same; president of board of commissioners and county auditor to sign same; may then turn proceeds over to board of education to build school house.

October 25th, 1910.

HON. FRED H. WOLF, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR: — I am in receipt of your letter of October 24th in which you submit the following to me for my opinion:

> "The board of education of Fulton Township school district upon petition of more than one-fourth of the electors, submitted the question of centralization of schools to a vote, which vote carried. There are no buildings in said township school district suitable for the accommodation of such centralized schools, on account of the school buildings now located in said district having been pronounced by the department of workshops and factories to be unfit in their present condition to be used for school purposes. The board of education has been unable to provide new school buildings in said district, and by reason of the same there are now no schools being held in said district. The board of education has called and held four elections, submitting the question of issuing bonds to build a suitable school building for said district, but each time the people have voted against the issue. Thereafter, on September 12, 1910, an elector and

taxpayer of said district requested the board of education, in writing, to call another election submitting the question of bond issue to provide for school buildings. The board at a called session refused to take any further action. Thereupon the matter was brought to the attention of the county commissioners, together with the request to intervene, under section 7610 of the General Code of Ohio, to make provision for the accommodation of the schools of said district.

"Pursuant to such request and upon being advised and satisfied that the board of education of said township district had failed and neglected to provide suitable buildings for such schools said county commissioners on the 19th day of September, 1910, adopted a resolution setting forth all of the facts above related and declared it to be necessary for them to intervene under the provisions of said section 7610 of the General Code, and that there were no funds in their hands to be used for that purpose and found that it would require the sum of $18,500.00 for the purpose of purchasing a site, erecting, furnishing and equipping a building thereon and to provide temporary schools for the current year and set October 5th, 1910, as the day upon which said question of a bond issue should be submitted to a vote; said election was held and resulted in a majority of one vote in favor of the issue of the bonds. The vote has been canvassed, certified, and proper resolution providing for the bond issue adopted and the bonds have been advertised for sale on November 5th, 1910.

"The right of the county commissioners to submit said question to a vote of the electors of said district is now questioned, but not by any proceedings in court. A complete copy of the legislation and actions of the county commissioners is hereto attached, and we respectfully request your opinion upon the following questions:

"1. Did the county commissioners, under the above conditions, have the right to submit to the electors of said township, the question of a bond issue for the purpose therein stated?

"2. If the commissioners had the right to submit said question to a vote, did their duties end when said issue of bonds was authorized, or should they continue until said bonds are sold, delivered and paid for?

"3. If said bonds are sold, issued and paid for, may the county commissioners certify their proceedings to the board of education, and may the board then proceed to the erection of buildings, or should the commissioners continue in charge until said building is erected?

"4. Who shall sign said bonds if issued?

"5. Where shall said bonds be made payable?

"6. Who shall, in the future, provide levy to care for said bonds, if issued?

"7. Is the legislation passed by said board of county commissioners regular?"

Before taking up the particular facts submitted by you, I desire to call your attention to the fact that in considering questions arising under the school laws of the state, such construction should be placed upon the various statutes as will give harmony to our educational system, and secure as far as practical its equal benefits and the reasonable facilities for their enjoyment to every locality.

Cist. v. State, 21 O. S. 339,
Strong v. State, 21 O. S. 352,
Mooney v. Bell, 8 N. P. 658.

So, bearing the above rule of construction in mind, every locality, if possible, is to be supplied with a school.

Under the statement of facts submitted by you, the Fulton Township school district is without any school buildings to be used for school purposes, and the board of education seems to be without means to provide one. Said board has also refused to make a further attempt to issue bonds for the purpose of erecting a school building. Section 7610 of the General Code seems to have been enacted by the general assembly to cover just such cases as submitted by you, and is in part as follows:

> "If the board of education in a district fails * * *, to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, * * * the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any or all of such duties and acts, in the same manner as the board of education by this title is authorized to perform them. * *"

The next question which presents itself is how far may the commissioners go in providing suitable school houses, etc., and the answer is found in the very wording of the statute:

> "Shall perform any or all of such duties and acts *in the same manner as the board of education by this title is authorized to perform them.*"

The county commissioners' authority to perform acts in the same manner as the board of education is supported by the following cases:

State ex rel Schnee c. Board of Education, 4 O. D. 329,
Board of Education vs. Shoaul etc., 4 N. N. P., N. S. 433.

To answer your first question it will be necessary to determine whether or not the board of education of Fulton Township would have the authority to submit to the electors of said township the question of a bond issue for the purpose therein stated.

I call your attention to section 7625 of the General Code which is as follows:

> "When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites, to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

The above quoted section being authority for the board of education to submit to the electors the question of issuing bonds and since the commissioners, under section 7610, have found that the board of education has failed to provide suitable school houses, the above section would also be authority for the commissioners to act under the same section in the same manner as the board of education.

I will consider your second and third questions together. Section 7610 authorizes the commissioners to act in school matters when a board of education has failed to provide certain school advantages, etc. The object of this section undoubtedly is to confer upon the county commissioners the right to remove conditions which keep the school youth from having the advantages contemplated by our school laws, and such section certainly authorizes the commissioners to continue their action until such conditions have been removed. I am, therefore, of the opinion that the county commissioners may, after submitting the question of issuing bonds to a vote, continue until said bonds are sold and delivered and paid for, providing the county commissioners consider such action necessary on their part to guarantee the school youth the school privileges contemplated by our school laws, and as soon as such privileges are again open to the school youth, or the means are provided for the school youth obtaining such privileges, the county commissioners may then certify their proceedings to the board of education, and the board may then proceed in the erection of buildings with the funds provided by the bonds obtained by the county commissioners.

In this connection I call your attention to section 7626 of the General Code which authorizes the board of education to issue bonds for the amount indicated by the vote, and to provide by resolution for the sale of the same. This, therefore, would be specific authority for the county commissioners to do the same while acting under section 7610.

Answering your fourth question. Section 7627 of the General Code provides that bonds issued by boards of education shall be signed by the president and clerk of the board of education. In the case at hand the county commissioners, while acting under section 7610, are, in fact, the board of education for the purpose of issuing the above bonds. Their act shall be considered the act of the board of education. (See State ex rel Schnee v. Board of Education, 4 O. D., 329.)

It will be necessary, therefore, for the persons of the board of county commissioners acting in the capacity of president and clerk to sign said bond, which would undoubtedly be the president of the board of county commissioners and the county auditor, who, by section 2566 of the General Code, is made the secretary of the board of county commissioners, and acts in a capacity to the board of county commissioners similar to that of a clerk of board of education.

Answering your fifth question. Said bonds issued by the board of county commissioners acting as the board of education should be made payable at the same place as all other school bonds.

Answering your sixth question. Section 7628 of the General Code provides that when an issue of bonds has been provided for, the board of education annually shall certify to the county auditor a tax levy sufficient to pay such bonded indebtedness as it falls due, together with accrued interest thereon. As long as the county commissioners act as the board of education it shall be their duty, under this section, to provide for the levy to care for the bonds above issued, but as soon as the action of the county commissioners is certified to the board of education it shall then become the duty of such board of education to provide the above levy. However, in case such board of education fails and neglects to provide such levy, the commissioners would again be authorized to take action

under section 7610. This, therefore, insures a levy to be provided to care for the bonds issued.

Answering your seventh question. I have carefully gone over the resolution passed by the board of county commissioners which sets forth the facts authorizing them to take jurisdiction to provide proper school facilities, and which provides for the calling of an election to issue bonds, and consider the same regular. I also note through the entire action of the board of county commissioners, the county auditor has performed the duties which necessarily would have been performed, had the board of education been acting, by the clerk of the board of education. I have discussed this feature of the question in answering your fourth question, and am of the opinion that the county auditor is the proper person while the commissioners are acting as the board of education, to perform the duties imposed upon the clerk of a board of education.

Referring to the notice of election for the bond issue, the commissioners have served notices of such election in both ways provided in section 4839 of the General Code. That is, by publishing a notice in a newspaper of general circulation in the district and by posting notices thereof in five public places in the district at least ten days before the holding of such election.

I note that in the notice published in the newspaper the word "building" was omitted, but I do not consider this material for the reason that the commissioners have also caused notices to be posted in five conspicuous places in the school district, and in the notices posted the word "building" is not omitted.

I also note that the commissioners have canvassed the return of the election. Section 5120 of the General Code authorizes a board of education to canvass the returns on the second Monday following such election. This would also be authority for the county commissioners acting as the board of education to canvass such returns.

I also note that the county commissioners have taken action to sell said bonds. Section 7626 of the General Code is authority for the board of education to sell such bonds, and would, therefore, be authority for the county commissioners acting for the board of education to do the same.

In conclusion I desire to call your attention to the fact that the board of county commissioners should not act as the board of education in any more matters, or for a greater length of time, than is absolutely necessary to remove the cause, or to provide a means for removing the cause, of said board of county commissioners acting under section 7610 of the General Code, and as soon as such cause has been removed, or the means provided for the removal of such cause, the board of county commissioners should certify their action to the board of education, and the action of the board of county commissioners in all school matters will be at an end.

I herewith return to you the various resolutions passed by the board of county commissioners relative to the above matters.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL DIRECTORS—AUTHORITY TO EMPLOY JANITOR.

September 22nd, 1910.

HON. J. C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> 1. Does section 4722 of the General Code give the director of a township sub-district power and authority to employ a janitor to care for the school house during the school term?
> 2. Does section 7690 of the General Code apply to city schools only, or does it also govern township school boards?

I beg to call your attention to section 4722 of the General Code which is in part as follows:

> "The director of each sub-district shall preside at the school meetings of the district, record the proceedings thereof, and *act as the organs of communication between the inhabitants and the township board of education.* He shall take charge of the school house and property belonging thereto *under the general order and direction of the township board of education,* and preserve them. * * *"

You will note from the above section that the director is the mere organ of communication between the inhabitants and the township board of education and that the director only has charge of the school house and property belonging thereto under the general order and direction of the township board. In this connection I call your attention to section 7690 of the General Code which provides in part as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and shall fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. * * *"

This section applies to all boards of education and specifically places the authority to employ a janitor for school buildings with the board and not with the director of a township sub-district.

I am, therefore, of the opinion that a director of a township sub-district is without authority to employ a janitor to care for a school house during the school term and that section 7690 of the General Code applies to all boards of education and is not limited to only city boards.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY TREASURER—DEPOSITS MAY BE MADE IN COUNTY DEPOSITORY WITHOUT REFERENCE TO CAPITAL STOCK OR SURPLUS OF SUCH BANK.

February 4th, 1910.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> May the county treasury, under the county depository act deposit any amount up to $400,000 in a bank which has been designated a county depository without reference to the capital stock or surplus of the bank, conditioned, of course, that said bank has given bond for $400,000?

In reply I beg to say the "county depository act," unlike the state depository act, contains no provision that a bank which has been designated as a county depository shall not have at any one time a greater deposit of the county funds than its paid-in capital stock.

Section 1 of the "county depository act" does provide, however, that no bank or trust company so designated "shall receive a larger deposit than, and in no event to exceed $400,000. Provided, * * * it gives security to sufficiently cover such deposits."

I am, therefore, of the opinion that the county treasurer is not required to take into consideration the capital stock of a designated county depository in depositing county funds therein.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—RESIGNATION AND IMMEDIATE REEMPLOYMENT OF SUPERINTENDENT OF SCHOOLS AT INCREASED SALARY, FULLY DISCUSSED.

April 13th, 1910.

HON. ALTON F. BROWN, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your letter of April 2nd is received in which you request my opinion upon the following statement of facts:

> "During the summer of 1909 the board of education of Carlisle Village school district appointed a superintendent of their high school, for the term of one school year, at a salary of $85.00 a month; in December of the same year the superintendent resigned for the reason that he could get a higher salary at another place; his resignation was accepted by the board but they immediately appointed the same man to fill the unexpired term and also for the next school year at a salary of $100.00 per month; in January after this appointment four of the old members retired from the board and four new members assumed the duties of the board."
>
> *Query.* Was this appointment legal?

The reasoning in your letter of March 30th in regard to the question here involved is, in my opinion correct. Section 7700 of the General Code (Sec. 4017, R. S. in part) reads as follows:

> "All resignations or requests for release from contract by teachers, superintendents, or employes, must be promptly considered by the board, but no resignation or release shall become effective except by its consent."

Under this section the board had the power to accept the resignation of the teacher spoken of in your statement of facts, and release him from his contract.

Sections 7690 and 7691 of the General Code (Sec. 4017 R. S.) read in part as follows:

> Sec. 7690. "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district * * *. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. * * *
>
> Sec. 7691. "No person shall be appointed as a teacher for a term longer than four school years, or for less than one year, except to fill an unexpired term, the term to begin within four months of the date of the appointment. In making appointments teachers in the actual employ of the board shall be considered before new teachers are chosen in their stead."

Under the above quoted section 7691 the board had the power, upon accepting the resignation of the teacher in question to appoint a teacher in his place, for a period not to exceed four years, or it might have appointed a teacher only until summer of 1910; and under the above quoted section 7690, the board had the power to fix the salary at which such teacher should be employed, and it is immaterial that such salary was greater than the salary at which the former teacher had been employed, if, in their judgment, such teacher was worth such increased salary. In other words, the board of education had full power to make a contract with a teacher for a year and a half, as it has done, and if the proceedings stated in your letter were had in good faith, the fact that they had re-employed the teacher who had just resigned would not invalidate the contract.

Very truly yours,
U. G. DENMAN,
Attorney General.

ST. ANTHONY'S ORPHANAGE HOME—CLAIM AGAINST LUCAS COUNTY FOR CARE AND TREATMENT OF CHILDREN PLACED IN ORPHANAGE BY JUVENILE COURT FULLY DISCUSSED.

February 23, 1910.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry and request an opinion thereon:

"On the 25th day of November, 1908, the board of county commissioners of Lucas county, Ohio, passed and approved a certain resolution, a copy of which is herewith enclosed. In pursuance of the terms of this resolution, a number of girls have from time to time been committed by the juvenile court to the Convent of the Good Shepherd, and at present 11 girls are being cared for in said institution, at a cost of $8.00 per month each to the county.

St. Anthony's Orphanage, so-called, of this city, incorporated, as we are advised, under the name of St. Vincent's Orphanage, but not accredited in the manner provided by statute, has been from time to time voluntarily accepting and receiving boys and girls committed to it from the Juvenile court, until, at the present time, 57 children are being cared for and maintained therein, about 25 of whom are non-catholics. The Orphanage now complains of this burden, voluntarily assumed by it, and has made application to the board of county commissioners for an allowance in the same amount being paid the Convent of the Good Shepherd, to cover the actual cost and expense of maintaining the 57 children above mentioned, committed to its care.

Upon investigation, it appears that the Lucas county Children's Home is ready, willing and able, and has offered to receive and maintain all or an ypart of these 57 children at any time; and the question, therefore, has arisen, not only as to the propriety of such action requested by the Orphanage, but its legality as well, and this necessarily has involved the validity of the Board's former action in reference to the support of the girls now being maintained in the Convent of the Good Shepherd.

We call your attention particularly to sections 37 and 40 of Senate Bill No. 413, entitled, "An act to regulate the treatment and control of dependent, neglected and delinquent children, and to repeal certain acts therein named," as found in 99 Ohio Laws at page 202, and more especially the last above named section, where the following language is found: "And all fees and costs in all cases coming within the provisions of this act, *together with such sums as shall be necessary for the incidental expenses of such court and its officers,*" *etc.*

Section 12 of the same act, in the 99 Ohio Laws, gives the power to the judge of the juvenile court to commit the child to the care and custody of some association that will receive it, embracing in its objects the care of neglected or dependent children, and that has been duly accredited as hereinafter provided. The same section makes further provisions with reference to the commitment of the child, as you will observe from the reading of the section.

The real question that we want determined here is whether or not, if this association were properly accredited, and had a right to receive the child sent to it by the juvenile court, may the county pay the cost and expense of the care of such child? Will it make any difference if the Children's Home, owned and operated by the county, were unable, as they are at times, to receive and care for children that must be disposed of in some fashion by the juvenile court? Judging by the wording of section 40, it would seem that the act should be liberally construed to bring about the purposes provided for throughout the act; and the only question is, therefore whether the county has a right to expend its money in the fashion indicated.

On account of the great amount of work we have had in the office and because of the many statutes involved we have been considerably delayed in the preparation of this opinion.

The answer to your inquiry involves the construction of the act "To regulate the treatment and control of dependent, neglected and delinquent children, and to repeal certain acts therein named," which act is found in 99 O. L., pages 192 to 203 inclusive, and it also involves a construction of the act "To revise the statutes of Ohio relating to children's homes and to dependent and neglected children," which act is found in 99 O. L., pages 184 to 191 inclusive.

The first act above referred to is commonly known as the juvenile court act, and was passed April 23, 1908, and the second act above referred to, providing for children's homes and relating to dependent and neglected children, was passed on that same day, and each of them was aprpoved on the following day by the Governor, and each on that following day became a law.

Your question is, if St. Vincent's Orphanage, an incorporated association, were properly accredited, and had a right to receive a child sent to it by the juvenile court, might the county pay the cost and expense of the care of such child? Would it make any difference if the children's home, owned and operated by the county were unable, as it is at times, to receive and care for children that must be disposed of in some fashion by the juvenile court, and has the county a right to expend its money under a contract or arrangement with such orphanage for such children?

In answering this question it is necessary to determine what obligation rests upon the county under the law to care for such children as are dealt with in the juvenile court, that is, dependent, neglected and delinquent children.

In my judgment each of the acts above referred to is to be liberally construed, and each of them embraces, or has to do with dependent, neglected and delinquent children. By a reading of the juvenile court act, it appears that it was the intention of the general assembly to create a tribunal with certain prescribed procedure in and through which jurisdiction might be taken and exercised over dependent and delinquent children, as described in the act and over their parents, guardians or other persons in whose care such children may be. Certain procedure is prescribed in this act for bringing a child before the court for disposition thereof according to the provisions of the act regulating the disposition of dependent or delinquent children as the case may be. The words "neglected" and "dependent" seem to be used interchangeably in the act and to refer really to the same and but one class of children, while the word "delinquent" refers to a second class of children. A course of procedure is prescribed through sections 7 to 10 inclusive of the juvenile act, and section 19 of that act to bring either a delinquent or a dependent child before the court, and when either of such is thus brought before the court, it is the duty of the judge, on the day named in the citation, or upon the return of the warrant of arrest, or as soon thereafter as may be to proceed in a summary manner to hear and dispose of the case.

Under section 12 of the act, 99 O. L., pages 194 and 195, in case of a delinquent child the judge may continue the hearing from time to time, and

> "may commit the child to the care or custody of a probation officer, or may allow such child to remain at its own home subject to the visitation of the probation officer; and subject to be returned to the judge for further or other proceedings whenever such action may appear to be necessary; or the judge may cause the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the judge, or he may

> authorize the child to be boarded in some suitable family home in case provision be made by *voluntary contribution* or otherwise, for the payment of the board of such child, until suitable provision be made for the child in a home *without such payment;*"

This section then gives several other alternative dispositions which may be made, including the committing of the child to training schools for boys, industrial schools for girls, and institution in the county caring for delinquent children, or which is provided by a city or county for such children, or to the boys' industrial school at Lancaster or, if over sixteen years of age, to the reformatory at Mansfield, or to any state institution, etc., these latter named institutions being public, county, city or state institutions. The section then provides that a child committed to such institution shall be subject to the control of the board of trustees thereof, who may parole or discharge such children from custody; the last sentence in this section then provides:

> "Or the judge may commit the child to the care and custody of some association that will receive it, embracing in its objects the care of neglected or dependent children, and that has been duly accredited as hereinafter provided."

There is no provision, however, in this section, *standing alone,* authorizing the judge to commit such child to any person, association or institution and thereby lay upon the county the duty of paying or authorizing the commissioners to contract to pay any charge or expense for the care and maintenance of such child. In the case of a dependent or neglected child brought before the court, it is provided in section 13 of the act that the judge may make an order committing such child to the care of some reputable citizen or some training or industrial school, as provided by law, or *to the care of some association willing to receive it,* which association embraces within its objects the purpose of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which association shall have been accredited as hereafter provided. And this section 13 also provides that the judge, if the health or the condition of the child requires it, may cause the child to be placed in a public hospital or institution for treatment, or in a private hospital or institution which will receive it for like purposes *without charge.*

This section standing alone does not give the judge the right to commit a dependent or neglected child to any person, institution or association, and thereby lay upon the county the duty, or give the commissioners the right to expend money for the care and maintenance of such child.

The language of each of these sections 12 and 13 indicates an intention on the part of the general assembly to give the judge the power to commit the child to a public institution, suitable to the care of the particular child, or to some person who will take it without charge, under the supervision of the judge, or to some accredited association who will receive it. Such association may be accredited under sections 34 and 35 of the act, 99 O. L., pages 200 and 201.

Section 37 of the juvenile act, 99 O. L., 202 provides that,

> "The judge in committing children shall place them, *so far as practicable,* in the care and custody of some individual holding the same religious belief as said child or its parents, or with some association which is controlled by persons of like religious faith as such child or its parents."

And section 40 provides that the act shall be liberally construed to the end that its purposes may be carried out, to-wit, that,

> "Proper guardianship may be provided for in order that the child may be educated and cared for as far as practicable in such manner as best subserves its moral and physical welfare, and as far as practicable in proper cases that the parent, parents, or guardians of such child may be compelled to perform their moral and legal duty in the interest of the child."

Now it is a well known principle that a county officer can only expend money from the public treasury for such matters or things as are expressly authorized by statute, or as are necessary to enable him to carry out the powers expressly conferred. The last sentence in section 40 pertains to the fees and court costs in cases coming before the juvenile court, and provides for the payment of the costs of transportation of the child to the place to which it may be lawfully committed, but this language cannot be construed to include the cost of maintenance and caring for these children after they reach the institution. It is not broad enough for that, and it will be seen by referring to section 12 and section 13 of this act that the judge is only given the right to commit the child to some person or family who will take it without charge or to some public institution, county, city or state which, of course, would not charge for it, or in the third place, to some *association* willing to receive it, and provided such association is an accredited one under sections 34 or 35 of the act.

In reading the first sentence of section 40 providing that the juvenile act shall be liberally construed to the end that its purposes may be carried out and proper guardianship, education and care given the child in such manner as will best subserve its moral and physical welfare, it may be contended that such construction should be liberal enough to allow the juvenile court to commit children to such person, association or institution as might to him seem best, and that such commitment in and of itself would lay upon the county commissioners the duty to pay for the care and maintenance of such children even though such commitment should be to some private individual or association. This construction, however, might wholly ignore the last phrase of this first sentence which requires a liberal construction to the end that,

> "as far as practicable in proper cases that the parent, parents or guardians of such child may be compelled to perform their moral and legal duty in the interest of the child".

It certainly was not the intention of the general assembly to lift the burden of supporting a child from the parent, parents or guardians. On the contrary this section commands that a liberal construction shall be given to the act in order that such parent, parents or guardians may be compelled to perform their moral or legal duty in the interest of the child. In other words, the act cannot be so liberally construed as to allow the judge to commit the child to some person, family, association or individual if it is within his power to compel the parent, parents or guardians to care for such child. In other words, the act cannot be so liberally construed as to allow the judge to commit the child to some person, family, association or individual if it is within his power to compel the parent, parents or guardians to care for such child.

Then again, by the last sentence of section 13 of the act it is provided that the judge may, if the child is sick, cause it to be placed in a public hospital or

institution for treatment or special care (in which institution no charge would be made) or in a *private* hospital or institution which will receive it for like purposes *without charge.* This sentence clearly indicates that it was not intended by the general assembly to give the judge the power to commit these children to individuals, families, associations or institutions, and by so doing, without further authority compel the county, through any of its officers, to pay for the care and support of such children because it is not probable that the general assembly had it in mind to give authority to the judge to commit the child in good health to some private association or institution, and thereby without further authority lay a charge upon the county to pay the costs and expenses of caring for such child, but with-hold such power when it becomes necessary for him to make disposition of a child who is sick or in such condition of health as to render it necessary that it be given the care of a hospital.

It seems clear, therefore, that the juvenile act, standing alone, does not confer upon the juvenile court or the judge thereof power to commit a child, in sickness or in health, to any private person or association and by such act of commitment make it incumbent upon the county, through its commissioners, to pay or contract for the payment of the cost and expense of caring for and supporting such child by such private person or association. But this does not dispose of the question because the juvenile act must be read in connection with the other act referred to, providing for children's homes, which act, as heretofore stated, is found in 99 O. L. pages 184 to 191, inclusive. And this act is an amendment of various sections of the Revised Statutes which, under one form or another, have been the law of Ohio for many years.

The act amends sections 929, 930, 930b, 931, 931b, 932, 933, 934, 2181, 2183 and 3137 of the Revised Statutes of Ohio.

Section 930 provides for the appointment of trustees and other officers to manage the home and prescribes the duties of those officers.

Section 930b provides for the employment of a teacher in the home, prescribes certain duties for the clerk of the board of trustees, and provides certain funds to conduct a common school in such home.

Section 931 regulates the admission of children to the home and provides as to what children shall be eligible thereto. This section makes the institution,

> "an asylum for all children under the age of 16 years, of sound mind and free from infectious or contagious disease, who have resided in the county not less than one year, and for such other children, under such age, from other counties in the state where there is no home located, as the trustees of such home and the board, boards or authorities, having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of abandonment by parents or orphanage or neglect, or inability of parents to provide for them."

The remainder of this section provides for the making of a record of the history of the child.

Section 931b provides that,

> "All children now maintained in the county infirmary of any county in this state, or who shall hereafter be received into such county infirmary, and shall become eligible to the children's home of such county or district, shall be certified to the trustees thereof by the infirmary directors."

The word "trustees" just used means trustees of the home. This section then further provides for a like action on the part of township trustees as to children found by such township trustees to be proper subjects for the care of the county and eligible to such children's home, and it further provides that these children shall be conveyed to such home by the township trustees, and the expense of such conveyance shall be paid out of the township poor fund.

Section 931c makes it

> "unlawful to keep or maintain in any county infirmary in this state any child or children entitled to admission into a children's home except such as are imbecile, idiots, or insane."

The language quoted above from sections 931, 931b and 931c, all taken and read together makes it very clear that the general assembly meant to lay upon the county the duty of caring for and maintaining all abandoned, orphan, or dependent children within the county, and that this should be done at some place outside of the county infirmary, because the first sentence of section 931c makes it unlawful to keep or maintain, in any county infirmary, any child or children entitled to admission into a children's home except such children as are imbecile, idiotic, or insane. And all children under the age of sixteen years, of sound mind and free from all infectious or contagious diseases, who have resided in the county not less than one year, are eligible to the children's home.

The remainder of section 931c, and which is not quoted above, reads as follows:

> "The board of commissioners of any county in the state, *where such home has not already been provided,* shall make temporary provision for such children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which *shall* be furnished, provided and managed in all respects as now provided by law for the support and management of children's homes in the state of Ohio; provided, that the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of children, and the commissioners shall levy an additional tax, which shall be used for that purpose only."

Section 2181 provides, in part, as follows:

> "In all cities where children's homes or industrial schools may be established under the incorporation law of the state, the trustees and managers of such institutions may take under their guardianship all children who may be placed under their care and management in either of the following modes:
>
> First — Children under sixteen years of age who are voluntarily surrendered by the father, etc., * * *.
>
> Second — Children under sixteen years of age who, upon application of the trustees and managers may be committed to their care by any judge of probate court, mayor of such city, or judge of juvenile court, on account of vagrancy or exposure to want and suffering, or neglect or abandonment by their parents or guardians, or other persons having custody of such children, etc., * * *"

The last sentence of section 931c above quoted is to the effect that, "where such home has not already been provided," the commissioners of the county shall make temporary provisions for such children as are eligible to a children's home by transferring them to the nearest children's home where they can be received and kept at the expense of the county of their residence, or such commissioners shall make provision for them by leasing suitable premises for the purpose and furnishing, providing and managing such premises the same as children's homes in Ohio.

This language is clearly mandatory and strengthens the opinion heretofore expressed that it was the intention of the general assembly to lay upon the county the duty to care for all children under the age of sixteen years, and who are of sound mind and free from infectious or contagious disease, in some other home than the county infirmary, and I am of the opinion that if a child is dependent or neglected, is under sixteen years of age, of sound mind and free from any infectious or contagious disease, the trustees of a children's home in the county of the residence of that child would have no discretion but must accept the child into the home, and if a children's home has not already been provided, then it is a mandatory duty upon the commissioners to make the temporary provisions mentioned in section 931c by transferring such child to the nearest children's home or by leasing suitable premises for the purpose of caring for the child or by providing for the care and support of said child within the county in the manner which the commissioners may deem best for the interests of children. This language is mandatory on the commissioners to provide one or another of the methods just mentioned for caring for such children. It is discretionary with the commissioners to select any one of the methods possible, that is, they may transfer to the nearest children's home where they can be received and kept or they may lease suitabl premises for the purpose, if such premises can be found, or they may make such other provision for the care and support of these children within the county as they may deem best for the interest of the children, and they then have the power to levy an additional tax to be expended for this purpose, but they must select one or the other of these methods.

What has just been said has been said on the assumption that no home has already been provided. If, however, the county has a children's home already provided, but which is taxed to its capacity and cannot receive any more children and give them reasonable care, then so far as such additional children are concerned there is no such home for them and it then becomes the duty of the commissioners to make some one of the other provisions mentioned in section 931c. The proviso, or last sentence in section 931c, therefore, in my opinion, is broad enough to, and does give power to the county commissioners to contract or make arrangements with a private association or corporation, duly accredited under section 34 and section 35 of the juvenile court act, to receive delinquent or dependent children on commitment by the juvenile court where there is no children's home in the county, or where there is a children's home, if the capacity of the home is at any time so taxed that no additional children may be received there with reasonable convenience, or if such home is not prepared to reasonably comply with section 40 of the juvenile act in giving proper guardianship, education and care in such manner as will best subserve the child's moral and physical welfare.

Section 2181, as above quoted, simply gives power to the trustees and managers of the institutions named in the section to take under their guardianship all children who may be placed under their care and management in either of the two modes prescribed in the section, but it would not be incumbent upon the county commissioners to pay such institutions for such care and management of the children mentioned in the section and committed to such institution there men-

tioned unless a contract were made between the commissioners and the trustees or managers under section 931c.

The amount of money to be paid by the county for the care and support of such children to such accredited association or incorporation would, of course, be a subject of mutual agreement between the county commissioners and the proper officers or managers of the association or incorporation, and this would be true of the continuance of such arrangements. The number of children so to be committed would also be a subject of such agreement between such parties, having regard, of course, for the capacity of the regular county children's home, and the facilities there to care for the children in the manner indicated by the provisions of both of these acts, evidencing the intention of the general assembly as to what care and advantages shall be given to these children.

There is one inconsistency between these two acts, and of which it may be deemed necessary to make mention, in that the juvenile court act gives jurisdiction over a delinquent or dependent child under seventeen years of age, while the act relating to children's homes and to dependent and neglected children sets an age limit of sixteen years, but I apprehend that little difficulty will come from this, because of the fact that in most cases by the time, or before, a child reaches the age of sixteen years, it will have been furnished a home with some private family or otherwise outside of a children's home or any private association or incorporation home to which it may be committed.

Section 12 of the juvenile act provides that a delinquent child "may be committed to the boys' industrial school at Lancaster, or if it appears upon the hearing that such delinquent child is sixteen years of age and over and has committed a felony, he may be committed to the Ohio State Reformatory at Mansfield, or in the case of a delinquent girl, over nine years of age, she may be committed to the girls' industrial home at Delaware.

Yours very truly,

U. G. DENMAN,

Attorney General.

BRIDGE FUND—CITIES ENTITLED TO DEMAND AND RECEIVE.

Under the General Code no cities are entitled to demand and receive any portion of the county bridge fund.

October 28th, 1910.

HON. E. C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date, in which you advise that under old section 2824 of the Revised Statutes cities of the second class, which include cities of the size of Fremont, were given the right to demand and receive one-half the taxes levied upon property within the city limits for bridge purposes, and that you are unable to find that that portion of the section was carried into the new code. You also desire my opinion as to whether or not cities the size of Fremont may now demand and receive from the county auditor and treasurer one-half the taxes levied and collected for bridge purposes upon property within the city.

I beg to advise that section 2824 of the Revised Statutes provided for certain cities receiving part of the bridge fund from the county. This section has been divided and written into the General Code as sections 5635 and 5636. Neither of these sections now provide for paying any portion of the bridge fund to any

city. I note from the table of revision in the General Code that that portion of old section 2824 R. S., which provided for certain cities receiving a portion of the bridge fund, was considered special legislation by the codifying commission and was omitted in the General Code.

Section 2421 of the General Code makes a reference to cities which receive a part of the bridge fund, but I am unable to find any where in the General Code any provision for any city to receive any portion of such fund, and I am, therefore, of the opinion that the city of Fremont is not entitled to demand and receive any portion of the bridge fund.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—AUTHORITY TO ISSUE BONDS TO EXTEND TIME OF PAYMENT OF DEBTS.

November 19th, 1910.

HON. WILLIAM DUNNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 12th, in which you submit the following question to this department for an opinion:

> A special school district board of education has made improvements during the last three years as follows: Roofing building, building side-walks, painting, etc., amounting to about $1,300. No bonds were ever issued for this work. The board is in debt about $900. May it issue bonds under section 7629 General Code to pay this indebtedness?

Section 7629 of the General Code is in part as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, * *."

You will note from the above that section 7629 provides for issuing bonds to obtain or improve public school property. In the case which you submit the improvements have been made over a year ago, and the cost of the same is now a debt of the board of education, so in fact the board of education desires to issue bonds to pay a debt and not for the purpose of obtaining or improving public school property.

I desire to call your attention to section 5656 of the General Code which is as follows:

> "The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board of commissioners deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."

You will note the above section authorizes a board of education to issue bonds for the purpose of extending the time of payment of any debts which from its limits of taxation such school district is unable to pay at maturity.

Yours very truly,
U. G. DENMAN,
Attorney General.

EXTRADITION — INTERSTATE.

Issuance of new requisition by governor of another state, and of warrant by governor of Ohio necessitates new hearing by judge designated by governor regardless of discharge of fugitive on former hearing.

October 6th, 1910.

HON. LYMAN R. CRITCHFIELD, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 19th, requesting my opinion upon the following question:

> "A demand for extradition was made by the Governor of Illinois on the Governor of Ohio for a fugitive, and the Governor of Ohio complied with the demand for the surrender of said fugitive on the charge of obtaining money by false pretenses in Illinois, and a warrant was issued by the Governor of Ohio to the sheriff of Wayne County, Ohio, commanding him forthwith to arrest and bring said fugitive before a judge of the supreme court, circuit court or common pleas court, to be examined on the charge as provided by the General Code of Ohio.
>
> "The prisoner was taken before a judge of the circuit court and it was adjudged by said judge: 'That the proof adduced before him was not sufficient for him to order said person committed to the jail of the county, thereafter to be delivered to the executive authorities of the state of Illinois, or its agent duly appointed.'
>
> "One of the reasons named by said judge of the circuit court for said finding, was, 'That there was not sufficient proof adduced before said court to clearly identify the said John Newell who was arrested under said warrant for the crime charged, as being the same John Newell complained of as having committed the crime named in said warrant.'
>
> "The court further found that 'the requisition was insufficient in this, to-wit: that the complaint made before the magistrate was not accompanied with an affidavit or affidavits to the facts constituting the offense charged by persons having actual knowledge thereof.'
>
> "After this finding, new requisition papers were made out and another demand made on the governor of Ohio, who honored the requisition and issued a second warrant to the sheriff of Wayne County, commanding him to arrest said fugitive.
>
> "Was the finding by said judge of the circuit court res adjudicata, so as to prevent the arrest of said fugitive by virtue of a second warrant? Can the sheriff be enjoined from arresting said fugitive by virtue of the second warrant, and if so enjoined, could mandamus proceedings be begun in the supreme court or before a judge thereof, to compel the sheriff to execute the warrant?"

Section 113 of the General Code, formerly section 97 Revised Statutes, provides in part that,

> "If the governor decides to comply with the demand for the surrender of a person * * * he shall issue a warrant to the sheriff of the county in which the person * * * may be found, commanding him forthwith to arrest and bring such person before a *judge* of the supreme court, of the circuit court, or of the common pleas court, to be examined on the charge."

Section 114 of the General Code reads in part that,

> "Upon the return of the warrant by the sheriff the judge, * * shall proceed to hear and examine the charge. Upon proof by him adjudged sufficient, he shall commit such person to the jail of the county for a time to be fixed by him in the order of commitment * * *"

It has been decided in this state that this proceeding before a judge of one of the courts mentioned is not judicial in its nature.

Sheldon vs. McKnight, 34 O. S., 316.

I am, therefore, of the opinion that whether or not the rule of *res ddjudicata* would otherwise apply, it can have no application to such a proceeding.

In any event, however, your statement of facts shows that upon the first findings of the judge proceedings were re-commenced *de novo*. The governor having decided that the demand made in the courts of such new proceeding was a different demand from that made in the course of the proceedings first instituted, and having commanded that the judge again review the matter, I am of the opinion that it is the duty of the judge to take such action and that it is the duty of the sheriff to serve the second warrant, and that both of these duties are ministerial.

From all the foregoing it follows that the sheriff could not be enjoined from serving the second warrant issued by the governor.

Yours very truly,
U. G. DENMAN,
Attorney General.

LAW LIBRARY ENTITLED TO SHARE ALL FINES COLLECTED FOR VIOLATION OF COUNTY LOCAL OPTION LAW.

October 6th, 1910.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 10th, in which you request my opinion as to the joint operation of section 13247 and section 3056 General Code, as amended 101 O. L. 295. Your particular question is as to whether library associations are entitled to the fines and penalties assessed and collected in the common pleas and probate courts for violation of the county local option law.

Section 13247 General Code regulates the disposition of fines collected under the county local option law and provides as follows:

"Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and thirty-one, if enforced in the county court, shall be paid into the county treasury, and, if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

Section 3056 as amended provides in part that:

"* * * In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association * * *"

Under section 13247 it will be observed that the moneys accruing from fines collected in county courts must be paid into the county treasury, and there being no provision as to further disposition of the same it follows that they must be credited to the general fund within the county treasury. There is no difference then, so far as such fines are concerned, between their disposition and the disposition of fines collected in ordinary criminal cases which is regulated by section 12378 of the General Code. This section provides as follows:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

The evident object of section 13247 is not to make a special disposition of these fines but rather of the fines enforced in municipal courts which must be paid into the treasury of the municipal corporation in which the cause is tried.

The language of section 3056 of the General Code is general and its primary meaning includes fines collected under the county local option law as well as fines collected under other criminal law.

The precise question is as to whether the amendment of section 3056, being in a sense general as regulating the disposition of all fines, by implication repealed or modified that portion of section 13247 which relates to the disposition of fines imposed and collected under the local option laws in county courts. If the latter is to be regarded as a *particular* provision then, in my judgment, a repeal by implication would have to be denied. I have, however, above indicated that, in my opinion, the portion of section 13247 above quoted is not to be regarded as a particular statute. The particular portion of the section is the latter portion which makes a special disposition of fines collected in municipal courts. While the question is not free from doubt I incline to the conclusion that the two statutes are equally general in the sense under consideration, and that the provisions of section 3056 modify section 13247 by implication, just as they modify section 12378.

It follows, therefore, that the clerks of the common pleas and probate courts must treat fines collected under county local option law in the same manner as they are required by section 3056 of the General Code to treat fines collected

under other criminal laws, and that five hundred ($500.00) dollars out of a fund arising in part from both kinds of fines belong to the trustees of the law library association.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — REPAIR OF IMPROVED ROADS IN VILLAGES.

October 4th, 1910.

HON. C. C. W. NAYLOR, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 5th in which you submit for my opinion thereon the following question:

> "What width of the streets in incorporated villages are the county commissioners required to keep in repair?"

You cite to me section 7444 of the General Code which provides that,

> "County commissioners shall keep in repair the portions of such (improved roads) within their respective counties as are included within the corporate limits of a city or village * * * to points therein where the sidewalks have been curbed and guttered, and no further."

You state that the county commissioners have followed section 7184 of the General Code, formerly section 4759 of the Revised Statutes, respecting the specifications of improved roads, and that the roads so constructed are narrower in width than the street-widths prescribed by the various councils of the cities and villages in question.

The controversy which gives rise to your question is as to whether the commissioners must keep that portion of the road only which they constructed in repair, or must keep the entire width of the village street in repair.

In my opinion, county commissioners are required to keep in repair only so much of the village street as is an improved road. The remaining portions of the village streets are not "improved roads" within the meaning of section 7444.

It is also my opinion that the duty of the commissioners is simply to keep these roads in repair, and this duty does not extend to the repair or construction of gutters at the edge of the village streets.

Yours very truly,
U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES — MANNER OF FILLING VACANCIES.

Where county auditor appoints township trustees under Sec. 3187, General Code, upon removal of one of such trustees, trustees may appoint successor for unexpired term. Successor should not be elected.

March 18th, 1910.

HON. JOHN Q. LYNE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR: — Your letter of March 4th is received in which you ask my opinion on the following statement of facts:

"Homer Township of this, Morgan County, is an original surveyed township, organized under the provisions of sections 1366-1375 included, Bates' Revised Statutes, and requiring three trustees and one treasurer for the purpose of managing the school and ministerial funds.

"No such officers having been elected and there being vacancies in the above offices the Auditor of this county in October, 1908, appointed three trustees and one treasurer, under the authority given him under section 1371, Revised Statutes, for three years.

"One of the trustees so appointed left the township in January, 1909, and another left the township on November 11th, 1909.

"At the regular election in 1909 three new trustees were voted for with other candidates on the regular township ballot, but no notice of the election of these trustees had been given as required by section 1369 Revised Statutes.

"Was this election of trustees valid or is there now two vacancies by reason of the appointees of the auditor leaving the township?

"If there are two vacancies how are the vacancies to be filled?

"Should these special trustees and treasurer be elected at the general township election and on the same ballot with other township officers, or should there be a separate election and ballot?"

In reply thereto I beg leave to submit the following opinion:

Section 3187 of the General Code (Section 1371 R. S. O. in part) reads as follows:

"When it comes to the knowledge of the county auditor that such electors of such township have failed to so apply to the commissioners for one year after such application is authorized, or that in such township the trustees and treasurer elected have failed to qualify or perform the duties incumbent upon them, the auditor shall appoint from the electors of such township three trustees and one treasurer, who shall hold their offices for the same term, perform the same duties, and have the same powers as if elected as hereinbefore provided."

You state in your letter that in October, 1908, the auditor or Morgan County duly appointed three trustees and one treasurer under the authority of the above quoted section for a term of three years. The term of these trustees, therefore, would run until October, 1911, I take it from your statement of facts.

I am of the opinion that upon the removal from the township of each of the trustees spoken of in your letter it became the duty and right of the remaining trustees, by virtue of section 3186 of the General Code (section 1370, R. S. O.) to fill such vacancies by appointment for the unexpired term. This section reads as follows:

"When a vacancy occurs in the office of trustee or treasurer, the trustees shall fill it by appointment."

It follows from the fact that the term of office of these trustees runs until October, 1911, that there was no authority to hold the election for such trustees at the regular election in 1909, and that, therefore, such vacancies still

exist in such board of trustees, and it is the duty of the remaining trustee to fill such vacancies by appointment for the unexpired term, under the above quoted section of the General Code.

In answer to your last question I am of the opinion that, under sections 1366 to 1375, Revised Statutes, inclusive, the first trustees and treasurer might be elected or appointed at any time in the year. I take it from your statement of facts that the trustees appointed by the auditor in October, 1908, are the first trustees of the original surveyed township. If this is so, the terms for the successors to these trustees would commence in October, 1911.

Yours very truly,
U. G. DENMAN,
Attorney General.

BOARDS OF EDUCATION — DEPOSITORIES FOR SCHOOL FUNDS.

Boards of education may determine, by resolution, the territory within which banks are "conveniently located" for the deposit of their funds. Such discretion must be reasonably exercised. Boards must obtain bids from all banks within the territory so designated by them. Boards can not exclude banks within such territory from bidding for their funds.

June 9, 1910.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR: — Your letter of May 18th is received in which you request my opinion upon the following question:

> Under Sections 7607, 7608 and 7609 of the General Code, is it necessary for the board of education in a school district containing less than two banks to obtain bids from all the banks in the territory wherein it determines that banks are conveniently located?

In reply thereto I beg leave to submit the following opinion:
Section 7607 of the General Code reads in part as follows:

> "In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the righest rate of interest, which shall not be less than two per cent for the full time the funds or any part thereof are on deposit. * * * "

Section 7608 of the General Code reads as follows:

> "The resolution and contract in the next four preceding sections provided for, shall set forth fully all details necessary to carry into effect the authority therein given. All proceedings connected with the adoption of such resolution and the making of such contract must be conducted in such a manner as to insure full publicity and shall be open at all times to public inspection."

I am of the opinion, under the above quoted provisions of Sections 7607 and 7608 of the General Code that boards of education should, at the time of

the adoption of the resolution providing for the deposit of the funds of their school district, determine what banks are "conveniently located" for the deposit of such funds, and should designate in such resolution the territory within which they deem banks to be conveniently located for the purpose of such deposit. I do not wish to be understood, however, in this particular to hold that boards of education may arbitrarily decide as to such convenience of location; their discretion in this particular must, of course, be reasonably exercised.

I am further of the opinion that upon such determination and the passage of such resolution, the board of education should obtain bids from all banks located in the territory so designated by them. This may be done by advertisement and by sending notices to all such banks. It would seem clear from the above quoted provisions of the General Code, and I am of the opinion, that the legislature intended such deposit of funds to be made only after the fullest of competition between the banks "conveniently located" as to the school district, the funds of which are to be deposited, and, therefore, a board of education could not designate in such resolution particular banks in a certain territory to be "conveniently located" to the exclusion of other banks in the same territory. In other words, all of the proceedings in regard to the depositing of school funds by boards of education must be carried out with the utmost fairness and publicity with the view to obtaining the highest rate of interest possible on such funds.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS — TREASURER OF TOWNSHIP BOARD OF EDUCATION — TOWNSHIP TREASURER.

Refusal of township treasurer to qualify as treasurer of township board of of education constitutes a vacation of both offices.

June 4, 1910.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: — Your letter of May 16th is received in which you ask my opinion upon the following question:

> If a township treasurer qualifies and gives bond as township treasurer and refuses to qualify and give bond as treasurer of the school funds for the reason that the compensation fixed by the township board of education is not satisfactory to him, has such school board the right to appoint a treasurer of the township school district, or does the fact that the treasurer has refused to qualify as treasurer of the school funds operate as a vacation of the entire office such that trustees of the township can fill?

In reply thereto I beg leave to submit the following opinion:
Section 4763 of the General Code reads in part as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. * * * "

Section 4764 of the General Code reads as follows:

"Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands."

Section 3263 of the General Code reads as follows:

"Forthwith, after the election or appointment of township officers, the township clerk shall make a list of all the officers elected or appointed, stating the offices to which they are respectively chosen or appointed, and add thereto a requisition that they severally appear before him, or some other officer authorized to administer oaths, and take the oath of office, and give bond as provided by law. Such clerk shall forthwith make service of such list and requisition by delivering to each person so elected or appointed a copy thereof, or such list may be delivered to any constable of the township, who shall make service thereof as hereinbefore required. Such list and requisition, with the time and manner of service thereon, shall be returned and filed in the office of the clerk."

Section 3265 of the General Code reads as follows:

"If after receiving notice of his election or appointment, a person elected or appointed to a township office fails to take the oath of office and give bond within the time required by law, he shall be deemed to have declined to accept, and the vacancy shall be filled as in other cases."

Section 3261 of the General Code reads as follows:

"If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

Under the above quoted Section 4763 of the General Code it is made the legal duty of township treasurers to act as treasurers of the school funds of such township school districts, and the performance of the duties of treasurer of the school funds of a township school district is, therefore, an integral and important part of the legal duties of such township treasurers.

By the above quoted Section 4764 of the General Code such township treasurers must, before entering upon their duties as treasurer of the school funds of the township school district, execute a bond with sufficient sureties and in a proper amount as therein specified, to the approval of the board of education of the township school district. As the township treasurer spoken of in your question has never qualified to act as treasurer of the school funds of the township school district within the time required by law, although, as I take it, he

has been notified by virtue of Section 3263, supra, I am of the opinion that, under Section 3265 above quoted, he must be deemed to have declined the office and the vacancy may be filled as provided in Section 3261, supra. A township treasurer can not, in my opinion, accept and perform a part only of the duties enjoined on him by law, and his failure to fully qualify to perform all of the duties of his office creates a vacancy in the whole office and not in regard to the office of treasurer of the township school district alone.

Very truly yours,
U. G. DENMAN,
Attorney General.

REAL ESTATE ASSESSORS—PROVISION REQUIRING THEM TO COMPLETE THEIR WORK BY JULY 1, IS DIRECTORY. ASSESSORS ENTITLED TO COMPENSATION FOR WORK NECESSARILY DONE AFTER SAID DATE.

July 2nd, 1910.

HON. FRANK J. ROCKWELL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23rd, presenting for my opinion thereon a number of questions pertaining to the powers and duties of the real estate assessors and boards of assessors.

The conditions which you describe in your letter are, I am satisfied, quite general throughout the state, and for the sake of convenience I shall consider not only the questions raised by you, but also such others as may occur to me as possible under different sets of circumstances. Also, I shall take the liberty of discussing certain general principles which seem to me to have some bearing upon the various questions asked by you before attempting to answer them in detail.

With this end in view I shall assume a typical case, preferring so to do than to confine myself to the exact facts stated in your letter:

It being the second day of July, 1910, a certain real estate assessor or board of assessors has not completed the work of valuing the real property in the district; the returns of the assessor or assessors have not been compiled, and cannot be completed and filed with the county auditor on the first Monday of July.

Query: 1. May the assessor himself or the board itself complete the work of valuation?

2. Assuming an affirmative answer to the first question, is the assessor or are the members of the board of assessors entitled to compensation for such work?

The multitude of questions of this general type which have arisen throughout the state concern the construction and application of the so-called Quadrennial Appraisement Act, 100 O. L. 81, and particularly section 5 thereof, now section 5547 General Code, which is as follows:

> "Each assessor of real estate shall begin the valuation of the real property in his district on or before the fifteenth day of January after his election and shall complete such valuation on or before July first, following."

The fundamental question involved in the numerous particular questions which have been asked is briefly, is the provision as to the time at which the valuation of real property shall be completed directory or mandatory?

The general rules of statutory construction by which directory and mandatory statutes are distinguished, are well settled. I quote some of the authorities:

"The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results * * *. The statutory provisions which may thus be departed from with impunity * * * are usually those *which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act.* Directory provisions are not *intended* by the legislature to be *disregarded;* but where the consequences of not obeying them in every particular *are not prescribed,* the courts must judicially determine them * * *"

Lewis' Sutherland Statutory Construction, Section 610.

"There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words, and there are no negative words, and it relates to the *time* or manner of doing the acts which constitute the chief purpose of the law * * * by an *official person* the provision has been usually treated as directory. Where a statute is affirmative it does not necessarily imply that the * * * time mentioned in it is exclusive, and that the act provided for, if done at a different time * * * will not have effect. Such is the literal implication, it is true; but * * * that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially *that the act shall have effect;* * * *. Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. 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 the failure to obey which the rights of those interested will be not prejudiced, are not commonly to be regarded as mandatory."

Lewis' Sutherland Statutory Construction, Section 611.

"Provisions regulating the duties of public officers and specifying *the time for their performance* are, in that regard, generally *directory.* Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases *universally* hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer * * *"

Lewis, Statutory Construction, Section 612, and cases cited, particularly James v. West, 67 O. S. 28.

"Statutory prescriptions in regard to the time * * * of proceeding by public functionaries are generally directory, as they

are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity and despatch in the conduct of public business."

26 American & English Ency. of Law, 689, and cases cited, including Davidson v. Kuhn, 1 Disney, 405.

See —

Stem vs. Cincinnati, 6 N. P. 15,
In re Arnold, 8 N. P. 112,
Hubbell vs. Renick, 1 O. S. 171,
State vs. Defiance County, 7 N. P. 239,
State vs. Covington, 29 O. S. 117,
State vs. Kiesewetter, 45 O. S. 254, 260,
Gates vs. Beckwith, 2 O. D. Reprint, 394,

Quoting,

Cooley on Constitutional Limitations, section 93,
Maxwell on the Interpretation of Statutes, Sec. 452.

In the case last above cited it is quite aptly said (page 260):

"Whether a provision imperative in its terms should be treated as directory or as mandatory, has been held to be a matter of expediency * * * it may be said that if no advantage would be lost or right discharged, or benefit sacrificed, either to the public, or to an individual, by such a holding, the provision might be regarded as directory. Or, if less injury would result by disregarding than by enforcing the provision, according to the law, then it could with propriety be treated as directory merely." per Spear, J.

These quotations embody several different statements of the same rule, viz., Where an officer is charged with the performance of a public duty and commanded to complete the discharge of it by a time certain, a court will inquire,

1. As to whether the completion of the official act in case the officer fails to perform it within the time limited, is provided for by law, and

2. In the event that no such provision of law is found, as to which is the paramount intent of the general assembly, the performance of the duty at all events, or its completion within the specified time. If the court finds that the law does provide for the completion of the official act in case the officer designated to perform it fails to do so within the prescribed time, or if it reaches the conclusion that the public interest requires the provision as to time to be observed at all events regardless of the completion of the official act, then, and in either event, the court will hold the provision as to time mandatory. If, however, the opposite answers are returned to these two questions, the provision will be regarded as directory.

There is also a rule that the general assembly must be presumed to have have intended to safeguard the interest of taxpayers first of all.

"What the law requires for the protection of the taxpayer * * * is mandatory, and can not be regarded as directory merely."

Lewis' Sutherland Statutory Construction, section 628, and cases cited.

To anticipate slightly, the application of this rule to the case at hand would appear to be somewhat difficult at first glance, inasmuch as a careful

reading of the whole act known as the quadrennial appraisement law leads to the conclusion that the requirement that all land be appraised quadrennially by assessors elected in a certain way is for the protection of taxpayers, and, likewise, the above quoted provisions as to the time within which the work of valuation shall be completed is for the benefit of taxpayers.

Perhaps a more exact statement of the rule applicable to the statute is found in 26 American & English Ency. of Law, page 620, as follows:

> "Provisions in regard to the assessment and collection of taxes, and the measures preliminary thereto, which are intended for the protection of the taxpayer, to insure an equality of taxation and to prevent a sacrifice of his property, are mandatory; while, on the other hand, those intended simply for the guidance of the officers and to promote the efficiency of their work are directory."
>
> Citing State vs. Harris, supra,
> Welker vs. Potter, 18 O. S. 85.

It is apparent that in order to submit section 5547, General Code, to the tests suggested by the rules above stated it will be necessary, at least, to examine all of what is known as the quadrennial appraisement act of 1909. Upon such examination it will be found to be a part of a general scheme of taxation, indeed but a part of a general scheme of tax valuation, and that all related statutes must likewise be examined before a conclusion can properly be reached.

I deem it unnecessary to quote the provisions of the quadrennial appraisement act which govern the election of real estate assessors and the organization of city boards of such assessors, such as are embodied in sections 1. 2 and 3 of the act in 100 O. L. 81, excepting that provision of section 1 which reads as follows:

> "Such real estate assessors when so elected as aforesaid, shall within and for their respective districts have all the power and perform all the duties heretofore conferred upon or required of the decennial assessors of real estate elected under any and all laws now in force pertaining to such assessors."

In connection with this provision, those of section 10 of the act, now section 5579 General Code, are of interest, viz.:

> "All of the provisions of the statutes of the State of Ohio are hereby repealed in so far as they conflict with or are inconsistent with the provisions of this act, *and not otherwise.* All the powers and duties conferred by statute upon county auditors, the state auditor, county boards of equalization, boards of review, boards of review of municipalities, state boards of equalization and election boards, relating to decennial and other equalization of real property, are hereby made applicable and extended to quadrennial appraisements of real estate."

I quote these provisions not only because portions of them have been properly omitted from the General Code, as executed law, but also and more particularly because they clearly indicate the intention of the general assembly to effect, by means of the quadrennial appraisement act, nothing more or less than a change in the times and intervals at which real property shall be appraised, and

that existing statutes should, as far as possible, be harmonized with and fitted into the provisions of that act.

Section 4 of the original act, now section 5548 General Code, provides for the inauguration of the work of valuation and is unimportant in the present connection. Section 6 provides for the compensation of assessors. Consideration thereof may properly be deferred until later in this opinion.

Section 7 of the original act, now section 5545 General Code, as amended January 31, 1910, contains the following significant provision:

> "If a board of real estate assessors in a city deems it necessary to enable it, within the time herein prescribed, to complete the proper listing and valuation of the real property within such city, it may employ a chief clerk and appoint such expert assistants as it may deem necessary, * * *"

It will be seen by this provision, which is included in the last amendment of the general assembly that that body has emphasized its command that the work of *listing and valuation* be completed by the first day of July. In one view of the case this cause might be deemed to be a legislative construction of the law as mandatory. Such a view, however, in my judgment, is superficial. It does not conform to any of the tests suggested by the rules of statutory construction as above defined. To put it in another way, the general assembly might declare most solemnly that the statute was intended to be mandatory, and yet, under the rules, which courts, from the very necessities of cases, have laid down, such a statute might well be held to be directory merely. I am, therefore, of the opinion that section 7 as amended has no bearing whatever upon the question as to whether section 5 of the quadrennial appraisement act is directory or mandatory.

Section 8 of the quadrennial appraisement act, now section 5546 General Code, as amended January 31, 1910, provides that,

> "In cities such board of real estate assessors shall cause to be printed, in pamphlet form, a list showing all the real estate owners * * * and *valuation* made by them of each parcel of real estate, and cause a copy of the same to be mailed to each owner of real estate in the ward. * * * The expense of preparing, printing and circulating such pamphlets in cities, shall be paid out of the county treasury upon the order of the board of assessors * * *"

I can not escape the conclusion that these notices can not be sent out until the valuation of all the property is completed. Hence the direction or mandate of section 5 of the Act, now section 5547 General Code, whichever the provision of time may be, might be complied with, and yet a city board would have official duties to perform after the first of July, and would have to continue to exist as an official board for the purpose of drawing the order on the auditor provided for in said section 8.

Section 9 of the Act, as amended January 31, 1910, now section 3366 General Code, contains specific authority for the appointment, with the approval of the county auditor, of such assistants as may be necessary in his judgment

> "to enable him to complete, within the time prescribed by law, the proper listing and valuation of the real estate therein."

So far as this provision is concerned it is almost identical with that of section 7, and the comments heretofore made with respect to the effect of the latter section

apply as well to this provision of section 9. The very last clause of said amended section 9, now section 3366 General Code, contains a remarkable provision, viz.:

> "In townships and villages, the county (commissioners and county auditor) and in cities, the mayor, president of council and county auditor, shall determine and limit, between the dates provided, the time necessary for such assessor or board of assessors to perform the duties required of them by law."

I quote this section at this time, not because I believe it has any direct bearing upon the construction of section 5, but simply so that it may be taken into account in connection therewith. As a matter of fact, I believe that it is to be read in connection with other provisions *respecting the fixing of the compensation* of real estate assessors. I shall allude further to this provision in discussing the question as to whether such assessors are entitled to any compensation for services performed after July 1, 1910. So far as it affects the meaning of section 5 of the act, this provision merely serves to emphasize the legislative command and intent that the work of the assessors be completed by July 1st. Inasmuch, however, as it does not answer any of the questions above suggested as tests for the determination of the directory or mandatory nature of the statute, it is not conclusive in that respect, and is to be placed in the same category with the provision of section 7, and the other provision of section 9 already quoted.

The provision last above quoted is interesting in one respect, viz.: It apparently assumes that all the services of real estate assessors are those rendered under the quadrennial appraisement act. As already stated, this assumption is erroneous. There are other duties of real estate assessors not prescribed by the quadrennial appraisement act, and a consideration of which may be of service in reaching a conclusion upon the main question submitted by you. Thus section 5555 General Code, being Revised Statute 2790, provides that,

> "The assessor shall * * * before he makes his returns to the county auditor * * * deliver to the owner or agent of any tract or lot in his district, by mail or otherwise * * * a true and certified copy of the valuation of each tract or lot, also of any building or buildings thereon, so valued by him * * *"

This duty is in adidtion to that of sending out the pamphlet list provided for by section 5545, General Code, and *it is a duty that must be performed after the work of valuation has been completed and before the returns are made.* Thus, it is a duty which must and can only be performed after July first, if the work of valuation referred to in Section 5547 is not completed until that date.

Section 5565, General Code, which may be inconsistent with the amendment of Section 9 of the quadrennial appraisement act passed January 31, 1910, now Section 5546, General Code, and above quoted, (a question which it is not necessary here to consider) provides as follows:

> "An assessor who deems it necessary to enable him to complete, *within the time prescribed*, the listing and valuation of the property * * * of his district, * * * may appoint a qualified citizen * * * as an assistant."

I quote this section because it was in force for many years before the quadrennial appraisement law was enacted. It shows that the general assembly

intended that a (then) decennial appraiser should complete his work by a certain time. This provision is exactly similar to those of Sections 7 and 9 of the quadrennial appraisement act, and if the courts have given a meaning or an effect to this provision of former Section 2794 R. S., the same is valuable as a precedent in determining the effect of those provisions.

Section 5569, General Code, formerly Section 2798 Revised Statutes, provides that:

> "Each assessor, on or before *the first Monday in July* * * * every four years * * * shall make and deliver to the auditor of the county a return * * * of the amount, description and value of the real property subject to be listed for taxation in his district. * * * "

This is the provision which formerly contained the expression of the legislative intent as to the time when the work of valuation, etc., of real property should be completed. It will be observed that the language is not as emphatic as that of Section 5 of the quadrennial appraisement act, and yet I think it means substantially the same thing, viz,—that the assessor shall complete the work of valuation by a certain date.

At any rate, whatever conclusions may be drawn from a comparison of these two section, it is clear that the assessors, under existing laws, have, at least, until the first Monday in July, which, in most cases, will be after the first day of July, to complete their books of returns. Here again we have duties of the assessor or boards of assessors as such which may lawfully be discharged after the first day of July.

Section 5573, General Code provides that:

> "On careful examination of the returns of an assessor, if the county auditor discovers that any tract of land or any lot or part of either, has been omitted, he shall add it to the list of real property, with the name of the owner, and forthwith shall notify the proper assessor of such omission. Such assessor shall forthwith ascertain and return the value of such tract or lot, or part thereof, and in case of his inability or neglect, the auditor may ascertain the value thereof and place it opposite such property."

This section, formerly Section 2802 R. S., is of great importance in the determination of the questions now under consideration. In the first place it indicates clearly that the assessors and boards of assessors as such, are liable to be called upon in their official capacity by the auditor, at any time during his possession of the assessors' returns, which possession lists, at least, until the third Monday of July, on which date the so-called "decennial county board of equalization" is required by law to convene, before which board the auditor is required to lay the returns made by the district assessors. Sections 5594 and 5598, General Code.

In fact enough has been said, it seems to me, to demonstrate, beyond all reasonable doubt, that the real estate assessors and boards of assessors are officers whose terms of office extend under General Code, Section 8, formerly Revised Statutes, Section 8, until their successors are elected or appointed and qualified according to law, and that they are likely to be, and, in the very nature of the case, are almost certain to be called upon to perform official duties after the first day of July of the year in which they make the valuations of real estate. This disposes of any possible contention that an assessor or board of assessors

has no legal existence as such after July 1st, and equally well of the possible contention that no compensation may lawfully be paid to assessors for any kind of work performed after July 1st, although it is anticipating somewhat to make the latter statement.

Section 5573 has another bearing upon the question. If it be determined that the power of the county auditor thereunder is sufficiently broad to enable him, in case the work of valuation is not completed by July 1st, to complete it himself, then the first test embodied in the rule of statutory construction, above defined, is satisfied and the statute in question is mandatory; that is to say, if the general assembly intended that, as a consequence of the failure of the assessors to complete the work of valuation on or before July 1st, the county auditor should take the work up where they leave it and complete it for them, they, the assessors, having nothing further to do with it, then Section 5 of the quadrennial appraisement act, Section 5547 General Code above quoted, is mandatory, and the power of the assessors and boards of assessors to value real estate ceases on July 1st.

A careful examination of the terms of Section 5573, however, will disclose that the auditor has no such power thereunder to complete the work of the assessors. In the first place, he can act only "on careful examination of the returns of assessor" and if no returns have been made he has no power at all. In the second place, he has no power himself to value real estate even if the returns have been made, unless the proper assessor or board of assessors, upon being requested by him, fails or neglects to make the valuation. It is clear, in other words, that this section, far from implying that the power of the assessor terminates at any given time, and that the county auditor then steps into his shoes, so to speak, really does, indicate clearly that the assessor continues in office with power to value real estate, at least upon the command of the county auditor, after July 1st.

It will be found by examination of Section 5569, from which a short quotation is made herein, that the returns required to be made by the assessors must contain valuations of all the separate tracts of real estate in their districts. A book or document not containing what, in the judgment of the assessors, is a valuation of all the separate tracts in their districts, is not a return. On reading the two sections, 5569 and 5573 together, and for all the foregoing reasons, I am of the opinion that the county auditor is not authorized to demand the incompleted results of the labor of an assessor or a board of assessors on the first Monday in July or at any particular date, so long as the assessor, or assessors, continue able and willing to perform his or their duties, and to record such incomplete work as the "return" of such assessors and then, under Section 5573, himself to complete the work of valuation and return.

Section 5573, in other words, does not "define the consequences" of noncompliance with Section 5 of the quadrennial appraisement act within the meaning of the rule of statutory construction above outlined.

I have carefully examined the General Code and find therein no provision for completing the work of valuation of real property in case the assessors fail to complete the same by the first of July.

Of the laws passed by the last general assembly other than the amendment to the quadrennial appraisement act to which reference has already been made, I know of but one, namely, the so-called "Langdon Law" which deals even remotely with the valuation of real estate. This law being the act of May 10, 1910, creates a state tax commission to which is given very broad supervisory power over the collection of state revenues and the administration of the machinery of taxation generally. I have examined this act carefully and find the following the only provision worthy of consideration in this connection:

"Sections 81. * * * It (the tax commission of Ohio) shall see that all laws concerning the valuation and assessment of all classes of property, and the collection of taxes thereon, are faithfully obeyed. It shall issue such orders and instructions to the different taxing officers as will carry into effect the provisions of law relating to taxation and shall enforce the same agreeably to the provisions of this act * * *

"It shall order a re-assessment of the real or personal property in any taxation district, when, in the judgment of said commission, such property has not been assessed in compliance with the law. When a re-appraisement is ordered in any taxing district the commission shall appoint an appraiser or board of appraisers who shall forthwith re-assess such property in such taxing district, and who shall have all the powers, shall perform all the duties and shall receive the same compensation from the same sources as provided by law for assessors of real * * * property. It shall require county auditors to place upon the tax duplicate any property which may be found to have, for any reason, escaped assessment and taxation. * * *"

Broad as this power is it extends, as will be observed, only to the "re-assessment" of property, which I presume we may infer means re-valuation of property for purposes of taxation. It can not complete work which is uncompleted; it may only begin all over again. The power to order the auditor to place upon the tax duplicate any property found to have been omitted, can not be invoked, in my judgment, to the support of the view that section 5 of the quadrennial appraisement act was mandatory, for two reasons:

1st. The duplicate itself is made up of the returns filed by the assessors, and the power to correct the duplicate would not seem to exist at all until the returns are filed.

2nd. The Act of 1910 is a separate and independent act, general in its nature, and evidently not designed to amend the quadrennial appraisement act. Therefore, the meaning of the latter act is to be determined independently of the tax commission act, unless the latter clearly appears to have effected an implied amendment of the former. Such implied amendments are not favored.

In fact, I have not found in the so-called quadrennial appraisement act itself, or in any of the related statutes in force previously to its enactment, or which have been subsequently passed, any machinery for carrying on and completing the work of the valuation of real estate by any authority other than the quadrennial appraisers after July 1st in the assessment years. Furthermore, I have not found in any of the laws which I have examined any definition of the consequences of the failure of the assessors to complete the appraisement on that date. Accordingly, it will be seen that by the first of the two tests hereinbefore laid down, section 5 of the quadrennial appraisement act must be regarded as directory.

The second test above suggested was, in short, it being ascertained that no consequences of failure to perform an official act within the time certain limited by statute are provided by law, which, as between the performance of the act and the observance of the time limitation, is to be deemed of prime importance within the legislative intent? This test, it seems to me, is very easily applied to the law under question, and the answer to this question is almost apparent at first glance. I do not think it can be disputed that the intent of the law is that real property shall be appraised and valued for taxation every four years. The public welfare demands that this be done. The con-

siderations supporting this necessity are far more weighty than those underlying the requirement that the work be done on or before a certain date. In other words, it being certain on this date, namely, July 2, 1910, that the quadrennial appraisement of this year, if completed at all in many of the taxing districts of the state, must be completed hereafter in spite of the command of the statute that real estate assessors shall "complete such valuation on or before July 1st," there is no escape from the conclusion that the work must be finished by the assessors.

I am, therefore, of the opinion that the above quoted provision is merely directory and that it is not only the power but the *duty* of such assessors and boards of assessors as have not completed their work to continue the same until it is finished.

I have gone thus thoroughly into the rules of law and the statutes to which they must be applied in the solution of this question because the section giving rise to the question is a new one which has not been judicially construed. As a matter of fact, I see no difference in effect between the mandate of section 5547 and that of section 5569 above quoted, which requires each assessor "on or before the first Monday of July * * *" every four years to deliver his returns to the county auditor. This section has been judicially construed, and the decision in the case in which such construction was made is, in my mind, decisive of the question thus far considered and answered. I quote from it at this time, not only because it epitomizes all that I have endeavored to state as leading to the conclusion already reached, but also because it fittingly introduces a discussion of the remaining question, viz., that as to the right of the assessors to compensation for services in valuing real property after July first.

The case referred to is that of Stormer vs. The Commissioners of Lucas County, Reported 8 N. P., 110. In the opinion per Barber, J. will be found the following:

> "Jerome Stormer was the decennial appraiser of real estate of the sixth ward of Toledo, Ohio, for 1900. He did not make his return on or before the first Monday of July, 1900 * * *. He was unable to complete his task of appraising until August 8th. He presented his bill for the thirty-one days' work rendered after the first Monday in July to the commissioners of this county. His claim was disallowed. He brings this appeal. The * * * agreed statement of facts * * * shows that Stormer * * * and his assistant wasted no time; but, with all their diligence * * * could not complete the appraisement and valuation of the real estate in the sixth ward until August 8th, 1900.
>
> " * * * The only legal question is, can Stormer recover his pay therefor?
>
> "Only one answer is possible. The law entitles him to the payment of his bill upon the agreed facts. The law is expressed. Section 2795, as amended last winter, provides that,
>
> > 'Such district assessor shall be entitled to receive the sum of four dollars for each day necessarily employed in the performance of his duties to be paid out of the county treasury.'
>
> "The agreed facts say that he was necessarily employed these thirty-one days. There is no statutory provision anywhere to be found

prohibiting payment, or that in any manner modifies this express provision."

"Section 2798, the only provision relied upon as a defense, provides that the assessor shall return to the auditor on or before the first Monday of July *every piece of property in his ward.* * * * It is agreed in this case that this was an impossibility.

"How could the assessor have made a return of the value of every piece of property, if the time was too short for its physical accomplishment? It is argued that he might have made return of what he had done and showed the auditor what he had not done. This is not a compliance with the law * * *

"All enactments imposing duties impossible of performance within a given time are directory; such statutes are understood as dispensing with the performance of what is prescribed, when performance is impossible, for the law in its most positive injunctions is understood to disclaim all intention of compelling impossibilities. * * *

"Under section 2798 the essential thing is the proper valuation of the property according to law. This is mandatory, and the assessor can be made to perform his duty. As to time, it must be held to be directory. Otherwise, if the time be too short to perform the mandatory part of it, the assessor would have to work a miracle to keep out of jail and get his pay. If the assessor can not perform his imperative duty, under section 2798, within the time limit, he must still perform it as soon as he possibly can. When he has performed his imperative duty, the laws says he shall have four dollars per day for each day necessarily employed in its performance. * * * *It is not perceived, although so claimed in argument, how the law can be held directory in order to validate the returns of the assessor but mandatory in order to invalidate his per diem.*"

"It was asked where the limit was to be made. If thirty days, why not six months? The law fixes the limit. The assessor is entitled to no pay, except for time necessarily employed." The commissioners have full power to investigate the honesty and merit of every claim. They should do so.

"Negligence, waste of time, or idleness, should not be paid for. They are all perfect defenses * * *"

As above suggested, this decision leads naturally to the consideration of the question of the compensation of the assessors for time during which they are employed after July 1st in the valuation of real property.

Section 3368 General Code provides that,

"The county commissioners of each county shall fix the salary of each township, village and city assessor in such county. Such salary shall be not less than three dollars and fifty cents per day and shall not exceed one hundred and fifty dollars per month for the time necessarily employed in the performance of their duties. Such salary shall be payable monthly from the county treasury *on the allowance thereof by the commissioners* upon the warrant of the county auditor."

Standing alone it will be perceived that this section is almost identical in terms with that considered by the court in the opinion from which quotation is herein made. If there were no other provisions of law the conclusion could be easily reached that the assessors would be entitled to receive pay for work of valuation done after July first. In a word, it is the duty of the assessor to work after July first. Time so consumed is "necessarily employed in the performance of his duties." Therefore, he is entitled to his per diem.

Some difficulty arises, however, by reason of the provision of section 9 of the quadrennial appraisement act, as amended January 31, 1910, now General Code section 3366. For convenience I repeat the quotation:

> "In townships and villages the county (commissioners and county auditor) and in cities, the mayor, president of council and county auditor, shall determine a limit, between the dates provided, the time necessary for such assessor or board of assessors to perform the duties required of them by law."

This is a very strange provision. I do not see that it adds anything to the law as it formerly existed. Tested by the logic of the court in the decision above quoted it appears impossible that any board or officer could possibly *determine in advance* the time which would be necessary for the performance of the duties of another officer or board. Your letter does not state whether action has been taken under this provision to limit the time to be consumed by any of the assessors or board of assessors within your county. For the purpose of this opinion I will assume that proper action has been taken or attempted to be taken under favor of the clause. Furthermore, I shall disregard the defect in the statute arising from the omission of the words "commissioners and county auditor" placed in parenthesis in the quotation above made. If the clause were valid and operative, this omission would probably not be serious as a court would look to the original act to explain the ambiguity in the codified section. In the view I take of this clause, however, neither of these matters is of any importance.

The provision, nevertheless, requires careful analysis. In the first place it appears to be the legislative intent that the determination and limitation to be made under favor of this clause shall be made in advance. This determination is evidently not intended to supplant the power of the commissioners under section 6 of the act, now section 3368 above quoted, to allow claims for compensation of assessors. If that had been the intention section 6 should have been expressly amended. It is a cardinal principle of statutory construction that implied repeals and amendments are not to be favored. Only an implied repeal will support the conclusion that the boards created by amended section 9 are to exercise the functions already vested in the county commissioners by section 6. For this reason alone the other alternative must be taken, and I am, therefore, of the opinion that whatever action is authorized under section 9 must be taken in advance of services rendered or, at least, before the completion of the work (if the appraisers of 1910 began on time, that is to say, on January 15, 1910, the determination in advance under favor of this act of January 31, 1910, could not, of course, have been made as to the time in which such assessors should complete their work).

It will be observed that the authority thus attempted to be delegated to the boards created under favor of section 9, section 3366 General Code, is not to fix the aggregate amount which the assessors shall receive, but to fix the time necessary for the performance of the duty. This is not a maximum or a minimum, simply "the time necessary" for each appraiser to complete his work.

I do not believe that this provision is valid. The legislative intent thus to provide against delays and extravagances on the part of the appraisers is clear. However, I do not believe that it is competent for the general assembly to delegate to any authority whatsoever the power to determine conclusively, either in advance or after the fact, the time necessary to be employed in the performance of any public duty. This is a judicial function, quite beyond the control of the general assembly. The county commissioners, it is true, have authority to allow or disallow claims, but from their decision an appeal may be taken to a court of competent jurisdiction where questions of "necessity" may be properly adjudicated according to the constitution. Again, for the very reason suggested in the decision of Judge Barber the provision is a nullity. Let us assume that the county auditor and the county commissioners have, prior to July 1st, fixed the time which will be necessary for a given township assessor to complete the valuation of the property in his district. The assessor, let us say, employs assistants and diligently endeavors to complete the work within the time so fixed. Nevertheless, he fails to complete it. Can it be said that the determination of the board is conclusive? It is at the best a mere fiction. It must be admitted that the mere dictum of this board can not be determine the time actually necessary for the performance of the assessors' duties. Inasmuch as the compensation of each assessor is not made to depend directly upon the determination of either of these boards, and inasmuch as the plain provision of law is that he shall be entitled to a certain per diem "for the time necessarily employed in the performance of his duties,"I am of the opinion that the fact, and not the arbitrary determination, controls. That is to say, I believe the law to be that each assessor is entitled to his per diem for the work actually done by him,—at least, so far as section 9 of the amended act is concerned. In reaching this conclusion I have, as above indicated, first decided that this clause in section 9 is practically a nullity. I may illustrate the operation of this clause in another way, viz., suppose an assessor actually employs less time than that fixed by the board in the discharge of his duties, is he entitled to pay for all the time determined upon by the board? The question answers itself.

Another reason for rejecting the section under consideration is found in the fact that the two boards created by it have power merely to fix and determine the time necessary "between the dates provided," that is, between January 15 and July 1st. It will be seen at a glance that this provision does not strengthen the law in any particular, and that the decision of the common pleas court of Lucas County is just as applicable in principle to it as it was to section 2798, Revised Statutes, under which it was rendered.

I know of no other provision of the law in any way affectig the matter of compensation of the assessors for services rendered in the valuation of real property in their districts after July 1st. I, therefore, conclude that real estate assessors may receive their per diem compensation for services rendered after July 1st if the same are necessary to the completion of their work.

As suggested by the court, the county treasury is amply protected. If any of these delinquent boards of assessors, or assessors, have not been diligent, the county commissioners now have, and at all times have had, ample authority to disallow their bills for compensation. Furthermore, the limitations of section 7 of the quadrennial appraisement act as amended, to-wit:

> "that the total cost of any quadrennial appraisement in any city shall not exceed the sum of one-twentieth of one per cent. of the total tax duplicate of said city * * * unless such excess shall

> have been authorized by the board of county commissioners and county auditor of the county * * * prior to the incurring of such excess expense * * *"

constitute another safeguard of the public treasury. In short, there is no good reason why real estate assessors should be allowed to prolong the work of valuation by dilatory methods.

Your specific questions are as follows:

> "1. Can the members of the Akron board, or the assessor for the village of Barberton, be paid for work done after July 1st, in case their respective tasks cannot be completed by that time?
>
> "2. Under section 7 of the act providing for quadrennial assessment, as amended February 12, 1910, can their assistants, such as their chief clerk and other clerks, in the case of the city board, be paid out of the county treasury for clerical work done after the 1st of July which could not have been finished before that time?
>
> "3. Under the amendment of same date can the assistants appointed by the auditor for the village assessor be paid for work done after the first of July in finishing what could not have been completed by that date?
>
> "4. In event the members of the city board, or the assessor in the village of Barberton, or either or any of them, refuse to work after July 1st in case no compensation can be obtained by them for work done after that time, how shall the work be completed?
>
> "5. In your opinion would mandamus lie against such officers to compel them to finish their work?
>
> "6. I call your attention to section 5573 of the new General Code, and ask you whether in your opinion the auditor, in case of failure to complete their work on the part of any assessor or board of assessors, could proceed to ascertain the value of any property not returned by any such assessor or board of assessors and place the same on the duplicate under the provisions of said section?
>
> "7. In your opinion would such refusal and failure to complete their work after July 1st predicate criminal action of any sort against such assessors?"

The answer to your first question, as will be apparent from the foregoing discussion, must be in the affirmative.

The answer to your second question is also in the affirmative. I deem it unnecessary to discuss the particular reasons underlying this decision. It seems to me to follow as a matter of course, under the law, that if the assessors themselves can lawfully perform services and be paid for them after July first, all their clerks and assistants in the work of valuation may be retained and paid so long as the limitation fixed by law or the action of the commissioners and the auditor is not exceeded.

Answer to your third question is likewise in the affirmative. I may say, as applicable both to this question and the preceding question, that the mere fact that an assistant is appointed for the purpose of completing the work of valuation by July first, does not make it unlawful for him to be employed after July first. To hold otherwise would result in endless confusion.

Answering your fourth question, such refusal to work on the part of any assessor would create a vacancy in his office, which would have to be filled as provided by law. His successor would then be obliged to complete the work.

In answer to your fifth question I may say that I believe mandamus would lie against assessors to compel them to finish their work.

I have already answered your sixth question.

Your seventh question, in the face of what I have already held, need not be answered. Without quoting and discussing any statutes I may say that I have found none as yet under which criminal action might be successfully predicated against assessors refusing to complete their work after July first.

In conclusion, I beg to point out as to the limitation of Section 9, as amended, an infirmity, mention of which I have hitherto overlooked, viz, — The clause in question provides that the boards therein created shall determine and limit between the dates provided, the time necessary for each real estate assessor or board of real estate assessors to perform the duties required of them under this act. "The duties required" of "real estate assessors" under this act, the Act of 1909, are, by section 1 of that act, "all the duties heretofore conferred upon or required of decennial assessors of real estate elected under the laws pertaining to such assessment." As I have already pointed out there are duties of real estate assessors other than that of completing the valuation before July 1st, and many of these duties, even one of them created by the quadrennial act itself, viz., that of sending the pamphlet lists to property owners, — might, in the strictest view of the law, lawfully be performed after July first. Hence it will be seen that the said provision of Section 9 is meaningless.

In view of some statements heretofore given out from this department as to the construction which should be placed upon the quadrennial appraisement law, or that part of it under discussion in this opinion with reference to the time in which such law commands the completion of quadrennial appraisements, I deem it proper to say at this time that this is the first formal official opinion which has been given upon the subject from this department, and that what was said upon the matter was to the effect that the General Assembly had fixed a time, viz., between January 15 and July 1, within which that body desired the work to be completed, and this department from the general experience in the past has been, and is, of the opinion that such time under the provisions of this law for the employment of assistants should have been sufficient in nearly all, if not all, cases, whether townships, villages or cities. Our advice, therefore, was that the assessors should make every effort to properly complete the work of appraisement within the respective districts within the time prescribed by the General Assembly. However, on making a thorough examination of the quadrennial appraisement law, as it now stands, and the decennial appraisement law preceding it, with a thorough examination of the court decisions and other authorities, I am of the opinion, therefore, for the reasons hereinbefore set out that,

1. The provisions of the law providing that all the real estate in Ohio shall be appraised or valued at this time as a basis for taxation during the coming four years as mandatory, and that such provisions, therefore, of course, are the primary purpose of the law. The other provisions of this act are provisions prescribing the ways and means by which such primary object shall be consummated.

2. That provision of the law fixing the time within which the work shall be done is clearly directory. This does not mean that the assessors were at liberty to disregard this provision and refuse to make an honest effort to complete the work between January 15 and July 1, but since, under the authorities hereinbefore referred to, this provision is directory, then the work of appraisement

must be completed within such time as is actually necessary to do the work and make the appraisement as required by the mandatory provision above mentioned. In other words, it was the duty of the present assessors to complete the appraisement of all the real property within their respective districts in this state within the time prescribed by the General Assembly, viz, between January 15 and July 1, if possible, but if in any case such appraisement has not been completed, then it is the duty of such assessors to finish the work within such additional time as is necessary therefor.

3. It is the duty of the county commissioners to supervise the action of the assessors to the extent of seeing to it that those officers have not purposely delayed the completion thereof.

4. If the work has been faithfully prosecuted, but nevertheless, in any case, is not completed, then such assessors must be paid their compensation for whatever extra time is required to complete the appraisement, and their necessary clerks and other assistants, and employes must also be paid their respective compensations for such extra time.

5. If in any case an assessor, or the board of assessors, as the case may be, have not completed their work of appraisement and returns they may be compelled to do so under proper court proceedings in mandamus, but in my opinion if there should be any such refusal that would work an abandonment of the office, and there would be a vacancy, and such vacancy should be at once filled by the proper authority as prescribed in section 3369 of the General Code, and the work of completing the appraisement for the particular district should then be carried on by the new assessor or board of assessors as the case may be.

6. It is not only within the power, but it is the duty of the county commissioners, in determining compensation for this extra time employed, to take into consideration the fact whether the work has been diligently or otherwise prosecuted.

Each and all of the above conclusions are established in the case of Stormer v. Commissioners above cited on page 19 of this opinion, 8 N. P. old series, page 110.

Very truly yours,

U. G. DENMAN,

Attorney General.

PROSECUTING ATTORNEY—COUNTY DEPOSITARIES—BONDS OF—"PRO RATA CLAUSE."

County commissioners may not accept bonds from county depositaries which contain "pro rata clauses."

October 31st, 1910.

MR. LEWIS E. MALLOW, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter of October 27th is received in which you request my opinion upon the following statement of facts:

> A bank was created a county depositary to the extent of three hundred thousand dollars, and it furnishes an undertaking or three separate undertakings with three separate surety companies, each company furnishing a bond in the sum of one hundred thousand dollars. These bonds contain what is known as a "pro rata" clause limiting the liability of the surety in case of default on the part of the bank

to such portion of the total loss thereby sustained by the county as the penalty of the bond shall bear to the total amount of undertakings executed by the depositary to the acceptance of the county commissioners, and not to exceed the penalty of the bond.

Is such a bond "a good and sufficient undertaking" within the meaning of section 2722 of the General Code?

In reply thereto I beg leave to submit the following opinion:

Section 2722 of the General Code reads as follows:

> "No award shall be binding on the county nor shall money of the county be deposited thereunder until the hypothecation of the securities hereinafter provided, or until there is executed by the bank or banks or trust companies so selected and accepted a good and sufficient undertaking, payable to the county, in such sum as the commissioners direct, but not less than the sum that shall be deposited in such depositary or depositaries at any one time."

It seems clear to me that bonds containing a "pro rata" clause such as you give in your statement of facts are not "good and sufficient undertakings" within the meaning of section 2722. As suggested in your letter, in case of default by the depositary, say to the extent of two hundred thousand ($200,000.) dollars, and all of the surety companies who were sureties on the bonds of the depositary remaining solvent and financially able to respond, no trouble would arise, but, in the event that one of such surety companies should become insolvent, then under the "pro rata" clauses in the bonds entered into by the other surety companies, the county would be the loser to the extent of one-third of the whole amount in default by the bank. On the other hand, had each surety company in such case been severally liable for the full amount of the deposit, the insolvency of one of them would not result in loss to the county. The county commissioners, of course, should not be concerned with any arrangement which such surety companies might enter into fixing their liability on such bonds as between themselves, but I am clearly of the opinion that they should not approve a bond containing a clause such as the one cited in your statement of facts, which, in the event of certain contingencies, by no means impossible or improbable, would relieve the surety companies of a part of their liability, and thus cause loss to the county. Bonds containing such clauses, in my opinion, do not comply with the evident intent which the legislature had in framing the county depositary act which was to absolutely secure the county from all possibility of loss due to default by a bank in which county funds had been deposited under that act, and, I am, therefore, of the opinion that such bonds are not "good and sufficient undertakings" within the meaning of section 2722 of the General Code.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXATION — INTANGIBLE PROPERTY — WHERE LISTED UNDER CERTAIN FACTS.

August 6th, 1910.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 30th, enclosing for my opinion thereon the following statement of facts and questions:

> "On March 1st, 1909, L and L moved from a township in this county to the city. They were brother and sister and both single. They rented a house in this city. They both owned farms in the township from which they moved. The sister died last January and the brother rented another house and has a house-keeper, keeping house for him. He sleeps in the rented house in this city. Last year the intangible property was listed in the township where they resided before moving to the city. The same was done this year by the brother. At the time of removing from the farm to the city both retained rooms in the house on the farm which they had furnished but neither slept in the rooms so retained. They would go to the farm frequently and stay during the day returning to the city in the evening. The brother claimed that he came to the city only temporary and intended to return to the farm to live. He always voted in the township from which he came and claimed that as his place of residence, and is willing to make affidavit to that effect.
>
> "The board of review claims that his intangible property should be listed in the city.
>
> "What do you consider the domicil of the brother and where should the intangible property be listed? Or what do you consider the situs of his intangible property?"

This inquiry invites consideration of section 5671 General Code which, after requiring certain kinds of property to be listed in certain ways provides:

> "All other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon *resides* at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed."

It is apparent at first glance that this section does not in any way modify the rule of common law that the situs of the intangible property is determined by that of the owner.

> Bradley v. Bower, 36 O. S. 28,
> Grant v. Jones, 39 O. S. 506,
> Cooley on Taxation page 269.

Your inquiry, however, seems to raise the question as to whether the word "resides" as used in the above quoted section refers to the domicil of the taxpayer or to the place of his abode. The word is capable of either meaning. See Am. & Eng. Ency. of Law under the headings "residence" and "taxation." It is necessary, therefore, if possible, to ascertain by the principles of statutory construction which meaning is to be given to it in this section. Before entering

upon such an investigation, however, it is well to define the two possible meanings of the word. "Residence" in the sense of domicil is closely analogous to, if not synonymous with "legal residence." Every individual has a "domicil." It is that place which the individual regards as home, and to which when absent therefrom he has the intention to return. This *intention* is the essential feature of domicil. Residence must have existence at one time in order to create domicil, but domicil is not perfect without intent. See Bouviers' Law Dictionary.

On the other hand, "residence" in the sense of place of actual abode means simply the place where the individual dwells for a considerable interval of time in a fixed and permanent manner regardless of the intention of the individual. See Bouviers' Law Dictionary.

Without at this time fully considering the facts submitted by you, it appears that the person mentioned in your statement has his place of actual abode in the city of Circleville; so that if this is the sense in which the statute employs the term "residence" his intangible property should be returned for taxation therein.

On the other hand, your statement of facts, at least suggests the possibility that the person therein mentioned may have his *domicil* in the out-lying township, and if domicil is meant by the statute, then his intangible property must be returned for taxation in such township.

Upon investigation of the authorities I am of the opinion that the word "residence" as used in section 5761 means "domicil" as distinguished from "place of actual abode." The leading case is Boreland v. Boston, 132 Mass. 89. The statute under consideration therein provided in effect that "inhabitants" of a municipality on the first day of May should be taxed therein for a given year. The court in its opinion employs the following instructive reasoning:

> "* * 'citizenship,' 'habitancy' and 'residence' are severally words which may in the particular case mean precisely the same as 'domicil,' but very frequently they may have other and inconsistent meanings; and while in one use of language the expressions a change of domicil * * of residence, are necessarily identical or synonymous, in a different use of language they import different ideas * *.
>
> "We cannot construe the statute to mean anything else than 'being domiciled in.' A man need not be a resident any where. He must have a domicil. He cannot abandon, surrender or lose his domicil, until another is acquired * *. It surely was not the purpose of the legislature to allow a man to abandon his home, * * * with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population * * *.
>
> "We think, however, that the sounder and wiser rule is to make taxation depend upon domicil. Perhaps the most important reason for this rule is, that it makes the standard certain. Another reason is, that it is according to the general views and traditions of our people."

Thereupon the court considering various authorities as to the meanings of the various terms discussed by it comes to the following conclusion:

> "Upon the whole, therefore, we can have no doubt that the word 'inhabitant' as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means, 'one domiciled'."

This case is followed by an unbroken line of authority in Massachusetts.

The rule in Indiana is the same. "In the provision of the assessment law * * the word "residing" has reference to a fixed and permanent domicil and not to temporary or transitory residence." Syllabus Culbertson v. Commissioners, 52 Ind. 361. In the opinion page 366 the following language appears:

> "The word used in the third section of the assessment law is 'reside.' In what sense was that word used? The word domicil is not used in our constitution. The words 'inhabitant' and 'resident,' 'reside' and 'resided' are used as synonymous * *. We think that the word 'reside' as used in the third section of the assessment law was intended to convey the idea of a fixed and permanent residence and not a temporary or transitory abode."

Followed in Brookover v. Case (1908) 83 N. E. 524 and in Schmoll v. Schneck (1907) 82 N. E. 805.

A New Hampshire statute used the word "inhabitant" which in Moore v. Wilkins 10 N. H. 452 was held to mean "domicil."

A Vermont statute provided that an owner of personal property should be taxed therefor in the town "where he resides on the first of April."

In Mann v. Clark, 33 Vt. 55 the court assumed the word "residence" to refer to the domicil of the owner.

From the foregoing authorities it seems to me safe to assume that the word "residence" when used in taxation laws means "domicil." If there were no such provision as that found in section 5371 and we were left to the common law for the determination of the situs of intangible property for the purpose of taxation we should find that the same would be the domicil of the owner. This was held to be the law in the state of Kentucky which has no statute defining the situs of such property. Montgomery v. Lebanon, 111 Ky. 646.

Apparent exceptions to a line of authority otherwise unbroken are found in certain states, but upon examination of the statutes therein it will be discovered that terms more definite than those employed in section 5371 are to be found therein. Thus a statute of New York fixes the situs of personal property for the purpose of taxation at the place where the owner's principal business is transacted or where he spends the greater portion of his time. So also the statute of Rhode Island provides that personal property shall be taxed at "the actual place of abode of the owner."

Upon the foregoing authorities I conclude that the latter portion of section 5371 is intended — as indeed it would seem at first glance to be intended — to be *declaratory* of the common law, and that it fixes the situs of intangible property for the purpose of taxation at the *domicil* of the owner. This view is supported by the provision of section 5373 General Code defining *residence in the state* for the purpose of taxation, but being silent as to the definition of residence as among different localities within the state. This statute is clearly remedial, and being silent in one respect must be regarded as evincing the legislative intention to leave the common law in that respect untouched.

Coming now to the consideration of your statement of facts I beg to state that it *seems* therefrom that the domicil of the person in question is in the outlying township. The ultimate question, of course, is as to his intention with respect to the permanency of his residence in the city of Circleville. If, as you state, he is prepared to state under oath that he regards his residence therein as temporary merely, and that he intends to return to a certain place in the township to live, such a statement would be admissible evidence to prove his actual

intention, and would be entitled to some weight. It could be over-thrown of course by the proof of circumstances absolutely negativing such an intention, but I am free to state that no such circumstances are disclosed in the statement of facts. The fact that he rents a house in the city where he sleeps and keeps his clothing and personal effects of an intimate nature establishes his place of abode merely — not his domicil. The Kentucky case above cited is instructive on this point. The first branch of the syllabus therein is as follows:

> "Where a farmer removed his family to a neighboring town in order to have the advantage of the schools there while his children were within the school age, but never voted in town and spent the greater part of his time on the farm, and left a part of his household goods in his dwelling house on the farm, reserving the right to remove his family back to the house at any time, he has not, though he has remained in town for two years, abandoned his domicil in the country, and his personal property * * is not subject to municipal taxation."
>
> Montgomery v. Lebanon, *Supra.*

As above suggested, evidence tending to prove domicil or more strictly speaking, evidence tending to prove the formation of the intention, which determines domicil, is of many possible kinds, and I hesitate to hold categorically either that the person concerning whom you inquire is or is not subject to taxation in the city of Circleville.

As indicating the difficulty of determining domicil in a given case, and as suggesting rules which may be used to the board of review in determining this and other cases, I beg to quote from another and later Kentucky decision, that of Lebanon v. Briggs, 117 Ky. 430. In that case the facts are *almost* identical with those in the Montgomery case, except that in the Briggs case the farmer while he had moved to town for the purpose of affording his family the advantages supposed to be derived from urban residence and while he intended to reside in the city temporarily only, and while also he retained rooms on his farm for the use of himself and family, did not entertain any fixed intention of returning to his or any particular farm. He testified that he intended in the future to make his residence with his family "in the country on some farm. I do not know whether I will make it my farm or not but I am going away from town." The syllabus is as follows:

> "In an action by a city for personal taxes defendant testified that he had left his home in the country, and moved, with his family, to the city where he bought a residence, with no fixed intention of returning to his farm, which he rented on the shares, reserving three rooms in the house for his own use. Held, that he had become a resident of the city and therefore liable to be taxed as such."

In a word, the rule defined by these two cases is that when one moves from the country to the city for a temporary purpose he does not retain his domicil in the country unless he continues to entertain the intention to return from the city to the same place in the country where he has previously lived.

If the facts as you state them constitute all the evidence available for the determination of the question now before the board of review, I am of the opinion that the person concerned therein is not liable for taxation on his intang-

ible property in the city of Circleville. Other facts, if any should be applied to the solution of the principal question in accordance with the principles above laid down.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

IMPROVED ROADS—COUNTY COMMISSIONERS MUST REPAIR.

April 13th, 1910.

HON. D. W. MURPHY, *Prosecuting Attorney, Milford, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 10th, in which you requested my opinion upon the following question:

> "Should township trustees or county commissioners keep the improved roads of a county in repair?"

The repair of improved roads was formerly regulated by Chapter 10, Title 7, Part 1, Revised Statutes, being section 4876, et seq. Section 4889 thereof provided that,

> "Each township in the counties of Belmont, Butler, Carroll, Champaign, Clermont (and a number of other counties) * * * shall be a road district for the care and maintenance of (free turnpikes)."

Section 4896 provided that,

> "*In every other county* the county commissioners are hereby constituted a board of turnpike directors in which the management of all such roads therein shall be exclusively vested."

There were certain miscellaneous provisions in Chapter 11 relating to repairs in case of emergency, but the two sections above quoted, as those *in pari materia* therewith, were intended to provide for the ordinary repair of improved roads.

The supreme court of this state in the case of Thorniley vs. State ex rel Dickey, 81 O. S., decided recently that this scheme of legislation was unconstitutional because the statutes in question were of a general nature and did not have a uniform operation throughout the state. Had it not been for the enactment of the act found in 99 O. L. 360, and consisting of amended section 4919 and supplemental section 4919-1 of the Revised Statutes, this decision of the supreme court would have left the state without any provision for the repair of improved roads.

Section 4919-1 became sections 7422 and succeeding sections of the General Code. In its present form section 7422 provides that,

> "The county commissioners shall cause all necessary repairs to be made for the proper maintenance of all improved roads in the county. For such purpose they may levy a tax upon the grand duplicate * * *"

Section 7423 provides that,

> "The proceeds of such levy * * * shall be * * * in the repair of paved, macadamized, stone and gravel roads, and for no other purpose."

By an examination of the related sections it will be ascertained that they are intended to provide for the ordinary repairs required to be made on improved roads, and that they are uniform in their operation throughout the state

I know of no laws of the state now in force and applicable to the subject of repair of improved roads, other than those included within the chapter of the General Code of which section 7422 is a part.

It is my opinion, therefore, that the county commissioners have the sole power to repair improved roads.

Very truly yours,
U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — SALARY OF — YEAR FOR WHICH PAYABLE.

October 13th, 1910.

HON. EMMETT C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 14th, in which you request my opinion as to the year for which the salaries of the county commissioners shall be paid.

You call my attention to section 3001 of the General Code which provides in effect that the annual compensation of the county commissioners shall be determined by aggregate tax duplicates of the county "on the twentieth day of December of the preceding year," and desire particularly to be advised as to the year for which the salary thus determined is to be paid.

The county commissioners' salary act, so called, now section 3001 of the General Code, is silent with regard to this question. Section 2395 of the General Code, however, provides that the board of county commissioners,

> "shall * * * hold their office for two years commencing on the first Monday of September next after their election."

This department has repeatedly held that salaries are payable as of the official year of the office as determined by the commencement of the term of office, in the absence of any specific provision to the contrary. The county officers' salary law makes the calendar year the official year for the payment of salaries of the auditor, treasurer, and other county officers, excepting the county commissioners, the infirmary directors, prosecuting attorney, and the county surveyor. There being no such provision with regard to the commissioners, I am of the opinion that the salary computed according to the tax duplicate of December 20th is the salary of the county commissioners for the year beginning on the third Monday of September of the succeeding year.

Yours very truly,
U. G. DENMAN,
Attorney General.

VILLAGE—MAYOR, VACANCY IN OFFICE.

When mayor of village resigns president of council succeeds to office regardless of his failure to give bond as required by council.

November 16, 1910.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter enclosing a letter addressed to you by Dr. A. E. Archer, clerk of the village of Lynchburg, in which the following question is submitted:

> "The village mayor having resigned, the president of council fails to give bond; has the village any mayor?"

You request my opinion upon the question thus presented.
Section 4256 of the General Code provides in part that,

> "* * * In case of the death, resignation or removal of the mayor the president pro tem of council shall become the mayor, and serve the unexpired term, and until the successor is elected and qualified."

Section 4669 of the General Code provides in part that,

> "Each officer required by law or ordinance to give bond shall do so before entering upon the duties of the office, *except as otherwise provided in this title* * * * "

Passing by the question as to whether the mayor is "required by law" to give bond, I am of the opinion that the succession to the office of mayor on the part of the president pro tem of the village council in the event of the mayor's death, is automatic under section 4256, and is within the purview of the exception of section 4669 of the General Code. It is evidently the intention of the first of these two sections that there shall at no time be a vacancy in the office of the mayor, but that the president pro tem. of council shall become mayor at the instant at which the death, resignation or removal of his predecessor takes place. The requirement that bond shall be given and approved before an officer enters upon the duties of his office being subject to such exceptions as are "otherwise provided in this title," it follows that the two sections may be harmonized and that section 4256 is to be given effect.

It is my opinion, therefore, that upon the death, resignation or removal of a village mayor the president pro tem. of council immediately becomes mayor, and his failure to qualify by giving bond to the satisfaction of council, does not prevent him from exercising the powers and duties of the office.

Very truly yours,

U. G. DENMAN,
Attorney General.

SQUIRRELS MAY NOT BE KILLED IN CLOSED SEASON WHEN FOUND INJURING CROPS.

November 15, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date in which you request my opinion as to the right of an owner, manager or tenant of premises to kill squirrels found injuring and destroying grain during the closed season under the game laws

Section 1416 General Code provides that:

> "No person shall kill, injure or pursue a squirrel except from the first day of October to the thirtieth day of October, both inclusive."

This section is the last of several successive sections of the code relating to the seasons for killing various birds and animals.

Section 1414, for instance, relates to the season for killing rabbits, while section 1415 applies to raccoons. Both of these sections contain saving clauses preserving the right of the owner to kill in the closed season when the animal is found destroying crops, etc. Apparently the general assembly did not suppose that squirrels were capable of destroying crops.

So far as the strict legal phase of the question is concerned I am of the opinion that under section 1416 General Code, an owner has no legal right to destroy a squirrel found injuring his crops, excepting in the open season.

Very truly yours,

U. G. DENMAN,
Attorney General.

PUBLICATION—NOTICE OF TAX DUPLICATE.

November 15, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date in which you request my opinion as to the proper publication of the notice of the tax duplicate required to be given by the county treasurer under section 2648 of the General Code.

You point out the fact that section 2648 provides simply that such notice "shall be inserted for six consecutive weeks in a newspaper having general circulation in the county." However, section 6252 of the General Code is to be read in connection with section 2648 of the General Code.

Section 6252 provides that,

> "A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, * * * and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. * * * "

The notice provided in section 2648 of the General Code is required to "specify particularly the amount of taxes levied on the duplicate" for the various purposes for which taxes are to be levied, and, in my judgment, is such a notice as is contemplated by section 6252 of the General Code.

From all the foregoing it follows that said notice should be published in two newspapers of opposite politics at the county seat, if such there are.

Very truly yours,

U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS—MANNER OF CLEANING.

August 3rd, 1910.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—You state that there is a joint county ditch located in Westfield Township, Morrow County and Oxford Township, Delaware County, which needs cleaning out and that while Westfield Township elected a ditch supervisor, Oxford Township has not elected one. You ask whether the ditch supervisor of Westfield Township may apportion that part of the ditch located in Westfield Township under the provisions of 98 O. L. 280 and 99 O. L. 237, as now contained in the General Code section 6705 of which was amended by the act approved May 2nd, 1910.

Upon an investigation of the various laws referred to by you, it appears to me that the ditch supervisor of a township such as Westfield Township can proceed with the cleaning out and repairing that part of a county or joint county ditch which is located within his township.

I am therefore of the opinion that the ditch supervisor of Westfield Township may apportion that part of the ditch located in his township.

You state also that one of the land owners whose land would be benefited by the cleaning out of this ditch is insane and now confined in the State Hospital. You ask how the notice provided in section 5 of the act of 98 O. L. 280 now contained in sections 6694 and 6698 of the General Code, may be served upon such insane person.

Such notice shall be served upon the guardian of such insane person and if there is no existing guardian of such person, application should be made for the appointment of such guardian in order that service of such notice may be properly made.

You ask also how new tile are to be provided in the case of county ditches which have been tiled and in which some of the tile have become broken and destroyed so that it is necessary for them to be replaced.

I am of the opinion that, under the provisions of sections 6691, et seq. of the General Code, the replacing of broken tile is a part of "the cleaning and keeping in repair of township and county ditches" and that the new tile to be provided should contain in the apportionment according to benefits to be received from the improvement, which apportionment is made among the property owners to be benefited by the cleaning and the repairing of a ditch.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS — FRANCHISES — AUTHORITY TO GRANT AND PERIOD SAME MAY RUN.

August 2nd, 1910.

MR. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — You state that on September 16th, 1899, the commissioners of your county granted to a certain railway company, in consideration of the sum of $400.00 per year, the right to construct, lay, maintain and operate along, upon and over a certain bridge and the approaches thereto, a double tracked electric railroad, together with all the necessary poles, wires, etc.

You state that the resolution of the county commissioners is silent as to the length of time this grant was to run but does provide that:

> "The right hereby granted shall continue so long as said The Lorain and Cleveland Railroad Company shall well and truly perform all the terms and conditions herein contained by said railway company to be performed."

You state that conditions have changed much since 1899 and you ask whether you have the authority and what procedure should be followed to either oust the company from the use of this bridge or to compel a larger payment of rent.

At the time the county commissioners of your county passed the resolution above mentioned, September 16, 1899, it seems that the statutes provided no specific length of time as the maximum term for a franchise granted by the county, such as the twenty-five year limitation provided for municipal franchises. It may be claimed for this reason that under authority of State ex rel v. Columbus Ry. Co. 1 C. C. N. S. 145 that the county commissioners at that time had the authority to grant a perpetual franchise for an electric railway company. The great weight of the authority, however, is against the right of the county to grant a perpetual franchise, especially in the absence of specific statutory authority setting forth such right without question. A county is but a part or a subdivision of the state government and it is well understood that county commissioners like other local officers have only those powers which are specifically granted to them and those powers necessarily implied from their specific powers. It is understood also as set forth in above case of State ex rel v. Railway Company that a franchise is

> "subject to be determined by the general assembly under section 2 of Article I, or under sections 1 and 2 of Article XIII of the constitution."

It is said in the case of Gas Light and Coke Company v. Columbus, 50 O. S. 65:

"The council cannot, in the exercise of legislative powers, bind its successors, unless authority from the state so to do so is clearly indicated * * *. * * * The council has not the authority to sign away, nor bargain away, the right of the city to perform its public duty, especially as to a primary use of its street nor to abridge the capacity of its successors to discharge those duties unless some express provision of statute is found to that effect." * * * An ordinance to grant an exclusive right, or a perpetual right to occupy a particular part of the street, would be an attempt to bind succeeding councils as to their exercise of legislative powers, and would, for reasons stated, be ineffectual."

Even if the county commissioners had the right to grant a perpetual franchise it does not necessarily follow that they did grant or attempt to grant such a franchise for such a length of time. The language of the resolution must speak for itself; in construing such language we must remember that "public grants of franchises, powers, rights, privileges or property in which the government has an interest must be construed in favor of the grantor and strictly against the grantee; whatever is not clearly, plainly and unequivocally granted is withheld; nothing passes by implication except it be necessary to carry into effect the obvious intent of the grant,"

Joyce on Franchises, sec. 254.

and that contracts for an indefinite period are not favored.

Cinti. Gas Light and Coke Co. v. Evondale, 43 O. S., 257.

From the information furnished me the franchises granted to the Railway Company in your case does not purport to be perpetual, but it is set out that it shall continue

> "so long as the * * * company shall well and truly perform all the terms and conditions herein contained by said railway company to be performed."

It appears from this language that the company may terminate the franchise at any time by failure or refusal to pay the rental of four hundred dollars per year; such a condition especially makes the length of time uncertain and indefinite. In addition to this, if the county is without power to terminate the franchise so long as the four hundred dollars per annum rental is paid there is lack of mutuality in the agreement between the county and the company for the reason that the franchises may be terminated arbitrarily at any time by the company but cannot be terminated by the county at its pleasure. Upon this question the language of our supreme court in a recent case of the East Ohio Gas Company v. The City of Akron, 81 O. S. 33 at page 52 seems especially applicable.

> "Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion. This court laid it down as the law, in *Railroad Company v. Defiance,* 52 Ohio St., 262, 307, that: 'every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restriction of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be con-

strued strictly against the grantee, and liberally in favor of the public, and *never extended beyond its express terms* when not indispensable to give effect to the grant.' The doctrine, as well as the judgment, in this case was affirmed in *Wabash R. R. Co. v. Defiance*, 167 U. S., 88. The same rule of construction was approved and followed in *Blair v. Chicago*, 201 U. S., 400, *and in Cleveland Electric Ry. Co. v. Cleveland*, 204, U. S., 116.

It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

It appears from the above and from the information presented by you that such franchise of September 16, 1899 "can continue only so long as both parties are consenting thereto" and that the county may, if it so desires, terminate such franchise by action on the part of its county commissioners.

Should the county commissioners take such action and should the company refuse to abide by such action the matter could be tested in the courts, either by quo warranto by the prosecuting attorney or by a suit in injunction brought at the instance of the county commissioners.

The authorities upon the specific questions raised by you are so scarce and the power of county commissioners as to the granting of franchises so little defined by statutes that a test of the questions raised by you in the courts would be of much value.

In stating the above opinion I am taking the view that powers of public officers are to be strictly construed and that grants by the public are to be construed in favor of the public.

Very truly yours,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—METHOD FOR COUNTY AND TOWNSHIP RAISING FUNDS UNDER SEC. 6903 G. C. TO BUILD.

August 19th, 1910.

HON. ELBERT F. BLAKELY, *Prosecuting Attorney, Lake County, Painesville, Ohio.*

DEAR SIR:—You state that your county has determined to pave a highway under the provisions of section 6903, General Code, that the county and a township have agreed under section 6905 of the General Code as to the proportion of the improvement to be paid by each, but that the county and township have no available funds for such improvement. You ask:

1. Whether the county is authorized, under section 6912 of the General Code, to issue bonds for the share assumed by the township.

2. Whether the county is authorized to issue bonds for the share assessed the abutting property.

3. Whether, under section 6912, the payment of the amount of one installment therein mentioned refers only to the installment paid by abutting property, and if so, what authority is given for placing the portion of the township on the tax list.

4. Whether the owners of abutting property may pay their first installment at once without waiting for the regular tax-paying period, and whether,

upon such payment, the commissioners are authorized to proceed with the issuance of bonds.

You also state that under the state highway law the county and a township have each agreed to pay twenty-five per cent of the cost of a state highway. You ask:

5. Whether, under section 1223 of the General Code, the county should issue bonds for fifty per cent of the amount of the improvement, or whether the county and township should each issue bonds for twenty-five per cent of the amount of such improvement.

1. Section 6912 of the General Code provides as follows:

> "The assessment so made shall be certified by the commissioners to the auditor of the county, who shall place it on the tax list against such taxable property, and it shall thereupon become a lien thereon, and be collected in not to exceed ten annual installments as other taxes. The commissioners, after the amount of one installment has been paid, *in anticipation of the collection of the balance of such assessment,* may borrow a sum of money sufficient to pay the residue of the whole of the estimated cost and expense of the improvement, and issue and sell negotiable notes or bonds bearing a rate of interest not to exceed five per cent per annum. In such event said commissioners shall cause the damages to be paid and the improvement to be made forthwith, and may add interest at the rate of not to exceed five per cent per annum to all unpaid installments and collect them together with the assessment."

Upon a reading of the above section and related sections, I am of the opinion that section 6912 authorizes the county to issue bonds only in the amount of the balance of the assessments made upon abutting property owners and that such section does not authorize the county to issue bonds either for the share assumed by the township or for any portion assumed by the county not included in assessments made upon abutting property.

2. I am of the opinion that section 6912 authorizes the county to issue bonds for the share assessed upon abutting property with the exception of the amount included in the first installment of the assessment made upon abutting property.

3. I am of the opinion that under section 6912 the language "the amount of one installment" refers only to the installment to be paid by abutting property. It appēars to me that the county is not given authority for placing the portion of the township upon the tax list, but that the township trustees must make a levy for such purpose and certify the same to the county in the same manner as in the case of other township levies.

Since sections 6956-1 to 6956-15 inclusive, as contained in the act approved May 7, 1910, refers to road improvements which are made.

> "when a majority of the owners of real estate who reside within the county and who own lands *lying and being within one mile* in any direction from either side, end or terminus of the road or part thereof to be laid out, constructed or improved, shall present a petition to the commissioners of any county."

The provisions of such act apply to this specific kind of road improvement and are not general provisions which can, under section 6914 of the General Code,

be made to apply to a road improvement under section 6903 et seq., which latter road improvement is made "on a petition therefor signed by the owners of at least a majority of the *foot frontage* on a county road or part thereof."

4. It is held in Page and Jones in "Taxation by Assessment," section 1085, that:

> "If an assessment is made payable in installments, it has been held that the property owner has an implied right to pay the entire assessment at once in the absence of some express provision in the ordinance forbidding such payment. If the statute specifically so provides, interest may be charged upon such installments and such interest may be made a part of the assessment, at least as long as the property owner has the right to stop the interest by paying the assessment or any installment thereof."

It seems that one reason for requiring the payment of one installment by all of the abutting property prior to the issuing of bonds in anticipation of the collection of the balance of the assessments, it to estop the abutting propery owners from attacking the proceedings for such road improvement and thus to protect and validate the bond issue. This object is accomplished whether the first installment is paid at or before the regular tax-paying period.

I am, therefore, of the opinion that the county commissioners are authorized to proceed with the issuance of bonds as soon as the first installment has been paid by all of the owners of abutting property, if such payment is made prior to the regular tax-paying period.

5. Section 21 of the act of 99 O. L. 308, of which present section 1223 of the General Code is a codification, provides as follows:

> "It shall be lawful for the commissioners of any county or for the trustees of any township to incur indebtedness or to issue bonds at a rate of interest not exceeding four per cent in the manner authorized by law, for the payment of the said county or said township share of the cost of any highway improvement undertaken under the provisions of this act, or any other act in which the state of Ohio pays one-half the cost of construction; provided, further, that for the purpose of carrying out the provisions of this act the county commissioners of any county or the trustees of any township in addition to any limit fixed by law or to any authority under any act now in force giving authority to sell bonds and fix the rate of interest and levy taxes to provide for their payment may, by unanimous vote of the board of county commissioners or of the township trustees, provide for the sale of bonds, fix the rate of interest not exceeding four per cent and levy taxes for the purpose of paying the same."

Such section 1223 of the General Code provides as follows:

> "The commissioners of a county or the trustees of a township shall not incur any indebtedness or issue bonds at a rate of interest to exceed four per cent for the payment of the costs and expenses of a highway under the provisions of this chapter. Such commissioners or trustees, by a unanimous vote, may provide for the sale of bonds, fix the rate of interest not to exceed four per cent and levy taxes for the payment of bonds and interest, which taxes may be in addition to the limit fixed by any state law or authority."

I find no language specifically authorizing the county commissioners to issue bonds for the amount of a road improvement assumed by a township under the state highway law and am of the opinion, from a reading of the above quoted language, that where a county and township have each assumed to pay twenty-five per cent of the cost of a state highway, or in fact any other proportion, the county should issue bonds only for the portion assumed by the county and the township should issue bonds for the portion assumed by the township. The township, therefore, may issue bonds whether it is acting under section 1187 of the General Code, or whether it is joining with the county under other sections of the state highway law in assuming a portion of the cost of a state highway.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ROADS AND HIGHWAYS—METHOD OF WORKING OUT ROAD TAX.

August 23rd, 1910.

HON. E. S. MCNAMEE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—You call my attention to sections 7486, 7487, 7488, 3372, 3373, 5635, 3282, 7562, 7441 and 7442 of the General Code, and ask how much of his road tax a taxpayer may work out under the provisions of section 5649 of the General Code, as amended by the act of April 7, 1910.

Such section 5649 of the General Code, as amended, now provides as follows:

> "Any person charged with a road tax may discharge the same by labor on the public highways, within the proper time, at the rate of one dollar and fifty cents per day, and a ratable allowance per day for any team and implements furnished by any person, under the direction of the superintendent of the proper district, who shall give to such person a certificate specifying the amount of tax so paid, and the district and township wherein such labor was performed, which certificate shall in no case be given for any greater sum than the tax charged against such person; and the county treasurer shall receive all such certificates as money in the discharge of said road tax; provided, that, when the commissioners of any county so direct, the superintendent shall write on the margin of his lists, opposite to the amount charged against all such as may pay the same by money or labor, the word "Paid", and shall return his list on or before the fifth day of September in the year in which levied, to the township clerk, who shall write on the margin of the list sent him by the auditor, opposite to the amount charged against each person who may have paid the same in labor or money, as shown by the return of the superintendent, the word "Paid", and shall forthwith forward the same to the county auditor, who shall charge all such as may remain unpaid, as shown by the township clerk, upon the duplicate of the proper county, and the same shall be collected as other moneys are collected, in the December installment, by the county treasurer. When such road tax is paid in labor, such labor shall

be performed before the first day of September, in the year in which levied. All road taxes collected by the county treasurer shall be paid over to the treasurer of the township or municipal corporation from which the same were collected, and shall be expended on the public roads, and in building and repairing bridges, in the township and municipal corporation from which the taxes were collected, under the direction of the trustees of the proper township, or council of such municipal corporation; and all funds heretofore levied for road purposes, and not expended, shall be expended by the trustees of the township or council of the municipal corporation from which the same were collected, as other taxes collected under the provisions of this title."

Since sections 5646 to 5649, inclusive, of the General Code, are contained under the sub-head "township taxes", it is clear that section 5649 refers only to township road taxes.

In order to understand fully the meaning of such section 5649, it is necessary to go into the past history of such legislation and to investigate especially the meaning which has in the past been attached to the words "any person charged with a road tax", as now found in section 5649 G. C.

Section 8 of the act of April 19, 1877, (74 O. L. 92), provided that:

"Any person charged with a road tax may discharge the same by labor on the public highways within the time designated in this act, at the rate of one dollar and fifty cents per day, etc."

It is difficult to tell from this act just what road tax could be worked out under the meaning of the language "any person charged with a road tax". We find that such section 8, as contained in section 2830 of the Revised Statutes of 1880, contains such words and that section 2829 of the Revised Statutes of 1880, in codifying section 7 of the act of 74 O. L. 92, provided for an additional road tax of one to two mills "which may be discharged in labor as hereinafter provided."

Under the Revised Statutes of 1880, therefore, section 2829 designated the particular tax which might be discharged by labor, and section 2830 described the particular manner in which such road tax might be worked out and the manner in which taxes not discharged by labor should be collected.

Section 2830, as contained in the act of April 12, 1880, (77 O. L. 184), also uses the language:

"Any person charged with a road tax may discharge the same by labor",

and, since section 2829 remained unchanged at that time, such language referred only to the one to two mill levy set out in section 2829.

Section 2829, as contained in the act of March 21, 1887, (84 O. L. 224), provided, as to the township road tax, that in certain counties "one-third of said tax may be discharged in labor as hereinafter provided", and that in other counties a levy of one to two mills "may be discharged in labor as hereinafter provided".

Section 2829, as amended by the act of April 3, 1888, (85 O. L. 145), provided that two mills out of the township road tax "may be discharged in labor as hereinafter provided."

Section 2829, as contained in the act of April 18, 1892, (89 O. L. 371), also provided that two mills out of the township road tax levy "may be discharged in labor as hereinafter provided."

It is seen, therefore, that, from 1880 until the repeal of section 2829 by the act of 98 O. L. 327, the language of section 2830 — "any person charged with a road tax" — referred not to any road tax but to the specific part of the particular road tax set out in section 2829, which part, section 2829 provided, "may be discharged in labor as hereinafter provided".

The act of 98 O. L. 327, which repealed section 2829 R. S., also amended section 2830 so as to read:

> "Any person charged with a road tax shall pay the same in money to the county treasurer in the same manner as other taxes are collected and paid."

This amendment did away with the discharging of township road taxes by labor. The same act provided, in section 1, on page 340, that the township trustees might make a levy for road purposes of "not to exceed four mills on each dollar". Such tax was to be paid direct and no provision was made for discharging any part of it in labor.

Such section 1 of the act of 98 O. L. 327 appears to have been amended by what is styled "Sec. 1" on page 437 of the act of 99 O. L. 436. Such section 1 provides that, in addition to such four mill levy,

> "the township trustees may, at any time, if they deem the same necessary, levy an amount not exceeding one mill, upon each dollar of valuation of the taxable property of the respective townships, for road purposes, *which may be worked out* at the same rates as other work is paid for, of a similar nature."

Section 2830 R. S., as amended in the same act of 99 O. L. 436, provided that:

> "Any person charged with a road tax shall pay the same in money to the county treasurer, etc.,"

but this provision did not prevent the working out of the one mill levy provided for in section 1 and such one mill levy was the only levy at that time which could be discharged in labor.

Such section 1 was carried into sections 7486, 7487 and 7488 of the General Code and section 2830 into section 5649 of the General Code.

Upon the adoption of the General Code, therefore, the four mill levy, provided for in section 7486, must be paid in money and the one mill levy, provided for in section 7488, might be worked out "at the rates other work is paid for, of a similar nature." However, no road tax levy, other than such one mill levy, could be so worked out by labor on the public highways.

The question before us, therefore, is whether section 5649, as amended by the act of April 7, 1910, refers only to such one mill levy when it uses the language "any person charged with a road tax may discharge the same by labor on the public highways," or whether such section 5649 now permits any or all township road taxes to be discharged by labor.

It is impossible to see how such language as section 5649 can be made to apply to all township road taxes. Such an interpretation would clearly interfere with the object of the levy to "purchase suitable stone or gravel," provided for

in section 3282 of the General Code, and might seriously cripple the work of the road superintendent under sections 3372 and 3373 of the General Code.

Since section 5649, as stated above, refers only to township taxes, section 5635 of the General Code, relating to taxes for county road and bridge purposes, is not involved. It is clear, also, that the purpose of the levy provided for in section 7562 for the repair of bridges would be defeated by permitting part of such levy to be worked out by labor. The same is true of the levies provided for in sections 7441 and 7442 for the purpose of "cutting down hills, filling low places, and making repairs that are necessary by reason of any casualty, etc."

In going over the history of legislation upon this subject, I find that the only levies which property owners have been permitted to work out by labor have been levies for the common and ordinary repair of public highways and we are reduced to deciding whether present section 5649 applies only to section 7488 or whether it applies also to the four mill levy provided for in section 7486.

Upon a review of the entire subject, I am of the opinion that section 5649 applies only to the one mill levy of section 7488. Section 2830, so long as it contained a provision for discharging a road tax by labor, never designated what road taxes should be so discharged, but permitted the language "Any person charged with a road tax" to apply only to road taxes which other provisions of the law specifically provided might be discharged by labor. It appears to me, therefore, that the amendment to section 5649 was intended only to designate the manner in which a road tax might be discharged by labor and was not intended to enlarge the number of road taxes which might be discharged by labor. In other words, the amended part of section 5649 now applies only to such sections as 7488, in which the statute specifically sets out that the levy therein provided for may be discharged by labor.

In confining the amended part of section 5649 to the one mill levy of section 7488, I believe we are in line with the policy of this state since the act of 74 O. L. 92, and also that we avoid many inconveniences and inconsistencies which would arise if such amendment were made applicable to any or all other township road levies.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

COUNTY OFFICERS — COMPENSATION OF OUTGOING.

December 20th, 1910.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR: — I have your letter of December 13th in which you submit to me for an opinion the following question:

> Will the outgoing officer whose term began January 4, 1909, and ends January 1, 1911, receive his full pay for the last month which does not expire until the 4th day of January?

It is provided in the act passed April 2, 1906, 98 O. L. 172, entitled "An Act to perform the terms of office of various state and county officers to the

constitutional provisions of (relating to) biennial election," that certain county officers shall be elected for a term of two years, and that their terms shall begin on the first Monday in January after their election.

The meaning of this act is unmistakable. It clearly means that the terms of these officers shall be for two years, no more and no less, and that their terms shall begin on the first Monday of the January next preceding their election. It also seems perfectly clear that these officers shall receive compensation for two years, no more and no less. It is certainly not the meaning of the act itself nor was it the intention of the legislature, in passing the act, that the compensation of a county officer elected for a term of two years, and whose term begins on the first Monday in January following his election, shall be increased or lessened by reason of the fact that the first Monday in January might be the first day of that month or the seventh.

I am, therefore, of the opinion that the outgoing officer will receive his full pay for the last month of his term, notwithstanding his term commenced on the 4th day of January, 1909, and the term of his successor begins on January 2nd, 1911.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY TREASURER — EMPLOYMENT OF DELINQUENT PERSONAL TAX COLLECTOR.

December 13th, 1910.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — I have your letter of December 6th, in which you submit to me for opinion the following question:

> May the county commissioners, under section 5696, General Code, authorize the county treasurer to employ collectors to collect delinquent personal taxes if the list was not publicly read as provided for in said section?

In the case of Commissioners v. Arnold, 65 Ohio State 479, the Court held that:

> "County commissioners have no jurisdiction to authorize a county treasurer to employ a collector to collect personal delinquent taxes under section 2858, Revised Statutes, (section 5696, General Code), until they first cause the delinquent list to be publicly read as provided in that section".

You will readily see from a reading of this case that the Court held that the reading of the delinquent list was mandatory.

I am, therefore, of the opinion that the county commissioners, under this section, cannot authorize the treasurer to employ a collector of this tax, owing to the fact that the delinquent list was not publicly read at the last September meeting of the county commissioners.

Yours very truly,

U. G. DENMAN,
Attorney General.

VOID TAX SALE — REFUNDER OF TAXES — PAID UNDER.

Purchaser of tax title at void sale who subsequently pays taxes by virtue of such purchase may have refunder for amount paid at sale and annual taxes for five years preceding discovery of error which voids sale only.

December 30, 1910.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of December 19th, enclosing a letter addressed to you by Mr. L. H. Beam, Attorney-at-law. The question submitted by Mr. Beam to you and by you to this department is as follows:

> A certain tract of real estate, in some manner not accounted for, acquired two descriptions in the year 1892. On the one description the property appeared upon the tax duplicate in the name of "A" who had always owned it and paid taxes on it. In said year it was placed upon the tax duplicate under its other description in the name of "B" who never claimed any interest in the property and, of course, paid no attention to it, and did not pay any taxes on it. In that manner the property under the second description was placed upon the delinquent tax list and sold for taxes to "C" in the course of time, to-wit: in 1894. Subsequently, and also in due course of time, "C" received a deed from the auditor of Richland County based upon his tax title. From that time to the present the property has remained upon the tax duplicate in the names of two persons both of whom have paid taxes on it, to-wit: "C" and the successor of "A". It is conceded that "C's" title is void and "C" now applies for a refunder to the auditor of Richland County, not only for the amount of delinquent taxes which he paid at the tax sale, but also for the annual taxes which he has paid since upon the erroneous impression that he was the owner of the property.
>
> Query: May the auditor refund to "C" all or any of the taxes erroneously paid by him?

Two statutes and two only are acknowledged by Mr. Beam and by yourself to apply in any way to the question, to-wit: sections 5729 and 2590 of the General Code.

Section 5729 is in part as follows:

> "If the taxes charged on land or lots is regularly paid and such land erroneously returned delinquent and sold for taxation, the sale thereof shall be void. The money paid by the purchaser at such void sale shall be refunded to him out of the county treasury on the order of the county auditor, and so much of the tax as has been paid into the state treasury shall be refunded to the county treasury.
> * * * "

Before considering section 2590 of the General Code it may be profitable to consider this section 5729 and its application to the case at hand by itself. Clearly it applies to a case such as that disclosed in your letter. If the taxes charged on the lot in question had been regularly paid and the land was erro-

neously returned delinquent and sold for taxes, the tax sale was void. The money paid by the purchaser at the tax sale may certainly be refunded to him regardless of any limitation in time.

But this section certainly does not provide for a refunder of any taxes paid by the purchaser at the delinquent tax sale other than the delinquent tax itself. By no construction whatever can such a meaning be read into it. A person paying taxes on property held under a tax title deed in the manner described in your letter can certainly not rely upon the express provisions of this section for relief by way of refunder. The matter is not dependent upon the equities of the case as suggested by Mr. Beam. Such equities can not override the express provision of the statute, nor supply provisions which are not present therein.

The other section cited, section 2590 of the General Code, must be read in connection with section 2589 of the General Code. The related provisions of the two sections are as follows:

> "* * * If at any time the auditor discovers that erroneous taxes or assessments have been charged or collected in previous years he shall call the attention of the county commissioners thereto * * *. If the commissioners find that taxes have been so erroneously charged and collected, they shall order the auditor to draw his warrant * * * in favor of the person paying them for the full amount * * *"
>
> "No taxes or assessments shall be so refunded" (in the manner provided for in section 2589) "except as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the auditor * * *"

The question is, do these sections govern a case like this? If they do govern the case then the holder of the tax title is entitled to have refunded to him the taxes which he has paid during the five years previous to the discovery of the error; if they do not apply to this case then no taxes whatever can be refunded to the holder of the tax title, inasmuch as section 5729, as above stated, contains no authority for such refunder.

On careful consideration I am of the opinion that these sections do apply to a case like this. The taxes paid by the holder of the tax title after securing his were clearly erroneously charged and collected, and he is entitled to the relief set forth in the statute and to no other relief.

For reasons which I have made apparent I have not fully considered the equities in the case as presented by Mr. Beam. I am inclined to the opinion, however, that the holder of a tax title under the circumstances described acquires no equity superior to those of the real owner of the property, even if such equities could be relied upon to read into a statute language which is absent therefrom.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF REVIEW—CLERICAL WORK PERFORMED BY CHIEF CLERK AFTER EXPIRATION OF TIME—BOARD REQUIRED TO COMPLETE WORK—COMPENSATION FOR.

December 28th, 1910.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 23rd, enclosing a letter addressed to you by the Chief Clerk of the Board of Review of the city of Chillicothe acting as a quadrennial board of equalization for said city. The statement of facts made in the letter and upon which my opinion is desired, is as follows:

> On the last day of the time allotted to the board of review of the city of Chillicothe by the state board of appraisers and assessors for the completion of its work of quadrennial equalization, certain clerical work deemed necessary by the board remained undone; it by order entered upon its journal directed its chief clerk to perform all such necessary clerical work, and authorized its president to sign vouchers for the payment of the clerk for his services in performing such work.
>
> The county auditor now refuses to honor the voucher of the president for services and expenses of the chief clerk in pursuance of the aforesaid order.

I am not informed by your letter as to the ground upon which the county auditor refuses to draw the warrant. The following are possible reasons for his action which occur to me:

1. It may be contended that the board of review was without authority to incur any expense of equalization after the date fixed by the state board of appraisers and assessors for the conclusion of its work.

2. It might be contended that the specific work which the board orders its clerk to do was not such as it might lawfully cause to be done.

I can not pass upon the second question which might be in the mind of the auditor for the reason that the Tax Commission of Ohio is given authority by section 81 of the law establishing that body, 101 O. L. 399-420, to issue orders and instructions to taxing officers. I am informed that the Tax Commission has issued orders and instructions to boards of equalization requiring them to do certain things and to incur certain expenses in the doing thereof. I am not, however, informed as to the exact instructions of the Tax Commission, and, of course, am not informed by you as to whether or not the action of the board of review, which is clearly not one *required by law,* has been directed by the Tax Commission. Because of my lack of information on this point I do not pass either upon the power of the board of review to incur these expenses upon its own initiative or upon the power of the Tax Commission to order them to be incurred.

The first question suggested by you may be paraphrased as follows:

Does the time limitation fixed by the state board of appraisers and assessors in any event preclude the payment of expenses incurred after its expiration, the actual work of equalization having been completed within the time prescribed?

Section 5620 of the General Code provides that,

> "* * * The state board of appraisers and assessors * * * may fix the time within which the *work* shall be completed."

This section authorizes the state board simply to prescribe the time within which the *duties of the board* as such shall be discharged. In this instance the object of the statute is effected by the limitation upon the time within which the board itself shall *equalize* the valuations returned to the county auditor by the real estate assessors. Clerical work connected with this task, however, is no part of the work limited by such a determination of the state board.

Assuming, therefore, that the work enjoined upon the chief clerk by the board of review in connection with its equalization was such work as could lawfully be delegated by the board to its clerk, and which was no part of the work of equalization itself, I am of the opinion that the clerk may be paid for his time spent and expenses incurred after the date fixed for the completion of the work of equalization by the state board of appraisers and assessors.

Yours very truly,

U. G. DENMAN,
Attorney General.

CHANGE OF VENUE—WHAT FEES PAYABLE TO OFFICERS OF COUNTY TO WHICH CASE IS TAKEN.

December 8th, 1910.

HON. N. H. MCCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date submitting for my opinion thereon the following questions arising under section 13638 of the General Code, providing for the payment of costs in case of change of venue in a criminal case:

> (a) "Do the fees earned by the officers of the county to which the case is taken, become the property of the officer, or are they to be treated as other fees, and paid into their respective funds?
>
> (b) "In the case of the sheriff, may he include as a part of these fees the expenses to which he is entitled under section 2997 of the General Code, for railroad fare, etc., in subpœnaing witnesses, or should these expenses be borne by his own county?"

Said section 13638 of the General Code provides simply that,

> "The *cost* accruing from a change of venue, *including* the compensation of the attorneys so appointed, the reasonable expense of the prosecuting attorney incurred in consequence of a change of venue, the fees of such clerk and the sheriff, and the fees of the jury sitting in the trial of the case in the court of the county to which the venue is changed, shall be allowed and paid b ythe commissioners of the county in which such indictment was found."

This section does not provide for the *disposition* of these fees; it regulates the source from which they shall be paid. There is nothing in this section inconsistent with the general provision of section 2996 of the General Code, being a portion of the salary law applicable, which provides that,

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive * * *"

I am of the opinion that fees earned by the officers of the county to which a change of venue in a criminal case is had, are not entitled to retain for their own use the fees earned in such case, but must turn the same into the county treasury under the provisions of section 2983 of the General Code.

Answering your second question I beg to state that section 2997 of the General Code, cited by you, provides that,

> "County commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and supœnaing witnesses in civil and criminal cases. * * *"

This expense is clearly not a part of the costs of any criminal case, and, is, therefore, not included in the word "cost" as used in section 13638 of the General Code. It is not "fees" of the sheriff, but merely reimbursement for his expenses. Therefore, it is not included within the catalogue of charges to be paid by the commissioners of the county in which the indictment is found.

The expenses of the sheriff in subpœnaing witnesses in a criminal case transferred to his county upon a change of venue, are, in my opinion, such expenses as are included within the intendment of section 2997 of the General Code.

I am, therefore, of the opinion that the commissioners of the county to which the change of venue is had must allow and pay the sheriff his actual expenses incurred in performing such services.

Very truly yours,
U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — SECTION 7112 G. C. — FULLY DISCUSSED.

May 5, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: In your letter of April 26th, you call attention to that part of section 4757-7, Bates' Revised Statutes, which now reads as follows in section 7112 of the General Code:

> "The compensation of the road commissioners, engineer and assistants shall be allowed by the county commissioners, and, with counsel services and all other necessary expenses, shall be paid out of the road fund raised for the purpose of making such road improvement."

You ask whether the above language authorizes the commissioners of a road district, operating under sections 7095 to 7136 of the General Code, to employ and compensate inspectors of road improvements.

Section 7111, General Code, fixes the compensation which shall be paid to various persons employed in road district work but makes no mention of inspectors.

Section 7119, however, provides that:

> "The road commissioners shall have charge of and superintend the improvement of the roads under their charge. * * * "

This latter provision, in my opinion, authorizes the road commissioners to incur the actual expenses necessary in the proper supervision of road improvements. While, therefore, the road commissioners are primarily charged with the work of superintendence, I believe that when it is necessary for them to employ inspectors to assist them in such superintendence, the cost of such inspection will come within the language of section 7112, all other necessary expenses". While no specific amount of compensation is fixed for such inspectors, nevertheless the road commissioners should be guided by the provisions of section 7111 in determining the amount of compensation to be paid per day for such work.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — STATE AID — MANNER OF BUILDING.

May 4, 1910.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — In your letter of April 15th, you state that:

> "A petition was presented to the Highway Commissioner to build a pike in this county, under an act passed by the general assembly and found in Vol. 99, p. 308, Ohio Local Laws. Such proceedings were had under Sec. 10 of the act, that the Highway Commissioner approved the application and caused the highway described in the petition to be mapped, outlined and a profile made thereof by an engineer; also had plans and specifications made thereof. After all of this was done the same was transmitted to the Board of County Commissioners of Brown County, in which this pike was sought to be established and improved, as required under Sec. 11 of the act, and the Board of Commissioners refused to adopt a resolution to construct this improvement. * * * "

You state also that:

> "The engineer has presented a claim to the county commissioners for one-half of his services, which he claims is due him on his work in Brown County",

but that

> "No levy has ever been made to pay any costs or expenses of this highway",,

and that you know of no money available in the treasury to pay this bill. You ask whether this is a legal bill against the county.

I believe that, under the state highway law, it is the duty of the county, in case it fails to proceed in the construction of a highway after the acts set out in sections 10 and 11 of the act of 99 O. L. 308 have been performed by the state highway commissioner, to pay one-half of the cost and expense so incurred in the making of surveys, etc. The resolution of the county commissioners of Brown County, dated December 28, 1908, in pursuance of which the state highway commissioner caused this highway to be surveyed, etc., contained the following language:

> "*Resolved*, That we do herewith authorize the assumption by said county of its share, and also the share of the said township, in the cost and expense of the surveys, supervision and construction of said improvement, in all fifty per cent of said cost and expense."

This agreement of the county commissioners to pay one-half of such cost and expense is in conformity with the provisions of sections 16 and 26 of the act of 99 O. L. 308, which are now found in sections 1207 and 1215 of the General Code.

Although the agreement of the county commissioners to pay such one-half of this cost and expense was made at a time when no fund was available and when no levy had previously been made for this purpose, I am of the opinion that this is a legal bill against Brown county. The cost and expense incurred in this case did not arise out of any direct contract between the county commissioners and the persons to whom this money is due, but arose out of work and material furnished under direction of the state highway commissioner in pursuance of the specific provisions of the state highway law.

Yours very truly,

U. G. DENMAN,
Attorney General.

COMMON PLEAS JUDGE—TIME OF TAKING OFFICE.

December 23rd, 1910.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I have your letter of December 14th in which you submit to me the following question for an opinion:

> "When does the term of office of Stephen M. Young, who was elected judge of the court of common pleas for the first sub-division of the fourth judicial district at the last general election November, 1910, and who was nominated to succeed Judge S. B. Alexander, commence?"

Section 1532 of the General Code provides:

> "Each judge of the court of common pleas shall be chosen in an even numbered year, and hold his office for six years, commencing on the first day of January following his election."

An act entitled "An act fixing the terms of judges of the court of common pleas prescribing when they shall be elected, and extending certain of their terms, so as to effect the purpose of section 1, article XVII of the constitution," which was enacted by the general assembly for the purpose of conforming the election of common pleas judges to the constitutional provisions relating to biennial elections, and which became a law April 11, 1906, 98 O. L. 119, follows:

> "Section 1. Every judge or additional judge of the court of common pleas hereafter elected shall hold his office for six years, commencing on the expiration of the term of his predecessor as fixed by law, or in case such term be hereby extended, then on the expiration thereof as so extended, and shall be elected at the election for state and county officers next preceding the commencement of his said term.
>
> "Section 2. The existing term of office of any judge or additional judge of said court which would otherwise expire in any even numbered year, or in November or December of any odd numbered year, shall be and is hereby extended to the first day of January of the odd numbered year next succeeding such expiration, and the incumbent of said office at the time when such existing term would otherwise expire, shall hold the same until the expiration of said term as so extended, subject to all the provisions of the constitution or laws, relative to impeachment, removals or vacancies therein. Provided, however, that the term of any said judge expiring in the year one thousand nine hundred and six, whose successor has been elected prior to the passage of this act, shall not be so extended.
>
> "Provided that nothing contained in this act shall affect the terms of office or extensions thereof fixed by any special act passed by the 77th general assembly.
>
> "Section 3. That all acts or parts of acts inconsistent with the provisions hereof, be and the same are hereby repealed."

Section 1532 of the General Code was taken from section 2 of the act above quoted (Revised Statutes 481z) and the act is not, in fact, repealed by the above sections of the General Code. You will note that on page 11 of the General Table in Volume 3 of the General Code, that section 481z Revised Statutes is revised by the General Code section 1532. For other disposition or amendment of this act reference is made in the General Table to the Appendix. The Appendix referred to is not in existence in printed form or in any compact form, but simply means those sections of the Revised Statutes which are not repealed by the General Code, as they now exist on the statute books of this state. The act of April 11, 1906, (98 O. L. 119) is, therefore, still in force as a whole, and is the law which governs the particular question at hand. Of course, section 1532 is the general law in relation to the terms of the common pleas judges in Ohio, but the act of April 11, 1906, (98 O. L. 119) still being in force, the two sections must be read together, and you will note in section 1 of the act referred to that the term of a common pleas judge is for six years *"commencing on the expiration of the term of his predecessor as fixed by law,"* unless such term is extended by virtue of this act.

The solution of this question, therefore, depends upon the date of the beginning of Judge Alexander's term. He was, of course, elected for a term of five years. You do not state the date on which Judge Alexander's term began, but I assume that it was either May 8, 1905, or May 8, 1906. If Judge Alexander

were elected in November, 1904, and his term of office began May 8, 1905, the expiration of his term, under section 2 of the above quoted act, would be extended to January 1, 1911, and the question would be effectually disposed of. Section 2 of the act applies only to "existing terms," and if Judge Alexander's term began May, 1905, his term at the time of the passage of the act was an "existing term" and came within the operation of the statute. If Judge Alexander were elected at the November election of 1905 for five years, his term began May 8, 1906.

Section 2 of the act provides that,

> "The term of any judge expiring in the year nineteen hundred and six, whose successor has been elected prior to the passage of this act shall not be so extended."

If Judge Alexander were elected in November, 1905, the term of his predecessor would not be extended to January 1, 1907, under the provisions of the act but would expire in May, 1906. Judge Alexander's term, therefore, if he was in fact elected in November, 1905, began in May, 1906, and as his term was not an "existing term" at the time the act became effective, his term would not be extended by the act nor would it be effected in any way by it.

Section 15, Article IV of the Constitution of 1851 provides:

> "The general assembly may increase, or diminish, the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution, shall vacate the office of any judge."

Under this section of the Constitution, Judge Alexander's term can not be shortened. His term will not expire, if his term began in May, 1906, until May, 1911.

I am, therefore, of the opinion:

1. That if Judge Alexander was elected in November, 1904, his term will expire December 31st, 1910, and Judge Young's term will begin January 1, 1911.

2. If Judge Alexander was elected in November, 1905, and his term of office began in May, 1906, that his term of office will expire in May, 1911, and Judge Young's term will begin in May, 1911, on the expiration of the term of Judge Alexander.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—COUNTY MUST PAY TOTAL EXPENSE WHERE ROADS IMPROVED UNDER STATE HIGHWAY LAW.

August 5th, 1910.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—In your letter of July 29th and in the letter of your assistant, with enclosures, you inquire whether under the state highway law the county can

pay more than one-half of the total expense of an improvement; whether after agreeing in its preliminary resolution to pay one-half of the expense of an improvement the county can later assume a larger portion of the expense; whether a county can assume more than one-half of the total expense of the improvement without contribution from townships and abutting property owners, and also whether under any of the above questions or under an objection as to the constitutionality of the state highway law, bonds issued by your county to pay the county's share of an improvement will be legal in case the amount of such bonds is in excess of one-half of the total cost of such improvement.

As to the objection that the county cannot assume more than one-half of the costs of an improvement under the state highway law we must remember that the purpose of the state highway law, as set forth in the original act, 97 O. L. 523, and in subsequent acts, such as 98 O. L. 232, 99 O. L. 306 and the present Code, has ever been to furnish the aid of the state, both financially and in the form of services on the part of the state highway commissioner to the various counties of the state in furthering the construction and maintenance of improved highways. Section 2 as contained in each of the three above acts provides that,

> "The object and purpose of this department shall be to instruct, assist and co-operate in the building and improvement of the public roads, under the direction of the state highway commissioner in such counties and townships of the state of Ohio as shall comply with the provisions of this act."

Section 1183 of the General Code now provides that,

> "The state highway commissioner shall carry into operation the provisions herein relating to his office, and all other laws providing for the co-operation of the state with local authorities in the construction and maintenance of public highways."

It was recognized from the beginning that the amount of money contributed by the state for state aid to counties would be very small as compared with the amount of money annually spent in each county upon public highways. The object of the state highway law, and appropriations made under it, has been to encourage the construction of improved roads in each of our counties, and to furnish to each county as object lessons in improved roads of a standard resulting from the experience acquired by the state highway commissioner who, under the law, has been given authority to "make inquiry in regard to systems of road building and management throughout the United States, conduct investigations and experiments in regard to the best methods of road making, and the best kinds of road material, etc."

In return for the aid given by the state it was required that the county should assume at least one-half of the expense of any improvement, such part assumed by the county to be apportioned between county, township and abutting owners.

Even in the original act, however, it was provided that the county could assume more than half of the expense of an improvement. Thus section 20 of the act of 97 O. L. 523 provided that, "nothing herein contained shall prevent any county and township from agreeing to appropriate a larger amount for such road improvement than the amount specified in this act."

Under this act the state paid only one-fourth of the cost and expense, it being provided in section 11 of the act of 97 O. L. 523 that, "three-fourths of the cost and expense thereof shall be a county charge in the first instance."

When we remember that under the state highway law preliminary applications for road improvements must be made prior to the first day of January, and several months before it is known just how much money will be appropriated by the state for state aid work, and when we recall that the insistence of the state is that the state shall in no case pay more than one-half of the expense of an improvement, we see the necessity of permitting some latitude on the part of the county as to the amount which may be assumed by the county subsequent to the appropriation of the state. If the county were arbitrarily limited to the assumption of one-half of the total cost very few improvements could satisfactorily be made.

Section 16 of the act of 99 O. L. 308 provides as follows:

> "One-half of the cost and expense of the construction thereof shall be paid by the treasurer of the state of Ohio on the warrant of the state auditor issued upon requisition of the state highway commissioner out of any specific appropriations made to carry out the provisions of this act, and one-half of the cost and expense thereof shall be a county charge in the first instance, but twenty-five per cent. of the whole shall be paid by the township or townships as hereinafter provided, said one-half shall be paid by the treasurer of the county in which such highway or sections thereof, is located, upon the order of the county commissioners upon the requisition of the state highway commissioner out of any funds in the county treasury for the construction of improved highways under the provisions of this act; but the amount so paid shall then be apportioned by the county commissioners between the county, township or townships and the abutting property as provided by this act; *provided, further, that nothing contained in this act shall prevent any board of county commissioners or township trustees from agreeing to appropriate a larger amount for any road improvement than the amount specified in this act, up to the full cost and expense of the same.*"

Section 1222 of the General Code prior to its amendment contained the following language:

> "Nothing in this chapter shall prevent a county or township from the payment of a larger amount for a road improvement than the amount specified herein".

This department and the state highway department have since the passage of the act in 97 O. L. 523 held that a county could assume more than one-half of the expense of an improvement, and in the case of most of the improvements in the various counties from the beginning of state aid work, the state has paid less than one-half of the expense, and the larger portion of the expense has been borne by the counties, no objection having ever been raised in any county of the state to such assumption of additional expense on the part of a county or township It appears from the language of section 16 of the act of 99 O. L. 308 that the state may be relieved of the full cost and expense of an improvement and lend only the aid of the state highway department in the construction of such improvement.

Section 1222 of the General Code was amended by the act approved May 19, 1910, so as to read in part as follows:

"* * * Moneys so appropriated shall be equally divided among the counties of the state, but the amounts so apportioned shall remain in the state treasury until applied for as provided by law. The county commissioners of any county in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the expense of such road as herein provided to be paid by townships or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without contribution from any township or townships or the owners of property abutting upon such road. The township trustees of any township in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the expense of such road as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without contribution from the county or the owners of property abutting upon such road."

As amended this section provides that,

"The county commissioners of any county * * * may * * * assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state *up to the entire cost and expense of such* road improvement."

Under this provision, as under the provision of section 16 of the act of 99 O. L. 308, it is seen that a county may, as before, assume all of the expense of an improvement, receiving only from the state the state aid in the form of assistance from the state highway department.

The object in view in amending section 1222 of the General Code was not to change this phase of the law but rather to provide that a county might assume any part or all of the expense of an improvement without being required to apportion such expense among the townships and abutting property owners. In other words, the amendment enables the state to deal with a county in state aid work without requiring either the state or the county to deal with townships or abutting property owners. Cuyahoga county can, therefore, agree to pay, and pay, any part of the expense of an improvement under the state highway law up to the entire cost and expense of the same. The fact that the preliminary resolution of the county was made with the idea that the county should pay but one-half of the expense will not prevent the county from later assuming a larger portion of the expense. As stated above, the preliminary application is made long before the amount of money to be appropriated by the state can be ascertained. After the appropriation by the state, the highway commissioner prepares plans, specifications and estimates. When these have been approved by the county commissioners, the county then enters into its agreement as to the amount of the expense which it will assume in the construction of such improvement. Until the county has entered into such agreement, the county is in no wise bound by any preliminary resolution so far as the actual construction of an improvement is concerned. A county can, therefore, by resolution, agree to assume more than one-half of the expense of an improvement at any time

prior to the time when the state highway commissioner advertises for bids for the construction of such improvement. And when the county, under section 1201 of the General Code has given its approval, the county is legally bound to pay a sum up to the amount so assumed upon the awarding of a contract by the state highway commissioner as provided in said section 1201.

While objection has been made to the constitutionality of the state highway law on the ground that state highways are to be constructed only outside of the limits of municipalities, and while the dictum of the supreme court in the case of Hixson v. Burson, et al., 54 O. S. 470, has been quoted in support of this contention, I am unable to find any actual decision of the supreme court upon this question, the supreme court in the above case having stated that, "This point * * * is left undecided".

I believe, however, that highways constructed under the provision of the state highway law would not come under the objection thus raised by the supreme court, even had the supreme court decided such point specifically.

Under section 1224 of the General Code the county commissioners are given power to make a levy "for the creation of a fund to be known as the state and county road improvement fund" Out of this fund the county may spend money for the improvement of roads either within or without municipalities. In fact section 7414 of the General Code provides that,

> "The county commissioners may expend so much of the 'state and county road improvement fund' as they deem necessary in repairing any free improved roads within their respective counties."

Even if the fund mentioned in section 7414 were not the same fund referred to in section 1224, the fact that the levy may be as great as one mill indicates, when we consider the duplicates of the various counties, that the fund so to be raised in most cases will exceed any amount ever appropriated by the state for a particular county, and I find no provision of law which would prevent county commissioners from using this fund for highways receiving state aid or for other highways anywhere within a county. In other words, the fund so raised is levied upon all the property of the county and may be expended in any part of the county. The state highway law merely provides that the state will aid in the construction of highways outside of municipalities. So that there can be no objection to this limitation so far as the county is concerned. When a county has once selected a highway to be constructed with state aid, and all the proceedings up to the issue of bonds have been legal, as above explained, it appears to me that there can be no more objection to the validity of such bonds on the ground that such improvement belongs to only one part of the county than there can be objection made to the validity of bonds issued for the construction of a particular bridge or a particular street or highway.

In addition to this it is claimed by many that a municipality is benefited as much as any other part of a county by the construction of an improved road outside of such municipality, and the provisions of the state highway law limiting state aid to roads outside of municipalities may be a legislative declaration upon this subject which cannot be overturned by the courts.

For the above reasons, and since a law is presumed to be constitutional until declared to be otherwise by the courts, I am of the opinion that bonds issued under section 1223 of the General Code for your county state highway improvement are legal and valid, even though such bonds are in an amount in excess of the amount of state aid money given to your county. Even if it were held that the provision of the state highway law prohibiting the giving

of state aid for highways constructed within municipalities is unconstitutional, it appears to me that the court would take into consideration the entire state highway law and the importance of state aid in general as compared with this particular limitation, and would hold that the state was required to aid a county in the construction of a road whether such road were within or without a municipality. If such a view were taken, inasmuch as the particular road mentioned by you is a road selected by your county, and without a municipality, such a decision, in my opinion, would not affect your case.

Yours very truly,
W. H. MILLER,
First Assistant Attorney General.

ROADS AND HIGHWAYS—STATE HIGHWAY LAW—COUNTY MAY PAY MORE THAN ONE HALF OF TOTAL COST FOR ROAD.

September 21st, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—You state that your county advertised for the sale of $20,000 bonds at 4% under section 1223 of the General Code to raise money for the construction of a road under the state highway law; that such bonds were sold to the First National Bank of Chardon but that such bank now refuses to accept the bonds, claiming that, since the State of Ohio is paying only $6.000 toward the construction of such road and not one-half of the entire cost of such road, such bonds are illegal. You ask my opinion as to the validity of such bonds and also as to the deposit of a check for $1,000, deposited with you as security by such bank.

In a former opinion of this office already submitted to you it was held that section 1206 of the General Code authorizes but does not require the state to pay one-half of the cost of a state highway improvement; that, under section 1223 of the General Code and also such section 1223 as amended by the act of 101 O. L. 285, a county may assume more than one-half of the cost and expense of a state highway improvement, to-wit, "any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement."

Since applications for state aid are made by the county prior to January 1st of each year and therefore prior to the meeting of the general assembly which appropriates state aid money, and since the state highway commissioner is authorized to prepare plans and specifications for such road improvement prior to the appropriation of state aid money by the general assembly, it is seen that all preliminary steps for such road improvement, except the final resolution of the county commissioners and the letting of the contract, may be taken before it is known how much the state will contribute or whether the state will contribute any part of such expense. When we consider this fact, and also the fact that the state highway law provides for state aid for the purpose of encouraging counties to construct more improved roads than in the past, it becomes clear that the objects of the state highway law can be fully realized only in case counties are permitted to pay more than one-half of the cost of such road improvements. This has been the rule from the very beginning of the state highway law and I see nothing in the present law which would prevent the

continuance of this policy of permitting the counties to pay more than one-half of the cost of road improvements.

Since section 1223, G. C., authorizes the sale of bonds by the county up to the amount assumed by the county, this department has held that it is legal for a county to issue bonds in excess of one-half of the cost of a state highway improvement, as is being done in the case of your county. The First National Bank of Chardon, therefore, should be required to accept your bonds or you should forfeit their deposit of $1,000 which the county holds to secure the bank's performance of its contract with the county. The bank is not justified in refusing to take such bonds in the absence of an opinion of the supreme court or any other court and a court opinion upon this question can only be obtained through an action instituted in a particular case, such as the case of your county and the bank at Chardon.

Yours very truly,

U. G. DENMAN,

Attorney General.

ROADS AND HIGHWAYS — MANNER OF DISTRIBUTING STATE AID.

September 21st, 1910.

HON. TOM O. CROSSAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: — You state that in the year 1909 Perry county received $5,586.76 state aid money for your county and distributed such money to the various townships of the county; that the county by levy for 1909 produced a fund of $5,709.38 under the provisions of section 31 of the act of 99 O. L. 308, which fund was not available for distribution until after the February and August 1910 settlements. You ask whether such fund should be distributed to the townships under such section 31 of the act of 99 O. L. 308, or whether such money should be spent directly by the county commissioners under the provisions of the present General Code.

If the levy of the county was made for the purpose of securing the 1909 apportionment of the state amounting to $5,586.76, the fund arising from such levy should be distributed in the same manner as such sum of $5,586.76 received from the state for the year 1909. If, however, such fund was not levied for the purpose of securing the 1909 appropriation under such section 31, if, for example, the county distributed to the townships during the year 1909 a sum of money equal to the amount received from the state during 1909 and has a balance which can be added to the amount the county may raise under sections 1218 and 1224 of the General Code in order to secure the county's portion of the state's 1910 state aid appropriation, such balance, with the rest of the money raised by the county for 1910, may be expended by the county commissioners directly in the same manner as the funds received from the 1910 state aid appropriation.

Yours very truly,

U. G. DENMAN,

Attorney General.

COUNTY COMMISSIONERS MAY UNDER SECTION 6945 G. C. IMPROVE ROAD WHERE PARTY IS WITHIN MUNICIPALITY.

June 21st, 1910.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — You state that the county commissionersof your county contemplate the improvement of a public highway known as Glendale Avenue, the center line of which, throughout its length, is the boundary line between Pt. Lawrence township (now the city of Toledo) and Adams township; that they propose to levy for such improvement under the provisions of section 6945 of the General Code. You ask whether or not the county commissioners have authority to construct an improvement, any portion of which, or territory to be affected by the assessment therefor, is within the limits of a municipality.

In Wells v. McLaughlin, et al., 17 Ohio, 99, it is held in the syllabus that:

> "The power conferred upon county commissioners to lay out and establish county roads, authorizes them to locate a road within or through an incorporated town or city."

In Butman et al. v. Fowler et al., 17 Ohio 101, it is held in the syllabus that:

> "The county commissioners have power to establish county roads whose termini are wholly within the limits of an incorporated town or city."

In State ex rel. v. Commissioners, 35 O. S. 458, in an action compelling the commissioners of Franklin county to levy a tax "for the purpose of building, grading, and graveling or macadamizing" a road commencing in the Cit yof Columbus and intersecting a public road near the city, at page 468 the Court say that:

> "The fact that the road is in part within the city, in no way militates against the right to levy the tax."

In Lewis et al. v. Laylin et al., 46 O. S. 663, it is held in the syllabus that:

> "County commissioners have authority under the two-mile assessment pike law to improve a state, county, or township road, although the improvement embraces that part of the highway which lies within the limits of a municipal corporation."

At page 671 it is held:

> "That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized; nor is this character changed because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally."

Citing 17 Ohio 99 and 17 Ohio 101. The Court say, page 672:

> "These cases establish the doctrine, that territory, within a municipal corporation, is not exempt from the operation of general laws giving authority to county commissioners respecting public highways."

The Court say, page 674:

> "In the sections of the municipal code, which bear directly on the subject of street improvement, no words excluding this power of the county commissioners are found, nor are there any direct words of exclusion in sec. 2640, Rev. Stats. That section reads as follows:
>
> > "The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."
>
> "But it is contended that the general power conferred on municipal corporations by this section, and the special power to improve streets given by other sections of the municipal code, are incompatible with the existence of authority in the county commissioners to improve that portion of a state or county road which may lie within the corporate limits. If this contention is true it becomes a matter for the most careful consideration to determine which authority must yield to the other; and in that view it might be important to cast up the advantages on the one hand and the evils on the other, incident to such construction, and ascertain upon which side the balance stood; upon the theory that the legislature must be taken to have intended to promote the public welfare, and therefore intended that to be the law which would best accomplish it. But is there any such incompatibility? That there is some danger of a conflict of authority between the county commissioners and the municipal council, where both have power to improve the same highway, can not be denied. That is a danger that always exists where two independent officers or bodies have a concurrent authority over the same subject; yet, in many instances, there are other considerations that override this objection, and the concurrent authority is given. This is a question of public policy, to be considered and determined by the legislature alone.
>
> "It is true that section 2640, in very general terms gives to municipal councils the 'care, supervision and control of all public highways, * * * within the corporation.' The power conferred by this section is full and ample; but it contains no words directly excluding that conferred by the statute upon county commissioners. If it has that effect, it amounts to a repeal of the latter statute by implication. Repeals of this kind are not favored."

The above decision in 46 O. S. 663 is followed in the cases of State ex rel. v. Craig et al, 22 O. C. C. 135 and State v. Lewis, 13 Ohio Dec. N. P. 188. These cases hold that in the absence of specific provisions of law to the contrary, the county commissioners may improve roads within municipalities in the same manner as outside of municipalities, but these cases do not deny the right of a municipality to improve the same road as a city street.

The improvement mentioned by you seems to come under the provisions of sections 6926 to 6956, inclusive, of the General Code. You refer particularly to section 6945, which provides as follows:

> "For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county in which such improved road is to be or has been constructed, not exceeding ten mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

I find no specific provision of law denying the right of the county commissioners to improve such roads within the limits of municipalities and under the decisions above cited they therefore would have this right.

In addition to this, I find that section 6945 of the General Code was formerly section 5 of the act of 94 O. L. 98, and that section 1 of such act of 94 O. L. 98 was amended by the act of 99 O. L. 489 by the addition of the following language:

> "Provided that it shall not be necessary in determining such majority petitioners to count any such resident land owners residing within any municipality,"

which provision is now contained in section 6929 of the General Code, as follows:

> " * * * It shall not be necessary in determining such majority petitioners to count land owners residing within a municipality."

Here we have a provision of law which specifically recognizes the improvement of a road such as you mention by the county commissioners when such a road is within the limits of a municipality.

I am, therefore, of the opinion that the fact that a road to be improved by the county commissioners is partly within the limits of a municipality does not prevent such improvement by the county commissioners or affect or prevent them from taking such measures as are provided by law for improving the same and providing for the payment of the cost of such improvement.

Yours very truly,
U. G. DENMAN,
Attorney General.

FEEBLE MINDED INSTITUTION—NEED NOT ITEMIZE STATEMENTS RENDERED TO COUNTIES FOR CARE OF INMATES OVER FIFTEEN YEARS OF AGE.

December 9th, 1910.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date, in which you submit the following for my opinion:

> The county auditor of Lucas county is in receipt of a bill for $3,384.58 from the institution for the feeble minded at Columbus, covering cost of maintenance of sixty inmates of that institution sent from Lucas county. The cost is itemized as to the keep of fourteen inmates only, and the cost of any one of these fourteen does not exceed the sum of $10.00. The cost of the keep of the remaining forty-six aggregates in all the sum of $3,313.83 and is not itemized in any particular, the average cost being about $73.48 and based upon the alleged per capita cost of maintenance at our county infirmary. The county auditor has refused to pay this bill unless the same is itemized as to the cost of maintenance of each inmate. B. J. Jackson, financial officer of the institution has reported that it would be impossible to itemize costs in the cases referred to.

From the above statement of fact you desire my opinion as to the payment of this bill in its present form, and as to whether or not the cost of maintenance in each case should be fully and carefully itemized.

I beg to call your attention to section 1898 of the General Code which is as follows:

> "For each person over the age of fifteen years in the custodial department from any county in the state, the trustees and superintendent may charge against such county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, as shown by the annual report of the board of state charities. The treasurer of the county shall pay the annual draft of the financial officer of the institution for the aggregate amount chargeable against such county, for the preceding year, for such inmates.

You will note this section authorizes the institution to charge against any county a sum not exceeding the annual per capita cost to the county of supporting inmates in the county infirmary as shown by the annual report of the board of state charities, providing such patients are over the age of fifteen years.

I presume that the keep of the fourteen inmates which were itemized are the inmates from your county which are under the age of fifteen years, while the bill rendered in the lump sum for $3,313.38 is for the keep of inmates from your county over the age of fifteen years.

You will note this section further provides that the treasurer of the county shall pay the annual draft of the financial officer of the institution for the aggregate amount chargeable against such county for the preceding year for such inmates.

I note your argument that it would seem not to have been the intention of the legislature that the cost should in any event exceed the annual per capita cost to the county for supporting inmates in its county infirmary, and in no event in excess of the actual cost to the state for supporting inmates in the institution for feeble minded, which may be less than the annual per capita cost in the county infirmary. However, you will note the language of section 1898 specifically authorizes the trustees and superintendent to charge against any county a sum not exceeding the annual per capita cost to the county supporting inmates in its county infirmary without any limitation whatever as to the actual cost to the state for supporting such inmates in the institution for the feeble minded.

I am, therefore, of the opinion that the trustees and superintendent of the institution for the feeble minded may charge against Lucas county for all

inmates in the institution over the age of fifteen years from that county a sum not exceeding the annual per capita cost to the county of supporting inmates in its county infirmary, regardless of the cost to the state for supporting said inmates.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — CONTROL OF TOWNSHIP AND COUNTY ROADS.

October 6th, 1910.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR: — You ask whether, under the act of May 10th, 1910, 101 O. L., 292, county commissioners instead of the township trustees have the care and maintenance of county roads, and whether, under section 7137 et seq. of the General Code, formerly section 4715 Revised Statutes, township trustees may have obstructions or encroachments removed by their road superintendent.

The act of 101 O. L., 292, gives to the county commissioners "the supervision and control" of all the roads and turnpikes which are known as county roads, and proceeds to define the meaning of "county roads" under this act.

Section 2 of the act gives to the township trustees the supervision of all roads known as township roads as defined in the act.

I believe the object of this act was to prevent friction and to define the jurisdiction of the county commissioners and of the township trustees respectively. I believe, therefore, that it was the intention of the acts to make the county commissioners responsible for the county roads as defined in the act without interference from the township trustees, and likewise to make the township trustees responsible for township roads as defined in the act without interference from county commissioners.

Section 3 of such act, however, provides that "the board of county commissioners and the township trustees may enter into an agreement between said boards whereby they may jointly supervise, repair or maintain any state, county, or township road in their respective jurisdictions." Under this provision of the act the county commissioners may perform work on township roads by an agreement with the township trustees, and the township trustees may perform work on county roads by agreement with the county commissioners.

Since the road superintendent provided for in section 7137 of the General Code is "at all times under the direct control and supervision of the township trustees wherein such road district lies, and shall perform only such work as is directed by such trustees" such road superintendent can remove obstructions and encroachments from county roads, under the above act, only in pursuance of an agreement made with the county commissioners by the township trustees of his township. The county commissioners have specific authority, as is shown by section 7419 of the General Code, to remove such obstructions from county roads.

The last paragraph of your letter is not clear owing to some typographical error.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — STATE AID — COUNTY MAY PAY ENTIRE COST ASSESSED AGAINST TOWNSHIP.

May 31, 1910.

HON. JOS. L. MCDOWELL, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR: — You ask whether, under the state highway law, the county commissioners can provide for the construction of a state highway in a township without requiring the township through which the improvement extends to pay 25% of the cost of such improvement, and whether the county commissioners have the power or authority to assume the township's share of the cost and expense of such improvement and cause the same to be paid out of the county treasury.

Section 1222 of the General Code, as approved February 15, 1910, provided that:

> "Nothing in this chapter shall prevent a county or township from the payment of a larger amount for a road improvement than the amount specified herein."

While I believe that this language permitted the county to pay the amount which, under sections 1200 and 1207 of the General Code should otherwise be paid by the township, it was deemed advisable by the State Highway Commissioner, upon consultation with this department, to amend this section so as to make the language definite and clear.

Section 1222 of the General Code, as amended by the act approved May 18, 1910, provides as follows:

> " * * * The county commissioners of any county in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the expense of such road as herein provided to be paid by townships or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and the expense of such road improvement without contribution from any township or townships or the owners of property abutting upon such road. The township trustees of any township in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the expense of such road as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without contribution from the county or the owners of property abutting upon such road."

Under this section as thus amended, the county commissioners have the right to provide for the payment, out of the county treasury, of the entire amount which would otherwise be paid by the township and abutting property owners.

This question, as well as questions contained in your brief, have been taken up from time to time with the State Highway Commissioner.

Yours very truly,

U. G. DENMAN,

Attorney General.

ROADS AND HIGHWAYS—LIABILITY OF TOWNSHIP FOR DAMAGES CAUSED BY CONSTRUCTION—FULLY DISCUSSED.

June 23rd, 1910.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—You state that the trustees of Gilead Township, in your county, made application for state aid in the construction of an improvement on one of the highways of your township, under the provisions of the state highway law, 99 O. L. 308; that contract has been entered into for the construction of an improved road in such township, and that the specifications necessitate the the township would be placed in the same position in regard to such road improve- and the interfering with ingress and egress of land owners where such buildings are located, and also where farmers are accustomed to going in and out to and from their farms.

You ask whether Gilead Township is liable for damages in any instance for the lowering of the grade for such improvement.

In your case Gilead Township made application for state aid upon the refusal of the county to make such application. Under the state highway law the township would be placed in the same position in regard to road improvement as the county, in case the county had applied for state aid for the construction of such road.

Section 14 of the act of 99 O. L. 308 provided as to damages in state aid construction work, (as does also Sec. 1203, General Code), that:

> "The state of Ohio shall in no case be liable for any damages suffered."

The general assembly, in providing state aid under the state highway law, provided that the state's money should be used only for the work necessary to the construction of an improvement and the state is exempt from any responsibility as to the payment of damages or other extraneous sources of expense. If, therefore, there is any liability for damages by reason of the construction of such road, it must, in your case, be paid by the township.

Section 8 of the original law creating the state highway department, 97 O. L. 523, provided that:

> "In case such proposed highway shall deviate from the existing highway, the officials making application must provide for securing the requisite right of way by condemnation proceedings or otherwise, prior to the actual commencement of the work of improvement."

This section made no specific mention of change of grade but it was amended by the act of 98 O. L. 232 so as to read as follows:

> "Sec. 8. In case such proposed highway shall deviate from the existing highway, the officials making application must provide for securing the requisite right of way by condemnation proceedings or otherwise, prior to the actual commencement of the work of improvement, and *shall secure release from damage to property by reason of change of grade.*"

This section was later repealed by the act of 99 O. L. 308, section 13 of which provides that:

> "In case such proposed highway shall deviate from the existing highway, the officials making application must provide for securing the requisite right-of-way by condemnation proceedings or otherwise, prior to the actual commencement of the work of improvement, and shall secure release from damage to property by reason of change of grade."

And such section 13 was repealed by the General Code which now provides, in section 1195, that:

> "If the lines of a highway improvement deviate from an existing highway, the officials making application for such improvement must provide the requisite right of way by condemnation proceedings, or otherwise, prior to the commencement of work, and also secure proper releases from damages to property by reason of a change of grade."

It is difficult, however, to determine in what cases damages should, or should not, be paid to owners of abutting property by reason of change in grade.

In the case of Smith et al v. Commissioners, 50 O. S. 628, the court say in the syllabus:

> "Where the grade of a public road has been established, and the owner of abutting land has improved the same by erecting and maintaining buildings thereon with reference to such established grade, and with reasonable reference to the prospective improvement of the road and its future enjoyment by the public; and where the board of county commissioners has improved the road by changing such established grade, an action for damages will lie in favor of the owner against the board of county commissioners, where, by such change of grade, the owner's free and safe passage from the road to and from his land and buildings thereon has been obstructed or impaired."

See also the case of Cheseldine v. Commissioners, 6 O. C. C. 450, and the cases therein cited, and also case of Rief v. Commissioners, 27 W. L. B. 78, in which the jurisdiction of the common pleas court in such case was described.

It seems to be the rule in Ohio that where the grade of a road has once been established so that the owners of abutting property can, with reason, be assured a grade already established is to be permanent, and where such abutting owners have, with reasonable reference to the prospective improvement of the road and its future enjoyment by the people, erected buildings and improvements upon lands abutting upon such road, in such cases such abutting owners are entitled to damages actually resulting from a change in the grade thus previously established, for the reason that such change in grade amounts to the taking of private property for which, under the constitution, adeuate compensation should be made.

Ohio, however, seems to stand alone in holding that damages may be recovered for injuries resulting from a change of grade, almost every other state

holding that damages may be recovered only in connection with and in pursuance of statutes specifically making provision for such recovery.

See *Am. and Eng. Ency. of Law,* 2nd Ed., Vol. 10, pages 1125 and 1126, with cases cited, also
Elliott on Roads and Streets, 2nd Ed., Sec. 463, and cases cited.

This being the case, and in view of the indefinite statutory provision for the recovery of damages in the case of roads constructed under the state highway law, I believe that no damages should be awarded to any abutting property owner except upon clear proof that there has been a taking of private property for public purposes in the sense described in our constitution.

Under the facts presented in your letter, I am unable to ascertain whether the grade of the road in question had previously been established or to get an adequate idea of the changed conditions resulting from the improvement of this road. It appears to me, however, that when an unimproved road, such as a dirt road, is changed to an improved road, and a reasonable grade is established, the grade thus established is something to which the abutting property owners could reasonably have looked forward, when constructing their buildings and improvements along such road.

Since the answer to your question depends very largely upon the facts in your particular case, which facts are not fully presented to me, and since I question the right to recovery under ordinary circumstances, I refer you to the cases cited in Michie's Ency. Digest of Ohio reports, Vol. 1, pages 55 et seq., and suggest that no payment of damage be consented to in the absence of legal proceedings to define the liability of Gilead Township.

I am informed, also, that provision for road approaches was made in the contract for the construction of such road, and suggest that you procure a copy of such contract.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES — MANNER OF PURCHASING SAND FROM MEMBER.

November 30, 1910.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR: — You call attention to section 3283 of the General Code and submit the following:

> "A township trustee owns gravel which the board of trustees thinks is necessary to be used on the roads. He being prohibited to sell same to township, how shall they proceed to get the gravel? If by condemnation should they bring a condemnation suit in the probate court, or should the other two trustees fix the price? Would it be legal for the trustee owning the bank to lease same to a third party, and he sell the gravel to the township?"

Such section 3283 of the General Code provides as follows:

> "When the trustees are unable to purchase of, or contract upon fair and equitable terms with, the owner of a gravel bank, gravel bed,

other deposit of gravel, or of any stone, timber, or other material, in the judgment of the trustees necessary for the construction or repair of any road, improved road or highway within the township, or in case the owner refuses to sell or contract with the trustees, for the sale of such material, upon the trustees agreeing to allow a just and reasonable compensation therefor, they may condemn for public use such material, in such quantities as, in their judgment, the public needs require, allowing the owner therefor a just and equitable compensation. Such authority to contract, sell, agree and condemn shall extend to all townships within the county in which such trustees are elected or appointed in pursuance of law, or within any township of any adjoining county."

Section 3284 of the General Code provides that:

"An appeal from the amount of the compensation allowed by township trustees for the payment of material so appropriated, shall be allowed to the probate court of the county."

And that the person making the appeal shall be liable for costs "if the compensation allowed be not increased by the proceedings had in the probate court."

It is seen from the above that even if the township trustees proceed by condemnation under the above two sections, they must agree upon "a just and equitable compensation" before proceedings can be had in the probate court and it is seen, also, that the amount thus fixed by the township trustees has a bearing upon the amount of costs in the probate court in case the compensation allowed by the trustees is not increased in the proceedings in the probate court. For these reasons, the same considerations which apply to prohibiting township trustees from purchasing gravel from one of their number will apply to prevent the township trustees from condemning gravel which is owned by one of their number.

Since, therefore, section 12910 of the General Code prohibits a person "holding an office of trust or profit by election" from being "interested in a contract for the purchase of property * * * for the use of the * * * township * * * with which he is connected," the township trustees cannot obtain such gravel from one of their number by purchase or by condemnation, for the reason that the township trustee owning the gravel would clearly be interested in the contract for the purchase of such gravel. The fact that the price was fixed by the other two trustees would not change the situation for the reason that the third trustee, who owns the gravel, would still be an officer of the township interested in a purchase for the township.

As to the situation if the gravel bank in question were under lease to a third party, this is largely a question of fact to be dependent upon the terms and conditions of such lease. If such a gravel bank, owned by a township trustee, were under an existing lease, such that the lessee had full right, independent of the owner thereof, to sell or dispose of gravel in such a manner as he pleased without the owner of the bank having any financial interest in the amount of gravel sold, or in the price paid for the same, it might be permissible, under the above statutes, for the township trustees to purchase such gravel from such lessee. On the other hand, if a lease is made temporarily for the purpose of evading the above provisions of the law, and made with an understanding with the lessee that a certain amount of gravel is to be purchased from him by the trustees

in the event of his accepting such lease, in such case I believe that this would be only an attempt to evade both the letter and the spirit of the law and that the transaction would be illegal.

Yours very truly,

U. G. DENMAN,
Attorney General.

CHIEF OF POLICE — FEES.

Chief of police deemed compensated for all services by salary fixed by council; if such salary does not include expenses incurred by pursuing felon, chief may receive allowance from county commissioners under section 3015 General Code.

Allowance under said section may be made only for pursuit of felony outside of state.

Chief of police not entitled to allowance in lieu of fees under section 3019 General Code.

September 6th, 1910.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 30th, requesting my opinion upon certain questions arising out of the opinion of this department to the Bureau of Inspection and Supervision of Public Offices under date of June 24, 1910.

The former opinion was to the effect that there is no authority of law for the taxation of costs in state cases in favor of a chief of police of a city not having a police court. The questions now submitted are as follows:

> "First. How is the chief of police to be remunerated for his expenses incurred in serving a warrant issued by the mayor for a misdemeanor?"
>
> "Second. Is the chief of police in a city not having a police court cut off from the allowance authorized to be made by the commissioners for the pursuit of a felon, as provided in section 3015 of the General Code?"
>
> "Third. Should the clause in section 3015, supra, 'who has fled the country' be construed to mean, a. Any felon who has run away? b. A felon who has left the country? c. Who has left the state? d. Or who has left the United States?"
>
> "Fourth. Is the chief of police in a city not having a police court entitled to any allowance in lieu of fees under the provisions of section 3019?"
>
> "Fifth. How is the chief of police to be remunerated for his expenses of himself and prisoner, in conveying a prisoner to the county jail to await the action of the Grand Jury, upon a mittimus issued from the mayor's court, from which he was recognized to appear?"

Section 4214 General Code provides that council shall fix the compensation of each officer in each department of the city government. The compensation

so fixed is, upon familiar principles, deemed to be in full of all services to be rendered in the performance of official duties.

Your first question pertains to an official duty of the chief of police, viz.: that of serving a warrant issued by the mayor. For all time and expense spent in the performance of this duty the chief is presumed to be compensated by the salary provided under section 4214 General Code. However, it is competent for council, in my opinion, acting under the authority of the section above cited, to provide that the chief of police shall have a certain stated salary, or shall be compensated according to a certain rule, and shall have in addition thereto his expense necessarily incurred in the performance of his official duty. Without citing specific authority, suffice it to say, the rule is that reimbursement for expenses is properly a part of the compensation of an officer, and that power to fix the compensation includes power to authorize the payment of expenses.

I am, therefore, of the opinion as to your first question that council may lawfully *in advance* authorize the chief of police to be reimbursed from the city treasury for expenses necessarily incurred by him in the performance of his official duties, including the duty of serving warrants. There should, of course, be an appropriation from which such expense may be lawfully paid.

Answering your second question I am of the opinion that section 3015 General Code authorizes the county commissioners to allow and pay the necessary expenses of a chief of police incurred by him in the pursuit of a person charged with felony who has fled the country. Of course the chief of police is not to be presumed to be reimbursed twice for the same expense, and if he charges expense money under an ordinance of council similar to that above described, the commissioners would be without authority to make a similar allowance. On the other hand, if council fails to provide for the payment of such expenses then, in my opinion, the commissioners may act.

Answering your third question, I am of the opinion that the phrase "who has fled the country" as used in section 3017 refers to fugitives for whose return an extradition warrant may be required. That is to say, the expenses of the officer may not be paid by the county commissioners unless it is necessary for him to pursue the fugitive outside of the state. This statute is to be construed in connection with other statutes authorizing the return of fugitives. Ample authority will be found in such other statutes for the apprehension of fugitives within the state. (Section 13493 General Code.) While section 3017, closely following as it does the language of the extradition statutes, seems to me clearly to indicate that it is to be interpreted in this manner.

Answering your fourth question, I am of the opinion that the allowance authorized to be made in section 3019 being "in place of fees" cannot be made in cases wherein the officer is entitled to no fees, and that therefore, a chief of police in a city not having a police clerk is not entitled to an allowance under this section in state criminal cases.

Your fifth question is sufficiently answered by my answer to your first question.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

AUDITOR, COUNTY—FEE FOR INDEXING COMMISSIONERS' JOURNAL.

Auditor may not charge and collect for use of his fee fund any compensation whatever for indexing journal of county commissioners.

August 29th, 1910.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 22nd requesting my opinion as to the authority of the county auditor to charge and collect for the use of his fee fund compensation for indexing the commissioners' journal.

I beg to call your attention to the fact that section 850 Revised Statutes provided some compensation for this service, while section 2406 General Code omits any similar provision.

Section 850 provides that,

> "The clerk shall receive for indexing, provided for in this section, such compensation as is provided for like services in other cases."

The "indexing" provided for in this section is the index to be kept under favor of the first sentence of said section 850, which is as follows:

> "The clerk shall keep a full and complete record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose."

The reference " for like services in other cases" is obscure. You state that said clerk has been drawing the sum of ten cents for each index made, that being the fee of the county recorder for keeping up the general index, under former section 1155 Revised Statutes. This I assume to be the correct interpretation of the old law.

As you state, section 2406 General Code, does not authorize the clerk to receive any compensation for indexing as such, nor does it contain any provisions whatever relating to compensation. However, the provision which makes it the duty of the clerk to keep a general index of the record is retained.

Section 2627 General Code, formerly section 1074 Revised Statutes, provides that county auditor shall receive eight cents per hundred words "for recording the proceedings of the county commissioners * * * and all other recording required in making a complete record."

Section 2631 General Code provides that,

> "The fees and compensation provided for by the foregoing sections shall be in full for all services lawfully required to be performed by the auditors * * *. No county auditor shall charge or receive any other or further fees or compensation * * * as clerk of any board * * *."

The fee for recording can not be held applicable to services in making indexes, in my opinion.

The General Code, while not presumed to change existing law, has, nevertheless, the effect of so doing where its provisions are clearly different from those of the Revised Statutes.

Section 850 Revised Statutes is expressly repealed by the act adopting the General Code.

From all the foregoing I am of the opinion that the fee fund of the county auditor is not entitled to be augmented in any amount on account of the services of the auditor or of any of his clerks in indexing the journal of the county commissioners.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

DEPOSITORY—COUNTY—AWARD MUST BE FOR THREE YEARS REGARDLESS OF CONTRARY PROVISION IN NOTICE TO BIDDERS.

August 25th, 1910.

HON. ALTON F. BROWN, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 23rd, in which you request the opinion of this department respecting the following question:

> In inviting competitive bids under the county depository law, commissioners incorporate in the notice a provision that the successful bidder shall remain the depository of the county moneys *for a term of two years.* All other proceedings being in accordance with law an award is made.
>
> *Query:* At the end of two years what are the powers and duties of the county commissioners in the premises?

Section 2729 General Code, formerly section 6 of the county depository act, so-called, provides in part that,

> "* * * such bank or banks or trust companies shall become the depository or depositories of the money of the county and remain such for three years or until the undertaking of its successor or successors is accepted by the commissioners."

In my opinion this provision overrides and renders nugatory and void any inconsistent provision of the notice or contract of award. The effect is the same as it would be if the notice were silent as to the term of the award. Accordingly, an award for two years regularly made in other respects is, in my opinion, valid and binding as against the county for a period of three years.

So long then as the bank continues willing to act as depository of the county moneys during the period of three years from the date of the award, and complies in all respects with the laws relating to county depositories, and the orders of the county commissioners lawfully made in pursuance thereof, the bank is entitled to act as such depository until the expiration of such term, and the county commissioners are not authorized to re-advertise for bids.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

SPECIAL LEGISLATION — AUTHORITY OF COUNTY COMMISSIONERS TO TAKE OVER PRIVATE CHILDREN'S HOME — PROCEDURE.

June 2, 1910.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: — You state that in the City of Ashtabula there is a children's home formerly organized as a private charity and afterward incorporated under the laws of Ohio, to which children's home the county commissioners have, at various times, in pursuance of the provisions of sections 929-1, -2, -3 and -4, Revised Statutes, contributed various sums aggregating about $6,000 for the buildings for such home; that the property of such children's home is now worth from $15,000 to $20,000; that there is now outstanding against such home a debt of about $3,000, and that the trustees and superintendent of such children's home desire to transfer the legal title to all their property to the county provided the county commissioners will assume and pay such debt of $3,000. You ask,

First: Whether sections 929-1, -2, -3 and -4 R. S. are repealed by implication by the General Code;

Second: Whether, in order to take over this property and assume such obligation of $3,000 a vote must be had under the provisions of sections 3077 and 3078 of the General Code so that a tax may be levied to pay the obligation and support the home, and

Third: Whether the language of section 3092, General Code, is broad enough to authorize the taking over of this home and the levying of a tax to pay such obligation and to support the home.

The Codifying Commission gave, as their reason for failing to incorporate sections 929-1, -2, -3 and -4 R. S. into the General Code, that such law was special and therefore omitted it. An examination of such provisions shows that the law embodied in such sections 929-1, -2, -3 and -4 R. S. is of a special nature and, therefore, of doubtful constitutionality, because, although the subject matter is of a general nature, such law is not of uniform operation throughout the state. Since no court, however, has specifically declared such law unconstitutional, a presumption exists in favor of the constitutionality of such law and yet, for the reasons above stated, I am of the opinion that it is inadvisable to take any future action under such law because of its doubtful constitutionality.

Sections 3077 and 3078, General Code, provide as follows:

> Section 3077. "When in their opinion the interests of the public so demand, the commissioners of a county may, or upon the written petition of two hundred or more taxpayers, shall, at the next regular election submit to the qualified electors of such county, or of the counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. Notice of such election shall be published for at least two weeks prior to taking such vote, in two or more newspapers printed and of general circulation in such county or in the counties of the district, and shall state the maximum amount of money to be expended in establishing such home."
>
> Section 3078. "If at such election a majority of electors voting on the proposition are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase

of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof. Such institution shall be styled the children's home for such county or district."

I note from your communication that your county has not as yet established a children's home. The purchase of the property above described would amount to the establishment of a children's home and, for that reason, I am of the opinion that the question of establishing such home should be first submitted to the qualified voters of your county before the acquisition of the above property by the county.

Section 3092, General Code, provides as follows:

"* In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for such children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes, but the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, and they shall levy an additional tax, which shall be used for that purpose only."

This section does not apply to the acquisition of property for a children's home, but is intended to cover those cases in which it is necessary for the county commissioners to make temporary arrangements, either by placing children in children's homes such as homes provided by private charity, or by leasing property temporarily for the care of the children, or by making some other temporary arrangement. If you intended only to lease the property of the above described children's home, you could do so and provide for the care of children as set out in section 3092 of the General Code. If, however, you desire to acquire such property and to establish a children's home which shall be owned, managed and controlled by the county, you must proceed, not under the provisions of section 3092, but in the manner set forth in sections 3077 and 3078 of the General Code.

Yours very truly,
U. G. DENMAN,
Attorney General.

OFFICIAL STENOGRAPHER—NOT ENTITLED TO ADDITIONAL COMPENSATION FOR TAKING NOTES OF TESTIMONY BEFORE GRAND JURY.

April 15th, 1910.

HON. LYMAN R. CRITCHFIELD, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 4th in which you request my opinion as to whether fees of an official stenographer in taking testimony in the grand jury room may be taxed as costs in the case when no transcript of the evidence is ordered by the prosecuting attorney.

In my opinion such fees may not be taxed as costs. Section 474-6 Revised Statutes, being section 1548 General Code, provides that,

> "Upon the *trial of a case in any of such courts,* if either party to the suit * * * requests the services of a stenographer, the trial judge shall grant the request * * * in which case such stenographer shall cause accurate shorthand notes of the oral testimony or other oral proceedings to be taken * * *"

Section 7195 Revised Statutes, being section 13561 General Code, makes it the duty of the official stenographer, at the request of the prosecuting attorney, to take shorthand notes of testimony before the grand jury, and to furnish a transcript thereof to the prosecuting attorney. Both of these duties devolve upon the stenographer in his official capacity and are compensated, so far as he is concerned, by his annual salary receivable under section 1550 General Code, formerly section 474-8 R. S.

The question of fees taxable, however, is quite a different matter. Section 474-7 Revised Statutes, now section 1549 General Code, provides that,

> "In *every case so reported,* there shall be taxed for each day's service of the * * * stenographers a fee of four dollars, to be collected as other costs in the case."

This section does not provide, as you erroneously suppose, for the taxing of a stenographer's fee for services rendered in grand jury proceedings. The reference in that section to cases "so reported" is to the trial of cases in the common pleas, insolvency and superior courts. This is clear from an examination of section 1548 above quoted, and sections 1546 and 1547 which enumerate the only courts which could be referred to by the first clause of section 1548. Grand jury proceedings do not constitute *trials.*

Section 1551 General Code, formerly section 474-9 Revised Statutes, creates the duty of furnishing transcripts upon demand in ordinary cases, while section 1552 provides for the compensation of the stenographer for furnishing transcripts in ordinary cases. So section 1553 General Code, embodying the latter portion of former section 474-9, provides the fee receivable and taxable in case a transcript is made upon order of the prosecuting attorney. There is no provision, however, authorizing the taxing of any costs or the receipt of any additional compensation for the services of the official stenographer in *taking notes* of the testimony before grand juries. There is thus no statute authorizing such costs to be taxed, either expressly or by implication.

Yours very truly,
U. G. DENMAN,
Attorney General.

COSTS — ALLOWANCE IN LIEU OF — SECURITY FOR.

County commissioners may not allow sum in lieu of costs made on preliminary hearing to justice of the peace when prosecuting attorney nolles the case. Prosecuting witness not liable upon his security for costs in such case.

August 15th, 1910.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — You have submitted to this department for opinion thereon the following question:

> Is the county liable for, or may the county commissioners lawfully allow, the claim of a justice of the peace for costs taxed by him in the preliminary examination of a person charged with a misdemeanor, if the defendant, having been bound over and indicted, is discharged by the prosecuting attorney entering a *nolle prosequi*.'
>
> Is the prosecuting witness liable in such case upon his security for costs in the magistrate's court?

Answering your first question I beg to state that in the first instance I find no statute rendering the county liable per se and without the action of the county commissioners for any costs in misdemeanor cases. In fact, such liability is expressly negatived by section 3017 General Code, section 1307 Revised Statutes, which provides that,

> "In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace * * *"

The only cases in which a justice of the peace is entitled to costs from the county treasury, by virtue of self-executing law, are cases of felonies when the defendant is convicted, and misdemeanors and felonies when recognizances are taken, forfeited and collected and no conviction is had. See section 3016 General Code, section 1306 Revised Statutes.

The commissioners are given the following authority to make allowances in lieu of costs to justices of the peace in misdemeanor cases:

> "* * * In misdemeanors *wherein a defendant proves insolvent* the county commissioners * * * may make allowance * * * in place of fees, * * *"

Section 3020:

> "In ascertaining the amount of fees * * * to make such allowance, in cases where such officer was authorized to take security for costs, it must appear that he exercise reasonable care in taking such security. Until satisfied by the certificate of such justice of the peace * * * or by other proof * * * that the prosecuting witness was indigent and unable to pay the costs or procure security thereof, and if the officer exercised due care in taking such security, such officers' fees in such cases shall not be allowed."

It will be observed that the authority of the commissioners to make an allowance for costs in misdemeanor cases, is limited to cases in which "the defendant proves insolvent." Inasmuch as the defendant would in no wise be liable for costs unless he were convicted, it is clear that commissioners may not make any allowance in lieu of costs in misdemeanor cases where the state for any reason fails. The fact that the defendant is indicted by the grand jury is immaterial; his liability depends upon his conviction, and the fact of his insolvency can not be ascertained until the costs have been adjudged against him.

Answering your second question I beg to state that section 13499 General Code, section 7136 Revised Statutes, provides that,

> "When the offense charged is a misdemeanor, the magistrate * * * may require the complainant * * * to become liable for the costs if the complaint be dismissed * * *"

In my opinion the phrase "be dismissed" as used in this section refers to the disposition of the case by the magistrate himself. Under its provision, therefore, a justice of the peace is without authority to exact from a prosecuting witness a bond securing to the justice the costs in the case as against any contingency other than his own failure to bind over or final judgment where the same is proper. The purpose of the statute is to discourage promiscuous and illfounded criminal prosecution, and a contrary ruling would encourage justices of the peace to bind over defendants examined by them without due consideration of the object of such examination, viz., the existence of reasonable ground for the complaint.

Very truly yours,
W. H. MILLER,
Assistant Attorney General.

TREASURER — TOWNSHIP, NOT ENTITLED TO FEES FOR HANDLING SOLDIERS' RELIEF FUND.

August 16, 1910.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 11th submitting for my opinion thereon the following question:

> "As to the fees allowed by statute to the township treasurer, section 1532 allows him two per cent of all the money paid out by him upon the order of the township trustees.
>
> "Is the township treasurer entitled to any fees for the handling of the Soldiers' Relief Fund, and if so, from whom is he to receive payment?"

Section 3318 General Code, section 1532 Revised Statutes, provides in part as follows:

> "The treasurer shall be allowed and may retain as his fees * * * two per cent of all moneys paid out by him upon the order of the township trustees."

Section 2938 General Code, provides in part as follows:

> "* * * the county auditor shall transmit to the township clerks * * * a list of the names of the persons in the respective townships, and the amount payable monthly to each and, * * * the auditor shall issue to the treasurer of each township his warrant on the treasurer of the county for the amount awarded to the persons in such township, and the township treasurer shall disburse such moneys in the amounts to the persons named in the list furnished to the township clerk taking receipts therefor. * * * "

It is apparent that this latter section, which is a portion of the Soldiers' Relief Law, does not require soldiers' relief money to be disbursed upon the order of the township trustees. According, section 3318 has no application and the treasurer is not entitled under said section to any fees for handling such moneys.

Upon examination of the General Code I beg to state that I find no section authorizing the township treasurer to receive any fees for handling the soldiers' relief fund. That being the case I am of the opinion that the treasurer is required to perform his duties under the Soldiers' Relief Act without specific compensation therefor. The established rule, supported by the overwhelming weight of authority and by all the text writers, is that public officers are not entitled to compensation from the public treasury or from individuals except under authority of specific provisions of law. I am aware that there has been some deviation from this principle in some of the lower courts of this state, but I am not disposed to follow these decisions, as they are clearly against the holding of our own supreme court.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

COUNTY OFFICER — COMMISSION NECESSARY — SECTION 138 G. C. CONSTRUED.

November 26, 1910.

HON. G. P. GILMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received in which you state that John G. Leitch was elected county commissioner for Warren county in November, 1906, for a term of two years and on December 3d, 1906 was appointed to fill a vacancy occasioned by the death of Mr. J. R. Van Orsdal whom said Leitch was elected to succeed. Leitch received a commission for two years from December 3d, 1906, and upon re-election received a second commission for two years from the termination of the first. You inquire if Mr. Leitch must procure a commission covering the time from December 3, 1910 to the third Monday in September, 1911.

Section 136 of the General Code of Ohio provides that,

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

From your statement it appears that Mr. Leitch instead of receiving a commission to fill the unexpired term occasioned by the death of Van Orsdal received a commission for two years dating from the commencement of his services as the successor to Van Orsdal, and upon re-election received a second commission for two years from the date of the expiration of the first commission, leaving a period of time from December 3, 1910, to the third Monday in September, 1911, for which Mr. Leitch is the duly elected commissioner of Warren county, and which time is not covered by his present commission.

It is my opinion that Mr. Leitch should hold a commission covering the full period of time for which he has been elected, and he should, therefore, procure the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE—TERM OF OFFICE—MANNER OF DETERMINING WHICH DOCKET JUSTICE ENTITLED TO.

January 4th, 1910.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your communication of December 31st is received in which you submit the following for my opinion:

> In 1907 two justices were elected. One did not qualify and the trustees appointed his successor; the other resigned and no successor was appointed. In 1909 two justices were again elected and you desire to know first, is there any manner of determining which of said justices elected shall succeed to either of the particular dockets; second, if only one of the last elected justices qualifies, will the present appointed incumbent continue to hold office until the appointment and qualification of his successor.

Answering your first inquiry, I beg to call your attention to section 600 of the Revised Statutes, which is as follows:

> "When two or more justices are equally entitled to be deemed the successor in office of a justice, the trustees of a township shall designate which justice is to be deemed the successor of the justice going out of office, or whose office has become vacant, and shall enter a certificate in the last docket of the justice going out of office or whose office is vacant, of their determination, before the same is delivered to such successor."

This section authorizes the township trustees to designate which docket each elected justice is to take.

Answering your second inquiry, section 567 of the Revised Statutes provides that one appointed to fill a vacancy in the office of justice of the peace holds until his successor is elected and qualified. You will note, therefore, that the township trustees cannot appoint the present appointed incumbent's successor, but such successor must be elected and qualify according to law. If the township trustees, under authority of section 600 decide that the one recently elected who qualifies is entitled to the docket which at present is held by the appointed incumbent, such appointed incumbent's term will, of course, expire. However, if the trustees decide that such elected justice is entitled to the docket of the justice who was elected in 1907 and who resigned and no successor appointed, then the present appointed incumbent will hold until his successor is elected and qualifies.

Yours very truly,

U. G. DENMAN,
Attorney General.

SPANISH-AMERICAN WAR VETERANS—ENTITLED TO RELIEF UNDER SECTION 3701-59 R. S.

February 4th, 1910.

HON. EMMETT C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Your communication is received in which you inquire whether or not a man who served in the Spanish-American War, and who is indigent and disabled, is entitled to relief under the provisions of section 3701-59 and succeeding sections of the Revised Statutes, the same providing for a soldiers' relief commission, and providing "a fund for the relief of honorably discharged soldiers, indigent soldiers, sailors and marines of the United States, and the indigent wives, parents, widows and minor children under fifteen years of age of such indigent or deceased soldiers, sailors and marines," to be disbursed as therein provided.

A soldier who served in the Spanish-American War is certainly to be regarded as a "soldier of the United States," and if such soldier has been honorably discharged from service it is my judgment that he is entitled to the relief provided in this act.

Yours very truly,

U. G. DENMAN,
Attorney General.

CRIMINAL PROCEDURE—CHANGE OF VENUE—COSTS.

Notary fees incurred by prosecution and defense in opposing and supporting motion for change of venue are not costs in criminal case.

August 17th, 1910.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 27th, submitting for my opinion thereon the following question:

> "In the case of the State of Ohio vs. Frank J. Fry, indicted for soliciting and accepting a bribe in this county, a motion was made for a change of venue. In order to support this motion, the defendant, through his counsel, toured the county in company with a notary, obtaining affidavits in support of the motion for a change of venue. The state, of course, under these circumstances was compelled to do the same thing in the way of obtaining counter-affidavits. The clerk of the courts is disturbed as to whether or not the notary fees of the notary for the defense and the notary for the state should be included in the cost bill that goes with the transcript to the adjoining county, the motion for the change of venue having been granted."

In my opinion neither the notary fees incurred by the prosecution nor those incurred by the defense are any part of the costs. The following provisions of the General Code are in point:

Section 13636:

"* * * If it appear to the court * * * by affidavits that a fair and impartial trial can not be had (in the county where the offense was committed) such court shall order that the accused be tried in an adjoining county."

Section 13637:

"When the venue is changed the clerk of the court of the county in which the indictment was found shall make a certified transcript of the proceedings in the case, which * * * he shall transmit to the clerk of the court of the county to which such case is sent * * *"

Section 13638:

"The cost accruing from a change of venue including * * * the reasonable expense of the prosecuting attorney incurred in consequence of the change of venue, fees of such clerk and the sheriff, and the fees of the jury sitting in the trial of the case * * * shall be allowed and paid by the commissioners of the county in which such indictment was found."

Section 3004:

"In addition to his salary, each prosecuting attorney shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties or in furtherance of justice, which expense account * * * shall be allowed by the county commissioners and paid monthly from the general fund of the county."

The first three sections above quoted contain all the provisions of the General Code that are material so far as proceedings for change of venue are concerned. It will be noted that they do not provide that the fees of notaries public taking affidavits, under section 13636, shall be a part of the costs in the case. This of itself is a sufficient answer to your question. However, the fact that section 13638 makes special provision for the costs accruing from a change of venue, and no provision for any costs incurred in securing or resisting a proposed change of venue, make the conclusion more certain. The expression of one thing is the exclusion of all others.

Notary fees paid by the prosecuting attorney, in obtaining affidavits in resistance of a motion for a change of venue, are a proper charge in his expense account under section 3004 above quoted, and should not be regarded as a part of the "reasonable expense of the prosecuting attorney" within the meaning of section 13638.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

ELECTION — SPECIAL — RESULT MAY NOT BE CHALLENGED BY APPROPRIATE COURT PROCEEDINGS.

August 16th, 1910.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 9th, in which you submit for my opinion thereon the following facts:

> A special election in a village school district held for the purpose of authorizing the issuance of bonds for the construction of a school house resulted in a tie vote. Such result not being questioned for a time, another election was held and resulted in a majority of the votes being cast against the issue. A third election was held with the same result. At said third election the vote of a person was challenged and thereupon said person admitted that he was not, and had not been at any time previously, a qualified elector of the village district, and that he had voted in the negative at both of the previous elections.
>
> *Query:* Do the foregoing facts justify the conclusion that the first election really resulted in a majority in favor of the issuance of the bonds, and may the board of education at this time so regard it and proceed with the issuance of bonds?

In my judgment the board of education may not at this time regard the first election as having resulted in a majority in favor of the issuance of bonds, and may not proceed in accordance with such a conclusion.

No provision is made in the General Code for contesting the announced result of a special election of this kind. In the absence of any statutory contest it is my opinion that the result of such an election could be challenged by appropriate proceedings in injunction or mandamus in a court of competent jurisdiction, but not otherwise. Such a court in such proceedings would have the necessary machinery and power to investigate not only the qualification of one elector, but also that of all electors whose qualification might be questioned. That is to say, assuming what I regard as doubtful, namely, that the manner in which a person voted is at any time subject to investigation under the Australian Ballot Law, nevertheless the status of a single vote is inconclusive unless that of all votes is equally subject to investigation.

It might be contended that, for the purpose of saving time, or for the purpose of creating a condition which would expedite the submission of the question to a court of competent jurisdiction, the board of education ought to proceed as if the first election had carried. Such a view, however, is erroneous. In the first place, the board of education, so far as its powers are concerned, has no authority to go behind the returns of the election. In the second place, I do not believe that a court of equity or a court of summary jurisdiction in mandamus, would, at this time, entertain either of the actions above suggested. Such actions should have been instituted promptly after the announcement of the result of the first election. By submitting to the two subsequent elections, all parties in interest who might be proper parties plaintiff or relators, must, it seems to me, be deemed to have waived all questions as to the correctness of the result of the first election.

I am, therefore, of the opinion that the result of the first election, as determined by the election authorities, must be allowed to stand, and that it, as well as the two subsequent elections, now controls the board of education with respect to its power to issue bonds for the purpose contemplated.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION, ORGANIZATION OF, WHAT IS — PRESIDENT PRO TEMPORE, POWER TO ELECT.

Board of education can only elect president pro tempore in absence of president. Board of education which has only elected president pro tempore has not organized within meaning of section 3897a R. S. O.

February 8th, 1910.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, O.*

DEAR SIR: — Your letter of January 27th, in which you request my opinion upon the following statement of facts, is received:

> "The board of education of the Martins Ferry City School District, consisting of six members, is dead-locked on the matter of the election of a president. At an adjourned meeting held January 26, 1910, one of the members unanimously was elected 'president pro tempore for the period running from January 26, 1910, to February 1, 1910,' for the purpose of signing teachers' salaries budget. The banks acting for the city treasurer will honor his signature.
>
> "The question now is raised that while the board acted within its authority in electing a president pro tempore it could not fix the term which already is fixed by statute, to-wit, section 3897a R. S., 'the president to be elected for one year.'
>
> "In your opinion has the member so elected a good and valid title to the office?"

In reply thereto I beg leave to submit the following opinion:

The only power given a board of education to elect a president pro tempore is that found in section 3983 of the Revised Statutes, which reads as follows:

> "If at any meeting of the board the president or clerk is absent, the members present shall choose one of their number to serve in his place pro tempore; and if both are absent, both places shall be so filled; but on the appearance of either at the meeting, after his place has been so filled, he shall immediately assume the duties of his office."

Section 3897a of the Revised Statutes reads in part as follows:

> "Boards of education in city school districts shall organize on the first Monday in January after the election held for members of the

> board of education, by the election of one of their members as president, and the election of a clerk, who may or may not be a member of the board, the president to be elected for one year, and the clerk to be elected for a term not to exceed two years; they shall fix the time of holding regular meetings."

As your board has never "organized" under section 3897a, because it has never elected a president as therein provided, I am of the opinion that it had no power to elect the president pro tempore that it assumed to elect on January 26, 1910, for such president pro tempore could, as above stated, only be elected as provided in Section 3983, and under the circumstances therein enumerated.

Section 3983 provides for the election of such a president pro tempore only in case "the president * * * is absent." As your board has never elected a president, the circumstances under which a president pro tempore might be elected by them, to-wit, the absence of a president, could not arise, and in any case the power of your board to elect a president is limited to the election of one for a term of one year from the first Monday in January last past, under the provisions of section 3897a.

I am, therefore, of the opinion that your board of education has never legally organized and qualified to transact school business for the district of Martins Ferry. Its official acts, therefore, in maintaining and conducting the schools of your district would be a nullity, and should it, by neglecting to organize properly, continue to so incapacitate itself to conduct your schools, I am of the opinion that it would become the duty of the county commissioners, by virtue of section 3969 of the Revised Statutes, as amended March 31, 1908, to "do and perform" such of the duties and acts enumerated in said section 3969 as may be necessary to properly continue in operation the schools of your district.

It has been suggested in connection with the question presented by you in your letter that section 3986-3 of the Revised Statutes would govern in this case, and that the officers of the outgoing board of education would hold their respective offices until the new board has properly organized. Section 3986-3 reads in part as follows:

> "All existing officers of boards of education and school councils shall hold their respective offices until boards of education are elected and organized under the provisions of this act; * * *"

But this section was a temporary measure and applied only to boards existing at the time of its passage in 1904 and, therefore, has no application in this case.

In this connection also I have examined the case of State ex rel Marvin vs. Withrow, 11 O. C. C.-N. S., 569, which was affirmed by the supreme court November 23rd, 1909, without report, and holds that the office of president of the board of education is an office coming within the meaning of section 8 of the Revised Statutes, which provides that any one holding an office of public trust shall continue therein until his successor is elected or appointed and qualified. This case would appear on its face to be decisive of the question whether the president of the outgoing board would hold over as above stated, but an examination of the briefs in this case shows that the president in question in that case was still a member of the board of education at the time the action was brought. It is clear, therefore, that this case has no application to your situation.

I am, therefore, of the opinion, as above stated, that your board of education has never legally organized, and is unable to legally transact the business of conducting the schools of your district, and that should it fail to organize within

such a period of time that it is unable to perform the duties and acts provided in section 3969 of the Revised Statutes, as amended, it would then become the duty of the county commissioners upon being "advised and satisfied" of such a condition of affairs to "do and perform any or all of said duties and acts, in as full a manner as a board of education is by this title authorized to do and perform the same."

I also beg leave in this connection to call your attention to the latter part of section 3969 which provides a penalty not to exceed Fifty nor less than Twenty-five Dollars to be recovered in a civil action in the name of the state from each of the members of a board of education causing the failure to perform any of the acts enumerated in said section 3969.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY ROAD—PETITION TO LAY OUT, ALTER OR VACATE.

Action on petition to lay out, alter or vacate county road under section 4638 may be taken at either regular or special session of county commissioners.

April 8th, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication is received in which you request my judgment upon an opinion furnished by you to the county commissioners of your county in which you construe section 4638 and succeeding sections of the Revised Statutes.

These sections relate to the filing of applications for "laying out, altering, changing the width of, or vacating any county road" and provides that a petition shall be filed with the county commissioners, what the petition shall contain, and also the publication of notice of application.

In your opinion you held that the action on the part of the county commissioners relative to the acceptance and filing of the petition and action thereon, could only be taken by said commissioners at a regular session, and that such action must further be taken on the day specified in the notice, as provided in section 4641.

In reply I beg to say that I find no provision in these sections whereby a petition is required to be presented at a regular meeting of the county commissioners, and in the absence of any such express provision, section 853 Revised Statutes will control. This section provides that,

> "Special sessions may be held as often as the commissioners deem the same necessary, and, at any regular or special session, * * they may do any other official act, not, by law, restricted to some particular regular session."

It seem to me, however, that the county commissioners may accept this petition and act thereon at either a regular or special session of their board.

Yours very truly,
U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES—ARE WITHOUT AUTHORITY TO SIGN A NOTE AND BIND TOWNSHIP—MERE MORAL OBLIGATION.

March 11th, 1910.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date submitting for my opinion thereon the following question:

> "Two of the trustees of Franklin Township, of this county, assuming to act for the township gave a note in bank upon which the name of the township was not mentioned in any manner, their names being placed thereon merely as individuals. The money went into the township funds, and was paid out upon township orders. A new board of trustees has come into office and wish to know whether they have any legal authority to pay this note."

Township trustees have authority under sections 2834a and 2835 Revised Statutes, sections 5656 and 3295 of the General Code, to issue bonds in certain cases, but no authority under any law to bind the township in the manner described by you. There are decisions to the effect that a board of education may bind the school district by the signing of notes or the issuance of bonds when the money is placed in the district treasury.

State ex rel vs. Board of Education, 11 C. C. 41,
Bower vs. Board of Education, 8 C. C. N. S. 305,
Bank vs. Wilcox as Adm'r, 2 C. C. 325.

In all of these cases, however, the intention to bind the district was clear upon the face of the note or other written instrument, and none of the above cases decides expressly that a transaction such as that described by you creates a liability against the district. Furthermore, I do not feel able to say that, in my opinion, this line of authority is applicable to township trustees as well as to boards of education. On the whole it is my opinion that there is no obligation against the township arising out of the note itself. It is the mere personal debt of the individuals signing the same.

Whether or not the holder of the note might maintain an action for money had and received against the township, it would seem clear that there is at least a moral obligation resulting from what appears to have been an honest transaction, and that this moral obligation may lawfully be discharged by the present trustees without violating any of their duties.

Yours very truly,
U. G. DENMAN,
Attorney General.

FISH AND GAME LAW—COST OF PROSECUTIONS—BY WHOM PAID—FULLY DISCUSSED.

January 4th, 1910.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your communication of December 31st is received in which you submit the following for my opinion:

An affidavit under authority of sections 76 and 77 of the 99th Ohio Laws, page 364, was filed before a magistrate and the defendant found guilty. The case was carried on error to the common pleas court where judgment was reversed and the case was then carried to the circuit court where judgment of the common pleas court was affirmed, and you desire to know whether the county is liable for the costs of prosecution in this case.

I beg to call your attention to the last paragraph of section 17 of 99 O. L. 364, which is as follows:

"In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such cases; and if the defendant be acquitted or discharged from custody, by nolle or otherwise, or if he be convicted and committed in default of paying fine and costs, all costs of such case shall be certified by said justice of the peace under oath to the county auditor, who, after correcting any errors in the same, shall issue a warrant on the county treasury, in favor of the person or persons to whom such costs and fees shall be paid."

I am of the opinion that the above quoted section, which is the only section referring to costs of cases for prosecution under authority of this act, requires the costs of cases, such as submitted in your inquiry, to be paid by the county. Prosecutions under authority of sections 76 and 77 are criminal. The State is the real party in interest and the mere fact that the affidavit is required to be filed by the owner of the land, and the prosecution is conducted by his private attorney, does not change the nature of the prosecution or take it out of the operation of section 17.

I am, therefore, of the opinion that the county should pay the costs in the above case.

You also ask if, in my opinion, section 71 of the fish and game laws is constitutional. I beg to advise that, in the absence of a judicial construction of this section by a court of competent jurisdiction, the same is in every sense presumed to be constitutional and is so considered by this department.

Yours very truly,
U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY ENTITLED TO CHARGE EXPENSE OF STENOGRAPHER TO TAKE TESTIMONY IN PRELIMINARY HEARING IN WHICH DEFENDANT IS CHARGED WITH FELONY IN PERSONAL EXPENSE ACCOUNT AS PROVIDED IN SECTION 3004 GENERAL CODE.

April 8th, 1910.

HON. WILLIAM MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

"In case of a felony where the defendant is given a preliminary hearing before a magistrate, has the prosecuting attorney the right,

under the law, to require the court stenographer to take the evidence, and charge the expense of the same in his personal expense account to be allowed by the commissioners?"

In reply I beg to say, I have heretofore held that, the provisions contained in section 1298 Revised Statutes (section 3004 General Code) to-wit,

> "The prosecuting attorney shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice."

includes the expense incurred personally by a prosecuting attorney in the employment of a stenographer to take the testimony in a preliminary hearing in which the defendant is charged with a felony.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE LAW—CERTIFICATES AND NUMBERS NOT TRANSFERABLE.

February 11th, 1910.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 8th in which you request my opinion upon the following questions arising under the Automobile Law, 99 O. L., 538:

> "Can a person who has purchased a machine which already has a state license have the same transferred by the owner, or is it necessary for the new owner to secure another license?"
>
> "Can a person who has purchased a new machine, after having sold his old one, transfer his license to the new machine?"

Answering your first question I beg to cite section 7 of the law in question which provides that upon the filing of the application the Secretary of State shall,

> "assign to such motor vehicle, a distinctive number, and shall issue to the owner of such motor vehicle, * * * a certificate of registration * * *"

From the above quoted language it appears that the identity of the owner is a part of the identity of the motor vehicle. It is apparent, of course, that the principal object of the act is to afford a means of identification. Inasmuch as there is no provision therein for transfer of registration in the case of the sale of a registered machine, I am of the opinion that in such case the purchaser must procure a new certificate, and I am confirmed in this opinion by the provision of section 6, which is as follows:

> "Every owner of a motor vehicle acquired during any year shall, immediately upon acquiring such motor vehicle, file a like application with fees, as above, for registration, * * *"

There is no exception here in favor of those purchasing machines already registered in the name of another owner.

With respect to your second question I beg to state that, in my opinion, it is unlawful for a person selling a registered motor vehicle to transfer the number to a new vehicle purchased by him. The clauses above quoted from the Automobile Law lead to this conclusion.

Yours very truly,
U. G. DENMAN,
Attorney General.

QUADRENNIAL APPRAISEMENT—LIMITATION OF TOTAL COSTS IN CITY.

When expense incurred by city board of real estate assessors in excess of one-twentieth of one per cent of tax duplicate without prior authorization may lawfully be paid.

July 11th, 1910.

HON. FIELDER SANDERS, *Assistant Prosecuting Attorney, Cleveland, Ohio*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 7th, requesting my opinion upon the following statement of facts:

On the 30th of June, 1910, the board of real estate assessors of the city of Cleveland completed the work of valuation and other duties connected with the quadrennial appraisement of real estate in said city. On that day they discharged their clerks and approved a number of outstanding bills incurred by them. They also drew their order upon the county auditor for the amount of their pay-roll for the last half of the month of June. The bills and the pay-roll have not been allowed by the county commissioners.

However, the aggregate amount of all unpaid claims arising out of the quadrennial appraisement is such that when added to the amount of claims already presented, the resulting total will exceed the limitation of section 7, of the Quadrennial Appraisement Act, as amended January 31st, 1910, section 5545, General Code, which is as follows:

> "Provided, however, that the total cost of any quadrennial appraisement in any city shall not exceed the sum of one-twentieth of one per cent of the total tax duplicate of said city for the year next preceding that in which said quadrennial appraisement is made."

and such excess has not as yet been authorized as provided by said section "by the board of county commissioners and county auditor of the county in which said city is situated, *prior to the incurring of any excess expense.*"

Are salaries of the real estate assessors themselves a part of the "total cost" within the meaning of the above quoted provision?

Is there any way in which the excess expenses may lawfully be paid at this time? If such excess expenses may not be lawfully paid, in what order should the county auditor issue his warrants upon the county treasurer to an amount sufficient to cause the total cost to equal, but not to exceed the statutory limitation?

I have already held that the compensation of members of city boards of real estate assessors are a part of the total cost of the quadrennial appraisement within the meaning of section 7, above quoted.

Answering your third question before considering your second question I may say that the compensation of clerks and the bills for incidental expenses incurred and approved by the board are at present legal and valid claims against the county to the extent of the money in the county treasury, having regard to the limitation of section 7, while on the other hand the compensation of the members of the board themselves is not now subject to payment under any circumstances. Expenses of the first class are to be paid out of the county treasury, "upon the order of said board of assessors and the warrant of the county auditor" without any action under normal circumstances by the county commissioners, while the compensation of the assessors themselves requires the allowance of the county commissioners under section 3368, General Code, and section 6, of the Quadrennial Appraisement Act; this you inform me has not been done.

Thus, in a sense, the compensation of clerks and assistants, and the incidental expenses of the board are to be preferred, by the county auditor, to the compensation of the assessors.

It seems to me, however, that all the bills outstanding may lawfully be paid under the authority of the county commissioners and the county auditor, acting under section 7, above quoted. It is true that the provision of the law forbidding the incurring of expense, which will cause the total cost of the appraisement in a city to exceed one-twentieth of one per cent. except upon the *prior* authorization of the commissioners and the auditor, is to be regarded as mandatory in the fullest sense of the word. If however, without negligence or fraud on the part of the board of city assessors, excess bills had been incurred by them and without knowledge of the fact that the limitation of the statutes was thereby exceeded, then the commissioners and the auditor may still, in my judgment, take the action required under section 7. That is to say, honest and excusable ignorance on the part of the board of assessors as to the imminence, so to speak, of the limitation of the statutes, or the exact amount of the total cost, existing before all just claims are presented to them, and inducing them to fail to seek the authority of the board of commissioners and the auditor for the incurring thereof, in advance, should be regarded as excusing such failure to the extent that they may be permitted, as soon as the fact that the limitation has been exceeded is discovered, to go before the county commissioners and the county auditor to obtain the necessary authority.

Therefore, it is my opinion, if the bills and other claims on account of the quadrennial appraisement, now remaining unpaid, were incurred by the board of city real estate assessors in good faith and in honest and justifiable belief that the limitation of section 7, would not be thereby, exceeded, the county commissioners and the county auditor still have power to authorize the excess.

You state in your letter that the assessors obtained from the county commissioners the sum of $10,000 for the purpose of sending out the notices required by section 8, of the Quadrennial Appraisement Law.

The reason for these proceedings is not clear to me and I have ignored this fact in reaching my opinion.

Very truly yours,

U. G. DENMAN,
Attorney General.

MANUFACTURERS—MANNER OF LISTING PERSONAL PROPERTY FOR TAXATION.

July 5th, 1910.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter is received asking an opinion on the mode or manner of ascertaining the value of personal property belonging to manufacturers and merchants required to be listed for taxation as provided by sections 5385 and 5386 General Code; these sections are as follows:

> Sec. 5385. "A person who purchases, receives or holds personal property, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, as a manufacturer, and, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter provided, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto which, from time to time, he has had on hand during the year next previous to the first day of April annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

> Sec. 5386. "Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer, on the last business day of each month the manufacturer was engaged in business during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. Such result shall be the average value to be listed. A manufacturer shall also list at their fair cash value, all engines and machinery of every description used, or designed to be used, in refining or manufacturing, except such fixtures as are considered a part of any parcel or parcels of real property, and all tools and implements of every kind used, or designed to be used, for such purpose, owned or used by such manufacturer."

The above sections are a part of chapter 3, of the General Code; this chapter provides for the listing of personal property, and at section 5375, provides that a person required to list property shall make out and deliver a statement annually to the assessor of all the personal property, moneys, etc., in his possession or under his control on the day preceding the second Monday of April of each year, and the above sections provide that a manufacturer, when he is required to make out his statement to the assessor of the amount of his personal property subject to taxation shall include in his statement the average value of all raw material used, and the average value of the manufactured articles made during the year or during the time he was engaged in business.

Section 5386, above shown gives the manner in which this average is to be ascertained, and by applying the ordinary rules of construction to this section,

I am of the opinion that a manufacturer should on the last business day of each month he is engaged in business take the value of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, rectifying, combining or refining, and all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying or refining or adding thereto which he has in his possession or under his control on that day, and these amounts so obtained on the last business day of each month added together and the result divided by the number of months the manufacturer was engaged in business during the year, will give the average value to be included in the statement to the assessor.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS — BOARDS OF EDUCATION — CENTRALIZATION OF TOWNSHIP DISTRICTS BY SUSPENSION OF SUB-DISTRICTS — ELECTION FOR CENTRALIZATION, WHEN TO BE HELD — PREREQUISITES TO CENTRALIZATION BY SUSPENSION — POWER OF BOARD TO PROVIDE CENTRAL SCHOOL FACILITIES PRIOR TO CENTRALIZATION BY SUSPENSION.

March 4th, 1910.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Your letter of February 26th requesting my opinion upon the following questions, is received:

> "1. We have a township school district in our county that wants to centralize their schools this year; as I understand it, you have held that a vote to centralize in accordance with section 3927-2 of the Revised statutes, can only be held at a regular election, which is, no doubt, true.
>
> "Now the question comes up as to the right of the school board to submit the question of a bond issue under section 3991 R. S. and then proceed in case this bond issue election is favorable to purchase a site and erect and equip a central school building, and having done this, could they then suspend the other subdistricts in accordance with provisions of section 3922 Revised Statutes, and thus effect a centralization under these two sections, Revised Statutes, namely, 3991 and 3922?
>
> "2. Has a school board any authority to purchase, erect and equip a school building for centralization of their schools, unless the first jurisdictional step is taken by submitting the question of centralization to the electors under section 3927-2 Revised Statutes?"

In reply thereto I beg leave to submit the following opinion. Section 4840 of the General Code, (section 2996-2 Revised Statutes) reads as follows:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village, provides for the calling of a special election for that purpose, no special election will be so called. The question so to be voted upon shall be submitted at a

regular election in such county, township, city or village, and notice that such question is to be voted on shall be embodied in the proclamation for such election."

Sections 4726 and 4727 of the General Code, (section 3927-2 R. S. O.) make no provision for the calling of a special election for the purpose of submitting the question of centralization of schools to a vote of the electors of township school districts, and I am, therefore, of the opinion that such question must be submitted at the next general election.

Sections 7730 and 7731 of the General Code, (section 3922 R. S. O. as amended April 23, 1908) read as follows:

7730. "The board of education of any township school district may suspend the schools in any or all subdistricts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No subdistrict school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

7731. "No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Sections 3922 R. S. O. and 3927-2 R. S. O. as they stood prior to the amendment to 3922 of April 23, 1908, were passed upon by the supreme court in Bowers et al vs. Board of Education of Fulton Township, 78 O. S., 443. This case came up from Fulton Township, Fulton County, and involved the right of the board of education of Fulton Township to centralize the schools of that township by means of total suspension of subdistrict schools, although at an election at which the question of centralization of such schools was submitted to the electors of Fulton Township, the question of centralization had been decided in the negative. The decision in the common pleas court was rendered in May, 1906, wherein the court held that the board of education of Fulton Township could centralize their schools by suspension, under section 3922 R. S. O., notwithstanding the fact that an election held in such township prior to such centralization by suspension, by virtue of section 3927-2 R. S. O., had resulted against centralization. The circuit court affirmed the judgment of the common pleas court, and the supreme court, without report, in 78 O. S., 443, affirmed the

two lower courts. The subsequent amendment of section 3922 on April 23, 1908, made such centralization by suspension, under the circumstances which existed in the Bowers case, unlawful, but such amendment did not alter the decision of the court in regard to the right of a township board of education to centralize their schools by suspension of subdistricts, provided no election resulting in a vote adverse to centralization has been held in such township.

By the provisions of section 3922, Revised Statutes of Ohio, as it now stands, it is also necessary, before the board of education of a township shall centralize its schools under this section, to post notices in a conspicuous place in each subdistrict in the township for sixty days prior to such centralization.

I am of the opinion, under the authority of the above decision of the supreme court, that your township board of education may, under the above mentioned conditions, centralize its schools by suspension of subdistricts, by virtue of sections 7730 and 7731 of the General Code (section 3922 R. S. O. as amended April 23, 1908), and I am further of the opinion that the court may, by virtue of section 7625 of the General Code (section 3991 R. S. O.) after having formally determined that it is necessary, for the proper accommodation of the schools of such district, to purchase a site and erect a school house or houses for the accommodation of scholars after such centralization, and that the funds at its disposal or that can be raised under provisions of sections 7629 and 7630 of the General Code (section 3994 R. S. O.) are not sufficient to accomplish that purpose, and that a bond issue is necessary, the board may, by virtue of such sections, make an estimate of the probable amount of money required for such purposes, and at a general election, or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated, proper notices in the manner provided by law for school elections having been given of such election. The power is in the board, under section 3922, Revised Statutes of Ohio, supra, as amended, to centralize the schools as therein provided, and the power is given them to raise the money for the purpose of providing sufficient central school accommodations by section 3991, R. S. O.

I, therefore, can see no objection to the plan of procedure as outlined in your letter. I would, however, suggest that the notices provided by the amended section 3922, R. S. O., be posted for the required sixty days before the question of bond issue is submitted to a vote, to prevent the complications and questions which might arise should a petition be filed with you by one-quarter of the electors of the township by virtue of section 3927-2 of the Revised Statutes, before the completion of the plan outlined by your letter.

Yours very truly,
U. G. DENMAN,
Attorney General.

POOR FUND — COUNTY — TRANSFER OF.

March 16th, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of March 14th, wherein you state that the infirmary directors, acting under section 964 Revised Statutes, have certified to the county auditor an amount alleged to be needed for the support of the infirmary and needful repairs during the ensuing year, but that the amount so certified appears to be excessive. You desire to be advised as to the possibility of setting aside the certificate.

One of the means suggested by you is to transfer funds under favor of section 22b-2. This can not be done. That section authorizes transfer to be made among funds under the supervision of the board applying for the transfer; as the poor fund is under the supervision of the infirmary directors, it is clear that an action on the part of the county commissioners to transfer a portion of this fund would not lie. This has been the previous holding of this department.

Your letter does not so disclose, but I assume that a portion, at least, of the excessive amount in the poor fund arises from the proceeds of the Dow Tax. If that is the case, such portion may, under favor of section 2834d R. S., be transferred by the county commissioners to the general fund. This was the holding of this department in an opinion under date of April 28th, 1909, and it is the view of the common pleas court of Franklin County in the case of the Infirmary Directors vs. County Commissioners, 6 N. P.—N. S., 347. An examination of the decision in that case will disclose that the facts were substantially the same as those which confront you, assuming, of course, that the surplus in your poor fund is derived from this source. If then the surplus described by you is derived from the Dow Tax, a transfer under section 2834d Revised Statutes, would be the proper procedure. If, however, such is not the case I can think of no way to review the discretion of the infirmary directors under section 964, except upon proceedings in mandamus or injunction alleging an abuse of discretionary power.

Yours very truly,
U. G. DENMAN,
Attorney General.

ASSESSMENT—EXEMPTION FROM—COUNTY AND SCHOOL PROPERTY.

County property liable to assessment for municipal improvement, or for road improvement under section 4670-14 Revised Statutes, section 6926, General Code.

Council of municipal corporation may exact same fee from county as from other property owners for attaching to municipal sewer.

Whether school property subject to assessment under section 4670-14, R. S.

March 2nd, 1910.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 24th, submitting for my opinion thereon the following questions:

> "The village of Mt. Gilead, Ohio, recently constructed a sewer and levied an assessment of $250.00 against the court house, jail and the lots upon which the same are situated; the council of said village also passed an ordinance providing a charge of $5.00 for attaching to said sewer.
>
> a. Can the council of said village levy and collect an assessment against this property?
>
> b. If not, can said council prohibit the commissioners from attaching to said sewer upon the commissioners paying the $5.00 as provided for in their ordinance?

Upon the construction of a pike road under section 4670-14, can property belonging to a school district and used exclusively for school purposes be assessed for the payment of the construction of such pike road?

Upon the construction of a pike road under section 4670-14, can the County Infirmary, including the buildings and farm used therefor, be assessed for the payment of the construction of such pike road?"

Answering the first sub-division of your first question I beg to state that in my opinion the council of the village of Mt. Gilead may levy an assessment for the construction of a sewer against county property.

Section 63, Municipal Code, provides that,

"When the whole or any portion of an improvement authorized by this title, passes to or through a public wharf, * * * school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds *within and belonging to the corporation,* council may authorize the proper proportion of the estimated costs and expense of the improvement to be * * * entered upon a tax list of all taxable real and personal property in the corporation."

It is decided in Lima vs. Cemetery Association, 42 O. S. 128 that exemption from taxation is not exemption from assessment for improvements. The above quoted provision of the Municipal Code authorizes a particular exemption from assessment in the case of public grounds *belonging to the municipality.* This qualifying phrase, in my judgment, modifies all the enumerated public structures and properties, excepting the phrase "school building."

It seems to me, therefore, that the assessment can lawfully be levied by the village, that it may be collected from the county, and that the commissioners are authorized to allow the claim of the village, and may be compelled to do so.

Referring to the second branch of your first question, I know of no reason why the county cannot be compelled to pay the fee charged by the council for connecting with such a sewer. The county bears the same relation to this municipal utility as any other owner of property in a municipality, and is entitled to the benefits thereof upon the same terms and conditions.

Your second question presents a problem of great interest and difficulty, in view of the state of the law applicable to the same. The case of Poock, Treasurer, v. Ely, 4 C. C. 41, related to the liability for assessment of lands donated by Congress to the State of Ohio for school purposes, and it was held that such lands are exempt by favor of Article 6, section 2 of the Constitution, which provides that,

"The principal of all funds arising from the sale or other disposition of lands or other property granted or entrusted *to this state* for educational * * * purposes, shall forever be preserved inviolate and undiminished, and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriation."

The court holds that a trust fund created by the sale of such lands must be preserved "inviolate and undiminished" and that the diversion of a portion of such fund for the purpose of paying local assessments would constitute a breach of this duty thus imposed upon the state. This decision applies primarily to the school lands in Ohio; that is to say, those in section 16 in every township reserved by Congress for the use of schools. Its reasoning, however, applies with equal clearness to the funds and property of any board of education with which the school funds of the state in part derived from the accretions to the fund arising from the sale and rental of such school lands, are indivisibly commingled by such board. Such was the case prior to the adoption of the present school code, so called, and particularly section 3958 thereof. As this statute existed previously to 1904 it provided that each board of education should

> "determine * * * the entire amount of money necessary to be levied as a contingent fund for the continuance of the school or schools of the district, after the state funds are exhausted, to purchase sites for school houses, to erect, purchase, lease, repair and furnish school houses, and build additions thereto, and for other school purposes."

In other words, all the funds of a board of education were commingled regardless of their source and regardless of the object of their expenditure.

The present section 3958 provides that each board of education shall determine the levy necessary to be made after the state funds are exhausted, which levy

> "shall be divided by the board of education into four funds, namely, first, tuition fund; second, building fund; third, contingent fund: fourth, bonds, interest and sinking fund; and a separate levy shall be made for each fund."

It has been questioned whether this change in the section creates a fund not commingled with trust funds in any way, which may lawfully be made liable for assessment, and which would seem to render school property subject to assessment where the assessing statute does not itself create any exception in favor of such property. See Columbus vs. Bowland, 15 Decision, 334, where the question is not decided, but this view is stated. On the other hand, the Toledo cases, 48 O. S. 83-87, constitute the last expression of the supreme court on the subject. Whether or not the decision of this court on the main issue would be changed on re-submission of the question under present section 3958, I do not feel able to predict. However, I am of the opinion that the question is worthy of submission to a court of competent jurisdiction for its decision.

Inasmuch as there is in the road laws under consideration, no provision similar to that of section 63 Municipal Code, it would seem that the precise question submitted by you would afford a peculiarly appropriate means of raising this question for judicial determination.

Answering your third question I beg to state that I know of no reason why the property belonging to the county and used for a county infirmary, should not be assessed for the construction of a road under section 4670-14 et seq. R. S., and the assessment therefor paid out of the general fund of the county.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF PEACE HOLDING OLDEST COMMISSION FILLS VACANCY IN OFFICE OF TOWNSHIP TRUSTEE.

February 1st, 1910.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — I am in receipt of your letter of January 22nd in which you submit the following for my opinion:

> Two justices of the peace were elected in the same township in 1905, both received commissions and served for full term. In 1908 both were appointed and received commissions to serve until their successors are elected and qualified. In November, 1909, both were nominated and elected to the office of justice of the peace. Upon receiving notice of election only one of the justices paid to the Secretary of State his fee of two dollars for commission which he received in December, 1909. The other failed and neglected, on notice of election, to pay his fee of two dollars to the Secretary of State, and receive commission, until January 18, 1910. There is a vacancy in the board of trustees of their township, and you desire to know which one of the justices should make the appointment to fill the vacancy in the board of trustees.

I beg to advise that under date of August 8th, 1906, this department rendered an opinion to the Secretary of State in which it was held that section 1452 which provides that the justice of the peace "holding the oldest commission," in case of vacancy in the office of township trustees, shall fill the same by appointment, does not refer to a commission earlier than the one under which the justice is now holding office, and it is entirely immaterial as to what terms were served or commissions held by either justice prior to the current term.

In the statement of fact which you have submitted, the justice who received his commission in December, 1909, and qualified to act as justice of the peace on January 1, 1910, is, therefore, holding office under the commission he received in December, 1909, while the justice who failed and neglected, after notice of election, to pay his fee of Two Dollars to the Secretary of State for commission, until January 18, 1910, failed to qualify under his election in November, 1909, on January 1st, 1910, as required by law, and is, therefore, holding office under his appointment and under the commission he received in 1908.

I am, therefore, of the opinion that the justice of the peace who is holding office under the commission received in 1908 should make the appointment to fill the vacancy on the board of township trustees.

Yours very truly,
U. G. DENMAN,
Attorney General.

BONDS, SEC. 6912 GENERAL CODE CONSTRUED. WHAT CONSIDERED IN ASCERTAINING ONE PER CENT OF TOTAL COUNTY DUPLICATE.

March 1st, 1910.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: — Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> Under section 6912 General Code (Sec. 4637-9 R. S.) should the amount of outstanding and unpaid bond indebtedness of the county, at the date of the enactment of said statute, be estimated in arriving at the total amount of notes and bonds authorized to be issued under the provisions of this section?

In reply thereto I beg to say that this section in authorizing the commissioners of a county to borrow money and issue and sell negotiable notes or bonds for the improvement of roads also fixes a limitation of the amount of money which the commissioners may borrow for such purpose as follows:

> "Provided that the total amount of notes and bonds issued and outstanding under the provisions of this section shall at no time be in excess of one per cent of the total tax duplicate of the county."

This statute in its original form (94 O. L. 366) authorized the commissioners of the county to borrow money and sell negotiable bonds to pay the balance of assessment against property owners alone. In 1902 (95 O. L. 96) the statute was amended, authorizing the commissioners to borrow money in amount of the whole of the estimated cost and expense of the improvement and to issue and sell negotiable notes and bonds therefor, etc.

In 1904 (97 O. L. 490) the legislature amended the section to the limitations contained in its original form. In 1908 (99 O. L. 477) the legislature again amended the section giving to the commissioners authority to "borrow a sum of money sufficient to pay the balance of the whole of the estimated cost and expense of the improvement," and fixed a limitation on the amount of notes and bonds to be issued thereunder at 1% of the total tax duplicate of the county.

The section prior to the date of its last amendment contained no limitation as to the amount of bonds that might be issued thereunder. It is not unreasonable to assume that counties in the state had or could have had, at the date of fixing this limitation by the legislature, in 1908, an outstanding indebtedness, under this statute, in excess of 1% of the total tax duplicate of the county. But the language of the statute is "notes and bonds issued and outstanding under the provisions of this section."

From these considerations I reach the conclusion that this statute,, as last amended, and at which time the maximum limit was fixed, has only a prospective operation, and the indebtedness created or assumed prior to the amendment of the act on May 9, 1908 may not be considered in ascertaining when the prescribed limit of 1% of indebtedness has been reached.

This opinion seems to be in accord with the analogous case of Tiffin et al. v. Griffith et al., 74 O. S. 219.

Yours very truly,
U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS — JOINT COUNTY — MANNER OF CONSTRUCTING.

May 18th, 1910.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR: — You state that, upon the filing of a petition for a ditch to be located in Preble and Butler Counties, the boards of county commissioners of

these two counties met on the line of the ditch, that they then continued the matter to a particular day and that on such day the commissioners of Butler County, through the auditor, notified the commissioners of your county that they would not proceed further with the matter. You state, also, that the entire portion of the ditch to be located in Preble County is to be outside of a municipality, and that the greater part of the ditch to be located in Butler County lies within a village.

You ask whether this is a proper case for a joint county ditch, whether it is the duty of both boards to act, and what proceedings, if any, in mandamus should be brought to compel action by either board in case of its refusal to act.

Sections 6536 to 6563, of the General Code, describe what ditches may be constructed as joint county ditches, and the procedure to be followed.

Section 6536 of the General Code defines joint county ditches as:

> "Ditches, drains or water-courses which provide drainage, or, when constructed, will provide drainage for lands in more than one county",

and provides that such

> "may be constructed, enlarged, cleaned or repaired, as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or water-courses."

Since the language of Sections 6494, 6495 and 6496 of the General Code authorizes the construction of a single county ditch partly within the limits of a municipality, whether the municipality has petitioned for such ditch or not, the language of the above quoted provision of section 6536, making the laws for the construction of single county ditches applicable to joint county ditches, therefore authorizes the construction of a joint county ditch, part of which is within the limits of a municipality.

Section 6537, General Code, provides as follows as to joint county ditches:

> "When a ditch or improvement is proposed, which will require a location in more than one county, application shall be made to the board of county commissioners of each of such counties, and the surveyor or engineer shall make a report for each county. Application for damages shall be made, and appeals from the finding of the commissioners, in joint session, locating and establishing such ditch, and from the assessment of damages or compensation, shall be taken to the probate court of the county in which the greatest length of such ditch or improvement is located. A majority of the commissioners of each county, when in joint session, shall be competent to locate and establish such ditch or improvement. No county commissioner shall serve in any case in which he is personally interested; and any two commissioners of their respective counties, may form a quorum for the transaction of business under this chapter."

And Section 6451 of the General Code, which is applicable to joint county ditches as well as to single ditches, further explains the duties of the county commissioners of each county involved in the following language:

> "The county commissioners shall meet at the place of beginning of the ditch, as described in the petition, on the day fixed, as pro-

> vided in this chapter, and hear the proof offered by any of the parties affected by said improvement, and other persons competent to testify. They shall go over and along the line of the improvement, and by actual view of the ditch and the premises along and adjacent thereto which are to be drained or benefited thereby, determine the necessity thereof, and may adjourn from time to time and to such place as the necessity of the work may require. If the commissioners find for the improvement, they shall fix a day for the hearing of applications for appropriations of land taken therefor and damages that persons, affected by said improvement, may sustain thereby, and for the approval of the report of the county surveyor as hereinafter provided for."

While it is to be observed that "a majority of the commissioners of each county" is required to locate a joint county ditch, it is also to be noted that, under section 6451, General Code, it is incumbent upon the county commissioners of each county, upon the filing of a proper petition, to meet and to "determine the necessity thereof". While, therefore, the commissioners of either county may, in their discretion, determine whether a joint county ditch is necessary, so far as their county is concerned, and while they may decide against the construction of a joint county ditch, it is obligatory upon each board to decide this question one way or the other.

If, therefore, either board refuses to act, proceedings in mandamus may be brought against it by a "party beneficially interested", and I believe that a petitioner for a joint county ditch could properly proceed by mandamus against the board of his county in such case, under the authorities cited in Bates' Pleading, etc., Volume 3, pages 2092 and 2093.

Yours very truly,
U. G. DENMAN,
Attorney General.

RIVER — IMPROVEMENT OF — COUNTY COMMISSIONERS MAY NOT ABANDON PORTION OF ROUTE DEFINED BY PETITION.

February 18th, 1910.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — You have submitted to me for my opinion thereon the following question:

> A petition for the improvement of a living stream is presented to the county commissioners, who, after proceedings duly had, find for the improvement, and order the county surveyor to go upon the route thereof, make a map, etc., as required by the statutes. The surveyor reports that a certain portion of the improvements lying at one end thereof can not be made, as the cost of such portion would, if included in the assessment, make the latter so great as to exceed the benefits. May the commissioners abandon such portion? If so, may any portion of the costs be assessed upon the owners of property within the district adjacent to and drained immediately by the abandoned portion, assuming that the benefits will accrue to such property, through the making of such improvement?

In my opinion the commissioners have no authority to abandon any portion of a proposed improvement of a living stream as defined by the petition praying for said improvement. It is well settled in this state by the decisions of the supreme court in the cases of Commissioners vs. Harbine, 74 O. S. 318, and Mason vs. Commissioners, 80 O. S. 151, that the power of county commissioners to improve living streams is separate and distinct from that to construct ditches, and to improve water courses. The commissioners act under the ditch laws upon the petition filed with them under section 4450 Revised Statutes. The improvement to be considered by them is the improvement defined by said petition and they are not permitted to deviate therefrom unless under favor of some provision of the statute. The authority to change the termini of the improvement or either of them, is conferred upon the commissioners with respect to *ditch* improvements by section 4448 Revised Statutes. This section, however, does not, in my opinion, apply to the improvement of living streams. This has been the holding of the common pleas court of Hardin County in the case of Abel vs. Commissioners, 6 N. P., 349. The reasoning of the court in that case appeals to me as absolutely correct.

The proposed abandonment of a portion of the improvement would, in my judgment, constitute a change of one of the termini thereof.

I, therefore, conclude that the commissioners may not abandon any portion of a proposed improvement of a living stream. This conclusion renders unnecessary any consideration of the second question submitted by you, although I may be permitted to refer to the above cited case of Mason vs. Commissioners as being instructive upon all questions relating to assessments for the improvement of living streams.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY TUBERCULOSIS HOSPITAL—FRANKLIN COUNTY.

County commissioners must have acted under tuberculosis hospital act of 1908, 99 O. L. 62 in order to preclude subsequent action under said act, and acts amendatory thereto.

February 21st, 1910.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 14th requesting my opinion on the facts therein submitted, together with those disclosed by an abstract of the minutes of the board of county commissioners of Franklin county, and a copy of your opinion of November 25th, 1907, addressed to said board. The facts are as follows:

> On December 14, 1907, the county commissioners, acting under your advice provided for the erection of a "hospital on the farm now owned by the county and operated as a poor farm, for the care and cure of the indigent poor of the county afflicted with tuberculosis." Your opinion under which the board was then acting was to the effect that "if the buildings already provided (for infirmary purposes) are not, *in the judgment of the board of county commissioners,* sufficient and appropriate to properly care for the *indigent poor* of Franklin

county, which would include the indigent poor afflicted with tuberculosis, then said board has authority to provide adequate quarters."

Plans for the building thus authorized were approved February 22, 1908, and on the same day bids were advertised for. The contract was awarded on said bids April 14, 1908, and the building was promptly erected at a cost of less than $15,000.

On April 2, 1908, the general assembly passed, and on April 3rd, the Governor signed an act "to provide for county hospitals for the cure and treatment of inmates of county infirmaries *and other residents of the county* suffering from tuberculosis," 99 O. L. 62.

Section 1 of this act provides that:

"On and after January 1, 1909, it shall be unlawful to keep any person suffering from pulmonary tuberculosis * * * in any county infirmary except in separate buildings * * * "

Section 2 provides that:

"The board of county commissioners are * * * directed to construct * * * a suitable building or buildings, which shall be separate * * * from the infirmary buildings, *to be known as the county hospital for tuberculosis;* * * * provided *that there is not already established a hospital in the treatment and maintenance of tuberculosis patients;* * * * . The infirmary directors shall provide for the treatment, care and maintenance of patients received at said county hospital * * * and all expenses so incurred shall be audited and paid as are other expenditures for county infirmary purposes. An accurate account shall be kept of all moneys *received from patients* or from other sources, * * * ."

Section 4 provides that:

"The county hospital for tuberculosis shall be devoted to the care and treatment of those admitted to the county infirmary who are afflicted with pulmonary tuberculosis, and *of other residents of the county who may be suffering from said disease and who are in need of proper care and treatment;* and the board of infirmary directors shall * * * require satisfactory proof that (applicants) are in need of proper care, and have pulmonary tuberculosis; provided, that the infirmary directors may require from any such applicant admitted a payment of not to exceed $3.00 a week * * * for hospital care and treatment.

Section 5 provides that:

"The state board of health shall have general supervision of all county hospitals for tuberculosis * * * and said board acting with the board of state charities, shall approve the location and plans for the county hospital for tuberculosis."

On March 23, 1909 the governor approved an act amendatory to this act, the significant changes made by which are as follows:

Section 1 of the amendatory act extends the time during which it would be lawful to keep tuberculosis patients in county infirmary buildings until January 1, 1911.

Section 2 of the act of 1909 provides that:

> "The provisions of section 2825 of the Revised Statutes, relating to the construction of public buildings and bridges, as amended May 9, 1908, shall not apply to county hospitals for tuberculosis provided for herein."

In other respects the earlier act was not changed in any way. Your specific questions are as follows:

> 1. Have the county commissioners of Franklin county authority, under the amended act, to construct a new hospital?
> 2. If it is held that the amended act does not authorize the county commissioners to provide such a building as herein contemplated, have the board of county commissioners of Franklin county, authority, under sections 794, 795 et seq., or under any other statutes to construct said proposed buildings.
> 3. If it is held that the county commissioners of Franklin county are authorized by any existing law to construct said contemplated building, which is estimated to cost between eighty and one hundred thousand dollars, are they authorized to do so without submitting the proposition to a vote of the people, under the provisions of section 2825 R. S.?

It is apparent to me upon examination of all the documents submitted and a consideration of the statutes above quoted, that Franklin county has no tuberculosis hospital within the meaning of the act of 1908 and that of 1909. The building erected by the county commissioners *prior to the enactment of the law in question*, was simply an addition to the infirmary. Its plans were not approved by the state board of health; so far as the resolution of the commissioners recites, it was not open to any patient of the county, but only to those who might be indigent. In other words, so far as the purpose of its construction, as evidenced by the proceedings had, with reference thereto, is concerned, it was not intended to be a *tuberculosis hospital* at all, but simply a place for the care of those tubercular persons who might otherwise become inmates of the infirmary. This being the case, I am of the opinion that the proviso, "provided that there is not already established a hospital for treatment and maintenance of tuberculosis patients," which it will be observed was in the original act, does not refer to the building already constructed by the county commissioners. I am not clear as to the meaning of this proviso, but construing it with the other provisions of the act it seems reasonably clear that it refers, at least, to a *hospital* open for the reception of "pay" patients as well as indigent patients.

The commissioners of Franklin county have not yet exercised any powers under the tuberculosis hospital act, although the infirmary directors, in their management of the building constructed by the commissioners, may have attempted to conform to said act.

It follows from the foregoing that the commissioners of Franklin county are authorized now to construct a building to be used as a tuberculosis hospital, and that, as a matter of course, the provisions of section 2825 R. S., do not apply to the construction of such a hospital.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE OFFICERS HOLD OVER IN CASE OF FAILURE TO HOLD ELECTION.

February 17th, 1910.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of February 4th, in which you state that in the village of North Robinson, Crawford county, no election for municipal officers was held in November, 1909. You request my opinion as to whether the officers elected in 1907 continue to hold office under said election, or whether there are now vacancies in said offices which should be filled by appointments made according to law; and in case there are such vacancies, you desire to be advised as to the manner of filling the same.

I have examined the various provisions of the municipal code which define the terms of office of village officers. I find that all village officers, excepting the members of the board of trustees of public affairs are elected for terms of two years and until their successors are elected and qualified. The section relating to the election of the trustees of public affairs, being section 205 of the Municipal Code, provides simply that the members "shall be elected for a term of two years". However, they being elective officers and there being no inconsistent provision, section 8 of the Revised Statutes would seem to apply to such trustees, and under favor of said section they would also have the right to hold over in case successors were not elected at the time of holding the first election for municipal officers following the date of their original election.

I, therefore, conclude that upon the facts above stated the persons occupying municipal offices in the village of North Robinson in November, 1909, will continue to exercise the powers and duties thereof until January 1, 1912, and no longer, whether or not successors to such persons are elected in 1911 and qualify for the respective offices. (State ex rel v. Brewster, 44 O. S. 589; State v. Howe 25 O. S. 596; Constitution, Article 17, section 2).

Yours very truly,
U. G. DENMAN,
Attorney General.

CRIMINAL PROCEDURE — ISSUANCE OF WARRANT UPON INDICTMENT.

Except in case of forfeiture of recognizance of person bound over by a magistrate, warrant need not be issued for his arrest upon indictment at the next term of common pleas court.

March 10th, 1910.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of February 22nd, wherein you submit for my opinion thereon the following question:

> "In case a defendant is bound over from the examining court to the next term of the court of Common Pleas, and gives a recognizance, is it proper or necessary to have a warrant issued for his arrest after an indictment has been returned against him?"

This question involves the effect of the recognizance exacted by the magistrate. Sections 7147, 7161 and 7229 Revised Statutes, being sections 13511, 13526 and

13597 General Code cited by you, are sufficient in themselves to determine this question. I quote from the sections in their present form, although the law is, of course, in substance unchanged by the enactment of the General Code.

Section 13511 provides as follows:

> "* * * If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance * * * for his appearance at the proper time and before the proper court * * *"

Section 13526 provides that,

> "* * * a recognizance shall be taken for his appearance to answer the charge before the court of common pleas on the first day of the term thereof * * * *and that he will not depart without leave.*"

Section 13597 provides that,

> "A warrant may be issued * * * on an indictment found * * *"

The italicized portion of the second section above quoted, which you have evidently overlooked, seems to me to extend the obligation of the recognizance, at least, until the end of the term. The defendant is supposed to remain in constant attendance upon the court until an indictment is returned, unless he is excused. Consequently, if he is not present in court when the indictment is returned it would be proper, technically, to forfeit the recognizance. In any event, the remedies afforded by the recognizance are presumed, in my judgment, to be ample to enforce the defendant's presence in court for the purpose of pleading to the indictment. At the time the indictment is returned the court should, under the supplementary act found in 99 O. L. 356, require the execution of a new recognizance, but this is not to be confused with the recognizance mentioned in the above quoted section.

The third section above quoted gives rise to the only difficulty of the question. It provides without qualification that a warrant may be issued upon an indictment found. It is elsewhere provided that indictments may be found on presentation by the grand jury itself, or by the prosecuting attorney, without preliminary hearing. The reason of the section now under consideration would seem to be confined to this class of cases, and to those in which recognizances have been forfeited; but the language of the section is not so limited. At the most, however, this section merely authorizes a warrant to be issued and does not require such issuance in all cases. Accordingly, it is my opinion that it is, at least, not necessary to have a warrant issued for the arrest of an indicted defendant under recognizance from examination by a magistrate. Whether or not it is proper might possibly depend upon all the facts of each case.

Yours very truly,

U. G. DENMAN,
Attorney General.

COURT CONSTABLE, COMPENSATION OF.

Court constable is not entitled to per diem fee for days included within recess of court and on which he renders no services.

March 18th, 1910.

HON. J. A. SCHAEFFER, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR: — You have submitted to this department for opinion thereon the following question:

> "In counties in which one common pleas judge holds court, is the court constable entitled to per diem compensation for days during which he actually renders services only, or is he entitled to compensation at the rate fixed by statute for each day of a term of court including recess?"

Section 553 Revised Statutes, section 1693 General Code, in its present form provides that,

> "Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year. * * * and in counties where only one judge holds court two and a half dollars each day, and shall be paid monthly from the county treasury on the order of the court * * *"

The compensation thus provided in counties in which one judge holds court is in the nature of a per diem. If there is any doubt respecting this point, the same is resolved by examination of section 553 R. S. which employs the word "per" in place of "each." It has been repeatedly held that when the compensation of a public officer as fixed by law is in the nature of a per diem, the officer is entitled to pay for those days during which he actually renders service and for such days only.

Moran vs. Brew, 47 Ala. 709,
Reynolds vs. same, Ibid 711.

Both of these cases involve a question identical with that presented by you, so far as the right of an officer to per diem compensation during recess is concerned.

It is also held that where compensation is so fixed by law the certificate of a superior officer having authority to issue an order on the public treasury is not conclusive, but it may be disputed if not in accordance with the facts.

Morgan vs. Buffington, 21 Mo. 549.

It is true, of course, that parts of a day are not to be recognized in matters of this sort, and that the officer is entitled to receive his per diem fee for a day during which he renders service, although he may have been employed only a portion of such day.

Smith vs. Commissioners, 10 Colo. 17.

Upon the foregoing authorities I am of the opinion that the constable is not entitled to receive compensation for days included within a recess of the court and during which he renders no service, and that the order of the common pleas court is not conclusive as to the amount of such compensation.

Yours very truly,
U. G. DENMAN,
Attorney General.

HUMANE SOCIETY AGENTS—TENURE OF OFFICE.

October 13th, 1910.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 4th in which you request my opinion as to the term of office of humane society agents.

Section 3718 of the Revised Statutes to which you refer now constitutes sections 10070 et seq. of the General Code. Some of the pertinent provisions of these sections are as follows:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made * * *" (Section 10070.)
>
> "All appontments made by such societies * * * shall have the approval of the mayor of the city or village for which they are made. If a society exists outside of a city or village, appointment shall be approved by the probate judge of the county for which they are made * * *" (Section 10071).

Section 10072 makes it the duty of the council to provide reasonable compensation for the city agent and for the commissioners to do likewise with respect to the county agent.

Nowhere in the General Code have I been able to find any provision as to the tenure of office of these agents. The mere fact that their appointment must be approved by certain local officers is inconclusive. The general rule is that appointments authorized to be made for terms not limited are at the pleasure of the appointing authority.

I am, therefore, of the opinion that, unless otherwise provided at the time of the appointment, a humane society agent holds his position at the pleasure of the society appointing him, and of the mayor or probate judge, as the case may be.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXATION—QUADRENNIAL EQUALIZATION IN MUNICIPAL CORPORATION MADE BY BOARD OF REVIEW, IS TO TERRITORY ANNEXED AFTER COMPLETION OF WORK OF APPRAISEMENT.

August 8th, 1910.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 2nd, submitting for my opinion thereon the following questions:

> "1. Two days after the date preceding the second Monday in April, 1910, certain territory was annexed to the City of Bucyrus. The real property therein was appraised for taxation by the quadrennial township assessors. What authority should equalize the valuations of such property?"

"2. Must a board of equalization send out notices to property owners before they may increase the valuation of any real estate?"

Answering your first question, I beg to state that section 5624 General Code provides that,

> "Boards of review, within and for their respective municipalities, shall have all the powers and perform all the duties provided by law for all other municipal boards of equalization and revision. They may hear complaints and equalize the valuations of real and personal property, moneys and credits within their respective municipalities. Upon the appointment of a board of review in a municipality all other boards of equalization and revision therein shall be abolished. At the conclusion of the quadrennial appraisement of real property in such municipal corporation the board of review therein shall sit as a board for the equalization of the value of such real property."

The work of equalization is absolutely independent of the work of original appraisement, and neither in turn is made with reference to the date at which the value of personal property is fixed and at which the lien of the state for taxes attaches, to-wit, the date preceding the second Monday in April.

It is my opinion, therefore, that the city board of review, sitting as a board of equalization, and later as a board of revision, should equalize the valuation of all real estate within the limits of the corporation as they exist at the time its work is performed.

Your second question is answered by my opinion of August 3rd, addressed to Hon. F. M. Stevens, Prosecuting Attorney, Elyria, Ohio, a copy of which I enclose herewith.

Yours very truly,

W. H. MILLER,
First Assistant Attorney General.

TAXATION — QUADRENNIAL EQUALIZATION — EQUALIZING BOARDS NEED NOT SEND OUT NOTICE BEFORE RAISING VALUATIONS FIXED BY ASSESSORS.

August 3rd, 1910.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 14th, in which you submit for my opinion thereof the following question:

> "Must quadrennial boards of equalization and city boards of review send out notices to property owners before they may raise the valuation of any real estate in their equalization work?"

In my opinion the service of such notices is unnecessary, section 5594 prescribing the powers of quadrennial county boards of equalization does not require the same. Section 5624 General Code confers upon boards of review in and for their respective municipalities all the powers and duties of quadrennial county boards of equalization and requires of them no duties not imposed upon such quadrennial boards.

Section 5601 General Code provides that the board of revision composed of the same members as the quadrennial county board of equalization and being in cities the boards of review sitting in that capacity shall send out such notices. The provision is as follows:

> "* * * no valuation as fixed by the board of equalization shall be increased by the board of revision in any case except upon reasonable notice as prescribed by this chapter to all persons directly interested and an opportunity for a full hearing."

The expression of one thing is the exclusion of another. It is clear that boards of equalization and municipal boards of review sitting as such need not notify the owners in cases in which valuations fixed by the real property assessors are raised.

Very truly yours,

W. H. MILLER,
First Assistant Attorney General.

COUNTY NOT ENTITLED TO INTEREST ON MONEY OBTAINED FROM STATE.

February 25th, 1910.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your communication of the 21st inst. is received in which you inquire if the State of Ohio has the right to demand from the various counties a proportionate part of the depository interest, and also whether or not the counties have the right to demand of the State interest on the money appropriated by the legislature to be apportioned among the counties for school purposes.

In reply thereto I beg to say that I have answered your first inquiry in an opinion to the Auditor of State, a copy of which opinion I am pleased to enclose herewith to you.

As to your second inquiry I do not believe the county is entitled to interest on money obtained from the state,

First: Because the state depository law does not provide for an apportionment such as is provided for in the county depository act, and

Second: Because the money that goes from the state to the counties as state aid for the common schools is not subject to deposit, nor is it under the control of the State Treasurer as a depository fund after it has been appropriated by the legislature, and prior to such appropriation by the legislature it has not been impressed with the character of school fund money.

I trust these statements together with the copy of opinion enclosed will satisfactorily answer your inquiry.

Yours very truly,

U. G. DENMAN,
Attorney General.

REAL VALUE—PROPERTY MUST BE APPRAISED AT—REAL PROPERTY ASSESSOR BEGINNING WORK JANUARY 15, DIRECTORY.

January 13th, 1910.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 8th submitting for my opinion thereon the following questions:

> "Under section 5 of 'An act to provide for the election of assessors of real property,' (100 O. L. 83) fixing January 15th as the time said assessors shall begin their valuation, is the language there used to be construed as mandatory or directory, and may said work be legally commenced after said date?"
>
> "Is there, or can there be any valid understanding, outside of legislative enactment, whereby said assessors, may appraise the real estate for less than its "real value"?

In reply I beg to say that section 5 of the act to provide for the election of assessors of real property is as follows:

> "The assessors elected under this act shall begin the valuation of the real property in their respective districts on or before the 15th day of January after their election and shall complete the same on or before July first following."

The provision that the assessors shall begin the valuation on or before the 15th day of January, as contained in this section, is, in my judgment to be regarded as directory. Its purpose is to secure uniformity and dispatch in the appraisement of real property and of course should and will be regarded by all land assessors. Events over which assessors have no control may, however, transpire which will make it impossible for the work to begin at the time named in the section, and if for such reasons any assessors are delayed in the commencement of the valuation until after the time so fixed, I am clearly of the opinion that such appraisements would be regarded as valid and binding by the courts.

Section 2 of Article 12 of the Constitution provides that,

> "Laws shall be passed taxing * * all real * * * property according to its *true value in money.*"

This provision prohibits the fixing of any rule either by the land assessors or the general assembly for the valuation of property for the purpose of taxation other than at its true value in money.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAUPERS—WHO MUST CARE FOR—TRANSPORTATION OF CHARGED TO COUNTY IN WHICH IS LEGAL SETTLEMENT.

General Code Sec. 3482.

April 6th, 1910.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication is received in which you state that complaint was made to the infirmary directors of Wood county, Ohio, that a certain pauper therein required public relief, and that upon investigation, the directors ascertained that the pauper was foreign to Wood county, having a legal settlement in Marion county; that the infirmary directors of Wood county immediately notified the infirmary directors of Marion county of said fact and requested the Marion county authorities to take charge of the pauper; whereupon the infirmary directors of Marion county requested and authorized the infirmary directors of Wood county to deliver the pauper to Marion county, which was done by the aid of a warrant obtained from the probate court of Wood county which was found to be necessary. You then inquire which county shall bear the expense of the removal of this foreign pauper from Wood county to the county of legal settlement which is Marion.

In reply thereto I beg to say that the law is perfectly clear as found in section 3482 General Code (sec. 1496 R. S.) that "the infirmary directors of the county wherein the legal settlement of the person is shall pay the expense of such removal, and necessary charges for relief, etc."

There is no provision of law that would authorize the payment of any of this expense so incurred by Wood county. This expense is Marion county's liability.

Yours very truly,

U. G. DENMAN,
Attorney General.

REAL ESTATE ASSESSOR—OFFICIAL OBLIGATION.

Office of real estate assessor—work subject to review by county board of equalization.

Real estate assessor—liability under bond.

July 11th, 1910.

HON. POPE GREGG, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following statement of facts:

> A real estate assessor for one of the townships in our county failed and refused to appraise the land in the township in which he was elected according to law, but did appraise said land at much less than its true value, and placed thereon a much less value than that at which the real estate in neighboring townships was appraised.
>
> Is there any way to remedy this improper appraisement outside of the county board of equalization, and can any action be taken against the appraiser for improper performance of his duties?

In reply thereto I beg to say that in my opinion there is no provision of law for the correction of this illegal and improper appraisement of real estate prior to adjustment and equalization thereof by the county board of equalization. It will be the very essential duty of the county board of equalization to correct this and all other illegal valuations within the county so as to render unlikely the ordering of a re-appraisement thereof by the state tax commission under section 81 of the tax commission act.

As to your second inquiry, I refer you to section 5567 General Code, which provides as follows:

> "An assessor or his assistant who refuses or knowingly neglects to perform any duty enjoined on him by law, or consents to or connives at any evasion of the provisions of this chapter, whereby property required to be assessed is unlawfully exempted, or the valuation thereof entered at less than its true value, for each such neglect, refusal, consent, or connivance, shall forfeit and pay to the state not less than two hundred dollars nor more than one thousand dollars, to be recovered by action."

By virtue of section 10 of the quadrennial appraisement act, 100 O. L., p. 84, the assessor against whom you complain is amenable to the provisions and judgment provided for in the above section. Furthermore, the bond furnished by the assessor under section 2 of the quadrennial act would be available for the satisfaction of such a judgment, as well as the property of the individual assessor. Clearly the assessor had not the right, after qualifying as such assessor and entering upon the discharge of his duties as such, to violate his official obligation in such manner as the facts stated in your letter indicate.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNTY SURVEYOR — EXPENSES.

October 13th, 1910.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of September 12th, in which you request my opinion as to the right of the county surveyor to be re-imbursed for expenses incurred by him in paying board, livery hire and similar charges while performing the duties of his office within the county, but away from his office.

Section 2822 General Code provides in part as follows:

> "When employed by the day the surveyor shall receive $5.00 for each day and his necessary actual expenses * *".

This section, in my judgment, clearly contemplates that the surveyor shall charge his personal expenses, including room, board and livery hire when he is away from his office. When the surveyor is not employed by the day, however, and charges specific fees for specific services, he is not entitled to such expenses.

Yours very truly,
U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS—EFFECT OF DISMISSAL OF PETITION ON APPEAL FOR LACK OF JURISDICTION.

In case probate court on appeal dismisses ditch petition because of failure of county auditor to notify commissioners of the filing thereof, proceedings are not terminated, but auditor must thereupon serve such notice.

What costs properly chargeable in such cases.

January 7th, 1910.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 30th, submitting for my opinion the following question:

> "The board of County Commissioners proceeding under section 4451, located a ditch in our county for the improvement, and appeal was taken from the allowance to a land owner for compensation to the Probate Court. When the papers reached the Probate Court it was found that no notice of the filing of the petition has been given by the Auditor to the Board of Commissioners as provided by section 4451a R. S., and the probate court dismissing the appeal, held that the Commissioners had no power to act in any way upon the ditch proceeding, until the notice was given by the auditor as provided in section 4451a.
>
> The costs in the proceeding amount to quite a considerable sum and the Commissioners are desirous of your opinion as to whether the bond of the petitioner can be held for these costs, and if not, from what fund and in what manner the same should be paid."

Section 4451a cited by you provides that after the petition has been filed with the county auditor,

> "*Shall thereupon* give notice to the commissioners of the filing of said petition, together with a copy thereof. He shall fix a date for the hearing of the same, not more than thirty days from the date of said notice. The auditor shall prepare and deliver to said petitioners * * * a notice in writing * * * setting forth the substance, pendency and prayer of such petition."
>
> "And the auditor shall also prepare copies of said notice * * * one of which shall be served upon each * * * land owner * * *"
>
> "The person serving said notices shall receive two dollars for each day actually employed in said service."
>
> "Said auditor shall at the same time give a like notice to each nonresident * * * land owner by publication * * *"

From the facts stated by you I take it that not only have these proceedings been taken, but also the commissioners have viewed the ditch, and the surveyor has made the apportionment which in turn has been approved by the commissioners, etc.; that the appeal to the probate judge, under favor of section 4463, was from an order allowing compensation for land appropriated.

I do not believe that the costs in the proceeding are at the present stage thereof properly payable from any source. In fact, the proceeding has not been terminated. The effect of the decision of the probate judge is not to dismiss the petition, but simply to make necessary the service of notice by the auditor upon

the commissioners, and the fixing of another day for hearing. This must be done, as the duty of the auditor in the premises is mandatory.

I, therefore, conclude, on the main question submitted by you, that the costs made by the commissioners are not now payable.

A further question is suggested, viz., when the matter shall have finally been determined and the costs shall be payable either by the petitioner or apportioned under section 4479 R. S., as the case may be, what services, if any, already rendered, may be charged for in the bill of costs? On this point, I am of the opinion that the services of the person serving the notices, under section 4451a, and the charges of the newspaper in which notice upon nonresident land owners was published, are proper costs, they having been completed prior to the time when the commissioners could have acted upon the petition. The fees of the auditor and commissioners, of course, would not be proper costs in any event (sections 4453-4507 R. S.). All other services, however, having been rendered under void orders of the county commissioners, may not be charged for in the bill of costs.

As above stated, the proceedings are not at an end, and should now be carried forward in pursuance of law.

Very truly yours,
U. G. DENMAN,
Attorney General.

COSTS — SECTION 3019 GENERAL CODE RELATIVE TO LOST CASES CONSTRUED.

April 8th, 1910.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to whether or not the limitation of one hundred dollars "lost costs," as provided in section 1309 R. S. (section 3019 General Code), applies to the total costs made in the magistrate's court, or whether it means that each officer making costs in the case is limited to one hundred dollars "lost costs."

In reply I beg to say, the section referred to is as follows:

> "In felonies wherein the state fails, and in misdemeanors, wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

From the language used in this section the intention is clear that the maximum of one hundred dollars is placed against each officer making fees in the cases. In other words, a justice of the peace, police judge, or justice, mayor, marshal, chief of police, or constable, as enumerated in section 3016 General Code, are each entitled, in felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, upon the allowance of the county commissioners, a sum in lieu of lost costs not to exceed one hundred dollars in any one year.

Yours very truly,
U. G. DENMAN,
Attorney General.

BLIND RELIEF—TOTAL BLINDNESS NECESSARY TO BE ENTITLED TO.

April 8th, 1910.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of fact, together with a request for an opinion thereon:

> "There are quite a number of applications for blind relief pensions in Stark County coming from people who are seventy years old or over. These people, if they were not partially blind, would be unable to provide for themselves on account of old age. The blind commission is at a loss to know what its duty is in the premises.
>
> "*Query*: Must the blindness alone disqualify them to earn a living, or may they grant the relief where other infirmities contribute to their inability to work and earn a living?"

In reply I beg to say, section 2 of an act entitled "An Act to provide for the relief of needy blind" passed April 30th, 1908, and which defines a blind person, is as follows:

> "A needy blind person shall be construed to mean any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life, who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by this act, would become a charge upon the public or by those not required by law to support him."

Under this section a "needy blind person" is construed to mean a person who is unable to provide for himself by reason of loss of eyesight without regard to other infirmities.

I am, therefore, of the opinion that your blind commission in furnishing relief, under the provisions of the act providing for relief of needy blind, is limited to those cases in which the inability to earn a livelihood is due solely to loss of eyesight.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE—TERM OF APPOINTEE.

Justice of the peace may not be appointed for longer than next regular election and until successor is elected and qualified, but in no case appointment to be made for more than four years or unexpired term.

January 26th, 1910.

HON. C. L. NEWCOMER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> Clinton Payne was elected justice of the peace in the spring of 1903 and qualified for three years from April 14, 1903. He was re-elected at the November election 1905 and qualified on April 2, 1906. On April 24, 1909, he received a commission which reads that he was appointed justice of the peace until his successor is elected and qualified. At the November election in 1909 he was a candidate but defeated at the polls. The person elected has refused to qualify and you desire to know if Mr. Paine will continue in office until his suc cessor is elected and qualified.

I beg to call your attention to section 567 of the Revised Statutes, which is in part as follows:

> "When a vacancy occurs in the office of justice of the peace in any township, either by death, removal, absence at any time for the space of six months, resignation, refusal to serve, or otherwise, the trustees, having notice thereof, shall, within ten days from and after such notice, fill any such vacancy by appointing a suitable and qualified resident of the township who shall serve as justice until the next regular election for justice of the peace, and until his successor is elected and qualified; and the votes of a majority of the trustees shall be necessary to appoint."

To fully understand this section it is necessary to look to section 2 of article 17 of the Constitution of Ohio, which is in part as follows:

> " * * * the term of office of justice of the peace shall be such even number of years, not exceeding four years, as may be prescribed by the general assembly. * * All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law."

Taking the above quoted section of the Revised Statutes, and the quoted section of the constitution together we have the following: A justice of the peace may not be appointed for longer than the next regular election, and until his successor is elected and qualified, but in no case shall appointment be made for a longer period than four years or the unexpired term which the appointment was made to fill.

Applying the above to the particular state of facts presented by you, I am of the opinion that the justice appointed in April, 1909, will hold office until the next regular election, which will be in November, 1911, and until his successor is elected and qualified. But in case his successor is not elected in November, 1911, and does not qualify on the following January 1, 1912, as prescribed by law, the person appointed may not hold for a longer period than four years from the date of his appointment, and also in no case for a longer period than the unexpired term which he was appointed to fill.

Yours very truly,

U. G. DENMAN,
Attorney General.

DEPOSITORY—TOWNSHIP AND SCHOOL DISTRICT.

Building and loan association may not be township or school depository.

July 5th, 1910.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23rd in which you request my opinion as to the qualification of a building and loan association as a school district or township depository.

Section 7604 General Code, as amended May 18, 1910, provides that,

> "The board of education of any school district * * shall provide for the deposit of * * * moneys coming into the hands of its treasurer. But no *bank* shall receive a deposit larger than the amount of its paid in capital stock, and in no event to exceed three hundred thousand dollars."

Section 7605 General Code as amended at the same time provides that,

> "In school districts containing two or more *banks* such deposit shall be made in the *bank or banks* situated therein, that at competitive bidding offer the highest rate of interest * * *."

The township depository law, sections 3320, etc., General Code, provide as follows:

> Sec. 3320. "The trustees of any township shall provide by resolution for the deposit of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such *bank, banks* or *depository* within the county * * * subject to the following provisions * *."
>
> Sec. 3322. "In townships containing two or more banks, such deposit shall be made in the *bank* or *banks* situated in the township that offer at competitive bidding the highest rate of interest on the *average daily balance* on such funds * * *. No bank or depository shall receive a larger deposit of such funds than the amount of (its) bond and in no event to exceed three hundred thousand dollars."
>
> Section 3323. "In a township in which but one *bank* is located, the funds of the township shall be deposited in such *bank* (except in certain cases enumerated in the statute)"

Section 9644 generally relating to the organization of building and loan associations provides that,

> "Such associations shall not use the words "bank", "banking" or "trust", nor any one or more of them in combination", (as a part of its name).

Sections 9647, etc., enumerate the powers of building and loan associations. It is clear from these sections from which I forbear to quote, that a building and loan association is not, in the fullest sense of the word, a "bank" nor an institution exercising what may be termed "banking powers". The provisions of these sections which relate to the powers of such associations in the receipt of deposits are as follows:

(Such corporations shall have the power) "to receive money on deposit" (9648).

"To permit the withdrawal of deposits upon such terms and conditions as the association provides *except by check or draft*, but no such association shall be permitted to carry for any member or depositor any *demand, commercial or checking account.*"

"*The board of directors shall designate a bank or banks in which it shall cause the funds of such corporation to be* deposited in its name". "Such funds when so deposited, can be withdrawn only in such manner and for such purpose as is provided in the constitution and by-laws and authorized by law". (Sec. 9669).

I take it that in the construction of the two depository laws concerned in your inquiry the court would have regard to the manifest purpose of such laws, and would take judicial notice of the manner in which public funds are handled and disbursed. The township depository law in terms refers to "the average daily balance" to be maintained in the depository, thus indicating clearly that moneys are to be deposited and withdrawn from day to day upon draft or check of the treasurer. But this, I assume, is true of any deposit of public funds. Inasmuch then as building and loan associations are expressly forbidden by law to accept deposit accounts to be drawn against by check or draft, I am of the opinion that in this very essential respect they cannot qualify as depositories of public funds.

It is also probably true that upon the familiar principle that the expression of one thing is the exclusion of all others, the use of the word "bank" in both the depository laws would be held to exclude all other forms of institutions authorized to receive deposits, particularly inasmuch as the statutes create a clear distinction in name between banks and building and loan associations.

It is also probably true that the word "depository" as used in the township depository law in conjunction with the words "bank or banks" would be held on the principle of *ejusdem generis* to refer to institutions possessing, with respect to the making of deposits at least, all the powers of a bank.

For all the foregoing reasons I conclude that building and loan associations may not act as depositories of school district and township moneys.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY BOARD OF EQUALIZATION — QUADRENNIAL — TIME OF CLOSING SESSION; MEMBERS NOT ENTITLED TO EXPENSE AS SUCH.

June 30th, 1910.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of June 28th, submitting for my opinion thereon the following questions:

> "I beg to inquire as to what construction you have put on sections 5594 and 5595 of the General Code, relative to the closing of the sessions of the County Board of Equalization. By the terms of 5594, I would understand that the sessions shall close on or before the first Monday in October, and by the terms of 5595 the board 'shall complete its work on or before the fourth Monday of February.'

> "Also referring to section 5597, I beg to inquire as to the provisions for any necessary expenses that the members of the board may incur It will be necessary in this county for the board to employ conveyances to take them to various parts of the county to view real estate under consideration."

Answering your first question I beg to state that, in my opinion, the later date governs and that the "decennial" county board of equalization may prolong its sessions, if necessary, until the fourth Monday of February of the year next following the beginning of the equalization, as provided in section 5595 General Code. It must, however, complete its work by that time as the provisions of section 5596, which requires the auditor "immediately thereafter" to

> "give ten days' public notice * * * that the equalization has been completed, and that complaints against any valuation may be filed with the auditor of the county on or before the fifteenth day of April next following, etc."

are apparently mandatory.

Answering your second question I beg to state that section 5597 General Code does not authorize members of the decennial county board to be reimbursed for expenses incurred as such members.

Section 2813a Revised Statutes did contain such a provision, but it was inserted in the statute in such a way as to lead to considerable doubt as to its uniformity of operation, and hence, as to its constitutionality. The attention of the general assembly should be called to this apparent defect in the law. I have found no other section authorizing the payment of such expenses and am reluctantly compelled to hold that the members of the board of equalization are not entitled to be reimbursed for expenses incurred by them in the discharge of their official duties.

Yours very truly,
U. G. DENMAN,
Attorney General.

SCHOOLS — TOWNSHIP BOARD OF EDUCATION — CLERK — COMPENSATION.

Person holding office of member of township board of education and also clerk of such board entitled to compensation of both offices.

April 28th, 1910.

HON. LAWRENCE E. LAYBOURNE, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR: — Your letter of April 25th is received in which you ask my opinion upon the following question:

> "The board of education in German Township, Clark County, has elected one of its members as its clerk, and his compensation has been fixed by the board. Can he receive his compensation as clerk of such board and at the same time receive the compensation of two dollars for each meeting attended as a member of the board?"

In reply thereto I beg leave to submit the following opinion:

Section 4747 of the General Code (section 3920 R. S. O.) reads in part as follows:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president and a person, who may or may not be a member of the board, shall be elected clerk. * * *"

Section 4781 of the General Code (section 4056 R. S. O.) reads in part as follows:

> "The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. * * *"

Section 4715 of the General Code (section 3920 R. S. O.) reads as follows:

> "Each member of the township board of education shall receive as compensation two dollars for each meeting actually attended by such member, but for not more than ten meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

Under the above quoted provisions of section 4747 of the General Code the offices of clerk of the board of education and member of such board are specifically made compatible, and allowed to be held by one and the same person. Under the above quoted section 4781 the board of education of German Township has fixed the compensation of one of its members heretofore elected clerk of such board by virtue of the authority given by section 4747 of the General Code, and by virtue of section 4715 of the General Code, each and every member of such township board of education is entitled, as compensation for actual attendance at each meeting, to the sum of two dollars. The principle is well settled that so long as a person retains the legal title to an office he is entitled to the emoluments thereof.

Throop on Public Officers, section 443.

In the case of Andrews vs. City of Portland, 79 Maine, 490, it is held.

> "The plaintiff was marshal *de jure*. His salary was fixed by law. The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts, that authorities hardly need be cited. Dolan v. The Mayor, 68 N. Y. 274; McVeany v. The Mayor, 80 N. Y. 185; Fitzsimmons v. Brooklyn, 102 N. Y. 536."

As the member of the German Township board of education in question, by virtue of the above quoted sections of the General Code, holds the legal title both to the office of member of the township board of education and clerk of such board, he is, therefore, entitled to the emoluments of both offices, and I am, therefore, of the opinion that he can draw his salary as clerk of such board and

also his compensation of two dollars for each meeting of the board, not to exceed ten in number in each year, which he attends.

Yours very truly,

U. G. DENMAN,
Attorney General.

BUILDING COMMISSION TO BUILD COURT HOUSE.

Such commission has full power to determine all questions connected with the location and building of the court house.

May 16th, 1910.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> "1. We are building a new court house in this county. A commission was appointed to act in connection with the county commissioners under section 794-1. The question is now raised as to who has the right to determine the location of the building on the lot — the building commission or the county commissioners.
>
> "2. If the location of the new building requires a removal of a portion of the old court house are the county commissioners required to remove such portion of the old court house as will interfere with the construction of the new one or is the building commission authorized to have it done?"

In reply, I beg to say the sixth paragraph of section 794-1 Revised Statutes, section 2338 General Code, is as follows:

> "After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building and for furnishing, heating, lighting and ventilating it, and for the sewage thereof. Until the building is completed and accepted, by the building commission, *it may determine all questions connected therewith,* and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county".

The power vested in the building commission under the provisions of the above quoted section is very broad. "Until the building is completed and accepted, * * * it may determine all questions connected therewith". The power conferred in this provision certainly includes the determination of the location of the building and all other questions incident thereto. If the old court house stands in the way of the construction of the new court house, I am clearly of the opinion that the building commission may remove the same in part or in whole. In other words, after the commission is appointed the whole duty of the construction of the court house falls upon the building commission, and the county commissioners, acting as a separate board from the building commission, have no authority in the premises.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEDICAL SERVICES RENDERED INDIGENT PERSON.

Township not liable for services rendered prior to notice if said notice not given within three days.

May 16th, 1910.

HON. N. H. MCCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following statement of facts, together with a request for an opinion thereon:

> "On March 30th, 1910, an indigent person having no legal settlement in the State of Ohio, was seriously hurt by being run over by a railroad train, at Lodi, Harrisville township, Medina County. He was, on the advice of a local physician, at once conveyed to a hospital at Wooster, Wayne county, Ohio. No notice of the matter was given to the infirmary directors until the 5th day of April, following, when the officials at the hospital in Wooster notified the infirmary directors of the circumstances, and also that it was their intention to look to the infirmary directors of Medina county for their compensation for the care, surgical operation, etc., rendered the patient.
>
> On the same day the township trustees of Harrisville township received a written notice from their local physician, advising them that he had rendered his service on account of the indigent person, in his removal to Wooster, and that he would expect them to pay his bill. Neither of said notices were received by the respective parties within three days after the happening of the accident, and neither board had any opportunity to investigate or make provision for the care of the case before it was removed from their jurisdiction.
>
> *Query:* Under these circumstances what is the liability of the township trustees of Harrisville township and the infirmary directors of Medina county?

In reply I beg to say section 1494 Revised Statutes, section 3480 General Code, provides for a notice to be given township trustees or corporation officers when a person in any township or corporation is in a condition requiring public relief and contains this provision:

> "But if such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officers, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered"

Under this provision the township trustees of Harrisville township are not liable for any services rendered by the local physician prior to the giving of the notice for the reason that said notice was not given within three days after the physician's services began.

I find no provision in the statutes whereby any liability attaches to the board of infirmary directors. A board of infirmary directors is authorized under section 975 Revised Statutes, section 2546 General Code, to make contracts with one or more competent physicians to furnish medical relief for the persons of their respective townships. Your letter does not state whether or not the local phy-

sician of Harrisville township was under contract with the board of infirmary directors, and I am, therefore, unable to determine whether or not any liability exists against the infirmary directors by reason of such contract.

Yours very truly,
U. G. DENMAN,
Attorney General.

DITCH SUPERVISOR ENTITLED TO COMPENSATION AT THE RATE OF $2.00 PER DAY FOR ALL SERVICES ACTUALLY PERFORMED BY SUCH SUPERVISOR IN THE LINE OF HIS OFFICIAL DUTY.

May 14th, 1910.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication is received in which you submit copies of two bills rendered the board of trustees of Concord Township, Miami County, Ohio, by F. B. McNeal, ditch supervisor, for services rendered by said McNeal in the examination of records to procure a list of ditches in said township. You further state that you have advised the trustees that these bills are not lawful claims against the township.

Sections 3388 to 3399 inclusive, and sections 6691 to 6726 inclusive of the General Code, provide for the election of a ditch supervisor and in a general way prescribe his duties, and while these sections contain no express provision that the ditch supervisor may receive compensation for services such as are enumerated in these two bills, yet, for the purpose of cleaning and keeping in repair township and county ditches, the county supervisor is required to divide them into working sections and apportion such sections to the land owners, corporate roads, railroads, township and county according to the benefits received, and I presume in order to make this apportionment the ditch supervisor will have to know the names of the land owners to be benefited thereby, together with the number of acres of land owned.

Section 3388 of the General Code provides that,

> "Such supervisors shall be allowed two dollars per diem, for the time actually engaged in performing the duties of his office, to be paid by the township trustees * * *"

My judgment is that if a procurement of the list of ditches in said township, together with a list of the land owners abutting thereon, is essential to the making of a proper apportionment for the cleaning out said ditches, then the supervisor is entitled to a compensation at the rate of two dollars per day for the time actually engaged in such work. The question as to whether or not these bills are valid claims against the township is a question of fact rather than of law. If the services performed by him were necessary in the conduct of duties of his office, then they are legal claims and should be paid. If the procurement of a list of the ditches in the township from the official records is not necessary in the performance of the duties of a ditch supervisor, then he is not entitled to any compensation for services rendered by him in procuring the same.

Yours very truly,
U. G. DENMAN,
Attorney General.

ASSESSOR—TOWNSHIP—MAY NOT QUALIFY AND SERVE AS ASSESSOR FOR BOTH TOWNSHIP AND MUNICIPAL CORPORATION. SECTIONS 3261, 3349 AND 3351 GENERAL CODE CONSTRUED.

May 6th, 1910.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 12th in which you submit for my opinion thereon the following question:

> "Burton township, in our county, is divided into two election precincts, one for corporation and one for the outside township. In the election last fall an assessor of personal property living in the township precinct was nominated and elected in the township, and the same man was on the ticket in the corporation and was elected in the corporation. The township has never been divided into assessor districts as provided in section 3351 General Code of Ohio. Is it proper for this man to serve as assessor of personal property in both the township and the corporation of Burton?"

Your inquiry requires a construction of section 3349 of the General Code which is as follows:

> "One assessor of personal property for the township shall be elected biennially in each township * * *. If the township is divided into two or more election precincts, one such assessor shall be so elected for each precinct in which such election is held."

"Burton township" is divided into two election precincts. One of these two precincts is an incorporated municipality and with elective powers separate from those of the second precinct which also has elective rights independent of the municipality. This statute provides that if the township is divided into two or more election precincts one such assessor shall be elected for each precinct in which such election is held. Unless some other section of the statute affects and changes this statute the conclusion must be reached that the assessor residing in the township and elected assessor for the township precinct may not also qualify for the office of assessor in the municipal precinct. In my opinion section 3351 of the General Code does not apply to the question herein presented for the reason that the county commissioners have not acted in the premises.

A further reason why this assessor may not qualify as such for the municipal precinct is found in section 3261 General Code, which requires that residence in the precinct or township for which he was elected is a necessary qualification for the office of assessor therein. The residence of this man in so far as it is related to the office of assessor is confined to the precinct in which he resides. Your inquiry must, therefore, be answered in the negative.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMBER OF TOWNSHIP BOARD OF EDUCATION MAY NOT BE TOWNSHIP TRUSTEE.

August 17th, 1910.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 26th, submitting for my opinion thereon the following question:

> "May the offices of member of a township board of education and township trustee be held by the same person?"

In my opinion these two offices are not compatible. Without citing statutes suffice it to say that the township board of education is a body corporate and politic, having control of all school property belonging to the district, and exercising all rights and powers with respect thereto not specifically conferred upon other officers. So also the township trustees are a body politic and corporate, having like powers and duties with respect to township property. It is conceivable that disputes might arise as to property rights or as to the disposition of public moneys between the school district and the township which would, of course, result in the two boards being placed in the position of adversaries. For this reason alone the two offices are incompatible.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

BURIAL COMMISSION, COMPENSATION, ONLY AVAILABLE UNDER AMENDMENT TO LAW PASSED APRIL 9, 1908.

June 1st, 1910.

HON. FRED H. WOLFE, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> On April 9th, 1908, the legislature amended the act relative to the burial of indigent soldiers. Said amendment provides that the county commissioners shall appoint two suitable persons in each township to look after and cause to be interred honorably discharged soldiers, whereas the law prior to the amendment provided that three suitable persons in each township should be so appointed. The amendment further provides that the two persons so appointed shall receive as compensation one dollar each for each service performed. The amended act was not brought to the attention of the county commissioners of this county until the early part of 1910, at which time the county commissioners proceeded to and did appoint a committee of two as provided in said amendment.
>
> The committee of three under the old law now demand pay at the rate of one dollar for each service performed by them since the enactment of the amendment.
>
> *Query:* May the county commissioners pay the compensation provided in the amendment to the committee under the old law?

In reply I beg to say my judgment is that the compensation provided in the amendment, as passed April 9, 1908, applies only to the committee appointed in accordance with said amendment. That is to say, the compensation in the amendment is to be paid to the committee appointed thereunder, and does not apply to the committee appointed under the old law, for the reason that it was intended that the committee appointed under the old law was to serve without compensation.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY LOCAL OPTION.

The fine assessed by the mayor of a municipality for a prosecution of a violation of the county local option law should be paid into the municipal treasury.

June 7th, 1910.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> A prosecution was had before the mayor of the city of Ironton under the county local option law, and the defendant was fined $200 by the mayor. In default of payment the defendant was confined in the county jail. Thereafter the fine was paid to the county auditor and the defendant released.
>
> *Query:* 1. Is the county auditor required to issue a voucher for the payment of said fine over to the municipality of Ironton?
>
> 2. The county commissioners salary is based upon the tax duplicate of December of the preceding year. When should the salary, as based upon such duplicate, commence, the first of the following January or September?
>
> 3. Is there any law authorizing the boards of education in rural (township) districts to pay a constable or other officer for pursuing and arresting a criminal who had disturbed the school and assaulted the teacher in their district?

In reply to these questions, I beg to say:
First, section 7 of the county local option law, 99 O. L. page 37, is as follows:

> "Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation wherein said fine was imposed and bond forfeited, and shall be applied to such fund or funds as the council of said corporation may direct. When such law is enforced in the county court the fine shall be paid into the county treasury".

This section expressly provides that money "received from fines * * * shall be paid into the treasury of the municipal corporation wherein said fine was imposed". Under the facts stated in your inquiry the fine was imposed by the mayor of the city of Ironton, and it follows therefore, that the money should

have been paid into the municipal treasury instead of the county treasury. However, I am of the opinion that the county auditor is authorized to correct the mistake by the issuance of a voucher for the payment of the money received from the fine imposed by the mayor over to the municipality.

Second. This department has heretofore advised the Bureau of Inspection and Supervision of Public Offices that the yearly salary of a county commissioner, as fixed by the duplicate of the preceding year, shall commence with the beginning of his official term, to-wit, on the third Monday of September.

Third. I know of no statute whereby boards of education are authorized to pay fees to a constable or other officer for services rendered in criminal prosecutions.

Yours very truly,
U. G. DENMAN,
Attorney General.

REAL ESTATE APPRAISERS—COMMISSIONERS AND AUDITOR MAY REVIEW ACTION IN FIXING TIME LIMIT UPON SUBSEQUENT INFORMATION RECEIVED.

June 7th, 1910.

HON. M. O. BURNS, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts, together with a request for an opinion thereon:

> The real estate appraisers of Butler county, before entering upon the discharge of their duties were requested to come to Hamilton to organize and discuss a plan of action in regard to their work. In response to said request each of the appraisers made four trips, but when the commissioners and auditor determined the number of days to be allowed for doing their work they omitted to make any allowance for these four days of preliminary preparation.
>
> *Query*: 1. May the commissioners and auditor now review their action in so fixing the number of days, and include the four days omitted?
>
> 2. If so, will the commissioners and auditor be required to act unanimously in the matter. That is, upon a proposition to re-consider must the auditor vote "aye"?

In reply I beg to say:

First, section 9 of the act amending the act of March 12, 1909, is in part as follows:

> "And in townships and villages, the power and authority is hereby given to the board of county commissioners and the auditor of each county * * * to determine and limit between the dates provided, the time necessary for each real estate assessor or board of real estate assessors to perform the duties required of them under this act."

This provision means that the county commissioners, together with the auditor shall fix a time limit in which the real estate assessors in townships and

villages shall perform their duties, and is is my judgment that if in so doing the county commissioners and auditor make a mistake or error by reason of a lack of knowledge of the services to be performed by said assessors, they may thereafter correct the error or mistake as based upon subsequent information received.

Second: It is my opinion that in the performance of the duties enjoined upon the county commissioners and the auditor in fixing such time limit, each county commissioner and the county auditor will be entitled to vote upon the question and a majority of the votes so cast will control. That is, while it is necessary for the auditor to participate in the action, his concurrence is not essential to the fixing of the time.

Yours very truly,
U. G. DENMAN,
Attorney General.

BRIDGE.

County commissioners not liable for damages by reason of defective bridge unless such bridge so established is under the control of the county commissioners.

June 7th, 1910.

HON. J. R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following statement of facts, together with a request for an opinion thereon:

> "A bridge which was constructed by and for a number of years has been wholly maintained by the township trustees of Pleasant township, Hardin county, Ohio, became defective several months ago. On account of the $50.00 limit imposed on trustees, the county commissioners were requested to construct a new bridge and agreed to do so, stipulating that the trustees should temporarily repair the same, until it could be rebuilt. The construction of a new bridge wias advertised by the county commissioners and a contract let. Before any work was begun, however, or contracted to begin, an accident occurred on the bridge, whereby a horse of considerable value was lost. There is no question but that the bridge was defective and negligently so, and there is no question of contributory negligence."
>
> *Queries*: 1. Is the board of county commissioners authorized to compensate the owner of the horse in damages?
>
> 2. If not, is the board of township trustees authorized so to do?

Section 2408 of the General Code provides that the board of county commissioners shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any state or county road or bridge established by such board in its county in proper repair.

You will observe that this provision applies only to bridges which have been established or constructed by the county commissioners. Under the statement of facts submitted in your letter the bridge in question was constructed by the township trustees and has since been maintained by said trustees. The fact that the county commissioners have agreed to replace this bridge by a new one does not, in my judgment, place the old bridge under their control, par-

ticularly is this so by reason of the stipulation made that the township trustees should keep the old bridge in repair until the new one could be built.

The statement of facts does not inform me as to whether or not the road upon which this bridge is built is a township or county road. If it is an improved county road, under the statutes governing the same, the road is under the control of the county commissioners, and this fact might have some bearing upon the question of responsibility of the county commissioners for the injury done. In my judgment, however, upon the facts stated in your letter, the county commissioners are not responsible for the damage.

As to the responsibility of the township trustees, I refer you to the provisions of section 3244 General Code, which is in part as follows:

> "Each civil township lawfully laid off and designated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It shall be capable of suing and being sued, pleading and being impleaded, and of receiving and holding real estate by devise or deed, or personal property for the benefit of the township for any useful purpose * *."

The language used in this provision, to-wit, "It shall be capable of suing and being sued," is not restricted, and, in my judgment, will authorize a suit against township trustees for damages done by reason of defects in any bridge under their control, caused by the negligence of said trustees.

Yours very truly,
U. G. DENMAN,
Attorney General.

SHEEP CLAIMS.

Claim to be presented to the county commissioners in the county where sheep are injured.

June 16th, 1910.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, O.*

DEAR SIR: — Your communication is received in which you submit the following inquiry:

> A resident of Harrison County owned sheep which were being pastured in Jefferson County. The taxes on said sheep were paid in Harrison County. The sheep while in Jefferson County were killed by dogs.
>
> *Query:* Which county (Harrison or Jefferson) is liable, under section 4215 of the Revised Statutes, for the damages?

In reply I beg to say, section 4215 Revised Statutes provides that,

> "Any person damaged by the killing or injuring of sheep by dog or dogs, may present a detailed account of the injury done, with damages claimed therefor, verified by affidavit *at any regular meeting of the trustees of the township wherein the damage or injury occurred.*"

This section further provides that said township trustees may examine witnesses, not exceeding two, and administer oaths and make an allowance to the person or persons injured, which allowance shall be transmitted with the testimony to the county commissioners. The county commissioners are then required at the next regular meeting to examine the same, and if found in whole or in part correct and just, to order payment of the same.

From the above quoted provision of this section it is clear that the person damaged is to present his claim to the trustees of the township where the damage or injury occurred, and, in my judgment, the residence of the owner of sheep so injured is not material.

Very truly yours,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — VILLAGE COUNCIL — DELEGATION OF POWERS.

Council of incorporated villages can not delegate power given them to make contracts.

June 22nd, 1910.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: — Your letter of June 13th is received, in which you request my opinion upon the following question:

> "Has council for an incorporated village the right to delegate its power to a finance committee of three, by motion or resolution, to contract for laying of sidewalk, amount less than Five Hundred ($500.00) Dollars, to be paid for by special assessments, and should this contract be approved at a meeting of council to make it legal? We have no board of public service, and the number in council is six."

In reply thereto I beg leave to submit the following opinion:

By section 198 of the Municipal Code the power is given to councils of villages to make such contracts as are allowed to be made by directors of public service by virtue of section 143 of the Municipal Code. The principle is, however, well settled that where a power is given by statute to a public officer or board, to make contracts or to perform any act which requires the exercise of judgment or discretion on his or their part, such power can not be delegated unless expressly so provided in the statute conferring it upon such officer or board.

Kelly v. Cincinnati, 7 N. P., 361 (citing Board of Education vs. Mills, 38 O. S., 383, and Lippelman vs. Cincinnati, 4 O. C. C., 327).

Knauss v. Columbus, 13 O. D., N. P., 200.

I am, therefore, of the opinion that council spoken of in your inquiry can not delegate to a finance committee consisting of three of its members, the power to make the contract referred to, but such council could delegate the power to make the preliminary negotiations and arrangements concerning such contract to such a finance committee if the final approval and execution of such contract is made by council itself. Such a plan of procedure would not be a delegation of the power to make such contract, for it would not be of any force or effect until formally entered into by council, as provided in section 198 of the Municipal Code.

Very truly yours,
U. G. DENMAN,
Attorney General.

WORKHOUSE—PRISONER COMMITTED TO—IN DEFAULT OF PAYMENT OF FINE AND COSTS—PER DIEM FOR CARE AND MAINTENANCE NEED NOT ACCOMPANY MITTIMUS.

June 30th, 1910.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 11th submitting for my consideration and opinion thereon the following question:

> In case of a conviction for an offense punishable only by fine, and commitment thereunder to a workhouse not maintained by the political subdivision in which the conviction was had, for failure to pay the fine imposed and the costs, should the political subdivision transmit to the superintendent of workhouse with the mittimus a sum of money equal to forty cents per day for the time of commitment, for the care and maintenance of the prisoner?

I acknowledge also your letter of June 28th submitting authorities, and in this connection beg to advise that I have also given consideration to two letters submitted by Mr. W. J. Massey, Solicitor for the Village of New Concord, in forming my conclusion.

Section 4128 General Code assumed by both yourself and Mr. Massey to govern the case if any statute governs it, is, in part, as follows:

> "* * * when a commitment is made from a city, village or township in the county, other than in the municipality containing such workhouse, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to forty cents per day for the time of the commitment, to be placed in the hands of the superintendent of the workhouse for the care and maintenance of the prisoner."

In answering your question I shall assume that a person properly confined in a workhouse for non-payment of fine and costs is "lawfully committed" thereto. I have examined all the statutes relating to the matter, as well as the decision cited by you, and am satisfied that such is the law. This, however, is not conclusive of the question.

Section 4151 General Code provides in part that,

> "* * * In all cases where a fine may be imposed for punishment in whole or in part for an offense * * * the court or magistrate may order that such person stand committed to the workhouse until such fine and costs are paid, or until he be discharged, at the rate of sixty cents per day for each day of confinement, or be otherwise legally discharged."

A person "committed" under such an order of court after having failed or refused to pay a fine imposed upon him is not committed for any definite time. He may remain in the workhouse an hour, a day or a month. What then is the "time of the commitment"? It would not be fair to say that such time of commitment is the number of days at sixty cents per day it would take for the

prisoner to work out his fine and the costs, there being no provision of law authorizing the *return* to the municipality or township of the unused money transmitted, in case the prisoner pays his fine or is released prior to such time as he might have worked out his sentence.

Inasmuch, therefore, as a person committed to the workhouse in default of payment of fine and costs is not committed thereto for any definite time, and, accordingly, the exact amount to be transmitted under section 4128, if the same should apply, can not be authorized in any case, I conclude that the statute does not apply to such cases; or that, at least, if it is intended so to apply, it is inoperative. In any event, I am satisfied that a municipality not maintaining a workhouse is not obliged, under said section, to transmit any money with the mittimus of a commitment to a workhouse made in default of payment by the prisoner of fine and costs.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the City Solicitors.)

ELECTIONS — DELIVERY OF POLL BOOKS BY JUDGE TO CITY AUDITOR — COMPENSATION FOR SAME.

November 30th, 1910.

HON. CLIFFORD L. BELT, *City Solicitor, Bellaire, O.*

DEAR SIR: — I beg to acknowledge receipt of your letter of November 17th, requesting my opinion upon the following questions:

> "Is it incumbent on a municipality to pay directly or indirectly the sum of $2.00 and mileage to the judge of election for delivering a copy of the poll books and tally sheets to the city auditor in a general election?
>
> "Should a copy of the poll books and tally sheets be filed with a city officer in a general election?"

Section 5093 of the General Code provides in part as follows:

> "The judges and clerks in each precinct shall make out the returns of the election in duplicate, sign and certify one of the poll books and tally sheets thereof, and immediately transmit it to the deputy state supervisors by the presiding judge or such other judge as he may designate. The other poll book and tally sheet signed and certified in like manner shall be forthwith deposited with the clerk of the township or the clerk or auditor of the municipal corporation, as the case may require, by another judge designated by the preceding judge, and shall be preserved one year from the date of such election. * * *"

Section 5043 of the General Code provides in part as follows:

> "* * * The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality shall receive like compensation." (Referring to the compensation provided for the judge of elections called by the deputy state supervisors to receive and deliver ballots and supplies, being "two dollars for such service, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom"; but, of course, the mileage provided in this clause could never be payable to a clerk delivering returns to the auditor or clerk of a municipality.)

Section 5052 of the General Code provides in part as follows:

> "All expenses * * * of any general or special election, including *compensation of precinct election officers,* shall be paid from the county treasury as other county expenses."

Section 5053 of the General Code provides in part as follows:

> "In November elections held in odd-numbered years, such compensation and expenses shall be a charge against the * * * city

> * * * in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such * * * city * * * at the time of making the semi-annual distribution of taxes. * * *"

The foregoing sections of the General Code provide a complete scheme of legislation. In them a duty is created, compensation for such duty provided, and the manner of paying such compensation prescribed. The duty created by section 5093 of the General Code is one which arises in each general and special election, so that the answer to your second question must be in the affirmative. That is to say, the returns must be delivered to the city auditor or the village clerk in the even-numbered years as well as in the odd-numbered years.

By section 5043 the compensation of the judge of elections carrying the returns to the city auditor is clearly and plainly prescribed. This compensation is, in my opinion, a part of the "compensation of precinct election officers" within the meaning of section 5052 of the General Code.

It follows, therefore, that the answer to your first question is as follows: The compensation of the judge of elections delivering the returns of a general election held in an even-numbered year to the city auditor can in no event become a charge against the city. For the same service rendered in an odd-numbered year the city must ultimately pay; but such compensation must first be paid out of the county treasury as other county expenses, and then retained by the county auditor from the funds due the city at the next semi-annual distribution of taxes.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION — CEMETERIES.

Deeds for lots should be executed by mayor and authenticated by city auditor.

November 9th, 1910.

HON. J. J. BROWN, *City Solicitor, Alliance, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of October 28th requesting my opinion upon the following question:

> "The city of Alliance owns a public cemetery. Who, in your opinion, are the proper officials of said city, under the present laws, to execute deeds to purchasers of lots in such cemetery?"

Section 4165 of the General Code provides that,

> "The director (of public service) shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lots described therein."

This section, however, does not designate "the proper officer" referred to.

Section 4201 General Code provides that,

> "The clerk of the corporation shall record in a book provided for that purpose, a plat of all grounds for cemetery purposes * * * and he shall execute to the purchasers of lots such conveyances as may be necessary to carry into effect the contracts of sale."

It is true that this section is placed in the General Code among the sections relating to union cemeteries, and there appears to be some doubt as to whether it applies to cemeteries exclusively owned by a municipal corporation. This section was originally section 391 of the municipal code of 1869, 66 O. L. 214, and would seem to be of general application. However, the supreme court in the case of Tiffin v. Shawhan 43 O. S. 178, held that the city clerk had no authority to convey cemetery lots, but that the conveyance should be by the mayor under the seal of the city, authenticated by the clerk. This case was decided after the statute which has become section 4201 General Code was enacted, but that section does not appear to have been considered by the court. The case of Tiffin v. Shawhan establishes the principle that council may not delegate the function of executing conveyances to any particular city officer, and that in the absence of specific provision of law the power to execute conveyances resides in the mayor.

Section 4201 General Code, if it has any meaning, however, should be regarded as governing the case in spite of the decision in Tiffin v. Shawhan in which this section then existing was not considered. There is still some doubt in view of the fact that in the city there is no such office as "clerk of the corporation." Many of the duties formerly imposed upon the officer known as corporation clerk were imposed upon the auditor in cities by the provisions of sections 134 and 224 of the municipal code of 1902, and upon the clerk in villages by the provisions of section 201 of that act. The present code also provides for a clerk of council, but I am clearly of the opinion that this officer cannot be called the clerk of the corporation. I have carefully examined the provisions of both the municipal code of 1902 and of the General Code of 1910, and find therein no provision by which this power of the corporation clerk is conferred upon any of the now existing officers of a city.

I am, therefore, of the opinion that the power and duties enjoined upon the "clerk of the corporation" by section 4201 General Code expired, and were set at naught when the office was abolished. It follows from the foregoing that section 4201 General Code must be ignored and that the rule laid down in the case of Tiffin v. Shawhan must be followed. That case holds that the mayor should sign deeds for cemetery lots, and that the same should be authenticated by the clerk. This power of authentication has been expressly conferred by section 4277 General Code upon the city auditor, and I am, therefore, of the opinion that deeds for cemetery lots should be executed under the seal of the corporation by the mayor, and attested, under the seal of his office, by the city auditor.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — STREET ASSESSMENTS — MANNER AND TIME OF PAYING — FULLY DISCUSSED.

June 8th, 1910.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your communication of recent date, in which you submit the following for an opinion:

> "A street assessment, payable in ten installments, for which bonds have been issued in anticipation of the collection of the same, has been certified by the clerk of council to the county auditor, as provided in section 3892 of the General Code, and you desire to know if a property owner may at any time pay his entire assessment or if he is required to wait and pay each of said installments as they become due.

Section 3892, General Code, is as follows:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

This section requires the clerk of council to certify an entire assessment, which is payable in different installments, to the county auditor at one time. The county auditor then places such installments of the assessment as are due and payable upon the county duplicate and certifies the same to the county treasurer for collection, who collects such installments in the same manner as other taxes and pays the same to the treasurer of the corporation to be applied on the payment of the bonds issued in anticipation of such assessment.

The case of Makley v. Whitmore, et al, reported in 61 O. S. 587, holds that only installments of assessments becoming due and payable in any one year are to be entered by the county auditor upon the county duplicate for that year and that subsequent installments are to be placed upon the duplicate as they become due and payable. This case clearly holds that an entire assessment, with all of its installments, may not be collected by the county officials at any time and before each installment is due, but I do not understand the case to go so far as to prohibit one from paying all of the installments of the assessment at one time if such person so desires. The assessment with each of its installments is a fixed charge against the property and I do not see any reason for prohibiting one to pay his entire assessment at one time and relieve his property from the lien.

Section 2567, General Code, is as follows:

> "Except moneys collected on the tax duplicate, the auditor shall certify all moneys into the county treasury, specifying by whom to be paid and what fund to be credited, charge the treasurer therewith and preserve a duplicate of the certificate in his office. * * *"

Under the above section a property owner could obtain a pay-in warrant from the county auditor for the amount of his entire assessment, which would be authority for him to pay the same to the county treasurer, and such property owner would thereby relieve his property from the lien of such street assessment.

I desire to call your attention to the fact that a property owner may also pay his entire assessment, with all installments, to the proper municipal officer at any time prior to such assessment being certified by the clerk of council under authority of section 3892 to the county auditor for collection. For your information I herewith enclose copy of an ordinance levying an assessment on real estate which has stood the test of the courts.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION MAY LEASE WATER PLANT.

August 1st, 1910.

HON. J. R. SELOVER, *City Solicitor, Delaware, Ohio.*

DEAR SIR: — On July 28th, replying to your letter of July 26th, I advised you that I found no authority in the General Code for the leasing by a municipality of a privately owned water works plant. I regret to state that this advice was erroneous. Section 3809 General Code, formerly a portion of section 45 M. C., provides, *inter alia* that,

> "The council of a city may authorize * * a contract with any person, firm or company * * for the leasing of * * * the water works plant * * of any person, firm or company therein situated, for a period not exceeding ten years * *".

This provision is sufficient, in my judgment, to authorize the director of public service, upon direction of the council and approval of the board of control, to execute on behalf of the city a lease of a private water works plant, such as that described by you.

I find no provision of law requiring the proposition of leasing a water works plant in this manner to be submitted to a vote of the people.

I sincerely trust that my failure to observe the foregoing provision has not resulted in any inconvenience to you. The clause is interwoven with a number of provisions relating to taxation and the making of contracts. It is widely separated in the Code from the provisions granting general and special powers to municipalities as such and from those pertaining to the powers of council and those of the director of public service. For these reasons I overlooked it.

Yours very truly,

U. G. DENMAN,
Attorney General.

Y. M. C. A. — MUNICIPALITIES MAY NOT FURNISH FREE WATER TO.

June 13th, 1910.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR: — I am in receipt of your letter of June 7th in which you submit the following to me for opinion:

> May a city furnish water without charge to any institution in the city which does not belong to said city, for instance: we have a Young Men's Christian Association here who desires us to furnish them water free of charge and we would like to do so if the law will allow. This institution does not belong to the city.

I beg to call your attention to section 3963 of the General Code which is as follows:

> "No charge shall be made by such director for supplying water for extinguishing fires, cleaning fire apparatus or for furnishing or supplying connections with fire hydrants and keeping them in repair for fire department purposes, the cleaning of market houses, the use of public school buildings, nor for the use of any public building belonging to the corporation, or any hospital, asylum or other charitable institution devoted to the relief of the poor, aged, infirm or destitute persons or orphan children."

You will note from the above section that the last class of institutions referred to is as follows:

> "or any hospital, asylum or other charitable institution devoted to the relief of the poor, aged, infirm or destitute persons, or orphan children,"

and that the preceding phrase "nor for the use of any public building belonging to the corporation" does not in any way modify this latter phrase. It is, therefore, clear that a hospital, asylum or other charitable institution, to be exempt from charge by the municipality for supplying water, need not necessarily be owned or belong to the municipal corporation, but in case any hospital, asylum or other charitable institution is not owned by or belongs to a municipal corporation such institution must be *devoted to the relief of the poor, aged, infirm or destitute persons or orphan children,* to be exempt from water charges. If the Young Men's Christian Association of your city is a hospital, asylum or other charitable institution devoted to the relief of the poor, aged or destitute persons, or orphan children, such institution would then be exempt from a charge made by the municipality for supplying water, and it is not necessary that such institution be owned by or belong to the municipal corporation.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPALITIES — ISSUE OF BONDS.

After people have authorized bonds to be issued in excess of one per cent., council may not still issue one per cent. without vote.

March 24th, 1910.

HON. H. L. DELL, *City Solicitor, Middletown, Ohio.*

DEAR SIR: — I am in receipt of your letter of March 19th in which you submit the following for my opinion:

> The tax duplicate of Middletown is about six million ($6,000,000) dollars and, under the statute, we could only issue sixty thousand ($60,000) dollars worth of bonds without submitting same to a vote of the people. However, the people have voted to issue one hundred thousand ($100,000) dollars worth of bonds, and the question now arises, may the council issue sixty thousand dollars ($60,000) worth of bonds in addition to the one hundred ($100,000) worth of bonds authorized by a vote of the people?

The statutes which you refer to, no doubt, are sections 3940 and 3941 of the General Code, which are as follows:

Section 3940:

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

Section 3941:

> "When such council, by resolution or ordinance passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, deems it necessary in any one fiscal year to issue bonds for all or any of the purposes so authorized in an amount greater than one per cent. of the total value of all the property in such municipal corporation as listed and assessed for taxation, it shall submit the question of issuing bonds in excess of such one per cent. to a vote of the qualified electors of the municipal corporation at a general or special election in the manner hereafter provided in this chapter."

From the above quoted statutes it is quite clear that council could have issued bonds to the limit of one per cent. of the total tax duplicate of the city without first submitting the question to a vote of the people. However, from your statement of fact I understand that council has not issued any bonds prior to submitting the question of issuing one hundred thousand dollars worth of bonds to the electors. This one hundred thousand dollars bond issue which the electors have voted in favor of is in excess of the one per cent. which council could have issued, and you will note that the above sections provide that the total bonded indebtedness created in any one fiscal year may not exceed one

per cent. of the total value of all property in the municipality except after the question has been submitted to the qualified electors of the municipality, and as the present bonded indebtedness of one hundred thousand dollars would exceed the one per cent which council could have created without a vote of the people, it will now be impossible, as the bonded indebtedness has reached the one per cent. limit, for council to issue any further bonds without a vote of the qualified electors.

I am, therefore, of the opinion that the council of your city may not issue sixty thousand dollars worth of bonds in addition to the one hundred thousand dollars worth of bonds authorized by a vote of the electors without submitting the question to a vote.

See Supplement on opinion on this point, to Bureau.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONER — BRIDGES — CONSTRUCTION OF BY.

County commissioners are not required to construct any particular kind of bridge within this municipality; municipality may issue bonds to assist.

February 18th, 1910.

HON. BRUCE P. JONES, *Solicitor, London, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date in which you submit the following inquiry for my opinion:

> The board of county commissioners has declared a new bridge to be necessary for a free turnpike within the corporate limits of the village of London; the board proposes to construct a bridge and provide for separate passage ways on each side for foot travel. The whole estimated cost is $8,250. The board demands that the village pay one-third of the cost or they will not provide separate passage ways for foot travel. The village is not entitled to demand or receive any of the bridge fund levied by the county on its property.

You desire to know, first: Are separate foot ways over such bridge a part of the bridge the board are bound to construct? Second: If not, may the village enter into an agreement with the commissioners and issue and sell its bonds and turn the proceeds over to the county to pay the village's share of construction?

Answering your first question, section 7557 of the General Code of Ohio is as follows:

> "The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plankroads, which are of general and public utility, running into or through such village or city."

This section was construed in the case of State ex rel. v. Commissioners, 49 O. S. 301, in which it was held that the matter of constructing a bridge cannot be determined by a court in opposition to the views of a board of county commissioners who are familiar, not only with the resources, but with the wants of each and every part of the county.

I am, therefore, of the opinion that the commissioners are not bound to construct any particular kind of bridge and, in the case at hand, are not bound to construct separate passage ways for foot travel.

Answering your second question, section 3939 of the General Code is, in part, as follows:

> "When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent, and in the manner, as provided by law, for any of the following specific purposes:
>
> * * *
>
> 26. For constructing or repairing viaducts, bridges and culverts, and for purchasing or condemning the necessary land therefor."

From the above quoted section I am of the opinion that your village may issue and sell its bonds and pay its share of the cost of constructing a bridge with separate passage ways for foot travel and turn the proceeds of the bonds over to the county commissioners for that purpose.

Yours very truly,

U. G. DENMAN,
Attorney General.

P. S. — Answering the other questions submitted in your above letter, I herewith enclose a copy of an opinion rendered to the City Solicitor of Sandusky which, I believe, entirely covers the inquiries submitted by you.

POLICE AND FIRE DEPARTMENT EMPLOYES — RELIEF OF INJURED.

July 6th, 1910.

HON. E. G. STALEY, *City Solicitor, Tiffin, Ohio.*

DEAR SIR: — I am in receipt of your letter of June 27th, in which you submit the following for my opinion:

> Two members of the city fire department were injured, one while exercising one of the horses of the department by having the horse fall on him and injuring his leg, the other by the over-turning of the chemical engine. Query: Has the city any authority to pay doctor and nurse bills for these injured men?

I beg to call your attention to section 4383 of the General Code, which is as follows:

"Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

You will note the above section authorizes council to provide for the relief of members of either the police or fire department temporarily or permanently disabled in the discharge of their duties.

In answer to your second inquiry, I herewith enclose copy of an opinion rendered by this department to Hon. J. C. Williamson, which fully covers the same.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

CIVIL SERVICE COMMISSIONERS—INTEREST IN MUNICIPAL CONTRACTS.

July 21st, 1910.

HON. HOMER HARPER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Your inquiry asking "would a Civil Service Commissioner (Ellis Code p. 405, sec. 157) of a city, be violating the provisions of sec. 12912 Gen. Code, if he were interested in the public printing for the city, such as printing blanks, etc.?" is received.

Sec. 12912 provides as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township, or for one year thereafter, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

The statutes covering civil service in cities are contained in sections 4477 to 4505 inclusive, Gen. Code. Among the duties required and powers given the Civil Service Commission, is the power to determine and render judgment on appeal from the decision of the mayor removing a person from his position in the classified civil service, and the powers thus given the commission by applying the rules in the case of the State ex rel, vs. Jennings, et al. 57 O. S. 415, makes a Civil Service Commissioner a municipal officer which comes within the above section, and I am therefore of the opinion that Civil Service Commissioners are prohibited from having any interest directly or indirectly in the

profits of the public printing for the city, public blanks, publishing of ordinances and legal notices for the city or interested in a contract, job, work or services as provided by said section.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—DIRECTOR OF PUBLIC SERVICE—INTEREST IN CONTRACT.

Owner of building leased by city may not receive rent from city after accepting office of director of public service. Official status of such person and status of lease under such circumstances discussed.

June 27th, 1910.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23rd submitting for my opinion thereon the following statement of facts:

> "Upon January 15, 1908, for the purpose of providing a building for water works and light offices, council chamber and general municipal purposes, the board of public service of this city, after being duly authorized by ordinance of council, as lessee, duly entered into and executed a lease with John C. Hayne, a lessor, for the lease of a building owned by said lessor, for a term of two years beginning January 15, 1908, with the option on the part of the city to renew said lease for a further term of three years on condition that notice of such intention to renew be given by said lessee to said lessor at least 30 days prior to the expiration of the two year term. This lease was accepted and approved by resolution of council on January 18, 1908. Upon December 18, 1909, the city council, by resolution, instructed the clerk to notify the lessor of the intention of the city to renew said lease according to its terms. Upon January 1, 1910, the said lessor, John C. Hayne was appointed Director of Public Service. At no time prior to this date had he been a member of either the city council or the board of public service.
>
> "Since he has been an incumbent of said office of director of public service, he has received from the city $68.00 as rent due and payable under the terms of said lease. Recently a state examiner of the Bureau of Inspection and Supervision of Public Offices made an examination of the books of the city, and in his report he designated such payment of rental to said John C. Hayne, as being illegal and within the prohibition of M. C. sec. 144.
>
> "Question: (a) Was said payment of rental illegal? (b) If so, what is the present status of said lease?"

The examiner of the Bureau was in error in citing section 144 M. C. in support of his findings, as that section has no present existence. It is embodied at present in section 4334 General Code which, in part, provides as follows:

"No director of public service or officer or employe of his department shall be interested in any contract under his supervision."

As you suggest, some question might, with reason, be made concerning the proper application of this section to the lease described in your letter, inasmuch as the same was valid in its inception and binding upon the lessor. Furthermore, I seriously question whether or not this contract of lease is "under the supervision" of the director of public service. This department has heretofore held that the providing of appropriate sites and quarters for municipal buildings and offices is within the jurisdiction of council, and indeed, upon your statement of facts, it appears to have been council which has acted for the city in the matter. On the whole I am inclined to attach no importance to the provisions of section 144 M. C., section 4334 General Code as affecting the question at hand. In passing, it may be remarked that these provisions are exactly declaratory of the common law rule respecting the interest of public officers in public contracts, which rule is nothing more nor less than the fundamental principle of agency that an agent may not himself be the adversary of his principal in a matter within the scope of his authority; — as a corollary of which principle it follows that the interest of a public officer in a public contract respecting which he has, as an officer, no authority, is legal.

Broken Bow vs. Water Works Co., 57 Neb. 548,
Wertz vs. Independent District of Des Moines, 87 Ia. 81,
Dillon on Municipal Corporations, section 444,
Throop on Public Officers, section 610 et seq.

However, there are other provisions of law more comprehensive than that cited by the examiner, and which, in effect, go far beyond the common law rule. Thus section 6976 Revised Statutes, section 12912 General Code, provides in part that,

"Whoever, being an officer of a municipal corporation * * * is interested in the profits of a contract * * * for such corporation * * * shall be fined * * * and forfeit his office."

Without discussing this section I may say that I am inclined to think of itself it would render illegal the interest of the director of the lease in question, and would make it necessary for him, upon receipt of his appointment, to elect between continuing to be the city's lessor and becoming its director of public service.

There is still another section, however, that, in my opinion, settles the question beyond all doubt. I refer to former section 45 M. C., and particularly to that portion thereof now included within section 3808 General Code, which is, in part, as follows:

"No * * * officer * * * of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. The violation of any provision of this * * * section shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other things he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

The foregoing language is at once so clear and so comprehensive that it needs no interpretation in the light of the common law. It is a section which,

to my personal knowledge, has seemed in many instances to work considerable hardship and to deprive municipalities of the official services of those best fitted to render the same. It can not be construed, however, otherwise than as meaning that any officer of a municipality, whether or not he has any official power with relation to making of a given municipal expenditure can receive no money whatsoever from the city treasury, other than his fixed compensation. There are doubtless many qualifications of the construction thus broadly outlined, but none of them are invoked by the facts submitted by you. Again, the statute means and clearly says that the mere acceptance of such money from the city treasurer shall disqualify the officer from holding office, and when ascertained by competent judicial authority shall work a forfeiture of his office. So, in the case mentioned by you, I am reluctantly impelled to the conclusion that your director of public service has violated the above quoted provision of law, and as therein prescribed, may now, not only be compelled to repay all the money he has received from the lease, but he may even be removed from office. I suggest merely the possible penalties of the statute. I am certain that none of your city officials were aware of this provision of law and that all their acts were committed in good faith. It would be most unjust, in my judgment, under the circumstances, to impose any of the penalties above referred to, excepting that which requires the return of the money to the city treasury.

By further analysis I have reached the conclusion that so long as the gentleman who has become your director of public service sustained no official relation to the city, the lease was, as suggested by you, valid and binding. It has been decided in this state that a municipality may, in its proprietary capacity, enter into contracts extending beyond the term of office of the public agency of authority acting in its behalf.

State ex rel vs. Lewis, 12th O. D. 46,
Ampt vs. Cincinnati, 2 N. P., N. S. ——.

Section 3808 also declares void all municipal contracts involving the expenditure of money, unless the auditor, as a condition precedent to the execution thereof, certifies that the money is in the treasury, etc. This section, however, does not of itself authorize the recovery of money paid by a city under such a contract.

State ex rel v. Fronizer, 77 O. S. 7.

Upon his appointment as director of public service, the person in question had, as above suggested, an election by virtue of section 3808. He could have retained his ownership of the property on the one hand, or, on the other hand, could have parted with the property, or, with the city's consent, have cancelled the lease, when any only when he could lawfully qualify for the office of director of public service. He could not both retain his interest in the property and in the lease, and lawfully serve as director of public service, or as any other city officer.

In concluding, permit me to point out to you that it is hardly correct to offer as an analogy the case of a person performing, under a contract of the city, all the obligations by him to be performed and accepting municipal office before the discharge of the city's obligation to him thereunder. Though that question is not before me, I am inclined to the view that in receiving anything of value, by reason of the discharge of the city's obligation in such case, an officer would not violate the provision above quoted. But this is not the case at hand. The lease under which the city of Martins Ferry occupied its office rooms was not a contract executed in full on the part of the lessor on January 1st, 1910. He still owed the city the duty of preserving it in its peaceable possession of his

property from month to month, and the city in paying to him the sums referred to by you was discharging an obligation contingent upon his continued performance of that duty. Putting it in another way, the contract could have been terminated on January 1st, 1910, without, at the time, subjecting either party to other than anticipatory damages.

I conclude, therefore, that the payment of the rental to the lessor since January 1st, 1910, was illegal, and, *solely by virtue of the provisions of section 3808* (the city not having been damaged by the illegal payment), the same must be repaid.

I have not fully considered the present status of the lease, but I venture to express the opinion that so far as the effect of the dual relation of the director of public service to the city is concerned, the same continues to be a valid and subsisting agreement. The illegality arising therefrom taints the payment only. The section refers to the receipt of public moneys. Undoubtedly if such payments were made under a contract entered into during the term of office of the public agent, such contract would be void under section 6976 Revised Statutes above quoted. The apparent intent of the latter portion of section 3808 General Code is not to terminate the contract, but to terminate the incumbency of the interested official. Technically then, the lease continues but the director must resign or be ousted, and can not receive any rentals under his lease. Practically, of course, no such consequences need be visited upon the director, and if the lease is at once terminated or the director at once parts with his interest in the land, he may be permitted to continue in his position.

I do not pass upon the validity of the lease as affected by the impossibility of having the auditor make the certificate required by the first portion of section 3808.

Yours very truly,

U. G. DENMAN,
Attorney General.

BRIDGE FUND — EXPENDITURE OF BY COUNTY COMMISSIONERS CANNOT BE MANDAMUSED.

August 9th, 1910.

HON. E. G. STALEY, *City Solicitor, Tiffin, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date in which you submit the following inquiry for my opinion:

> The city of Tiffin has requested the county commissioners to contribute to a fund to construct a necessary retaining wall at the approach to a bridge on a county road which is within the city limits. The city of Tiffin receives no part of the bridge fund. The commissioners refuse to contribute anything toward building the wall, claiming that they have no authority to do so.
>
> *Query:* Is there any authority by which we can compel the commissioners to do their share of the work?

I beg to call your attention to sections 2421 and 2422 of the General Code, which are as follows:

> Section 2421. "The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and

county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Section 2422. "Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named in the preceding section. But when the cost of the construction or repair of the approaches or ways to any such bridge does not exceed fifty dollars, such construction or repair shall be performed by the township trustees."

I assume that the cost of the construction of the retaining wall is in excess of fifty dollars. I also assume that the retaining wall referred to in your inquiry is a part of the approach to the bridge. This latter assumption is, of course, a question of fact.

I beg to call your attention to the case of State v. Commissioners, reported in 49 Ohio State, page 301, in which the supreme court construed section 2421 of the General Code which, at that time, was section 860 of the Revised Statutes. The court in substance held that the language "shall construct all necessary bridges," though imperative in form, cannot be construed to require the construction of any bridge irrespective of questions of expediency. The necessity for a bridge requiring its immediate construction must, in the prudent administration of the affairs of a county, be related to many considerations, such as time, means, and the number of other bridges required by public convenience at other places in the county, and all those things being considered, whether the bridge should be constructed at once, is for the determination of the commissioners in the exercise of their administrative functions. *Their determination in the matter cannot be controlled by mandamus.* A bridge may be necessary but whether or not it should be constructed or repaired cannot be determined by a court in opposition to the views of a board of commissioners. The expediency of building or repairing a bridge, *however necessary*, is an administrative and not a judicial question. The above case was submitted to the supreme court on an agreed statement of fact that the bridge was *necessary* and the court in particular held that whether it would be necessary or not it was immaterial and that the discretion of the commissioners could not be controlled by mandamus. I am of the opinion that this case is also applicable to section 2422 of the General Code, which is a section *in pari materia* to section 2421 of the General Code, which the above case construes.

I am, therefore, of the opinion that you cannot mandamus county commissioners either to build, or to contribute to a fund to build, an approach to a bridge.

Yours very truly,

U. G. DENMAN,
Attorney General.

MAYOR—REPORT OF FINES, ETC., TO COUNCIL—MANNER OF MAKING.

June 13th, 1910.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> The council of this city passed an ordinance which provides that all licenses and permits shall be issued by the mayor of this city, and that the mayor be required to make a report in writing, at the first regular council meeting night in each month, of all licenses and permits issued and all fines and costs collected, and all forfeitures obtained and collected, setting forth the full amount of all money collected by him for the city.
>
> You desire to know whether or not it is within the power of council to pass such an ordinance.

I beg to call your attention to section 4270 of the General Code, which is as follows:

> "All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over. All fines, penalties, and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

You will note this section requires that the mayor make a report to council at the first regular meeting night of each month giving a full statement of all fines and forfeitures collected by him, and all moneys received by him in his official capacity. Therefore, the mayor is required by statute to make such a report to council as is contemplated in this ordinance.

I am of the opinion that, since this matter is regulated by statute and no authority is given to council to regulate the same, council is without authority to pass any ordinance requiring such a report to be made. However, it is within the power of council to pass an ordinance providing that the mayor shall issue all licenses and permits of whatever name or nature not otherwise provided for by statute.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTO POLICE PATROL—AUTHORITY TO ASSESS EXTRA COST AND FINE WHEN USED.

June 13th, 1910.

HON. J. J. BROWN, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 27th in which you submit the following for my opinion:

"A company desires to enter into a contract with this city whereby said company shall install an automobile police patrol and ambulance service.

"*Query*: May the city provide for the assessing of one dollar additional fine in cases where the patrol is used, which shall be paid to said company as an assist, or may the city provide that the regular costs in cases where patrol is used be increased one dollar, and said dollar turned over to said company?"

Answering your first question relative to increasing fine one dollar when automobile police patrol is used, I beg to advise that a fine should not be regulated by the manner in which a person is arrested and conveyed to jail. In all cases a statute or ordinance specifies a fine for a violation of the same. In some cases the statute or ordinance provides for a maximum and minimum fine, the amount of said fine to be regulated by the circumstances surrounding the act done which violates the statute or ordinance, but in no case should the fine be regulated in the manner provided by the authorities for the arrest of the guilty person.

I am, therefore, of the opinion that one dollar additional fine may not be assessed in cases where a person is conveyed to jail by the municipal authorities in an automobile police patrol.

Answering your second question relative to increasing the costs one dollar when automobile police patrol is used. At common law costs as such were unknown, and, therefore, now entirely depend upon the statute, and this is true in both civil and criminal cases. I am unable to find any statute which authorizes a municipality to charge as part of the costs in a criminal case one dollar for the conveyance used in conveying an arrested person to jail.

Yours very truly,
U. G. DENMAN,
Attorney General.

HUMANE SOCIETY — APPOINTMENT OF AGENT — CHIEF OF POLICE MAY NOT ACT AS.

December 5th, 1910.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letters of recent date in which you state that the humane society of your county designated a person then acting as chief of police of the city of Troy as its agent for that city, and that the person thus designated continued to act in both capacities until he resigned as agent of the humane society, and that thereupon the society designated a person then acting as police clerk to act as its agent. You request my opinion as to whether or not council may lawfully allow and pay to either or both of these persons any salary out of the city treasury for acting as agents of the humane society.

The appointments as agents of the humane society were, you state, made under section 10071 of the General Code upon the approval of the mayor of the city of Troy. Section 10072 of the General Code provides that the council shall pay such salary as it deems just and reasonable from the general revenue fund of the city to the agent thus appointed.

Section 45 M. C., now section 3808 of the General Code, provides that,

> "No member of the council board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation."

In like manner section 6976 Revised Statutes, at present section 12912 of the General Code, provides in effect that no officer of a municipal corporation shall be interested in the profits of a contract job, work or services for such corporation. However, this department has held that this section relates to contracts or to positions of a contractual nature, and this is not intended to prohibit the holding of more than one municipal office by the same person. The provision under consideration in State ex rel vs. Gard, 8 C. C., N. S. 599, cited by you, is quite different. That section prohibits *members of council* (but not other officers of a municipality) from holding any other office or employment.

The position of humane society agent is an anamolous one. The agent is in no sense an officer of the municipality, but his salary is to be fixed by the council and to be paid from the municipal treasury. He is undoubtedly a public officer, being vested with police powers. I am satisfied that the interest which the agent would have in his compensation, payable out of the city treasury, would not be such an interest as is contemplated by section 6976 Revised Statutes above referred to, as that section applies specifically to work or services *for the corporation.*

The question as to whether or not the salary fixed by council and paid out of the general revenue fund of the city is "an expenditure of money" within the meaning of section 45 M. C. above quoted, is quite a different one. While the relation of the agent to the city is in no sense contractual, yet the payment of the salary to the agent is an expenditure of the city's funds. The exact meaning of section 45 M. C. in this respect has not, so far as I know, been determined by the courts. The agent of a humane society not being an officer of the municipality, however, it would seem that his salary must be regarded as an expenditure within the meaning of section 45 M. C.

I am, therefore, of the opinion that, by virtue of section 45 M. C., which prohibits any officer of a corporation being interested in the expenditure of money on the part of a corporation, the *chief of police* would be precluded from accepting compensation from the city treasury for acting as agent of the humane society.

I have so concluded without considering the question of the compatibility of these two offices. As I have already pointed out, the statutes do not expressly declare the two positions incompatible, and, in the absence of such a provision as that included in section 45 M. C., they may be held by the same person, unless the duties conflict.

The conclusion above stated with respect to the chief of police does not apply to the police clerk. If I am not mistaken, the city of Troy does not have a police court, and the police clerk referred to by you is merely a subordinate in the department of the mayor or of the clerk of council. In either event he is not an officer of the corporation within the meaning of section 45 M. C. The statutes then do not forbid him to be interested in the expenditure of money by the corporation. Whether or not his duties as police clerk conflict with those of the humane society agent so as to render the two positions incompatible, is a question which I can not determine without being advised as to the provisions of the ordinance creating the position of police clerk. It may be that the person serving in that capacity would be obliged to act in some way as a check upon the

humane society agent, and if such were the case, the two positions would be regarded as incompatible. If, however, the police clerk is merely a subordinate without any discretion or independent powers or duties, then I know of no reason why the two positions may not be held by the same person.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — SECTION 12912 GENERAL CODE CONSTRUED — INTEREST OF OFFICIALS IN CONTRACT DURING ONE YEAR AFTER TERM OF OFFICE.

June 8th, 1910.

HON. W. J. TOSSELL, *City Solicitor, Norwalk, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date in which you submit the following for my opinion:

> Does section 12912, General Code, as amended April 28, 1910, operate to exclude from contracting with a city for a sewer improvement a corporation, the manager of which was last year auditor of the city making the improvement, said improvement being projected entirely after the expiration of the term of such auditor but prior to the expiration of one year after said term?
>
> Has the city power to accept a bid and enter into a contract with the above corporation for such improvement?

Section 12912, General Code, in its present form is as follows:

> "Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

This department has heretofore held the phrase, "or for one year thereafter," as used in the above statute, to apply only to an officer acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by a corporation during his term of office or for one year after the expiration of his term, and does not have reference to any other interest in contracts. Under the above quoted section an officer, during his term of office, may not have *any interest whatever* in contracts with the city, however, after his term of office has expired, he is only barred from acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the city during his term of office, and he is also barred from work undertaken or prosecuted by the city at any time within one year after the expiration of his term of office.

In the specific case which you present, the manager of the corporation was, at one time, city auditor, but the work which his company desires to bid on was

projected after the expiration of his term of office but before the expiration of one year thereafter. Therefore the test to be applied to this particular case is whether or not such ex-auditor, as general manager of the corporation which desires to bid on the work being projected by the corporation, will act as commissioner, architect, superintendent or engineer of the improvement. If the facts are such that he will act in any of the above capacities he will come within the operation of the statute. However, if the facts are such that he will not act in any of the above capacities, he will not come within the operation of the above statute. The facts of your particular case will govern.

I am of the opinion that the city may accept a bid from the corporation of which the ex-auditor is general manager, regardless of the fact whether or not such general manager would be criminally liable for acting as commissioner, etc., for the corporation bidding on the work.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION — CONTRACT FOR OILING STREETS.

Must be let by director of public service at competitive bidding if estimated total cost exceeds $500.

June 24th, 1910.

HON. H. L. DELL, *City Solicitor, Middletown, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of June 13th, requesting my opinion upon the following question:

> "Where a municipality has passed a proper legislation for the purpose of oiling several streets having petitioned for said oiling and 98% of the cost is to be assessed against the abutting property, can the director of public service make a contract for the oiling of said streets without advertising for bids for said work when the contract stipulates that oil is to be purchased by the municipality at so much per gallon and to be applied to the satisfaction of the director of public service and to be paid for when each tank is used, and each tank will invoice for less than $500.00."

Replying thereto I beg to state that section 143 M. C., being section 4328 General Code provides, in part, that

> "* * * when an expenditure within the department of public service * * * exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make written contract with the lowest and best bidder after advertisment, etc. * * *"

In my opinion, the fact that nearly all of the money to be expended for the purpose in question in the case stated by you is to be raised by special assessments does not alter the case, as the section above quoted applies to all expenditures and contracts within the power of the director of public service to make, whether the money to be paid therefor is taken from the city treasury or not.

I assume from your letter that council has, by the "proper legislation" referred to by you, authorized the director of public service to proceed with the work of oiling the streets in question and to make the expenditure necessary therefor, and that to this extent section 4328 above quoted has been complied with.

It also appears from your letter that the contract proposed to be entered into *is for the oiling of streets,* — that is to say, for the furnishing of whatever material and performance of whatever labor may be necessary in order to obtain the approval of the director of public service. In other words, the entire work is provided for by a single contract. This being the case, it is my opinion the money required, or estimated to be required to discharge the contract on the city's part, constitutes the "expenditure" contemplated by the statute — not the separate payments made in accordance with the terms of the contract. It follows, as a matter of course, that if such estimated expense exceeds five hundred dollars, which is to be assumed, the director of public service may not lawfully enter into such a contract without advertising for bids.

See Wing vs. Cleveland, 15 Bulletin 50.
Lancaster vs. Miller, 58 O. L., 558.

Section 3752 General Code applies to contracts for treating streets with oil, and is as follows:

> "The contract shall be made in accordance with the general laws governing municipal contracts, except that the requirement of a certificate that the necessary money is in the treasury, and the provision of law that council shall not enter into a contract not to go into full operation during the term for which all the members thereof are elected, shall not apply to such contract."

Had the general assembly intended to exempt such contracts from the provisions of section 4328 General Code it would have stated as much.

The case would be different, of course, if the director of public service, instead of entering into a single contract for the doing of all the necessary work, could lawfully, from time to time, purchase oil for that purpose without any contract, for sums less than five hundred dollars in amount, and should hire the labor directly himself or through a contractor for each particular process of oiling, so that the amount to be expended for that purpose, under any one contract of hire, should not exceed five hundred dollars.

Yours very truly,
U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SAFETY — MAY NOT DISPOSE OF PROPERTY OF CITY WITHOUT AUTHORITY OF COUNCIL.

November 25th, 1910.

HON. A. W. OVERMYER, *City Solicitor, Fremont, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of November 10th, in which you request my opinion as to the power of the director of public safety to sell or dispose of property belonging to the city without authority of council in case the estimated value of the same is less than $500.

You cite for my consideration in connection with this question sections 25

and 154 M. C., which sections are at present sections 3703 and 4371, General Code. The material portions of said sections are as follows:

> Sec. 3703. "Personal property not needed for municipal purposes, the estimated value of which is less than five hundred dollars, may be sold by the board or officer having supervision or management thereof. If the estimated value of such property exceeds five hundred dollars, it shall be sold only in the manner herein provided for the sale or lease of real estate."
>
> Sec. 4371. "The director of public safety * * * shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council."

Section 3699, General Code, provides in part that:

> "No contract for the sale * * * of real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council, and by the board or officer having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing, * * and only with the highest bidder, after advertisement * *."

I am, therefore, of the opinion that section 4371, being particular in its application, applies to and governs the director of public safety and that that officer may not lawfully dispose of property belonging to the city without authority of council. It is to be observed, however, that this authority may be conferred by ordinance or resolution passed in the usual manner; a two-thirds vote of all members elected to council is not required.

Yours very truly,

U. G. DENMAN,
Attorney General.

LONGWORTH BOND ACT—SPECIAL ASSESSMENT BONDS—MANNER OF RETIRING NOTES ISSUED BY COUNCIL—CIVIL SERVICE COMMISSION—MANNER OF CERTIFYING NAMES TO APPOINTING OFFICER.

Special assessment bonds are to be included within eight percent limitation of Longworth bond act.

Council may issue notes to retire notes previously issued.

Where civil service commission after certifying three names to appointing officer, and person to whom position tendered refuses same, commission must certify another name.

July 25th, 1910.

HON. FRANK A. BOLTON, *City Solicitor, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 19th requesting my opinion upon the following questions:

> "1. Are special assessment bonds to be included within the eight per cent limitation of the Longworth act?

"2. When the civil service commission have certified to an appointing officer three names from which an appointment should be made, and the appointing officer tenders an appointment to one of the three names so certified, is it the duty of the appointing officer to select one of the two remaining, or should the civil service commission certify another name to fill the vacancy of the person refusing the appointment?

"3. Where notes have been issued by council pursuant to section 95a of the Code and have become due, should they be retired by the issue of refunding bonds or assessment bonds? In the event you should decide that refunding bonds should be issued should the refunding bonds so issued be classed as assessment bonds and disregarded in the computation of the eight per cent limitation? Should the installments or assessments received be used in the retirement of these bonds?"

The eight per cent limitation of the Longworth bond act is that imposed by section 3954 General Code which is as follows:

"No municipal corporation shall create or incur a net indebtedness under the authority of this chapter in excess of eight per cent of the total value of all property in such corporation as listed and assessed for taxation. Bonds issued in good faith for such purposes, which at the time of the issue were within the limitations herein provided, shall be valid obligations of the municipal corporation which issued them. In ascertaining the limitations of such eight per cent and of such four per cent, all such bonds shall be considered except those hereinbefore excluded."

The phrase "such bonds" as used in the last sentence of the foregoing section can only refer to "bonds" * * which at the time of issue were within the limitations herein provided." It is part therefore, of a curative provision and is not to be regarded as affecting the future application of the limitation.

I find no other provision of the Longworth act or of the General Code corresponding thereto, which either expressly or by implication excludes from the catalogue of those bonds which are to be taken into consideration in determining the eight per cent limitation, bonds to be met by special assessments. Such bonds are not to be counted in determining the four per cent limitation upon the amount of indebtedness which may lawfully exist at any one time without a vote of the people. (Section 3946 General Code.) This section also applies to the one per cent limitation upon the amount of indebtedness which may be incurred within any one year without a vote of the people. The circuit court of Mercer county, in the case of Smith v. Rockford, 9 C. C. n. s. 465-470, in an obiter opinion expressed the view that "such bond * bonds * * * as were to be paid for by assessments * * would, of course, come within the protecting limits of (section 2835b now section 3946 General Code) provided they were not in excess of the eight per cent limitation of section 2837."

From all the foregoing it follows that special assessment bonds are to be included within the eight per cent limitation of the Longworth bond act.

Answering your second question I beg to state that section 1481 General Code provides in part as follows:

" * * the appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon

> certify to such board or officer the three candidates graded highest in the respective lists * * *. Such board or officer shall thereupon appoint one of the three so certified * * *."

The plain intent of this section is to afford to the appointing authority the choice of three persons for a given vacancy. Within the meaning of this section then, the refusal of one of the three persons whose names are first certified to accept an appointment tendered to him creates a new "vacancy"; the appointing authority should thereupon again notify the commission and it would become the duty of that body to certify another name.

Answering your third question, I beg to state that section 95a M. C., now section 3915 General Code, provides that,

> "Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments. * * They shall * * * due and payable not later than five years from the date of issue * *. All assessments collected for the improvement * * * shall be applied to the payment of the notes and interest thereon until both are fully provided for * * *."

It is quite evident from a consideration of the related sections that the "notes" referred to in the foregoing provision are not "bonds" of the municipality.

The *manner* of issuing assessment bonds is provided for by section 95 M. C., section 3914 General Code, which is in part as follows:

> "Municipal corporations may issue bonds in anticipation of special assessments * * *. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

It is clear to me that in view of the provisions of section 3916 hereafter quoted, said section 3914 *need not* be followed in the retirement of bonds issued under section 3915 formerly 95a M. C. Council at least has its choice as to which method it will use.

Section 3916 General Code, formerly section 2701 R. S., provides for the issuance of refunding bonds as follows:

> "For the purpose of extending the time of payment of any indebtedness * * * or when it appears to the council for the best interests of the corporation, the council thereof may issue bonds of the corporation or *borrow money* so as to change but not to increase the indebtedness in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent per annum * * ."

It is not necessary under this section, as is apparent from the express terms thereof to *issue bonds*. *Notes* may be issued to take up the notes previously issued, and which have become due. Such notes should be retired by the application of the assessments collected in like manner as is provided with respect to the notes originally issued. Such *notes* would certainly not be within the eight per cent limitation of the Longworth act. Whether or not the *refunding bonds* issued for the purpose of *retiring notes issued* under section 95a M. C., should

be disregarded in computing the eight per cent limitation of the Longworth act is a question which, it seems to me unnecessary to determine in view of the fact that by issuing notes such question would be avoided.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTHORITY OF BOARDS OF EDUCATION TO CONDUCT OR AUTHORIZE CLASSES TO CONDUCT ENTERTAINMENTS, ETC., FOR PROFIT.

July 19th, 1910.

HON. W. J. TOSSELL, *City Solicitor, Norwalk, Ohio.*

DEAR SIR:—Your letter of July 9th is received in which you request my opinion upon the following questions:

> "(1) Have boards of education power to conduct class day or other literary entertainments to raise money for (a) school purposes generally, (b) payment of commencement expenses such as hall rent, programs, diplomas, etc., (c) to furnish means for class receptions, banquets and reimbursement of pupils for expenses of graduation?
>
> (2) Have boards the power to authorize classes or societies in schools to give such entertainments to provide funds for the purposes designated by instances a, b, c, above?
>
> (3) Have boards the power to prohibit the giving of entertainments by graduating or other classes for the purposes heretofore mentined?"

In reply thereto I beg leave to submit the following opinion: There is no provision in the school code of this state, in terms, giving or withholding the powers from boards of education concerning which you inquire in your letter, and such authority must rest in your board of education, if at all, by virtue of the general powers conferred upon it and upon all boards of education by the provisions of the school code.

Section 4750 General Code, reads in part as follows:

> "The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the school. * *"

Section 7620 General Code, reads in part as follows:

> " * * * The board of education of a district may, etc., * * and make all other necessary provisions for the schools under its control. It also shall, etc., * * * and make all other provisions necessary for the convenience and prosperity of the schools within the sub-districts."

Section 7622 of the General Code reads in part as follows:

> "When, in the judgment of a board of education, it will be for the advantage of the children residing in any school district to hold

literary societies, school exhibitions, singing schools, religious exercises, select or normal schools, the board of education shall authorize the opening of the school houses for such purpose. The board of education of a school district in its discretion may authorize the opening of such school houses for any other lawful purpose. * *"

Section 7690 of the General Code reads in part as follows:

"each board of education shall have the management and control of all the public schools of whatever name or character in the district. * * *"

Boards of education are, by the provisions of the school code, bodies politic and corporate, the powers of which are limited to such powers as are conferred upon them by the provisions of that code (section 4749 General Code). Under the provisions of the General Code, above quoted, the control and management of the schools, and school buildings in any school district is placed in the board of education, and I am of the opinion that under the authority of the above quoted sections of the General Code, and especially sections 4750 and 7622, that your board of education has the power to make such regulations in regard to the holding of class day or literary entertainments in the schools of the district as may in its discretion seem reasonable and proper. That it would have the power to authorize, control and manage such entertainments to be held in the school buildings of the district seems too clear for argument; and it is also my judgment that such exercise being intimately connected with the schools of the district, would be within the control and management of the board of education, and such board might make such rules and regulations in regard thereto as it might deem necessary by virtue of the provisions of section 4750 of the General Code, *supra.*

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — OFFICERS AND EMPLOYEES — EXPENSES.

Expenses of officer or employe of municipal corporation incurred in attendance upon convention of such officer or employes may not be paid from public treasury. Exceptions to general rule defined.

April 9th, 1910.

HON. NEWTON D. BAKER, *City Solicitor, Cleveland, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of March 23rd, in which you call my attention to a certain ruling of the Bureau of Inspection and Supervision of Public Offices which is said to be based upon former opinions of this department, and request me to reconsider the question and state my own views thereon.

The ruling in question is that the supervising officers of the department of public safety and department of public service of a city may not authorize the payment of the expenses of subordinate officers and employes of said departments, incurred in attending meetings of associations of such officers and em-

ployes. You state correctly that the various opinions of this department heretofore rendered, and applicable to this subject, have not fully discussed the reasons upon which the conclusions stated have been based, and your request for a review of the entire subject is founded upon a desire to have such reasons discussed.

Your question does not call for an opinion upon specific facts but rather for a statement of my understanding of the principles of law applicable to the infinite number of questions of the general type described by you which might be raised. I shall, therefore, endeavor to treat the subject in a general way only, hoping that I may be able to suggest some rules that may be of service in the solution of each particular question.

In your letter you say that you have reached the conclusion that "the administrative and executive discretion is vested by the Code in the director of public service, or the director of public safety, to make any purchase of supplies, or any other expenditure not involving an amount in excess of $500 in their respective departments, and that * * if the director * * determines that enough advantage will accrue * * to justify his directing the chief of police (for example) to attend a convention * * of the Association of Chiefs of Police, * * the discretion to determine that question is lodged in the director * * and that the expense so incurred would properly be paid by the auditor. * *; that the power, if abused, is to be remedied by political action, unless the abuse is so flagrant as to warrant the interference of the auditor, * *." I cannot agree with you in this view, at least, not in its entirety.

In the first place, there is some doubt in my mind whether sections 4328 and 4371 General Code, to which you refer and which are hereinafter quoted, authorize the directors to expend any money, save *upon the public works,* buildings, etc., under their control. The application of the rule *ejusdem generis* would seem to indicate that the word "expenditure," where it occurs in both of these sections, would be limited in its meaning by the word "contracts," which is used in both sections in connection therewith, and that only such "expenditures" as are made necessary by "contracts" within the department are authorized under favor of these two sections. The reimbursement of officers or employes for expenses incurred by them is a matter related to their *compensation,* which is required to be fixed by *council* under section 4214 General Code.

Whatever may be the correct view of the meaning of these two sections, they do not expressly authorize expenditures *of this nature* to be made. I have already suggested one reason for holding that they do not, by implication, confer any such power. There are, however, certain general rules of construction which lead strongly to this conclusion and which may be of service in ascertaining the meaning of other sections of the Code which may be in point.

The purposes for which a director may authorize money, appropriated for the use of his department, to be expended, must be *public;* they must be *municipal* purposes; they must be *departmental* purposes. The jurisdiction, or the scope of the power of a local board or officer, whether the same be characterized as executive or as administrative, are defined by law, and obligations may not be incurred by any such board or officer in the furtherance of objects not within such jurisdiction or within the scope of such actual authority. Thus, section 4328 General Code, formerly section 143 M. C., provides that:

> "The director of public service may make any contract * * *under the supervision of that department,* not involving more than five hundred dollars. When an expenditure *within the department* * * exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council."

So, also, section 4371 General Code, formerly section 154 M. C., as amended 99 O. L., 564, provides that:

> "The director of public safety may make all contracts and expenditures of money * * for * * undertakings and departments *under his supervision.* * * "

You seem to question, however, whether, all the above limitations being granted, the determination of whether or not they have been observed in a given case rests within the discretion of the head of the department himself. I know of no authority for holding that an officer, even though he be vested with administrative discretion, is constituted the sole judge of the actual extent of his own jurisdiction and powers. I do not believe, for instance, that the undertakings and departments "under the supervision of the director of public safety" are such undertakings and departments as might seem, *to the director himself,* to be appropriately within his department. On the contrary, these are matters *of law.* The existence of a public purpose, the power of the municipality as such to expend moneys for a specific purpose, and the authority of a director to determine that a given enterprise is within his department, and to command a subordinate to commit an act in furtherance of such an object, are all matters subject to judicial decision, and I take it that there will be no dispute as to the power and duty of the city auditor, as disbursing officer, to raise any question subject to such judicial determination.

Taking up the particular question of reimbursement for expenses incurred, the basic principles pertaining to the same are, it seems to me, succinctly stated in Abbott's Municipal Corporations, section 697, as follows:

> "A public official *in performing the duties of his office* may incur miscellaneous expenses which are a proper charge upon public funds and this is especially true where the expense was one incurred in the performance of a duty in which the public corporation has a direct and beneficial interest or one which rests upon it as a duty or as an agency of the sovereign. For such disbursements a public officer is clearly entitled as a matter of right to a reimbursement. *If the expenses, however, are incurred in connection with services not authorized by law or in the performance of duties in excess of corporate powers,* no right of indemnity or reimbursement exists.
>
> "Where the expense is incurred in a service which properly belongs to the public corporation as a governmental agent or as the sovereign itself, or is one in which it is directly and beneficially interested, the authorities are all agreed that while a public official may not as a matter of right be entitled to reimbursement for the necessary expenditures, yet, the corporation has the unquestioned power to provide for a reimbursement. *Where, however, the disbursement was made in the rendition of a service in which the officer or individual alone is directly and beneficially interested and which cannot be considered as a duty resting upon the corporation to perform, the right or power of reimbursement does not exist for this would be equivalent to the appropriation or use of public moneys for private purposes."*

All of the above suggested limitations are to be found in the rule laid down by the author.

The requirement that taxation must be for a public purpose does not have a decisive bearing upon the question. It probably operates merely as a rule of statutory construction for it is conceded that courts will not set aside a legislative determination of what is a public purpose, except in case of palpable evasion of the limitation. See Cooley on Constitutional Limitations, Chap. 14, especially pages 598 et seq. However, the general assembly will not be presumed to have delegated to a municipal corporation the power to determine, through its administrative agencies, what constitutes a public purpose.

The following quotation is pertinent as bearing upon the question of the scope of *municipal power* in a given case:

> "The people of the municipalities * * do not define for themselves their own rights, privileges or powers * * . The municipalities must look to the state for such charters of government as the legislature shall see fit to provide; and they cannot prescribe for themselves the details. The general law under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting as a delegated authority; * *
>
> "The powers of these corporations are either express or implied. The former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant. * * The general disposition of the courts in this country has been to confine municipalities within the limitations that a *strict construction* of the grants of powers in their charters will assign to them. * * the reasonable presumption is that the state has granted in clear and unmistakable terms all that it has designed to grant at all."
>
> *Cooley's Constitutional Limitations, pages 227 to 233.*

This quotation from an author, whose name is itself authority, sufficiently defines the rule with respect to the determination of what constitute *municipal* activities. It seems clear to me that if, as stated in the opening sentence thereof, the people of a municipality cannot define for themselves their own rights, privileges and powers, then an officer of a municipality, the agent of such people, could not define for himself the extent of his own powers as such officer. This must be left to the courts.

What power then has the general assembly granted to municipal corporations? It seems to me that we may safely say that all powers to be exercised by the corporation are enumerated in Chapter 1 of Division 2, Title 12, General Code, among the sections of which are the following:

Sec. 3617

> "To organize and maintain police and fire departments, * *."

Sec. 3618.

> "To establish, maintain and operate municipal lighting, power and heating plants and to furnish the municipality and the inhabit-

ants thereof with light, power and heat, to procure everything necessary therefor. * * *."

Sec. 3619.

"To provide for the supply of water * * for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. * * "

There are many other provisions relating to powers, the exercise of which would properly come within the two departments in question. All of the enumerated powers, however, are of the same general nature. They authorize certain municipal activities to be undertaken, established and maintained without defining the manner in which this shall be done. The question still remains, therefore, as to whether a *municipal corporation,* being empowered to establish and maintain a police department or a water works, has, as a necessary or proper incident thereto, power to send its agents to other places for the purpose of acquiring indefinite and general knowledge concerning these matters.

Coming now to the consideration of the question as to the extent of the powers of the two departments in question, the same must be answered by an examination of the statute defining such powers, bearing in mind always that the powers so defined are not to be extended by implication beyond what is necessary and convenient to carry them out.

The director of public service is the chief administrative authority of his department, (Sec. 4323, General Code); he has the power to manage and supervise all public works and undertakings, (Secs. 4324, 4325 and 4326, General Code); he is given authority to establish sub-departments and determine the number of persons to be employed and appointed therein and to make rules and regulations for the administration of affairs under his supervision, (Secs. 4323 and 4327, General Code). The director of public safety exercises like administrative powers in his department, (Secs. 4367, 4368 and 4372, General Code); *excepting* that the number of officers in the police and fire departments is determined by ordinance of council, (Sec. 4374, General Code).

The public works and undertakings of the city, over which the director of public service is given authority by the above cited sections, are enumerated therein; so, also, the duties of the police force and fire department are prescribed by section 4378, General Code, as follows:

"The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes. * "

It will be noted from an examination of these and related sections, that, with respect to municipal undertakings, the director of public service is given general supervisory power, including, by necessary implication, power to issue, or cause to be issued, orders to his subordinates; that the director of public safety is given general executive power in his department. However, the director of public service is not vested with the power, in any of these sections, to determine what shall constitute a municipal undertaking; while the director of public safety is not only not vested with like power as to the powers and duties of the police department, but the absence of such power is made clearer by the existence of a

statute specifically defining such duties in particular and leaving further definition not to the director but to council. See Cleveland v. Payne, 72 O. S. 347, where it is held that a municipal corporation may not enlarge or restrict the duties of police officers without legislative authority and that a mere rule or regulation of the police department, not sanctioned by council, is of no effect as enlarging or restricting such powers.

Enough has been said, it seems to me, to indicate clearly that the limitations upon the powers of the two directors, which are above suggested, are limitations of law. It is also apparent, from an examination of the sections already cited, that there is found therein no express authority to order a subordinate, in either department, to attend a convention for the purpose of acquiring knowledge relating to the duties of his position. Furthermore, I may say that I have examined many other statutes and can find therein no such express authority. Unless, then, the authority can be implied as a necessary incident to the power to administer and supervise public works or as a necessary incident to the administration of the police and fire departments, the powers of which are expressly provided for, the conclusion must be reached that the directors have no authority to issue such orders and could not compel such subordinates to attend such conventions if they did order them to do so.

In James v. Seattle, 22 Wash. 654, it was held that:

> "Expenses incurred by a member of the city council in visiting other cities, under authority of the city council, for the purpose of procuring information upon the subject of water works, street paving, and other municipal matters, are not necessary expenses incurred in the performance of official duties, and the city cannot be made liable therefor, although the claim for such expenses may have been audited and ordered paid by the council.
>
> " * * The city comptroller is warranted in refusing to countersign a warrant ordered drawn by the council in payment of the claim."

Upon examination of this case it will be noted that the council, which was deemed to have general supervisory authority over the municipal utilities referred to in its resolution, appointed a committee, and authorized and directed it to incur the expenses in question.

In Irwin v. Yuba County, 119 Cal. 686, the supervisors of the county became members, on behalf of the county, of an association known as the "State Anti-Debris Association" for the protection against alleged damage arising from the deposit, through hydraulic mining operations, of gravel and sand into a river flowing through the county. In refusing to allow a claim for necessary personal expenses incurred by one of the supervisors in attendance upon one of the meetings of the supervisors, the court, page 687, say:

> "It cannot be pretended that this so-called "Anti-Debris Association" is anything more than a voluntary association of citizens, like many others convened to consider matters deemed by them a common interest: it has no existence beyond the mutual consent of its members, and from it any of its members may withdraw at any time. The fact that it is made up of a combination of committees appointed by the several county boards of supervisors from their own number, can give it no legal existence. Those boards cannot create new offices and prescribe their duties and appoint themselves to fill the offices and

perform the duties. Boards of supervisors frequently make appointments of persons * * to attend conventions called to consider matters relating to the internal concerns of counties; and while no authority of law is given them to do this, it has been found a convenient and satisfactory method of obtaining representation at important conferences of the people, and it is universally acquiesced in. But the power is not to be found in any statute, and its assumption would quickly lose the common consent if it should be held that the boards could also provide for compensating the services rendered under such appointments. Plaintiff stands in no better or different position from that of any other appointee of the board selected to act as a member of the debris association, unless it can be shown that the duties thus placed upon him fall within his official duties prescribed by law, and it could also be shown that he may be compensated beyond the compensation allowed for the performance of his ordinary duties as member of the board. No provisions of any statute have been pointed out, and we know of none, making it any part of the duties of a member of the board of supervisors to act as a member of any such association, nor can it be said that to do so is either within any implied powers of a member of such board, or necessarily incidental to any granted powers. * *

"It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority in law. It is not sufficient that the services performed, for which payment is claimed, were beneficial."

In Carlile v. Hurd, 3rd Colo. Appeals, 11, the petitioner, who was a deputy superintendent of insurance, sought to compel the state treasurer to allow and pay a warrant drawn on him by the superintendent for expenses alleged to have been necessarily incurred by the petitioner in the discharge of his official duties. Two bills had been contracted by the deputy superintendent; one was for expenses necessarily expended in his attendance upon an insurance convention, and the other was for expenses incurred in examining into the financial condition of an insurance company at its home office located outside of the state. The superintendent was authorized and directed by statute to "examine the financial condition * * of any insurance company * * doing business in the state, and inquire into and investigate the business of insurance transacted * *." He was given authority also to use the fees of his own office "for the purpose of defraying the expenses of the insurance department. * * ." The question was first raised that the determination of the superintendent of insurance as to the legality of his expenditures was final and that the treasurer of state had merely the ministerial duty to honor warrants presented by him. This contention was overruled by the court, which then proceeded to the consideration of the main questions as follows, (page 15):

"Since it was the duty of the treasurer to consider the legality of the warrant before he proceeded to pay it, it is essential to determine whether has conclusions were correctly reached. It will be remembered that the two warrants on their face purported to cover the expenditures of the deputy superintendent of insurance while he was attending a convention of insurance commissioners at St. Louis, and while he was investigating the financial condition of a foreign in-

surance company at Knoxville, Tennessee. The invalidity of the warrants springs, if at all, from the fact that the disbursements were not made by the officer while engaged in the discharge of his official duties in Colorado. The act which clothes the superintendent of insurance and his deputy with authority to examine and proceed against insurance companies can necessarily have no extra territorial force. Under all the decisions these officers are without authority outside the limits of their own state. It is evident that they would be powerless to either compel the production of books and papers, or coerce the foreign insurance companies into permitting them to make an examination into their financial condition, save by the enforcement of some penalty in the nature of a limitation upon their right to do business. Mechem on Public Officers, secs. 508 and 873; Cooley's Const. Lim. (6th Ed., p. 149); Chandler v. Hanna, 73 Ala. 390."

In Hooper v. Ely, 46 Mo. 505, the county court attempted to authorize one of a defaulting sheriff's bondsmen to pursue the defaulter and bring him back at the expense of the county, one of the grounds relied upon by the court being that the defaulter might disclose something useful to the county in relation to its burnt records. The court, on page 508, say:

"The pursuers were not public officers; they obtained nothing for the county, although they did for themselves. * *

"The statement of one of the judges, (of the ground above stated), is altogether too loose and indefinite an expectation upon which to found a public contract; * *

"This is not a case of an injudicious exercise of a given power, but is a naked assumption of power which it is our duty to check; * * "

The Supreme Court of New Jersey, in State, Lewis v. Hudson County, 37 N. J. L., 254, in holding that the freeholders of a county might lawfully reimburse the coroner for his expenses incurred in returning a fugitive from justice from another state without warrant and without requisition, made use of the following language, (page 257):

"It should be borne in mind that their power is not unlimited and that they have no legal right to vote away *ad libitum* the funds of the county. This court is not without ample power, on complaint of a tax payer, to set aside any wrongful, illegal or fraudulent appropriation by the freeholders of the moneys in the county treasury."

Upon the foregoing authorities I am satisfied that the rule laid down by the Bureau of Inspection and Supervision of Public Offices is correct. From these cases the following specific reasons in support of the holding and against the allowance of expenses of this sort, may be deduced:

1. There is no duty or power vested in the *municipality* as such, either expressly or by implication, to be represented by any of its officers or employes at such conventions.

2. The power to attend such conventions in person is not expressly lodged in either of the directors by statute, nor is the power to order subordinates and employes to attend such conventions so conferred. Such powers *do not* flow by necessary implication from any of the express powers conferred upon the direct-

ers, not only because of the other principles here stated, but also because of a possible tendency toward abuse, which, it seems to me, is quite apparent.

3. *As a matter of law* it cannot be said that the city would gain anything by sending any of its representatives to such a convention for no specific purpose but merely for the acquisition of general knowledge relating to the duties of officers and the problems of employments. To say that the municipality is justified in expending its money for the purpose of permitting its employes and officers to acquire information of this sort, is to say that the public money may be expended for the *education* of public servants. This, it seems to me, is fallacious and the power to make such an expenditure must be denied. Putting it in another way, the possible good that might result to the department and to the municipality from the acquisition of such general information, is too remote and indefinite upon which to found a public expenditure; the real and direct benefit accrues to the officer or employe and the city is not justified in paying for this. From still another viewpoint, officers are required to qualify and to continue to be qualified, and employes, likewise, are presumed to be cognizant of the matters within the scope of their employment. It is in each case for the individual, at his own expense, to make and keep himself qualified,—not for the city. An analogy in this connection, it seems to me, is the payment of the premium on a surety company's bond required by statute to be given by an officer. It has frequently been held that the payment of such a premium is not a proper charge upon public funds, although the bond is executed for the benefit of the public, because the duty to qualify by filing a bond is one charged upon the principal *as an individual* and not *as an officer*.

4. With respect to expenses of this sort incurred by heads and members of the police and fire departments, an additional reason for sustaining the ruling of the Bureau appears. *These persons are officers* upon whom certain specific, enumerated duties are imposed by law. The director of public safety has no power in any way to add to or subtract from these duties. It being ascertained that attendance upon a convention is not one of the enumerated duties, it follows, as a matter of course, that the director has no authority to order such attendance. Again, the members of the police and fire departments, *being officers,* not employes, and serving *under salaries fixed by council,* no provision being made for the payment of their expenses, it would follow that even if attendance upon a convention were deemed to be within the scope of their official duties and powers, yet the salary receivable by them would be presumed to compensate them for any expense so incurred. Indeed, it may be questioned whether this same principle does not apply to all employes as well as to officers inasmuch as, under section 4214, General Code, council is directed to "fix by ordinance or resolution their respective salaries and compensation," unless council expressly authorizes expenses, incurred in the performance of official duties, to be paid in the ordinance fixing such compensation.

In your letter you refer to an instance in which knowledge, acquired by an employe of the water works department of the city of Cleveland at a convention of some sort, was very beneficial to the city and enabled it to save a large sum of money in the construction of a municipal utility then under way. Inasmuch as you have mentioned this fact and because I realize that, in the business-like management of a city's affairs, every means of saving money should be looked upon with favor, I beg to suggest the circumstances under which, in my opinion, municipal directors and employes of their departments, under proper orders may, legitimately, incur expense of this kind. Take the case referred to by you as an example. There was an existing municipal undertaking presenting a perplexing problem. The question was specific and expert advice on the precise point was necessary. The city was justified in obtaining this advice in the cheapest

manner. If it was known that papers and discussions relating to this problem were to be presented and conducted at a convention of this sort, then any municipal director or employe might lawfully attend the convention for the specific purpose of listening to and engaging in such discussion with an ultimate view to using the knowledge thus acquired in the solution of the exact problem then pending. In Mogel v. Berks County, 154 Pa. St., 14, the law of the state authorized the prison inspectors of the various counties to purchase and use the system of identification known as the Bertillon system. In determining whether or not to adopt the scheme, certain prison inspectors and their wardens made a trip of inspection outside of the county to examine the workings of the system. There was no express provision of law for the payment of such expenses. The court, however, held that:

> "The authority to examine and investigate, so far as may be necessary to form an intelligent judgment upon the utility and value of the machine they were authorized to buy and the system they were authorized to adopt, is incidental to the power conferred."

The distinction between this principle, however, and one which would permit the officers or employes to engage in annual trips of inspection, is plain. The incidental power to examine into the system was executed and exhausted on the initial trip. I deem it proper to say, in this connection, that while there may be circumstances, such as above described, which will justify trips of inspection and attendance upon conventions, yet regular membership in and attendance upon such conventions cannot be sanctioned because of any supposed indefinite benefit that might accrue to the municipality. Even in cases wherein the city may send its employes on trips of this kind, the expenses incident thereto should have been authorized to be paid in the *salary ordinance* passed by council; otherwise the compensation provided would be deemed to reimburse the employe.

I therefore conclude that, with the exception above described, it is unlawful to pay the expenses of officers and employes of the departments of public safety and public service of a city, incurred in attendance upon conventions of organizations of such officers and employes, and that the ruling of the Bureau of Inspection and Supervision of Public Offices is the only one which may safely be followed as a general principle.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—CITY ELECTRIC LIGHT PLANT—RATE. BONDS—SEWER ASSESSMENT—PUBLICATION OF ORDINANCE.

Council must fix rates for sale of current from municipal electric light plant.

Power of city to fix discriminatory rate for certain class of consumers discussed.

Power of city to bind itself by contract for sale of such current discussed.

Publication required to be made of ordinance providing for the issue of bonds for sewer improvement to be paid by special assessment.

October 22nd, 1910.

HON. E. C. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 14th in which you submit certain questions for my opinion as follows:

"Three years ago the department of public service of the city of Bellefontaine made a contract with several concerns here for the use of the city's electric power (from the city's electric light plant.) Said contracts stipulated that the price for said power should be so much per month or what we call a flat rate. This flat rate is inconsistent with the prices adopted by the department. The contracts further stipulate that they shall be in force for a period of ten years.

"First: Can or could the department disregard their adopted prices and contract on a flat rate at so much per month?

"Second: Could they make a contract for such power, for a period of ten years?

"I also desire your opinion on another matter as follows:

"We are making preparations to build or construct a sewer system in this city. We have passed the ordinance to proceed, but expect to make the assessment after the work is done. We desire to sell bonds as soon as possible in accordance with the estimate. (Special assessment bonds.) Is it necessary to publish the ordinance providing for the sale of said bonds?"

I have carefully examined the provisions of the Municipal Code, both before and after its amendment by the Paine Law, so-called, and the corresponding sections of the General Code as well, and I find therein no express provision whatever respecting the manner of fixing rates chargeable for electric light and power furnished from a municipal plant. The only provisions relating to the matter are as follows:

Section 7 of the Municipal Code:

"* * * All municipal corporations shall have the * * * general power * * *

"15. * * * to establish and maintain municipal lighting, power and heating plants * * "

Section 2486 of the Revised Statutes:

"The council of any city or village shall have power * * * to erect * * * electric works at the expense of the corporation * * *"

It is now too late even to question the extent of the power thus expressed. That these provisions authorize a municipality to maintain an electric light plant from which electricity for lighting and power purposes may be furnished and sold to the inhabitants of a municipality as well as to use the current produced at such plant for purely municipal purposes, has always been the practical construction of this statute. Indeed whatever may have been the exact extent of the powers of municipalities in this respect in the year 1907, the revision of such section 7 of the Municipal Code by the general assembly of 1908 (99 O. L. 34, paragraph 7) resolved all doubts by expressly providing that every municipal corporation should have the power not only to establish and operate municipal lighting and power plants, but also "to furnish the municipality and inhabitants thereof with light, power and heat."

It is safe to assume, however, that municipal corporations now have and always have had the power to furnish their inhabitants, including corporations and business concerns, with electric light and power from municipal plants (See section 3618 of the General Code.)

A more difficult preliminary question is as to what department of the city government had the power to fix the rates chargeable for electric current. The directors of public service were given by the Municipal Code the general power to manage all the municipal lighting and heating plants and other property of the corporation not otherwise provided for (See section 141 M. C.) A similar provision now exists with respect to the director of public service. Whether such a general grant of power suffices to confer upon the department of public service authority to fix rates and make contracts relating to the price of electric current, or whether council in pursuance of its general legislative authority, and especially under section 127 M. C., which provides that,

> "* * * All powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein."

is not exactly clear.

In my opinion, however, section 127 governs and council should fix rates and enter into contracts respecting electric current to be furnished to provide consumers from the municipal plant.

In one view of the case such a holding would seem to make it unnecessary to consider any of the other questions involved in your first two inquiries. Inasmuch, however, as you do not submit the question as to the power of the department of public service to fix rates, I deem it proper to assume that council, in the case mentioned by you, took such action as was proper and necessary to authorize the department of public service to enter into these contracts. There is not only no express provision of law as to the authority to fix rates for the municipal electric light plant, but the statutes, as above indicated, are silent as to the matter in which this power shall be exercised; they impose no limitations whatever upon its exercise. Upon examination of the authorities, however, I am of the opinion that in maintaining and operating an electric light plant, a city acts not in its governmental capacity but in its corporate or business aspect, and that the rates fixed for electric current are not in the nature of taxes, and, accordingly, are not subject to the express requirement of our constitution that taxation shall be uniform.

1 Dillon Municipal Corporations, section 27,
Wagner vs. Rock Island, 146 Ill. 139,
Twichell vs. Spokane, 104 Pacific, 150.

Whether the fixing of rates be deemed an administrative or a legislative act, it is clear that the relation between the city and the consumer is purely contractual.

It is clear also that, notwithstanding the fact that the city is not subject to the rule of absolute uniformity applicable to the levying of taxes, and although it acts in a sense in a private capacity, its electric light business is one peculiarly charged with a public interest. Like then any other public utility operated by purely private capital, the municipal electric light plant must be conducted with due regard for the rights of the public in general. Rates fixed by the city must be reasonable and not discriminatory. Contracts entered into by officers duly authorized to do so respecting the price of furnishing electric current, must not result in unjust discrimination, but the rule against unjust discrimination is not equivalent to the rule of absolute uniformity. The officers of a city, like the officers of a railroad company, have a right to discriminate between different classes of customers. A city might, for instance, charge one rate for current

to be used extensively for power purposes, and another for current to be used for lighting purposes; one rate for stores and factories, and another for private residences, etc. It is held in this state that the officers of a city may not contract especially with individual consumers regardless of the amount of current which they may use.

Bellaire Goblet Co. vs. Findlay, 3rd Circuit Decisions, 205.

It appears, therefore, that the first specific question submitted by you is in the last analysis a question of fact. If the contracts mentioned by you are in pursuance of a classification of consumers which is itself not unreasonable and discriminatory against other classes of consumers then, as a matter of law, the making of such contracts under proper authority of council would be legal. If the contracts, however, are purely special contracts entered into with individuals or particular corporations without regard to reasonable classification of consumers, then, under the authority of Bellaire Goblet Co., vs. Findlay, supra, such contracts are illegal.

With respect to your second question I beg to state that no express limitation is found in the Municipal Code or the succeeding sections of the General Code, as to the time for which contracts respecting the price of electric current may be made between the city and consumers.

From the foregoing discussion it is apparent that the rates are contractual, and that the city in its private capacity, and through its duly authorized officers, may become bound not to change the rates fixed by it for a definite period of time. There is a principle that contracts made by public officers for a period of time extending beyond the term of office of such officer, are against public policy, but this is limited to cases where it appears that the contract is not made in good faith, in the interest of the public, and for a time reasonable under the circumstances. See Commissioners vs. Ranck, 6 C. D. 133.

I find no authority holding as a matter of law that a contract of this sort to be in force for ten years is unreasonable, and there certainly is no provision of law forbidding a municipality from entering into such a long term contract. Section 1691 of the Revised Statutes provided, it is true, that

> "The council shall not enter into the contract which is not to go into full operation during the term for which all the members of such council are elected."

But there are several reasons for denying to this section any application to the subject matter under consideration. On the other hand, the councils of cities in which electric lighting companies are doing business are expressly authorized to regulate the price which such electric lighting companies shall charge for current, and such regulation may be made to cover any reasonable period of time.

See State ex rel vs. Gas Co., 37 O. S. 45.

I, therefore, conclude as to your second question that unless the facts of the case disclose that the period of ten years during which these contracts were to be in force is unreasonable, they are not on that account invalid.

Replying to your third question I beg to state that section 1695 of the Revised Statutes, now section 4227 of the General Code, provides in part that,

> "Ordinances of a general nature, or providing for improvements, shall be published as hereafter provided before going into operation * * *"

The effect of this ordinance is to impose a liability primarily upon the city, and although that liability is in turn shifted and made ultimately to attach to the special assessments levied or to be levied, yet I am of the opinion that it constitutes the ordinance one of a general nature. It is, of course, true that the issue of bonds is in itself "a provision for an improvement" within the meaning of the section.

I am of the opinion, however, that the ordinance in question requires publication, but that the publication required to be made of all bond ordinances, under former section 97 M. C., at present section 3924 of the General Code, will satisfy all the requirements of the law.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — DEPARTMENT OF PUBLIC SERVICE — EMPLOYES.

In re articles of agreement between board of control of city of Steubenville and Local Union No. 259, International Union of Steam Engineers.

June 4th, 1910.

HON. JOHN A. HUSTON, *City Solicitor, Steubenville, Ohio.*

DEAR SIR: — You have handed to me proposed "articles of agreement" to be entered into between the board of control of the city of Steubenville or the director of public service of said city on the one part and Local Union No. 259 of the International Union of Steam Engineers on the other part, whereby in effect the city through its officers agrees to employ only union men, and further agrees as to the minimum compensation paid to different classes of employes. You have requested my opinion as to the power of the director of public service, or the board of control, or any executive officer of the city to enter into such agreement.

I have carefully examined the provisions of the General Code relating to the powers and duties of the director of public service and the board of control, as well as those bearing upon the power of a municipality, as such, respecting the employment of its agents. The question is of great importance. The right of men to combine and form labor unions for mutual protection and improvement is firmly established in our law. No question can be made as to the policy of recognizing such an association of persons.

My investigation has, however, led me to the conclusion that your question must be answered from the standpoint of the power of the officers of the city. The extent of this power is a matter of law.

It must be borne in mind, also, that in determining the extent of the powers of a municipal officer, the presumption is always against including therein any authority not expressly conferred by statute or following by necessary implication from the powers so expressly conferred.

I have searched in vain for any provision expressly authorizing municipal officers to contract with a third party or with an association respecting their power to make employments on behalf of the city. By force of the above stated presumption, this absence of express authority would be sufficient upon which to base the conclusion that the contract in question could not lawfully be made.

There are other reasons, however, which tend to the same conclusion. It cannot be said that authority to make such a contract is implied from the mere authority to employ engineers. In fact, many of the terms of the contract are in derogation of powers expressly conferred; thus, the director of public service is vested with the power to remove any person in the waterworks department not in the classified service, while for those individuals who are within the classified service a specific procedure of removal is provided by law. This contract, on the other hand, seeks to bind the city to adopt a method of removal absolutely inconsistent with either of those created by statute.

Again, the contract attempts to fix the minimum salaries and wages of certain employes. This is a function within the exclusive jurisdiction of council and no executive officer of the city has any power to contract on its behalf with respect to matters of compensation.

As a general proposition, however, I am thoroughly satisfied that the very gist of the articles of agreement submitted to me, that is to say the general subject matter of the employment of men in the waterworks department is not one concerning which executive officers of a city have any power to contract.

As a matter of law it must be said that the intention of the general assembly, in conferring upon certain officers the power to appoint and to remove subordinates and to make such appointments and removals in certain specified ways, was that this power should not be abridged by a contract attempted to be made on behalf of the municipality, and that these methods should be followed to the letter in making employments and removals.

In short, under the law as it now stands, and regardless of the policy of this contract, each employment made by the city through its duly authorized officers, must consist of a contract in conformity to the statute between the officer and an individual without the intervention of any third party or association.

I therefore conclude that the proposed articles of agreement, as a whole, and each section thereof, separately, may not be entered into by the city.

Yours very truly,

U. G. DENMAN,
Attorney General.

SOLICITORS, CITY — FEES AS NOTARY PUBLIC.

City solicitors may collect notarial fees for taking acknowledgments of deeds prepared by them for the city.

June 14th, 1910.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR: — Your letter of June 7th in which you request my opinion upon the following question is received:

> "The city of Troy is the owner of a cemetery, and when a lot is sold a deed is executed by the mayor for the lots sold. The deed is in regular form and provides for its acknowledgment by the mayor before a notary (my commission as a notary is from the State) and I have, out of the cemetery funds, due my office for writing the deeds and taking the acknowledgments fifty cents (50c) for each deed. The regular fee for such acknowledgment is forty cents (40c). The examiner of the Board of Public Accountants has directed the city auditor not to allow fees for so doing.

"Am I entitled to any fee for drawing such deeds and for taking such acknowledgment?"

In reply thereto I beg leave to submit the following opinion:

Section 4305 of the General Code reads as follows:

"The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

The above quoted section of the General Code prescribes the duties of city solicitors in so far as the drawing of legal instruments for the municipality for which he is an officer is concerned, and I am of the opinion that, under the wording of this section, it is part of the duties of your office to draw the deeds concerning which you speak in your inquiry.

I am, however, of the opinion that you are entitled to charge and collect from the city the legal notarial fees for taking the acknowledgments of the mayor to such instruments.

I am led to this conclusion by the fact that, under section 4304 of the General Code, your being commissioned as a notary public is not a necessary qualification for the office which you hold. Section 4304 reads as follows:

"No person shall be eligible to the office of solicitor of a municipal corporation who is not an attorney and counselor at law, duly admitted to the practice in this state."

Under our laws a layman may be commissioned as a notary public, and it is a fact in common knowledge that many attorneys at law, admitted to practice in this state, are not notaries public, and had the legislature intended to include notarial services among those required from city solicitors, it could, and would, have so specified in section 4304 of the General Code, supra.

A further reason leading to the above conclusion is that, you hold your office as notary public by commission from the state, whereas you hold your office as city solicitor by virtue of your election by the electors of your city, and the two offices, therefore, being separate and distinct, the compensation which you receive as city solicitor does not exclude your receiving fees for notarial services performed for your municipality of its officers. Nor do I think your services in taking such acknowledgments come within the meaning of the later part of section 4305, supra, to the extent of being a service "as legal counsel and attorney," for the above reasons.

I am, therefore, of the opinion, as above stated, that you are not entitled to charge any fee for the preparation of the deeds spoken of in your inquiry, but that you are entitled to charge and receive notarial fees for taking the acknowledgments to such deeds made before you by the mayor of your city.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY TREASURER—REMOVAL FROM CITY CREATES VACANCY IN OFFICE—DEPUTY MAY NOT BE APPOINTED WITHOUT AUTHORITY OF COUNCIL.

November 15th, 1910.

HON. MEEKER TERWILLIGER, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date in which you state that the person now holding the office of city treasurer intends within a few days to move out of the city for an indefinite period, and with the purpose of engaging in business in another state. He desires to designate a certain National Bank in the city of Circleville as his deputy, although the ordinances of the city do not provide for a deputy treasurer.

> Will the departure of the treasurer from the city, under the circumstances above stated, create a vacancy in his office?
>
> May the treasurer designate a deputy to perform the duties of his office during the remainder of his term under the circumstances above stated?

Section 4293 of the General Code, formerly section 222 Municipal Code, provides as to the city treasurer that "he shall be an elector of the corporation."

Section 4252 of the General Code, formerly section 228 Municipal Code, provides that,

> "In case of * * * removal * * * of any officer or director in any department of the city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment * * * for the unexpired term * * *".

While your letter does not so state, it seems fairly inferable from the statements which you do make that the treasurer does not intend to return to Circleville, but that his location in the other state mentioned is by himself regarded as permanent. If that is the case I am satisfied that he will cease to be an elector of the corporation upon locating in such other state. In any event I am satisfied that the act which he contemplates will constitute a "removal" within the meaning of section 4252 of the General Code above quoted, and that thereupon there will be a vacancy in his office to be filled by appointment by the mayor, as provided in said section.

It follows from the foregoing that even if the treasurer had the power to designate a deputy, such designation would be of no effect after his removal, inasmuch as the power, if any, would then reside in his successor appointed as aforesaid. However, I am of the opinion that on the facts submitted by you the present treasurer has no authority to appoint a deputy; no such authority is found in the sections of the General Code relating to the powers and duties of the treasurer. If it exists at all it must exist, as you suggest, by virtue of ordinance of cf council under Section 4214 of the General Code, formerly Section 227 Municipal Code, which provides that,

> "except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix, by

ordinance or resolution, their respective salaries and compensation, and the amount of bond to be given for each [illegible] if any is required."

In the absence of such action by council, the treasurer is without any authority to confer the powers of a deputy upon any person.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR MAY NOT BE EMPLOYED TO RECODIFY ORDINANCES.

January 6th, 1911.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—I have your letter of December 30th, which reads as follows:

> "I desire your opinion on the following: The city council have appropriated $600.00 for codifying the ordinances and are willing to give me the contract. May I legally accept it and do the work? In this matter I desire to refer you to page 704 of your annual report of 1909 and 1910, in which you rendered an opinion to R. L. DeRan of Tiffin, Ohio. I also desire to refer you to section 45 M. C. which reads '* * * nor shall any member of the council, board, officer or commissioner of the corporation, have any interest in the expenditure of money on the part of the corporation other than his fixed compensation * *'.
>
> "Would you advise me to accept the contract? Perhaps I have overlooked something along this line but I can hardly see where this section of the Code and your opinion to the Tiffin solicitor are in harmony. I want the work if I can get it legally."

You ask my recommendation of the opinion above referred to, and in pursuance of that request I have taken up the question with care and wish to express my regret that in rendering the former opinion reported on page 704 of our annual report for the year 1909, we in some way entirely overlooked old section 45 of the Municipal Code now carried in the same form into the General Code. I do not now remember whether the facts submitted on which the former opinion was rendered were different from the facts you submit in any material way, but my notion is that they must have been practically the same, at any rate the question submitted by you as to whether you, under the circumstances set out in your letter, could accept the contract for codifying municipal ordinances must be answered in the negative. The following provision in the General Code expressly prohibit such employment:

Section 3808.

> "No * * * officer of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation." (Formerly a part of section 45 M. C.)

Section 12912.

> "Whoever, being an officer of a municipal corporation * * * is interested in the profits of a contract, job, work or services for such corporation * * shall be fined not less than $50.00, etc."

Clearly an undertaking of the sort mentioned by you, being contractual in its nature, is within the intendment of the latter of the two sections above quoted, while the compensation receivable under such a contract is an expenditure of money other than the fixed compensation of the solicitor within the meaning of the first section.

My error in writing the first opinion must have occurred because of a failure to recall section 45 of the Municipal Code, now section 3808 General Code.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW — CHIEF OF POLICE HOLDING OFFICE AFTER JANUARY 1st, 1910, MAY ONLY BE DISMISSED FOR CAUSE.

February 11th, 1910.

HON. THOMAS W. LANG, *City Solicitor, Findlay, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date in which you submit the following for my opinion:

> Some time before the first day of August, 1909, the chief of police of Findlay was confined in the asylum of Toledo, and under the rules of the board of public safety the captain of police became the acting chief of police. Without an examination, as provided by said rules, the mayor appointed as chief our present chief of police, who during the month of August at my demand and according to the rules of said board took the examination with others in the police department, was properly certified by the mayor, and was thereupon appointed chief of police. Both the statute and the rules of the board of safety provide that appointments in said service were upon probation, and the said rules fixed the probation period at six months.
>
> *Query*: 1. Is said chief of police, appointed after August 1, 1909, and before January 1, 1910, under a rule prescribing the six months' probation, now protected against the operation of the rule under which his appointment was made?
>
> 2. Is the chief of police, appointed as above stated, subject to removal from the department without cause therefor and without right of hearing before the civil service commission?
>
> 3. Is said chief of police subject to reduction in rank without cause?

I beg to advise that the above appointment was legally made. Section 129 of the Paine law (99 O. L. 562) provides that the mayor may appoint a chief of police without imposing any limitations upon such appointment, and this section went into effect on August 1, 1909. (See section 3 of the Paine law.)

On January 1, 1910, section 162 of the Paine law went into effect, and this section provides the manner of dismissing and reducing in rank a chief of police then in office.

I am, therefore, of the opinion that although your chief of police was appointed by the mayor after August 1, 1909, under the six months' probation, he was holding office on January 1, 1910, and after January 1, 1910, is protected by section 162 of the Paine law which went into effect on that date, and can therefore only be dismissed or reduced in rank under authority of section 162 of the Paine law.

Yours very truly,
U. G. DENMAN,
Attorney General.

MEMBER OF BOARD OF REVIEW AND CIVIL SERVICE COMMISSIONER — COMPATIBLE OFFICES — QUERY.

February 2nd, 1910.

HON. W. A. O'GRADY, *City Solicitor, Wellsville, Ohio.*

DEAR SIR: — I am in receipt of your letter of January 28th in which you submit the following for my opinion:

> May a member of a board of review be appointed on the civil service commission of your city?

I call your attention to section 157 of the Paine law, 99 O. L. 565, which provides that the civil service commission "shall hold no other positions in the *public service* excepting in the schools and libraries."

I am of the opinion that "public service" refers to municipal public service only, and does not refer to such a position as member of a board of review which is not a municipal position. However, I call your attention to section 2819-3 of the Revised Statutes which provides that no member of a board of review "shall be engaged in any other business or employment during the period of time covered by the session of the board."

I am, therefore, of the opinion that, if being a member of the civil service commission of your city would require duties to be performed during the period of time covered by the session of the board of review, a member of the board of review may not be appointed by the commission, but if no duties are required to be performed by the commission while the above is in session, then a member of a board of review may be appointed on the commission.

Yours very truly,
U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SERVICE MAY DISCHARGE SECRETARY OF FORMER BOARD.

January 7th, 1910

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I have your letter of December 3rd in which you ask my opinion on the following facts:

> "For three or four years a party has been acting as clerk of the service board, having been appointed by the service board after an ex-

amination under the civil service law, is now asked by the new member to resign, saying that he has appointed another clerk. I would like to have your opinion on this as to whether or not he can be removed without charges being preferred and trial had?"

As the municipal code stood prior to the taking effect of the Paine law, the directors of public service were authorized under the law to remove any person appointed by them in their department at will, and section 162 of the code, as amended in the Paine law, 99 O. L. 567 provides in part as follows:

> "Nothing in this act shall prevent the dismissal of any appointee by the removing board or officer * *."

The chiefs and members of the police and fire departments are given certain protection defined in this same section 162, but this does not apply to the appointees in the department of public service. This same section further provides that:

> " No officer or employe within the classified service who shall have been appointed under such rules (meaning rules adopted by the civil service commission to be appointed under the Paine law) shall be removed, reduced in rank or discharged except for some cause relating to his moral character, etc."

The clerk mentioned in your letter, as quoted above, was not appointed under such rules nor was there any authority under the original municipal code for the adoption of civil service rules in the department of public service.

I am, therefore, of the opinion that your present director of public service was authorized to discharge the clerk of your former board of public service.

Yours very truly,

U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SAFETY HAS CHARGE OF CEMETERIES—CHIEF OF PUBLIC SAFETY APPOINTED FROM UNCLASSIFIED LIST.

Columbus, Ohio, January 7th, 1910.

HON. HAROLD W. HOUSTON, *City Solicitor, Urbana, Ohio.*

MY DEAR SIR:—I have your letter of January 3d in which you ask whether this department has rendered any opinion on the following inconsistencies in the Paine law:

> "1. Sec. 141 gives the management of cemeteries to the director of public service, while the second paragraph of section 147 gives the same duties to the director of public safety. The inconsistency is noted in Ellis' Code, but no opinion is given as to its operation."
>
> "2. Sec. 148 provides that 'the chief of police shall be appointed from the classified list of such (police) department,' while sec. 158 provides that the unclassified service shall include '* * the chief of the police department.' Provisions as to the chief of the fire de-

partment are analogous. The question is whether the chiefs belong in the classified or unclassified lists."

We have given no opinion on either one of these provisions, but with reference to the first one respeccting the management of cemeteries, my judgment is that section 147, giving this management to the director of public safety must control.

These two sections on this subject are directly contrary to each other, and the rule of statutory construction to be applied in such cases is that when two sections in an act of the legislature are directly contrary to each other the section which is later in position in the act must control. This rule has been declared in a number of decisions, although I do not just now recall them, but under which the management of cemeteries must go to the director of public safety.

As to section 148 of the code which you say provides that the chief of police shall be appointed from the classified list of such department, I take it that you mean section 149, because section 149 is the one which so provides. Section 149 was not specifically amended in the Paine law, 99 O. L. 563, but section 158 as so amended repeals section 148 of the original code in so far as the chief of police is concerned by implication, and therefore while the chief of police under the original code was to be appointed from the classified service, he now under the Paine law is placed in the unclassified list.

Yours very truly,

U. G. DENMAN,
Attorney General.

PARK COMMISSION — CHILDREN'S PLAYGROUNDS — PUBLIC COMFORT STATIONS.

March 3rd, 1910.

HON. CLYDE W. OSBORNE, *Assistant City Solicitor, Youngstown, Ohio.*

DEAR SIR:— I am in receipt of your letter of February 15th in which you submit the following for my opinion:

> "First: Is the law, creating the Park Commission and defining its authorities, to be so construed as to give to such Commission the right to *control and manage* children's playgrounds not located in public parks?
>
> Second: Have they authority to *establish* public comfort stations and children's playgrounds when the same are not to be located within the boundaries of a park?"

I beg to call your attention to 99 O. L. 441, section 4 of said act being, in part, as follows:

> "The board of park commissioners shall have the following powers:
>
> (a) The control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof."

The above quoted portion of Section 4, when construed in connection with the entire act contained in 99 O. L. 441, seems clearly to limit the authority of the park commissioners to the control and management only of such children's playgrounds as are located in public parks.

It is my opinion that sub-section (d) of Section 4 of the above act limits the authority of the park commissioners to establishing public comfort stations and children's playgrounds to such stations and playgrounds as are to be located within the boundaries of a park. The only distinction between sub-section (d) and sub-section (a) is that the latter has reference to the control and management of parks, etc., while the former relates to the establishment of parks, etc.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE POLICEMAN—SPECIAL CONSTABLE—COMPATIBLE OFFICES.

March 23rd, 1910.

HON. CARL ARMSTRONG, *City Solicitor, Mingo Junction, O.*

DEAR SIR — I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "About a year ago the mayor of Mingo Junction appointed as a regular police officer one who was at that time captain of the police force of the Carnegie Steel Company. The officer was appointed as policeman for the Carnegie Steel Company by virtue of Section 1738 of the General Code. Under the appointment of the mayor this officer acted as a village policeman, drew his salary therefor, and also acted in the capacity of Carnegie policeman and was paid by that company also.
>
> "Query: Was the appointment of the mayor legal, and could the man appointed hold the office of policeman and special constable at the same time, and draw two salaries? Can the money paid to him as such village police officer be recovered from him?"

I beg to call your attention to Section 206 of the Municipal Code, which is in part as follows:

> "Council may provide for such * * * policemen, * * * as it may deem best * * * and they shall be appointed by the mayor and confirmed by the council, and may be removed by him for cause which shall be stated in writing by council."

Under the above section the mayor has authority to appoint a policeman,

You also advise that the policeman's authority to act for the Carnegie Steel Company is by virtue of Section 1738 of the General Code, which is as follows:

> "Upon the written application of three free-holders of the township in which a justice resides, he may appoint one or more electors of the township special constables, who shall guard and protect the

property of such freeholders designated in general terms in such application from all unlawful acts, and so far as necessary for that purpose, a constable so appointed shall have the same authority and be subject to the same obligations as other constables."

From the above quoted section the officer serving as policeman for the Carnegie Steel Company has the same authority as a constable. Therefore, the answer to your inquiry rests upon determining whether the office of constable and that of village policeman are incompatible. The above two offices are not in any way a check upon the other, nor does one exercise a supervision over the other, nor does the statutory law of this state prohibit the holding of the two offices.

I am of the opinion that the two offices are not incompatible, and it is a familiar principle of law that where an officer by law may and does hold two offices he may receive compensation for both offices. Therefore, the money paid to the policeman of Mingo Junction by the village may not be recovered from him.

Yours very truly,

U. G. DENMAN,
Attorney General.

DELINQUENT WATER RENTS TO BE CERTIFIED TO COUNTY AUDITOR FOR COLLECTION.

March 24th, 1910.

HON. A. W. OVERMYER, *City Solicitor, Fremont, O.*

DEAR SIR: — I am in receipt of your letter of March 15th, in which you submit the following for my opinion:

> About one thousand ($1,000) dollars of water rent in Fremont are delinquent and the director has turned off the water from the property of the persons owing said water rents. The director has also turned over these delinquent accounts to the solicitor for collection.
>
> Query: Should these accounts be certified to the city auditor, and by him placed upon the tax duplicate and collected as a street or other assessment?

Section 3958 of the General Code is as follows:

> "For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefore are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

You will note that the above section provides that when the assessments for water rent are not paid when due the directors shall look direct to the

owner of the property for so much of the water rent as remains unpaid, and that the same shall be collected in the same manner as other city taxes. This section was formerly Section 2411 of the Revised Statutes, and was construed in the case of City of Gallipolis v. Trustees of Water Works in the 2nd N. P. 161, and was held to be constitutional.

I am, therefore, of the opinion that the delinquent water rents of your city which are in the nature of assessments should be certified to the auditor for collection in the same manner as other city taxes.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPALITY MAY NOT ISSUE BONDS FOR STEAM ROLLER.

February 16th, 1910.

HON. GEORGE C. STEINEMAN, *City Solicitor, Sandusky O.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> The city desires to purchase a steam roller costing $2300.00. May bonds be issued under the Longworth Bond Act for that purpose?

Section 2835 of the Revised Statutes enumerates the purposes for which bonds may be issued under the Longworth Bond Act. Clause 22 of the above section, which is as follows:

> "For re-surfacing, repairing or improving any existing street or streets as well as other public highway."

is the only possible clause in the Longworth Bond Act which would cover an issue such as above referred to. Under the well-known rule of construction that all powers of municipalities are to be strictly construed, I am of the opinion that clause 22 is not broad enough to issue bonds for purchasing a steam roller. This clause has reference to some *particular designated* act of "re-surfacing, repairing or improving" streets, and does not relate to some *continuing* act of re-surfacing, repairing etc.

Yours very truly,

U. G. DENMAN,
Attorney General.

SEC. 126 M. C. DOES NOT APPLY TO PERSONS IN CLASSIFIED LIST AND APPOINTED UNDER CIVIL SERVICE.

February 5th, 1910.

HON. H. HARPER, *Solicitor, Painesville, O.*

DEAR SIR:—I have your letter of February 2nd in which you ask my opinion on the following facts:

> "Will you please inform me whether the provision of Section 126 of the Municipal Code providing that 'the salary of any officer, clerk or employe so fixed shall not be increased or diminished during the

term for which he may have been elected or appointed' applies to the chief of police and officers, clerks, and employes elected or appointed under the civil service?"

The chief of police and other officers, clerks and employes appointed under the civil service are not appointed for any term, but are to serve so long as they comply with the rules and regulations of the department and faithfully perform the duties of the positions to which they have been appointed. These officers, clerks and employees, therefore, are not in office or position for a term, and Section 126 of the Municipal Code does not apply.

In your question you ask whether the chief of police and officers, clerks and employes *elected* or appointed under the civil service are subject to Section 126. No officer elected by the people in th classified service.

Yours very truly,

U. G. DENMAN,
Attorney General.

PUBLIC SERVICE DEPARTMENT—SALARIES OF OFFICERS AND EMPLOYEES TO BE FIXED BY COUNCIL.

January 31st, 1910.

HON. ROGER V. SMITH, *City Solicitor, Springfield, O.*

DEAR SIR:—I have received a letter from Mayor Bowlus, of your city, requesting my opinion as to whether the salaries or compensation of officers and employes in the Department of Public Service must be fixed by the director of public service, or by the council, and he calls my attention to Sections 138, 141, 145 and 227 of the Municipal Code, as amended in the Paine Bill, 99 O. L., 562 to 568 inclusive.

We have a rule in this office against giving opinions to any city official except the City Solicitor, and I, therefore, am sending the opinion to you because of a notice which has come to my attention, through the press, to the effect that there is some dispute between members of council on one side, and the mayor and yourself on the other. I would not, however, do even this except that sooner or later the matter of fixing these salaries and compensations must come under the inspection of the State Bureau of Inspection and Supervision of Public Offices, and if the subject is not handled in the manner required by law, as this department construes it, I should then be compelled to hold against you and the action taken by the director of public service in fixing the compensation or salaries. I trust, therefore, you will not consider that I am intruding in thus sending you this opinion, because I certainly do not desire to take up these difficulties in any case where there seems to be no need of the same.

I would first call your attention to Sections 145 and 227 of the Municipal Code as those sections stood prior to the enactment of the Paine Law. Section 145 at that time provided that the directors of public service might employ such superintendents, etc., as were necessary for the execution of the powers and duties of their department, and that they might establish such sub-departments as might be deemed proper, and this section also provided that the compensation and bonds of all persons appointed or employed in the department of public service should be fixed by said directors.

Section 227 at that time provided that the council should determine the number of officers, clerks and employes in any department, and should fix their

respective salaries and compensations etc., "except in the department of public service."

Section 138, as amended in the Paine Bill, 99 O. L. 563, makes no provision as to salaries or compensation and, therefore, does not affect the question submitted by your mayor,, and the same is true with reference to Section 141 as amended in the Paine Law.

Section 145, as amended in the Paine Law, 99 O. L. 564, provides as follows:

> "The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

By this amendement you will see that the last sentence in old Section 145 providing that the directors of public service should fix the compensation and bonds of all persons appointed or employed in the department of public service, is omitted, and the power of fixing such compensation and bonds is not given the director of public service in Section 145 as amended in the Paine Bill.

Section 227, however, as amended in the Paine Bill, 99 O. L. page 567, provides that,

> "Council shall, by ordinance or resolution, except as otherwise provided in this act determine the number of officers, clerks and employes in any department of the city government, *and shall fix, by ordinance or resolution, their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in any department of the city government,* * * *"

In this amended section, as just quoted, you will see that the first clause, namely,*"Except in the department of public service,"* which was in old Section 227 is omitted, and the new Section 227 is general, embracing all officers, clerks and employes in the city government, *"except as otherwise provided in this act."* Now it is not otherwise provided anywhere in the act, as to public service department.

Section 145 as amended in the Paine Law, 99 O. L., page 564, and as quoted above herein, only gives the director of public service the power to establish such sub-departments as may be necessary, and determine the number of superintendents, deputies, and other persons as may be necessary for the execution of the work and the performance of the duties of the department.

In view of the specific language in the new Section 227, placing the power of fixing compensation and salaries in the council, it can not be held that there is any such power in the director of public service to be inferred from the language in the new Sections 138 and 141, and we have advised the Bureau of Inspection and Supervision of Public Offices that the salaries and compensation of all persons in the department of public service is to be fixed by council. And it will not be sufficient for the council to make an appropriation to pay such salaries and compensation and then allow the director of public service to determine at what rate the persons employed in that department shall be paid. In other words, the council must fix the salary and compensation which shall be paid, either by the day, week, month or year, or for any other period.

Yours very truly,

U. G. DENMAN,
Attorney General.

CHIEF OF POLICE—MISCONDUCE IN OFFICE PRIOR TO JANUARY 1st, 1910, MAY BE REMOVED FOR.

Columbus, Ohio, January 8th, 1910.

HON. WAYNE HART, *City Solicitor, Wooster, Ohio.*

DEAR SIR:—I have your letter of January 4th in fhich you submit the following question for my opinion thereon:

> "I would like to have an opinion from you as to whether a newly elected mayor can suspend a chief of police, and file charges against him for acts committed prior to January 1st, 1910."

Section 162 of the code as amended in the Paine law 99 O. L., 565 provides that the chiefs and members of the police department may be dismissed only in accordance with sec. 152 and the appeal therein provided for shall be had to the civil service commission provided for in section 157 as amended in the Paine law.

Section 152 of the code just referred to specifies certain matters for which the mayor may suspend the chief of police and in that respect this section 152 is still in force. It contains no provision, however, as to when the acts complained of must have been committed, and in my opinion if the chief of police had done anything prior to January 1, 1910, which would have authorized his suspension and removal, the present mayor may now act upon that cause or the causes so arising. In other words, the mere fact that the cause existed prior to January 1, cannot effect the case. The chief of police is not appointed for any definite term, but under the law is an officer who may be removed at any time for the causes specified in section 152 of the code.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPALITIES MAY NOT ESTABLISH POLICE COURTS.

March 4th, 1910.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 16th in which you advise that the City of Lorain is interested in having an act passed *authorizing cities to establish police courts when deemed necessary,* and you desire to know what kind of a law could be passed for this purpose which would not be unconstitutional.

I beg to call your attention to Section 1 of Article 4 of the Constitution of Ohio, which is as follows:

> "The judicial power of the state is vested in a supreme court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts inferior to the supreme court, as the general assembly may from time to time establish."

You will note from the above section that the authority to establish courts is in the general assembly and there is no method by which a law could be con-

stitutional which would authorize cities to establish police courts when deemed necessary.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE SOLICITOR — EMPLOYED BY COUNCIL NOT REQUIRED TO RENDER SERVICES EXCEPT REFERRED TO IN CONTRACT.

April 14th, 1910.

HON. J. A. FOGLE, *Solicitor, Village of East Cleveland, Ohio.*

DEAR SIR: — I am in receipt of your letter of recent date. I note that you have been employed by the village of East Cleveland, as adviser and counsel for the council and civil officers of said Village of East Cleveland, including the board of education of East Cleveland School District, and it is specifically provided in the ordinance providing for your employment that the compensation therein provided shall be for all services performed by you "excepting services rendered it, in connection with cases in court."

The board of education of East Cleveland School District has employed you to conduct the necessary legal proceedings in court to appropriate land for school house site and, in view of the foregoing, you desire to know whether the board of education may legally pay for your services out of the funds of the board of education.

I call your attention to Section 199 of the Municipal Code, which authorizes council of a village to employ legal council for the village or any department or official thereof for a period not exceeding two years and to provide compensation for the same.

I am of the opinion that the ordinance of the village authorizing your employment is in the nature of a contract and the services to be rendered by you should be governed by this ordinance, and, as the ordinance specifically excepts services rendered in cases in court, I am of the opinion that it will not be necessary for you to render any such services for the compensation provided for in the ordinance.

Section 4762, General Code, which provides that the prosecuting attorney shall be the legal adviser of all boards of education in the county in which he is serving, except in city school districts, and, in such districts that the city solicitor shall be the legal adviser for the board of education, is in part as follows:

> "* * The duties herein described shall devolve upon *any official* serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation. * *"

I am of the opinion that this section does not prohibit you from being compensation for services rendered in connection with cases in court. You will note that this section refers to *any owcial* serving in a capacity similar to that of prosecuting attorney or city solicitor, while in your case you are the mere employe of the city and not an officer in any sense.

Yours very truly,

U. G. DENMAN.
Attorney General.

MEMBER OF COUNCIL—ASSESSOR—OFFICES INCOMPATIBLE—FORFEITURE OF OFFICE OF COUNCIL.

April 30th, 1910.

HON. M. R. SMITH, *Solicitor, Conneaut, Ohio.*

DEAR SIR: — I am in receipt of your letter of April 19th, in which you submit the following for my opinion:

> A member of council is serving as personal property assessor by appointment. If he should continue the assessor's duties until completed and then return to council as member, would he still be legally entitled to serve as member of council? If he were to resign as assessor before completing his duties as such could he then retain his seat in council? May he legally vote as member of council while serving as assessor?

I call your attention to Section 4207 of the General Code, formerly section 120 of the Municipal Code (96 O. L. page 59) which provides in part as follows:

> "Each member of council shall be an elector of the city, shall not hold any public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward or from the city, if elected from the city at large, shall forthwith forfeit his office."

This language just quoted provides that a member of council shall not hold any other public office or employment except that of notary public or member of the state militia, and that if at any time he shall cease to possess "any of the qualifications herein required" he shall forthwith forfeit his office. This means that if at any time he shall accept any other office than the office of councilman he shall forthwith forfeit the office of councilman.

I am, therefore, of the opinion that when the member in question of your council accepted the office of property assessor he forfeited and abandoned his office as councilman, and this being true he will not, of course, be able to serve as councilman after he has finished his duties as property assessor. This language is different from the language involved in the case of State ex rel v. Kearns, et al, 47 Ohio State, 566. In that case the statute simply provided that a member of council should not be eligible to any other office, but did not provide that if such member of council should accept another office he would thereby forfeit his position in the municipal council.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR—COMPENSATION AS POLICE PROSECUTOR.

Allowance for services of police prosecutor made by county commissioners prior to passage of General Code should be paid to city solicitor, and not to assistant designated to act as police prosecutor.

April 18th, 1910.

HON. CORNELL SCHREIBER, *City Solicitor, Toledo O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 16th in which you state that a question has arisen concerning your right to certain compensation allowed by the county commissioners for the services of the City Solicitor as police prosecutor in state case between the Prosecuting Attorney, as adviser of the county commissioners, and yourself. You state that the question which has been, by agreement, submitted to this department for advice, is as follows:

> The county commissioners having made a standing order allowing eight hundred ($800.00) dollars for the prosecution of state cases in the police court of Toledo, is the present city solicitor who took office on January 1st, 1910, entitled to such compensation, or is his assistant appointed on the same date and designated as prosecuting attorney of the police court entitled to such compensation? Again, the commissioners having made such a standing order, may they revoke it as to the solicitor during the existence of his term of office?

There is no doubt that, under present Sections 4306 and 4307 General Code, the compensation allowed by the county commissioners should be paid to the police prosecutor who should be confirmed by council. In this respect the opinion of the Prosecuting Attorney quoted in your letter is absolutely correct. On the other hand, it is equally clear that prior to the General Code the compensation allowed under favor of Section 137 Municipal Code, and Section 1813 (1536-844), Revised Statutes, should have been paid to the Solicitor himself.

> State ex rel Northup vs. Davis, 10th C. C. N. S. 517, affirmed by the supreme court.

The only question, therefore, is as to which law applies to officers in office at the time of the enactment of the General Code.

When the present City Solicitor went into office and appointed his assistant, thereby availing himself of the compensation provided by the county commissioners, under the then existing law, he and his assistant both acquired rights and duties which, under Section 13766 General Code, were protected from any invasion by the subsequent enactment of that Code. That section provides in part that,

> "Nothing contained in Section 13767, repealing a section of the Revised Statutes, or an act of the General Assembly, or a part thereof, shall be construed to effect a right * * * accrued or incurred thereunder."

The action of the commissionrs was prospective, and in my judgment, the compensation thereunder should continue to be paid to the Solicitor himself.

Such compensation so fixed by the county commissioners would seem to be in the nature of a "salary" within the meaning of Section 20 of Article 2 of the Constitution providing that,

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

See Woehler vs. Toledo, 8 Decisions reprint, 282.

On this principle the salary of the Solicitor having been fixed by the county commissioners for his present term, may not be changed so as to affect him.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—BOND ISSUE—SEPARATE ISSUES AUTHORIZED AT SAME ELECTION NEED NOT BE MADE AT SAME TIME.

August 10th, 1910.

HON. H. H. RANKIN, *City Solicitor, Washington C. H., O*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 5th in which you request my opinion upon the following facts:

> "Our school board called a special session under R. S. Section 3991 for the purpose of voting on the question of a $100,000.00 bond issue for the purposes of 'purchasing a site for and the erection of a high school building thereon at a cost of $75,000.00; for purchasing a site and erecting a graded school building at a cost of $20,000.00; and for repairing another school house at a cost of $5,000.00'
>
> "The question carried and the board now is preparing to issue the bonds. They only want to issue $20,000.00 in bonds at this time for the purpose of erecting the graded building and want to issue the remainder in about six months. The question has been asked whether this can be lawfully done."

Replying thereto I beg to state that Section 7625 of the General Code, formerly Section 3991 Revised Statutes, provided in part that,

> "When the board of education of any school district determines that * * * it is necessary to purchase a site or sites to erect a school house or houses, to * * * repair * * * a school-house, and to do any or all such things * * * and that a bond issue is necesssary, the board shall make an estimate of the probable amount of money required * * * and at a general election or special election * * * submit to the electors of the district a question of the issuing of bonds for the amount so estimated * * *"

Section 7626 provides in part that,

> "If a majority of the electors * * * vote in favor thereof, the board thereby shall be authorized to issue bonds for the amount in-

dicated by the vote. The issue and sale thereof *shall be provide for by a resolution* * * *." (Section 3992 R. S.)

Section 7628 General Code:

"When *an issue* of bond has been provided for * * * the board of education * * * shall certify to the county auditor * * * a tax levy sufficient to pay such bonded indebtedness. * * * " (Sec 3993 R. S.)

The use of the singular number throughout the foregoing sections is the only indication that the board of education is required to issue all the bonds which it is authorized to issue at one time. In my opinion this fact is not entitled to much weight. The effect of the election is not to impose upon the board *the duty* of issuing bonds in any amount, or at any one time. It simply *authorizes* bonded indebtedness in a given sum and for certain purposes to be incurred. There is no public interest requiring all of the bonds to be issued at the same time. I am, therefore, of the opinion that the board of education may lawfully issue bonds for separate purposes authorized at the same election at different times.

This conclusion is, as you suggest, strengthened by the provision of former Section 3994 Revised Statutes, now Section 7629 General Code, which is to the effect that

"The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, *from time to time, as occasion requires.*"

While this is a separate recital of a distinct power it serves to illustrate the legislative policy with respect to the issuance of bonds by boards of education.

Yours very truly,

U. G. DENMAN,
Attorney General.

EEPXNSE OF UNAUTHORIZED REGISTRATION, INCLUDING COMPENSATION OF REGISTRARS AND CLERKS, MAY NOT BE PAID BY CITY.

April 19, 1910.

HON. HORACE L. SMALL, *City Solicitor, Portsmouth, O.*

DEAR SIR:—You have submitted to this department for opinion thereon the following question:

"In the Fall of 1909 the deputy state supervisors of elections for Scioto County, under mistake of law, undertook to hold a registration of new voters, etc., on Thursday in the fifth week preceding the day of election. The mistake of law was discovered and no further registration of electors was had until Friday and Saturday in the third week preceding the election. Said deputy supervisors have now drawn vouchers for the compensation of registrars and clerks and for the other expenses of such registration, including that of the first day

above referred to, and the same have presented to the city auditor for allowance. Shall the city auditor allow the same, particularly such portion thereof as relates to the expenses incurred and compensation alleged to be payable on account of said first day's registration?"

In my opinion the auditor should not issue his warrant for any expenses incurred or compensation alleged to be payable on account of said first day's registration. It is conceded, of course, that there is no authority for holding such registration on the day named in the odd numbered years in quadrennial registration cities; this is clear under former Section 2926h Revised Statutes.

Section 2926d Revised Statutes, which was in force at the time such registration was attempted to be held, provided in part that,

". . . all necessary expenses of the board *for the purposes herein authorized,* and the *lawful* compensation of all registrars of electors in such cities, * * * and the necessary cost of the registers or other books * * * and supplies to be provided by said board for the *purposes herein authorized,* and the cost of the rent, furnishing and supplies of all rooms hired by the said board for their offices and as places for the registration of electors * * * shall be borne and paid, by any such city out of it general fund, upon vouchers of such board * * *"

Section 2926w Revised Statutes provided in part that,

"Registers of each election precinct shall be allowed and paid four dollars per day and no more, * * * for their services as registrars * * * but no registrar shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors * * * certifying that each has fully performed his duty, according to law as such, and stating the number of days' service actually performed by each * * *"

The frequent recurrence in these sections of language such as "lawful", "herein authorized", "according to law", etc., indicates clearly that the compensation and expenses payable under authority thereof were to be limited to those incurred by strict compliance with the law.

I am, therefore, of the opinion that, the board of deputy state supervisors of elections being without authority to order registration to be had on the day in question, none of the expenses and compensation could be lawfully charged against the public funds. It is not sufficient to say that the services were rendered in good faith, and the expenses likewise incurred. Public officers may be paid from the public treasury compensation for such services only as are expressly required to be performed by law.

Very truly yours,

U. G. DENMAN,
Attorney General.

SCHOOLS — SPECIAL ELECTIONS, EXPENSES OF AND OF REGISTRATION.

Expenses of special school elections paid by county. Registration expenses incident to such special elections paid by city.

April 1st, 1910.

HON. HORACE L. SMALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR: — Your letter of March 15th is received in which you request my opinion on the following statement of facts:

> "The board of education of the Portsmouth city school district has ordered a special election for March 29, 1910, to authorize an issue of $65,000 high school construction bonds.
>
> "The question arises as between the board of education and the municipal corporation as to which one should bear the expense of this special election, including the expense of the registration days preceding the election provided for by law.
>
> "It is the contention of the city that the board of education should bear all of the expense. On the other hand, the deputy state supervisors of election insist that the board of education should bear only the expense of the election, while the city should pay all registration expenses connected therewith."

In reply thereto I beg leave to submit the following opinion:

Section 5052, General Code, reads as follows:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Sections 4942 to 4946 inclusive, of the General Code, govern the payment of registration expenses and provide that all such expenses shall be paid by the municipality in which such registration is held.

Section 2966-27 R. S. O., prior to its amendment in 99 O. L. 84, read as follows:

> "All expenses arising from printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury as other county expenses; but, except in the case of November elections, shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county as above provided, shall be retained by the county auditor from the funds due to such township, city, village or political division, at the time of making the semi-annual distribution of taxes; the county commissioners, township trustees, councils, boards of education, or other authorities authorized to levy taxes, shall make the necessary levy to meet such expenses, which

levy may be in addition to other levies authorized or required by law; the amount of all such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In the case of municipalities sutuated in two or more counties, the proportion of expense charged to each of the counties shall be ascertained and apportioned by the clerk of the corporation, and certified by him to the several county auditors."

Under this section, as it stood prior to its amendment, the expense of the special election spoken of in your letter would have been paid out of the county treasury, and, except in case of November elections, charged against the funds of the board of education, but by the amendment of this section in 99 O. L. 84 (5052 General Code) the law has been changed as to the payment of such expense, and only the expense of November elections held in odd numbered years may be charged against school districts as therein provided. (Sec. 5053 General Code.)

I am, therefore, of the opinion that the expense of the special election you speak of should be paid out of the county treasury as other county expenses, and that as the above mentioned sections 4942 to 4946 of the General Code, governing registration expenses, make no provision for the payment from the funds of the school district of registration expenses necessary and incident to the proper conduct of such special election, they must be paid from the city treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPALITY MAY BE MADE GARNISHEE FOR WAGES OF EMPLOYE.

November 15th, 1910.

HON. LEWIS STOUT, *City Solicitor, St. Marys, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of October 31st, in which you submit for my opinion thereon the following question:

"Can a municipality in this state be made a garnishee for money due from it to an employe of said municipality at the suit of a creditor of said employe?"

It is the established rule of this state that a municipal corporation may be made garnishee in the manner described by you.

Newark v. Funk, 15 O. S., 462.

Yours very truly,

U. G. DENMAN,
Attorney General.

STREET ASSESSMENTS — SEWERS — CORNER LOT.

November 15th, 1910.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date, submitting for my opinion thereon the following questions:

> 1. "X owns two lots extending lengthwise on 61st street. Lot 1 has a frontage of 50 feet on A street and 150 feet on 61st street; and lot 2 has a frontage of 50 feet on B street and 150 feet on 61st street. A and B are residence streets. 61st street is a business street. X has built a house facing on A street. This house is set back 10 feet on the lot and is 30 feet in length and is connected with a sewer on A street. There are no other buildings on these two lots, but 61st street is building up very rapidly and it is quite likely that X will erect some buildings facing 61st street on both lots. There are sanitary sewers on both A and B streets and the city desires also to construct a sanitary sewer on 61st street."
>
> "In your opinion what is the taxable frontage of this 61st street sanitary sewer on these two lots?"
>
> 2. "If X has paid for the sanitary sewers on A and B streets and does not intend to use the sanitary sewer constructed on 61st street, what, if any, is his taxable frontage for 61st street sewer?"

The rule of Haviland v. Columbus, 50 O. S. 471, sometimes called the "corner lot case" was in Village v. Stocklein 81 O. S. 332, held to have been abrogated by the enactment of the municipal code of 1902, so that now in the opinion of the court, "the entire frontage abutting on the improvement is * * * by the clear terms of the statute a subject of assessment." (Opinion of Shauck J., page 335).

From all the foregoing it is therefore apparent that the assessable frontage of the two lots in question on 61st street is 150 feet for each lot.

Your second question cannot be answered as a question of law. The Supreme Court of the United States in the case of Norwood v. Baker, 172 U. S. 269, held that the general assembly of Ohio was without authority to delegate to any political sub-division the power to assess the cost of an improvement upon property according to the foot frontage, and regardless of the special benefits accruing to the property by virtue of the improvement. Such an exaction was held to be violative of the provision of Article I, section 19 of the Constitution of Ohio, to the effect that private property shall not be taken for public use without just compensation. This decision of the Supreme Court of the United States was interpreted in Walsh v. Barron 61 O. S. 15, and Shoemaker v. Cincinnati 68 O. S. 603, not as holding the so-called Taylor law, which permits assessments to be made according to the foot frontage unconstitutional in toto, but simply as reading into it, so to speak, a provision that whichever of the three methods of assessment afforded by said law might be chosen, an assessment on a specific tract must not exceed the benefits. It is apparent from an examination of the decisions of our own supreme court that the question as to whether the assessment exceeds the benefits is one of fact rather than of law. See particularly Schroder v. Overman, 61 O. S. 1.

In the case submitted by you then, the fact that the two lots in question are already furnished with connections with the sanitary sewer on A and B

streets respectively would be one of the facts that should be taken into account in determining whether the special benefit conferred upon lots by the construction of the 61st street sewer does or does not exceed the amount of the assessment chargeable against the two lots for the construction of the latter. It would not in itself be conclusive, and in this connection other facts mentioned by you, such as that 61st street is a business street, and that buildings are likely to be erected upon both lots facing it — rendering it exceedingly probable that such buildings will be connected with the 61st street sewer — must also be taken into consideration.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMBER OF COUNCIL MAY NOT RECEIVE PAYMENT FOR SERVICES PREVIOUSLY RENDERED CITY UNDER INFORMAL ARRANGEMENT.

November 15th, 1910.

HON. HORACE L. SMALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date in which you request my opinion as to the following facts:

> About twenty years ago the city of Portsmouth became lawfully the owner of certain shares of the capital stock of a certain corporation. These shares were at the time of little or no market value, and the city desiring to protect its interests has retained the stock and has employed an attorney in fact to represent it at stockholders' meetings, which have occurred from time to time until the present. The stock now is worth a considerable amount of money, and the city is desirous of closing the transaction and disposing of its interest for the use of the city treasury. The attorney in fact has served the city without any specific agreement for compensation, although his expenses have been paid. The understanding has always been that he would present his bill for services like any attorney-at-law at the termination of the transaction. It so happens, however, that the gentleman in question is at present a member of the council of the city, and the question arises as to whether or not, while he is such member, council may lawfully fix the amount of his compensation, and whether or not he may lawfully receive the same when so fixed.

Section 3808 of the General Code, formerly a portion of Section 45 Municipal Code, provides in part that,

> "No member of the council * * * of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation."

Section 4207 of the General Code, formerly section 120 M. C., provides that,

> "* * * each member of council shall be an elector of the city * * * and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required shall forthwith forfeit his office."

It does not appear that the implied agreement between the city and the attorney in question was, at the time it was entered into, such an agreement as for which a certificate of the auditor that the money necessary to discharge the obligation was in the treasury to the credit of the fund from which it is to be drawn, etc., even if the statute imposing such requirement (Section 45 M. C., now section 3806 General Code) was in force at the time.

In my judgment the provision of section 3808 has not as yet been violated. If, as stated by you, there never has been any specific agreement as to the compensation of this agent of the city, then there could not be said to be any legal liability on the part of the city to pay any compensation whatever, in view of the well-established doctrine that an action can not be maintained against a city upon the common counts.

For the same reason I do not believe that section 4207 has been violated. The "contract" contemplated by that section must be construed to be such a contract as would otherwise impose a liability upon a municipality.

I am, therefore, of the opinion that the gentleman in question was not disqualified as a member of council by virtue of his relation to the city. In the same connection I beg to state it is my opinion that the mere payment of the expenses of the attorney did not vest in him such an "interest" as would be violative of section 3808 of the General Code, if such payments have been made since he has been a member of council.

I mention all these matters because it might be urged that the person in question had already forfeited his membership in council. This I do not believe to be correct.

From all the foregoing it appears that, there now being no liability against the city and in favor of the attorney, excepting the moral liability which, of course, the council would be justified in recognizing and discharging, no question could arise until council does recognize such liability and attempt to discharge it. If, however, the council does attempt to recognize the liability and to fix the compensation payable to the attorney for his services, such act would of itself create a legal liability against the city. It would amount, at least, to an "expenditure of money on the part of the corporation" within the meaning of section 3808 of the General Code, and as such could not be accepted by a member of council without disqualifying him from holding any office of trust or profit in the corporation, and without rendering him liable to the corporation for any money he might receive thereby.

I am, therefore, of the opinion that the action of council fixing the compensation of the person in question for services to the city, can not lawfully be taken as long as he remains a member of council.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL MUST FIX COMPENSATION OF ALL MUNICIPAL EMPLOYES.

October 7th, 1910.

HON. WILLIAM G. BALDWIN, *City Solicitor, Warren, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of October 4th, submitting for my opinion thereon the following question:

Must council fix the compensation of occasional employes in the department of public service, such as extra carpenters, bricklayers, etc., as distinguished from the regular employes of the department?

Section 4214 General Code provides in part that,

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation."

It is "otherwise provided" as to fixing the number of employes in the department of public service by section 4327 General Code which provides in part that,

> "The director of public service may * * * determine the number of superintendents * * * clerks, laborers and other persons necessary for the execution of the work and the performance of the duties of this department,"

but not as to fixing the compensation of such employes.

In my opinion, therefore, council must fix the compensation of occasional as well as regular employes in the department of public service. Permit me to suggest, however, that it is not necessary that council shall fix a salary for each such employe and make an appropriation for the same. The intent of the law may be complied with and the business-like administration of the affairs of the department must be fostered by fixing the rate of compensation per day, hour or otherwise at which employes of certain classes shall be paid, and providing a single appropriation for work of an occasional nature out of which such compensation may be paid. The rates thus fixed by council may from time to time be amended to conform to the current price of labor in the local market in order to meet the difficulties suggested by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

LOCAL BOARD OF HEALTH MAY NOT ORDER PAYMENT OF COMPENSATION OF PERSONS NOT EMPLOYED BY IT.

August 29th, 1910.

HON. J. C. ELLIOTT *City Solicitor, Greenville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 9th, requesting my opinion on the following question:

> The board of health of the city of Greenville was organized in the spring of the year 1910. Previously to that time the powers and duties of a board of health had been exercised by the director of public service. A clerk in the department of public service performed duties corresponding to those of clerk of the board of health and received therefor a salary duly provided by council. The board of health elected another person clerk, but attempted at the same time

to provide additional compensation for the former clerk from the fund at their disposition. Is such an action of the board legal?

In my opinion the board of health has no authority to expend its money, or to authorize the expenditure from the public treasury of any moneys, as compensation for services rendered to another department prior to its organization by a person not employed by it. The only authority of the board of health to fix salaries is found in section 4412 General Code, formerly section 2115 Revised Statutes, which provides that,

> "The board shall have exclusive control of its appointees, define their duties and fix their salaries * * *"

With the appointees of other municipal departments the board had nothing to do.

With regard to services rendered to the city before the board of health was organized, the board has no power whatever either to determine the amount which shall be paid or to order payment of a bill for services. There are many reasons for holding the action of the board of health illegal.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

MUNICIPAL CORPORATIONS — DEPARTMENT OF PUBLIC SERVICE — SALARIES OF EMPLOYES MUST BE FIXED BY COUNCIL AND APPROPRIATIONS THEREFOR MUST BE MADE BY COUNCIL, THOUGH OUT OF EARNINGS OF MUNICIPALITY — OWNED PUBLIC UTILITIES.

August 17th, 1910.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 15th submitting for my opinion thereon the following questions:

> "Can the Service Director, who has charge of the municipal electric lighting plant, hire and fix the salary of all employes in that department?
>
> "In the semi-annual appropriation is it necessary for the council to make appropriations from the earnings of the municipal electric light plant, for paying salaries, wages, supplies, etc.?"

Replying to your first question I beg to state that section 4214 General Code provides in part that:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in the department of the city government, and shall fix, by ordinance or resolution, their respective salaries and compensation * * *"

It is "otherwise provided" in this title with respect to fixing the number of employes in the department of public service, by virtue of section 4327 General Code, which is as follows:

> "The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

It is, however, nowhere "otherwise provided" as to fixing the salaries and compensation of the employes in the department of public service. Persons employed in municipal electric lighting plant are, of course, "in the department of public service."

The making of contracts of employment is regulated in part by Section 4247 General Code, which provides as follows:

> "Subject to the limitations prescribed in this subdivision such executive officers (including the director of public service) shall have exclusive right to appoint all officers, clerks and employes in their respective departments * * *"

The "limitations" referred to in this section are those imposed by the civil service sections of the Code which I deem it unnecessary to quote. It is, therefore, my opinion that, so far as he is not restrained by the civil service laws, the director of public service may appoint all employes in the municipal electric light plant, , but that their salaries and wages must be fixed by council.

Answering your second question I beg to state that Section 3797 General Code, formerly a portion of Section 43 M. C., provides in part as follows:

> "At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, (or) from the moneys known to be in the treasury, or estimated to come into it during the next six months next ensuing from the collection of taxes *and all other sources of revenue* * * * ."

While this section, and the related sections, are *in pari materia* with sections relating to the levy and expenditure of taxes, its scope is not confined to the expenditure of moneys raised by taxation as is evident from the italicized portion of the above quoted provision. That this is the case is very evident upon consideration of Section 3799 General Code, formerly a portion of the same section of the Municipal Code, which provides as follows:

> "* * * There shall be no * * * transfer except among funds raised by taxation * * *"

The salaries and wages of persons employed in the municipal electric light plant, and the supplies necessary for the maintenance thereof are, of course, "objects for which the corporation has to provide."

It is, therefore, my opinion that the compensation of employes and other expenses properly chargeable against the earnings of the municipal electric light plant must be provided for by appropriation of council therefrom.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

MUNICIPAL CORPORATION — CITY ENGINEER — CITY AUDITOR — POWER OF.

When and under what circumstances city engineer is city officer."
City auditor may not compel attendance of witnesses for purpose of inquiring into legality of claim presented to him.

August 12th, 1910.

HON. E. G. STALEY, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 8th submitting for my opinion thereon the following questions:

> "Some time in April the Mayor of our city appointed a city engineer. The ordinance creating that office does not provide a salary for the engineer, the Director of Service having made an agreement as to what he should receive. I advised the city auditor not to pay him for the reason that it would be necessary for the council to fix his salary. He has been acting as engineer since April. How shall we pay him from April the 1st up until the time the council fixes his salary? Can we pay him according to the amount fixed by the council for services rendered prior to the time of the passage of the ordinance?
>
> "Our city auditor, under the provisions of the Revised Statutes is inquiring into a bill presented to him for payment, he has authority to call witnesses and hear their testimony. Now the question is: Can he compel witnesses to appear before him in the same manner that a court compels witnesses to appear?"

Section 4327 General Code provides that,

> "The director of public service may establish such sub-departments as may be necessary and determine the number of * * * engineers * * * necessary for the execution of the work and the performance of the duties of this department."

Section 4214 General Code provides that,

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers * * * in each department of the city government, and shall fix, by ordinance or resolution, their respective salaries and compensation * * *"

It would seem under your statement of facts that the proper procedure had been exactly reversed in your city. Instead of council creating the office and the director of service fixing the compensation thereof, the director, under the foregoing sections, must create and the council must fix the compensation. The mayor has undoubted authority to appoint the engineer under Section 4250, which provides that,

> "* * * the mayor * * * shall appoint and have the power to remove * * * heads of the sub-departments of the departments of public service and public safety * * *"

Your advice to the city auditor is correct. The director of public service has no authority whatever to fix the compensation of the city engineer.

Although the office of city engineer is one created by the director of public service, it is, nevertheless, an office as distinguished from an employment, inasmuch as the incumbent thereof is subject to "appointment" and removal. In one view of the case, therefore, if the engineer is a public officer he not only is not entitled at this time to draw any compensation from the public treasury, but council is without authority to appropriate money for his compensation for services already rendered.

Inasmuch, however, as the position held by the city engineer has never been regularly created, but the engineer has been,—as I assume,—rendering services at the request of the director of public service, I am of the opinion that his relations to the city at the present time and until such time as his position is regularly created and the salary provided by council, is contractual, and that his status is that of an employe and not an officer; instead of being the "city engineer," and the head of a sub-department within the department of public service, he is simply an engineer employed by the director of public service.

As such employe he is morally and legally entitled to compensation even though council has failed to fix a salary for him or to make an appropriation for his compensation. It is my opinion, therefore, that at the time of making the next semi-annual appropriation, council may lawfully appropriate such sum as, in its judgment, constitutes a reasonable and adequate compensation for the services rendered by the engineer for the city. Possibly council has already created an appropriation account from which he may be paid. In order fully to comply with the law, however, council should not only fix the future compensation of the city engineer, but the director of public service should formally create the sub-department of engineering and the office of city engineer, and the mayor should then make his appointment again.

Answering your second question I beg to state that Section 4285 provides as to the powers of the city auditor, that

> "* * * When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

This is the only provision respecting the power of the auditor to take evidence as to the validity of vouchers and claims. It will be noted that it does not expressly authorize the auditor to *compel* the attendance of witnesses, nor to compel witnesses to be sworn or to answer questions. This being the case I regret to state that the rule of law that the power to punish for failure to obey summons and subpoenas issued to witnesses by non-judicial officers will not be created by implication, however necessary such implication may seem, makes it necessary for me to hold that the auditor has no power to compel witnesses to appear before him, nor to compel them to be sworn or to answer questions.

> See in re Heffron, 16 W. L. B. 285, and authorities cited in the opinion of Harmon, J., especially Kilbourn vs. Thompson, 103 U. S. 168.

These authorities are decisive of the question.

Very truly yours,

W. H. MILLER,

First Assistant Attorney General.

MUNICIPAL CORPORATION—OFFICERS—EXPENSES OF MAY BE AUTHORIZED TO BE PAID BY COUNCIL.

August 12th, 1910.

HON. A. W. OVERMYER, *City Solicitor, Fremont, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 3d requesting my opinion upon the following questions:

> "The Service Director has requested me to write your department for an opinion as to the legality of allowing horse feed and pay for horse and wagon to the city plumber. This city cover four square miles and he uses his own horse and wagon to haul meters, pipes, etc., etc., to different parts of the city where he is required to work. It costs the city much less to hire his outfit than to hire some other persons.
>
> "The same is true of the city engineer. In giving sidewalk grades, etc. the city engineer proposes to use his own horse and buggy to haul his instruments etc. and charge the city $10.00 per month for the use of the same. Can the service director legally allow such bills?"

Section 4214 General Code provides in part as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix, by ordinance or resolution, their respective salaries and compensation * * *"

In my opinion the authority to fix compensation carries with it the authority to provide for the payment of expenses.

With respect to the question submitted by you, however, two classes of public agents must be distinguished, viz., officers and employes. It is a fundamental principle that a public officer is deemed compensated by his salary for all services rendered and for all expenses incurred as well. Unless, therefore, council in fixing the compensation of a city officer expressly provides that he shall be entitled to his necessary expenses, etc., such officer could not legally be reimbursed for such expenses. The city engineer, if his office has been created by the director of public service and he has been appointed by the mayor, must be regarded as a city *officer,* and the payment of his expenses is to be determined by the foregoing principle.

I have regardeded the proposed action with respect to the city engineer as in the nature of the payment of expenses, for the reason that the engineer may not enter into an independent contract with the city, or any officer thereof for the use of his own vehicle. This is prohibited by Section 3808 General Code which provides that,

> "No * * * officer * * * of the corporation shall have any interest in the expenditure of money on the part of corporation other than his fixed compensation."

Unless, therefore, the council, in the ordinance fixing the compensation of the city engineer, specifically allows him reimbursement for the use of his own vehicle as a part of such compensation, the engineer may not be paid anything for such use.

I am not advised as to the exact nature of the duties of the "city plumber." If this position constitutes the head of a sub-department within the department of public service, its incumbent is a municipal officer, and the question asked with respect to him must be answered in the same manner as that with respect to the city engineer.

On the other hand, however, if the city plumber is a mere employe of the department of public service, then his relations with the city are contractual and he is not only entitled to reimbursement for his expenses not required to be incurred by him by his contract of employment, but he is also exempted from the operation of Section 3808 above quoted. It is to be remarked, however, that before an employe can be reimbursed for extra expenditure there must be an appropriation available for that purpose.

Very truly yours,

W. H. MILLER,
First Assistant Attorney General.

STREET IMPROVEMENT — SERVICE AND PUBLICATION OF NOTICES TO PROPERTY OWNERS MAY BE WAIVED.

July 21st, 1910.

HON. EDGAR L. WEINLAND, *City Solicitor, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of July 21st enclosing letter of Mr. E. Howard Gilkey, Chairman, The Association of Indianola Property Owners. You request my opinion as to the power of council to levy an assessment for street improvement without any preliminary resolutions, notices and ordinances except the determination of necessity to proceed with the improvement, upon unanimous consent of the owners of abutting property petitioning therefor.

I have carefully examined all the sections of the municipal code providing for the making of assessments for public improvements. The notice required by former section 52 of the Municipal Code is obviously for the purpose of affording to property owners the right to file claims for damages under section 54 which, as is apparent from the language thereof, is a privilege which may be waived. Likewise the advertisement provided by section 2278 Revised Statutes is obviously for the purpose of permitting objections to the assessment to be filed under section 2279. This and related provisions being for the protection of the property owner may, in my opinion, be waived by him. Likewise section 56 of the Municipal Code providing for the impaneling of the jury to assess damages is contingent upon the filing of claims under section 54, and its provisions may be waived.

In short, I am satisfied that upon petition of all the owners of abutting property a street improvement may lawfully be undertaken by council without service and publication of such notices as are afforded for the protection of owners of abutting property.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION OF PUBLIC LIBRARY—FUND.

Trustees of municipal public library entitled to only so much of the proceeds of library fund levy made by council as may be appropriated to their use by council.

In re public library of City of Washington.

June 28th, 1910..

HON. H. M. RANKIN, *City Solicitor, Washington C. H., O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23d presenting for my opinion thereon certain questions submitted to you by the board of trustees of the public library of the city of Washington.

It appears from the papers before me that on November 10, 1902, the board of directors of the public library, having notified the council of the city of Washington that a donation had been offered for the purpose of erecting a public library building for the city on condition that the city, by resolution of council, pledge itself to spend at least the sum of Fifteen Hundred and Fifty ($1,550.00) Dollars per year for the maintenance of said library, council accepted the offer thus made and bound itself accordingly. Since that time the council has annually made levies for library purposes, and has observed its agreement to the letter by appropriating $1,550.00 per annum for the use of the library trustees. One of these annual levies it seems produced more than $1,550.00 for the library fund, and council instead of turning all of the proceeds of the levy, by appropriation, over to the library trustees, transferred the balance or excess over $1,550.00 to another fund over the protest of the trustees. On these facts the following questions are submitted by the trustees:

> "1. Is said transfer by said council legal, whether made at the end of the year or at any other time during said year, and may not said sum so transferred, be recovered for said library fund?
>
> "2. Is not the said library fund entitled to every cent of the money raised each year under levy made by council of said city for library purposes?"

At the time at which the resolution of council abstracted in the papers submitted to me was adopted, Sections 4002-39 et seq. Bates' Revised Statutes were in force. Section 4002-39 provides in part that,

> "The common council of every city *not exceeding in population thirty thousand inhabitants* * * * shall have power to establish and maintain a public library * * * and for such purposes may annually levy and cause to be collected, as other general taxes are, a tax not exceeding one mill on each dollar of the taxable property of such city or village, to constitute the library fund, which shall be kept by the treasurer separate and apart from other money of the city * * * and be used *exclusively* for the purchase of books * * * and whatever is required for the proper maintenance of such library and reading room."

Section 4002-40 and succeeding sections provided for the government and management of such public library, and Section 4002-44 in particular provided that the trustees should have power to receive title of gifts, devises and bequests of property, as to which they should "be held and considered to be special trus-

tees." This act found in 89 O. L., 98, was a part of a scheme of legislation supplemented as to various cities by the following provisions:

Sections 3999 et seq. R. S., 95 O. L. 361, Sections 4000 et seq. R. S., 95 O. L. 438, Sections 4002-19 et seq. R. S., Sections 4002-32 et seq R. S., Sections 4003 et seq. R. S. 94 O. L. 739 85 O. L. 546, 87 O. L. 105, 90 O. L. 311, 95 O. L. 736, and Sections 4002-46 et seq. Revised Statutes.

A classification was thus made of the various cities in the state, partly upon the basis of population and partly by reference to specific cities. This classification was essentially similar to other classifications of municipalities formerly in vogue under the Municipal Code as it existed prior to 1902.

As is well known, the supreme court in the year 1902 held, in effect, that such classification of municipalities was unconstitutional and void, but for the sake of convenience suspended its judgment until October 2, 1902.

State ex rel vs. Beacon, 66 O. S. 491-508.

In order to meet the emergency thus created, the general assembly, in extraordinary session, enacted what is known as the Municipal Code of 1902. The repealing section thereof, Section 231 M. C., provided in part as follows:

> "For the purpose of carrying into effect the powers and duties conferred and imposed upon present councils * * * or other legislative bodies, by the provisions of this act, and for the purpose of conducting the first election to be held in every muncipality hereunder, and of preparing for the change in the organization of municipalities herein provided for, this act shall take effect from and after the fifteenth day of November, 1902; and for all other purposes this act and every portion of the same, including the repeal of existing laws, shall take effect on the first Monday in May, 1903, and the following sections of the Revised Statutes of Ohio are hereby repealed: * * *"

The sections above referred to pertaining to public libraries in various cities were not included within this repealing clause, but by Section 218 of the same act, 96 O. L. 91, a general provision was made for the government of public libraries in cities and villages as follows:

> "The custody, control and administration, together with the erection and equipment of three public libraries established by municipal corporations shall be vested in six trustees * * * who shall be appointed by the mayor * * *. Such trustees shall employ the librarians and necessary assistants * * * adopt the necessary by-laws and regulations for the protection and government of the libraries and all property belonging thereto, and exercise all the powers and duties connected with and incident to the government, operation and maintenance thereof * * *"
>
> "The council of each city shall have power to levy and collect a tax not exceeding one mill on each dollar of the taxable property of the municipality, annually, and to pay the same to a *private corporation or association*, maintaining and furnishing a free public library for the benefit of the inhabitants of the municipality * * *"

It will be observed that this section contains no provision similar to that of Section 4002-39 Revised Statutes above quoted requiring the library fund to be kept separate and apart from other money of the city, and to be used exclusively for the maintenance of the library. This Section 218 M. C. was

amended 97 O. L. 35, so as to render any woman of proper age, etc. eligible to appointment as library trustee and with such amendment is incorporated in the General Code substantially as it was originally enacted, and it constitutes Section 4004 et seq. of that Code.

In my opinion, Section 4002-39 and all similar sections, while not specifically repealed by the act known as the Municipal Code of 1902, in point of fact, repealed by it, and are not now, and have not been since the year 1903 at the latest, in force. I have reached this conclusion for two reasons:

First: Classification of cities for the purpose of public library legislation was clearly unconstitutional within the reason of the rule adopted in State ex. rel vs. Beacon, supra, and

Second: The general assembly, in enacting Section 218 M. C., not only assumed that previously existing public library laws were unconstitutional, but provided in their stead this section applicable to all municipalities in the state which, had there been no question as to the constitutionality of the various special acts, would have repealed such special acts by necessary implication.

The present status of the library fund is, therefore, to be fixed by the general provisions of the Municipal Code and not by those of Section 4002-39 R. S.

The Municipal Code of 1902, Section 7, Paragraph 22, provided that,

> "* * * all municipal corporations shall have the following general powers * * *:
> "22. * * * To establish, maintain and regulate free public libraries and reading rooms, and purchase books, papers and manuscripts therefor, and to receive donations and bequests of money or property for the same in trust or otherwise * * *"

The same provision is now contained in Section 3620 General Code, and it has been in force substantially in this form ever since its enactment in 1902. Since that time, therefore, the maintenance of a free public library has been one of the general powers of all municipal corporations, and not a special power such as that created under former Section 4002-39.

By Section 32 of the Municipal Code of 1902 it was provided that,

> "*The council* of every municipal corporation shall have power to levy and collect taxes upon all the real and personal property within the corporation for the purpose of * * * exercising all the general * * * powers conferred by law."

This section was the first of those providing machinery of taxation for all municipal corporations, and, by necessary inference, the machinery thus provided for applies to the raising of revenues for library purposes as well as for other municipal purposes. This conclusion is made clearer by consideration of Section 33 immediately following and *pari materia* with the above quoted section, which provided that,

> "The aggregate of all taxes levied by every municipal corporation, exclusive of the levy for * * * free public libraries and library buildings * * * shall not exceed in any one year ten mills."

These sections are at present found in the General Code, Sections 3784 and 3785, substantially unchanged in form and substance.

Section 35 M. C. provided that,

> "On or before the first Monday in March of each year the several officers, boards and departments in every municipal corporation shall report and estimate * * * to the mayor and auditor * * * of the corporation, stating the amount of money needed for their respective wants for the incoming year, and for each month thereof."

See Section 3787 General Code.
Section 38 M. C. provided that,

> "The mayor * * * shall on the first day of April of each year submit to council the annual budget of current expenses of the municipality, any item of which may be *reduced* * * * by council * * *"

See Section 3791 General Code.
Section 40 M. C., now Section 3794 General Code, provided that,

> "Council shall cause to be certified to the auditor of the county, on or about the first Monday in July annually, the rate of taxes levied by it on the real and personal property in the corporation * * * who shall place the same on the tax list of the county * * *; the ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made * * *"

Section 41 M. C., now Section 3795 General Code, provided that,

> "The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation * * *; and the corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall at all times be open to public inspection. Unless otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund * * *; *and unless otherwise provided by law no money shall be drawn from the treasury except upon the warrant of the auditor pursuant to an appropriation of council*"

As heretofore stated, *it is not* "otherwise provided by law," with respect to the fund raised by levy for library purposes.

Section 43 M. C., Section 3797 to Section 3800 inclusive, General Code, provided in part that,

> "In all municipal corporations council shall make at the beginning of each fiscal half year, appropriations for each of the several objects for which the corporation is to provide, *out of the moneys known to be in the treasury or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue.* All expenditures within the following six months shall be made with and within said appropriations and balances thereof."

As heretofore remarked the maintenance of a free public library, where one has been established in a city, is one "of the several objects for which the cor-

poration has to provide." It follows, as a matter of course, that the proceeds of a levy for library purposes are not available for expenditure by the library trustees unless they have been appropriated by council.

Continuing, Section 43 M. C. provided that,

> "Councils of cities * * * may at any time * * * transfer *all or a portion of one fund* or a balance remaining therein to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, and no such transfer shall be made until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

This department has heretofore held that the word "fund" as employed in this clause of the section, refers to and means the proceeds of a levy for a specific purpose — not the amount appropriated by council from such proceeds to the use of a municipal department.

That the right of council to transfer from the library fund in a proper case exists, under this section, can not, it seems to me, be doubted. The library fund, as has been remarked, is not treated in the Municipal Code as different in any way from the other funds for which levies are to be made by municipal corporations. It is a fund "raised by taxation upon all the real and personal property in the corporation" and hence subject to transfer.

When council has appropriated all the money that, in its judgment, is necessary for the maintenance of the public library for the ensuing six months, and it ultimately appears that the returns from the tax levy for the library purposes exceed the amount thus appropriated, I believe that such a situation constitutes "an accomplishment of the object of the fund" within the meaning of the above quoted section, and that in such case there is no question as to the power of council to transfer from the library fund.

It does not clearly appear from the papers submitted to me whether council has acted in the manner above suggested. Assuming, however, that it has so acted and that the transfer which it has made is not an attempted transfer of an amount already appropriated by it, but is a transfer of the balance of the proceeds of the tax levy remaining after a flat appropriation of $1,550.00 has been made therefrom, I am clearly of the opinion that such a transfer is legal and that, furthermore,— answering the first specific question of the trustees — such transfer may be made not only at the end of the year but at any time during the year as is provided in Section 43 M. C.

It follows, of course, from the foregoing discussion that the "library fund" is not "entitled to every cent of the money raised each year under levy made by council * * * for library purposes" as suggested by the trustees, but that it is entitled to only so much of the proceeds of such levy as are appropriated by council. In the case submitted by you, of course, the terms of the donation require that such appropriation shall be not less than Fifteen Hundred and Fifty ($1,550.00) Dollars.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY TREASURER OR MEMBER OF SINKING FUND TRUSTEE MAY NOT ACT AS INSPECTOR FOR PAVING AND SEWER CONTRACTS. SEWER CONTRACTS.

February 8th, 1910.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "During the years 1906 and 1907 our city treasurer and a member of the sinking fund trustees acted as inspectors for certain paving and sewer contracts being done in the city. Could they legally serve and draw their pay from the city as such inspectors at the same time they were serving as officers for the city?"

Section 6976 of the Revised Statutes is as follows:

> "An officer or member of the council of any municipal corporation or the trustee of any township who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed, or for one year thereafter shall be fined not more than one thousand dollars nor less than fifty dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office."

I am of the opinion that the latter part of the above section prohibits your city treasurer and member of the sinking fund trustees from acting as inspectors for paving or sewer contracts done by the city while such city treasurer and member of the sinking fund trustees hold the above municipal position.

Yours very truly,
U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SERVICE—WATER OF ALL PERSONS IN ARREARS FOR WATER RENT MAY BE SHUT OFF.

February 8th, 1910.

HON. A. W. OVERMYER, *City Solicitor, Fremont, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 1st in which you submit the following for my opinion:

> The board of control, at their meeting January 3rd, 1910, passed the following resolution:
>
> "Resolved, That the Director of Service be instructed to turn off the water from all consumers who are in arrears for water rent, due December 1, 1909, and not paid on or before February 21, 1910,

and to furnish the City Solicitor with a list of all such delinquents, requesting him to collect same according to law."

It is claimed by some that if an appeal is made to the state board of health the city will not be allowed to turn off the water, as set forth in the above resolution, and you desire my opinion as to the right of the city to take the steps contemplated concerning those who are in arrears on February 21st, 1910.

I am of the opinion that your city has the power to turn off the water of such persons who are in arrears for water rent and have not paid the same on or before February 21st, 1910, as is contemplated in the above resolution. However, I am also of the opinion that your city has not taken the proper steps to enforce such an order. The board of control of your city have only authority to pass on certain contracts mention in Section 154a of the Municipal Code and the order contemplated is not such a contract.

By Section 138 M. C. the director of public service is authorized to "make rules and regulations for the administration of affairs under his supervision."

By Section 141 M. C. "the director of public service shall manage all municipal water * * plants * *."

You will note from the above that the director of public service shall manage all municipal water plants and make rules and regulations for the administration of the same and I am of the opinion that the providing of a method for the collecting of back water rent comes within his sole jurisdiction and not that of the board of control and that the providing of such a method is one of the details of the management of the same. In this connection I desire to call your attention to the case of Hutchinson v. City of Cleveland reported in the 9th O. O. C. Reports, New Series, page 226, and affirmed by the supreme court in the 79th Ohio State without report.

I know of no action which the state board of health may take to prevent a municipality from turning off the water of persons who refuse to pay their water rent.

Yours very truly,

U. G. DENMAN,
Attorney General.

TRUSTEES OF FIREMEN'S AND POLICE RELIEF FUND MAY NOT PAY PREMIUM ON BOND OF CITY TREASURER FOR ACTING AS CUSTODIAN OF FUND.

February 5th, 1910.

HON. GEO. C. STEINEMANN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 31st in which you submit the following for my opinion:

> "Have the trustees of the Firemen's Pension and the Police Relief Funds authority to pay the premium on the bond given by the City Treasurer as custodian of these funds?"

By statute the treasurer of every municipality, having a firemen's pension or police relief fund, is made the custodian of the fund and it is further required that the treasurer shall execute a bond for the faithful performance of his

duties in respect to these funds in such a sum and form as the trustees may require. However, I find no provision for authorizing the trustees to pay premium on the bond given by the treasurer. As the expenditure in question is not expressly authorized, the same may not be paid, as public moneys may not be expended in the absence of express or implied statutory authority. And further, the requirement that a bond be furnished by the treasurer is not one of the duties of the office but is an act of qualification which is a condition precedent to the exercise by the treasurer of the powers and duties of his office.

I am, therefore, of the opinion that trustees of the Firemen's Pension and Police Relief Funds are without authority to pay the permium on the bond given by the city treasurer as custodian of the above funds.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL MAY REQUIRE LIST OF NEWSPAPER SUBSCRIBERS TO PROVE CIRCULATION.

January 31st, 1910.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I have your letter of January 25th requesting my opinion on the following statement of facts:

> "Under Section 124 of the M. C. it is prescribed that ordinances and resolutions requiring publication shall be published in a newspaper printed in the German language if there be in such municipality such a paper having a bona fide paid circulation within said municipality of not less than one thousand copies, and the proof of such circulation shall be made by affidavit of the proprietor or editor of such paper, which shall be filed with the City Clerk of such municipality. On page 322 of the M. C. a form of affidavit is given which I take it complies with the requirements of this section.
>
> I should like to know whether or not the city, by its council, could compel a different form of affidavit—for instance, could they require the editor or publisher of such a newspaper to file with such affidavit a list of their banofide subscribers—or any other reasonable requirement which would go to show that such paper had the amount of circulation claimed in the affidavit?"

In my opinion your city council has the right to make such investigation as it may see fit to make in order that it may arrive at a proper conclusion as to the subscribers to the paper printed in the German language, and that in making this investigation the council would have the right to require a list of such subscribers. The statute does not prescribe the form of affidavit, although the one to which you refer might, under certain circumstances, be sufficient to satisfy members of council that it states the truth. In other words, in my judgment, it was the intention of the general assembly to prescribe that there should, at least, be filed with the city clerk of the municipality an affidavit of the proprietor or editor of the paper that such paper had a bona fide paid circulation within the municipality of not less than one thousand copies. This does not forbid the

council, however, to require further proof if, under the circumstances, it should appear to council that other proof should be had. Council should not, of course, be unreasonable technical or exacting in the matter, but the law does give them the right to be satisfied that the circulation is bona fide and in a number not less than one thousand copies, which are regularly paid for by the subscribers.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR — COUNTY COMMISSIONERS MAY COMPENSATE FOR ACTING AS PROSECUTING ATTORNEY IN MAYOR'S COURT.

May 18th, 1910.

HON. ELMER T. BOYD, *City Solicitor, Marion, Ohio.*

DEAR SIR: — In your letter of May 5th you state that you are city solicitor of the City of Marion; that as such you are prosecuting attorney of the mayor's court and that you have no assistants to you in your capacity as city solicitor or as prosecuting attorney of the mayor's court. You ask whether you may draw such compensation as may be allowed by the county commissioners for services as prosecuting attorney of the mayor's court.

Section 137 of the Municipal Code, as amended 99 O. L. 458, is, in part, as follows:

> "The solicitor shall also be prosecuting attorney of the police court or mayor's court, and shall receive for this service such compensation as council may prescribe and such additional compensation as the county commissioners shall allow; provided, that when council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court or mayor's court. The duties of the solicitor as prosecuting attorney of the police court or mayor's court shall be such as are provided in Section 1813 of the Revised Statutes, etc."

Section 1813 R. S. provided for city solicitors' assistants in such police courts, as follows:

> "The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper."

It is to be noted that under these provisions of law the county commissioners could make compensation either to the city solicitor, or to his assistants, or to both city solicitor and assistants, in payment for services performed in such police court.

Section 4307 of the General Code now provides as follows:

> "The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prose-

> cuting attorney of the county. The persons thus appointed shall be subject to the approval of the city council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper, which shall be paid from the county treasury."

This section makes no provision for the salary or compensation to be paid to the city solicitor by the city for the reason that the solicitor is a regular officer of the city whose salary and compensation are otherwise provided for. There is also no reason why the county commissioners should allow further compensation to assistants of a city solicitor and deny such compensation to a city solicitor who performs the same work without the employment of assistants.

In view of the above facts and also in view of the fact that the General Code purports to be a codification of pre-existing law, rather than a creation of new law, I am of the opinion that the provision or Section 4307, General Code, that "the county commissioners may allow such further compensation as they deem proper," applies to the city solicitor when he has performed work as police prosecutor, whether he has been provided with assistants or not.

Yours very truly,

U. G. DENMAN,
Attorney General.

ORDINANCE REGULATING JUNK YARD—FULLY DISCUSSED.

May 26th, 1910.

HON. CHANCE E. DEWALD, *Solicitor, Crestline, Ohio.*

DEAR SIR:—You inquire whether a village ordinance prohibiting the locating of a junk yard or shop within a certain number of feet of a residence, or within certain districts of a town, would be legal.

The only provision of the Municipal Code which appears to approach your subject is contained in Section 3650 of the General Code, which gives municipal corporations the power:

> "To prevent injury or annoyance from anything dangerous, offensive, or unwholesome; to cause any nuisance to be abated; and to regulate and compel the consumption of smoke, and to prevent injury and annoyance therefrom, and to regulate and prohibit the use of steam whistles."

Other statutes provide as to nuisances but it appears that a junk yard does not interfere with health, or with the general convenience of the public, or with public morals, and that for these, and other reasons, it cannot be considered a nuisance *per se*. While it may became a private nuisance because obnoxious to persons in the particular locality in which it is located, the public could not, by ordinance or otherwise, attempt to prevent or regulate junk yards on the ground that junk yards are a public nuisance. We must also distinguish between a junk yard itself, which may not in itself be a nuisance, and the manner in which such property may possibly be used by the persons in charge thereof.

In the case of Whitcomb v. City of Springfield, 3 O. C. C. 244, the Circuit Court, in construing the section of the statutes authorizing municipal corpora-

tions "To prevent injury or annoyance from anything dangerous, offensive or unwholesome, or to cause any nuisance to be abated," held that a city under such statutes has no power to cause any nuisance, other than a public nuisance, to be abated, and that the above language of the statute did not authorize a municipal corporation to prohibit, by ordinance, the use of steam whistles within the corporate limits. This decision, and other decisions of our courts upon the question of prohibiting smoke by ordinance, caused the general assembly to add to the old section the language of Section 3650 giving the city specific authority to regulate smoke and to prohibit the use of steam whistles. The Court in this case say, (page 247:)

> "It seems clear that there is no express power, that is, the power to regulate or prohibit the use of steam whistles is not in terms conferred upon the city.
>
> * * * *
>
> "If we should hold in favor the power of the corporation to interfere in such cases,—if the council may suppress every noise incident to the various kinds of business, then it would be within its power, at the instance of any individual who might be annoyed thereby to stop the boiler works, abolish the smith shops, suppress the church bells, and inaugurate an era of silence. No such power exists. Private annoyances must be redressed in the civil courts, not by municipal interference."

It would seem that the above reasoning would apply to a case of this kind and that the authority of the statute should be more specific before a municipality should undertake by ordinance the regulation of junk yards.

In the case of Deming et al v. the City of Cleveland, 22 O. C. C. page 1, in which case a city council declared a certain brook to be a nuisance, the Court say, page 7:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interest, arbitrarily interfere with private business or property, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of the police powers is not final or conclusive, but is subject to the supervision of the court. Lawton v. Steele, 152 U. S., 130, 135, 136, 137.
>
> "Whether a nuisance exists or not in a particular case, justifying the exercise of the power by the municipal authorities, is a question of fact to be determined from the nature of the nuisance and the evidence."

The Court also say, page 10:

> " * * It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a

nuisance, can, by a mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every home, every business and all the property of the city, at the uncontrolled will of the temporary local authorities.' Citing Yates v. Milwaukee, 10 Wall., 505.

"Neither the legislature nor the city council of the city can make a stream of water a nuisance by declaring it so. Its character in that regard can only be established by legal proceedings.

"Whether any particular thing or act is not permitted by the law of the state, must always be a judicial question, and, therefore, the question what is and what is not a public nuisance, must be judicial; and it is not competent to delegate it to the local legislature or administrative boards. * *

"The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned must contest the fact in the court. * *

"It follows as it would seem from an unbroken line of authorities, that the act of the legislature conferring this extraordinary power on the City of Cleveland, whereby it assumes to divert this stream from the premises of the plaintiff, because the council of said city declared by resolution it to be a nuisance, is unconstitutional and void; and all the proceedings of the council under and by virtue of this legislative act are necessarily null and void, and the defense based thereon must fail."

In the case of Borger v. The State, 1 C. C. N. S., 549, the Court held to be unconstitutional the act of 95 O. L. 592, by which the general assembly made it an offense to erect or operate, within four hundred feet of the administration department of any state penal institution, any boiler factory which may make loud noises, on the ground that the operation of such a factory is not a nuisance *per se,* and it does not appear that such restriction is imposed in the public as distinguished from private interest. The Court say:

"It is well settled that a state in the exercise of its police power may restrict objectionable trades to certain localities, but 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

I am of the opinion, therefore, that, in the absence of specific authority in the municipal code and in view of the above quoted decisions of our courts, a village ordinance prohibiting the locating of a junk yard or shop within a certain number of feet of a residence, or within certain districts of a municipality, would be unconstitutional and outside and beyond any powers expressed or implicated now granted by the state to municipalities. Should a particular junk

yard become offensive to private individuals, or to the public, the matter can, of course, be brought up for adjudication through legal proceedings in court.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS — BOARD OF EDUCATION — AUTHORITY TO PAY STREET ASSESSMENTS.

May 6th, 1910.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR: — In your letter of May 4th you state that a street in your city, abutting upon school property, has been improved by paving, that a portion of the cost has been assessed against the school property and that the board of education is willing to pay its assessment if they can do so in accordance with law. You ask whether such board of education is legally authorized to pay such assessment upon abutting school property for the paving of a street along such property.

I enclose herewith copy of an opinion rendered by the Attorney General on March 31st, 1910, in which it is held that special assessments for street improvements cannot be collected against the abutting property of a board of education. While this opinion holds that a board of education cannot be compelled to make such payments, I believe that the reasoning of the opinion will also show that a board of education has not the power, even if it so desires, to pay such assessments out of any school funds. Boards of education, like other officers, have only those powers which are specifically given to them, or powers necessarily incidental thereto, and although they may exercise discretion in many matters I find no provision of law which will permit a board of education to pay an assessment levied through the instrumentality of a different political corporation, to-wit, a municipality, under the circumstances presented by you. Section 2732, Revised Statutes, exempts school property from taxation. Section 3973 provides that school property shall be exempt, not only from taxation, but also "from sale on execution, or writ, or order in the nature of an execution." Such exemptions, as well as the decisions of our courts to the effect that school property is not subject to special assessments, are based upon the general principle that it is onerous, expensive and burdensome to require one public corporation, such as the board of education, which receives its money from the people, to make payments to another form of public corporation receiving its money from the same source.

It is true that Section 63 of the Municipal Code uses the word "may" when it provides that:

> " * * the council *may* authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and the same shall be collected as other taxes."

In Section 582 of the act of 66 O. L. 248, the words "shall be lawful" are used instead of the present word "may" in Section 63 of the Municipal Code. From a reading of the entire Section 63 I believe that the language of the section points out only one way through which council may provide for such assessments for the reason that no provision is now made for collecting such assessments in any

manner other than by entering the amount of such assessment "upon the tax list of all taxable real and personal property in the corporation."

For these reasons, and for the reason that I believe that a board of education should spend its money more directly under its own supervision without becoming involved in the contracts of others, I am of the opinion that a board of education is without power legally to pay the street paving assessment of your city.

Yours very truly,

U. G. DENMAN,
Attorney General.

SEWERS — CONSTRUCTION OF — FULLY DISCUSSED.

May 3rd, 1910.

HON. H. R. SCHULER, *City Solicitor, Galion, Ohio.*

DEAR SIR: — You state that the city of Galion is about to construct a complete sewer system and has reached the point of legislation for the construction of sewer laterals. You ask for an interpretation of the following language of Section 60 of the Municipal Code, to-wit:

> "In the case of the consruction of sewers hereafter, excepting main or district sewers, notice of the passage of the resolution therefor, as provided in Section 84 of the act of which this is amendatory, shall be made in the manner provided in section 52 of said act as amended herein."

And you inquire whether, under the law, the city should serve notice of the passage of the resolution declaring it necessary to construct sewer laterals in a district or districts provided for in general sewer plans upon the owners of property to be assessed in such district or districts.

The above provisions of Section 60 of the Municipal Code, as now contained in Section 3834 of the General Code, read as follows:

> "In the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided."

The "manner hereinbefore provided" is set out in Section 52 of the Municipal Code as now found in Section 3818 of the General Code, which reads as follows:

> "A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of proptrey to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner can not be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be prima facie evidence of the service of the notice as herein required."

Section 84 of the Municipal Code is now contained in Section 3878 of the General Code, which reads as follows:

> "When it is deemed necessary by a municipal corporation to construct all or a part of the sewers provided for in such plan, the council shall declare by resolution the necessity thereof. Such resolution shall contain a declaration of the necessity of such improvement, a statement of the district or districts or parts thereof proposed to be constructed, the character of the materials to be used, a reference to the plans and specifications, where they are on file, and the mode of payment therefor, and shall cause the resolution to be published once a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation."

In interpreting the language of Section 60 of the Municipal Code above quoted, we should define the meaning of the language "main or district sewers," and also classify the different kinds of sewers as set out in the statutes.

Going back to a time prior to the adoption of the Municipal Code, a considerable light was thrown on this question by a decision of the court in the case of Toledo ex rel. v. Railway Company, 4 O. C. C. 113, decided in 1889. The court says (page 129):

> "In providing a main sewer which is intended to furnish an outlet for the entire district, while it may provide local sewerage for the property abutting upon it, that property is to pay only such proportion of the cost as would be required to furnish it with drainage, and to that extent and in that proportion the sewer, although it be a main sewer, is as to that property to be regarded as a local sewer. As to such proportion of it as would be required, over and beyond the wants and necessities of the abutting property, to furnish an outlet to outlying property, it is to be treated as a main sewer, the cost and expense of which is not to borne by the abutting property. The same rules apply to a main sewer as to a local sewer proper — such a sewer as is described in section 2397, where it is said, 'No sewer shall be considered local except such as are intended for and used exclusively for the drainage and accommodation of lots abutting thereon.' The expense over and beyond this limit, or exceeding the proportion of the cost and expense authorized to be assessed on the abutting property, is to be paid from the sewer fund of the corporation. This is provided for by general levy, as other taxes are raised, upon the property within the sewer district."

In the case of Stanley v. City, 1 N. P., N. S. 235, decided in 1902, "lateral or branch sewers" are distinguished from "main sewers."

Section 3872 of the General Code uses the following language:

> "Each of the districts shall be designated by a name and number, and shall consist of one or more main sewers, with the necessary branch or connecting sewers, the main sewers having their outlet in a river, or other proper place."

In the above section the words "branch or connecting sewers" seem to have the same meaning as the words "lateral or branch sewers" in the above case of

Stanley v. City, and the same meaning as the words "local sewers" in the above case of Toledo v. Railway Company.

Section 3882 of the General Code uses the terms "main or branch sewers" as indicating two different classes of sewers.

In construing Section 60 of the Municipal Code, as amended by the act of 97 O. L. 123, the Circuit Court, in the case of Kohler Brick Co. et al. v. City of Toledo, et al., 10 O. C. C., N. S., 137, at page 143 uses the following language:

> "But I have already pointed out that what Section 52, 96 O. L. 40, provided for was service of notice, not of the resolution, but of a certain ordinance of a certain character which was not passed in this case, and which we hold was not required. So that this amendment of Section 60 can not be regarded as declaratory of the meaning of Section 52, 96 O. L., 40, as it originally stood; i. e., that it should apply to the resolution provided for by Section 84, 96 O. L., 48; but this amendment provides for a new thing — it makes a new requirement — and that is, that personal service of the notice of the resolution provided for in Section 84 shall be made. *And even now the provision is made to extend only to local sewers.* Main sewers are expressly excepted from the operation of the provision; and this sewer, according to the averments of the petition, as well as by the agreed statement of facts, was a main sewer, notwithstanding the fact that it did not provide for the conveying away of any storm water or waters from the streets; it was distinctively and exclusively a sanitary sewer, and yet to all intents and purposes a main sewer."

It take it from all of the above that the terms "main sewers" and "district sewers," as contained in Section 60 of the Municipal Code, present Section 3384 of the General Code, are synonymous and that the term "district sewer" in such section refers only to a main sewer constructed for the accommodation of an entire sewer district, as distinguished from branch, lateral, connecting, or local sewers.

Section 3819 of the General Code, formerly Section 53 of the Municipal Code, contains the following language:

> "Assessments levied for the construction of main sewers, shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith."

Where such a main sewer, in addition to its general purposes, is also used in the same manner as a street sewer, it is to be classed as a branch or lateral sewer as regards the lots or parcels of land for which the main sewer performs the functions of a local sewer.

It appears from the above and from a general survey of the entire subject, that service of notice provided for in Section 52 of the Municipal Code, (now sec. 3818 of the General Code, upon the owner of each piece of property to be assessed, is not required for main sewers in the above defined sense because main sewers are taken to be of general benefit to the entire sewer district, and that such notice is required in the case of other sewers such as lateral, branch or local sewers, because in the latter case only a part of a sewer district is affected and the owners of the particular lots or parcels of land are more individually interested and more particularly concerned with the construction of such local sewers. Such local or

lateral sewers appear to be classed along with street and other improvements set out in Section 50 and the following sections of the Municipal Code, now contained in Section 3812 and the following sections of the General Code, to which improvements such Section 52 of the Municipal Code is made specifically to apply.

I am, therefore, of the opinion that in the case of sewer laterals, by which I believe you mean ordinary street sewers having their outlet into a main sewer, notice of the passage of the resolution provided for in Section 3878 of the General Code should be made upon the owner of each piece of property to be assessed, in the manner provided for in Section 3818 of the General Code.

Yours very truly,

U. G. DENMAN,
Attorney General

COUNCIL—MAY NOT REQUIRE DIRECTOR OF SERVICE TO PERFORM DUTIES OF SUPERINTENDENT OF WATER WORKS AND ELECTRIC LIGHT PLANTS—ORDINANCES—MANNER OF PUBLISHING.

December 22nd, 1910.

HON. LEWIS STOUT, *City Solicitor, St. Marys, O.*

DEAR SIR:—I have your letter of December 17th in which you submit to me for an opinion the following questions:

> "1. May a council by ordinance require the director of public service to perform the duties heretofore performed by the superintendent of water works and electric light plant?
>
> "2. Under the statute requiring ordinances to be published in two newspapers of opposite politics and of general circulation in a municipality would a newspaper printed at Findlay, Ohio, but mailed from the postoffice at St. Marys, Ohio, be published in St. Marys?"

Replying to your first question I beg to say that Section 145 of the Municipal Code is as follows:

> "The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerk, laborers, and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

You will readily see that the director of service is given authority under this section to establish such departments and employ such superintendents as may be necessary. This section puts the matter wholly within the province of the director of service. I am, therefore, of the opinion, replying to your first question, that the council can not, by ordinance, require the director of service to perform the duties heretofore performed by the superintendent of water works and electric light plant.

In regard to your second inquiry it seems to me that, under the governing section the question for solution is not whether the newspaper in which the ordinance is required to be published is "published" at St. Marys, Ohio, but whether or not it is "of general circulation" at St. Marys. A newspaper of

general circulation may be defined as one published for the dissemination of local or telegraphic news and intelligence of a general character, having a *bona fide* subscribtion list of paying subscribers. If the newspaper in question was printed at Findlay, and is of general circulation in St. Marys, it makes no difference, under the statute, where it is published. If the paper is sold generally and has a *bona fide* list of paying subscribers in St. Marys, it is a newspaper of general circulation.

I take it from the statement in your letter that the newspapers are, in fact, mailed from the postoffice in St. Marys, that the paper is, in fact, of general circulation in that municipality.

I am, therefore, of the opinion, replying to your second question, that the newspaper referred to by you is a proper medium for the publication of the ordinances of St. Marys under the statute governing such publication.

Yours very truly,

U. G. DENMAN,
Attorney General.

SPECIAL ASSESSMENT — COLLECTION — TREASURER MAY ACCEPT TAXES WHEN PAYMENT OF ASSESSMENT IS REFUSED.

December 19th, 1910.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 13th submitting for my opinion thereon the following question:

> "Sidewalk and street paving assessments have been certified to the county auditor and by him placed on the tax list. The property owner tenders the treasurer his land tax but refuses to pay the assessment. What are the duties of the treasurer? Should he accept the land tax offered and let the assessment stand, or should he refuse the part offered and let the penalty attach to the land tax?"

The following provisions of the General Code are to be considered in the determination of this question.

Section 3892:

> "When any special assessment is made * * * the clerk of the council on or before the second Monday in September each year shall certify such assessment to the county auditor stating the amount and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith, and the county treasurer shall collect it *in the same manner* as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation * * *."

Section 2655:

> "If a person desires to pay only *a portion of a tax* charged on real estate otherwise than in such installments (referring to the division of

current taxes into halves payable respectively in December and in June, as provided by Section 2653 of the General Code), such person shall pay a like proportion of all the *taxes* charged thereon for state, county, township or other purposes, exclusive of road taxes. No person shall be permitted to pay one or more of such taxes without paying the others in like proportion, except only when the collection of a particular tax is legally enjoined."

I have been unable to find any other section similar to Section 2655 of the General Code, and applicable specifically to the collection of such assessment. It is elementary that such special assessments are not taxes. Certainly they are not taxes for general county or municipal purposes. In the absence of a statute like 2655 of the General Code, I know of no principle which would preclude the treasurer from accepting payment of all taxes otherwise on the general duplicate against property of the taxpayer, together with all other property in the county or taxing district, without being tendered payment of the special assessment. A separate record of such special assessment collections is, of course, kept in both the county treasurer's office and that of the county auditor, for the fund produced thereby is separate and distinct and to be paid to the treasurer of the corporation; separate bills and receipts for such special assessments are also issued by the county treasurer, and quite properly, so that the mischief intended to be remedied by Section 2655 of the General Code is not encountered in such a case as that of which you speak.

For all the foregoing reasons I am of the opinion that a taxpayer may refuse to pay a special assessment levied against his property, and that the county treasurer is not authorized by such refusal to refuse tender of the general land tax due on such property at the same election period.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR— COUNTY COMMISSIONERS MAY NOT COMPENSATE FOR PROSECUTING CASES IN MAYOR'S COURT.

December 23rd, 1910.

HON. D. F. MILLS, *City Solicitor, Sidney, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 15th requesting my opinion upon the following question:

> Is the city solicitor, since the enactment of the General Code, entitled to receive any compensation from the county commissioners, or have the county commissioners any authority to allow any compensation for services rendered by him personally as prosecuting attorney of the mayor's court in state cases?

You point out the fact that Section 137 M. C., as last amended prior to the enactment of the General Code, provided in part that,

> "The solicitor shall also be prosecuting attorney of the police or mayor's court, and shall receive for the service such compensation

as council may prescribe, and such additional compensation as the county commissioner shall allow:"

while Sections 4306 and 4307 of the General Code, provide in part that,

> "The solicitor shall also be prosecuting attorney of the police or mayor's court. Where counsel allows an assistant or assistants to the solicitor he may designate an assistant or assistants as prosecuting attorney or attorneys of the police or mayor's court."

and that,

> "Persons thus appointed shall be subject to the approval of the city council *and such assistants shall* receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they may deem proper, which shall be paid from the county treasury."

Section 137 M. C. provided in addition to the provision above quoted the following:

> "provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court or mayor's court. The duties of the solicitor as prosecuting attorney of the police court or mayor's court shall be such as are provided in Section 1813 of the Revised Statutes; such as are provoded in this act and in all other acts or parts of acts applying to all cities of the state and not inconsistent therewith * * *"

Section 1813 of the Revised Statutes above referred to is, with certain omissions, substantially identical with present Section 4307 of the General Code. In fact Section 4307 General Code purports to be a re-enactment of Section 1819 R. S. while Section 4307 of the General Code, which purports to be a re-enactment of Section 137 M. C., omits all reference to the special compensation of the city solicitor for the services therein referred to. At the same time the General Code repeals Section 137 M. C., as amended May 9, 1908. See sub section 42 of the repealing clause, being Section 13767 of the General Code, page 2933, Volume 3.

It was evidently the purpose of the general assembly in adopting the General Code to reconcile the apparent by conflicting provisions of Section 137, and that section of the Municipal Code which provides that council shall, by ordinance, fix the salary of each arranged so as to make the prosecution of cases in the mayor's courts a part of the regular duties of the prosecuting attorney to be covered by his regular salary. Evidently the general assembly overlooked that provision of former Section 137 which authorizes the county commissioners to make an allowance directly to the city solicitor in case he himself rendered services in conection with state cases. It is, of course, the rule that the codification is not presumed to change the law, and this rule might be invoked to read into the last clause of Section 1304 as at present constituted, the meaning that the allowance which the county commissioners are therein authorized to make applies as well to the city solicitor as to his assistant. In fact, the language

of this clause as it now stands, while not susceptible primarily to this meaning may be so construed without doing any great violence to the grammatical construction of the same.

On the other hand, however, the express repeal of that portion of Section 137 which formerly authorized the solicitor himself to receive such an allowance, together with the fact that Section 4307 does not purport to be a codification of Section 137 M. C., but merely of Section 1813 Revised Statutes, point to the conclusion that the codification has taken away the power of the commissioners to make the allowance to the solicitor. Were it not for the rule of construction to be applied to revisions and codes there would be no question whatever as to the effect of the repeal of Section 137, and the conclusion would inevitably follow that the solicitor is no longer entitled to receive the allowance.

The question is not free from difficulty, but I am of the opinion that the effect of the codified section, in spite of the presumption above referred to, is to destroy the former power of the commissioners to make an allowance to the city solicitor for services in state cases in the mayor's court. This is clearly an error or flaw in the General Code which should be remedied at the next session of the general assembly.

In this connection I beg to advise that I have heretofore held that such allowances as have been made to prosecuting attorneys by the county commissioners, by order on their journal, made prior to the adoption of the General Code and intended to be operative prospectively, being in the nature of salaries and vested rights, are protected by Section 1376 of the General Code, during the term of office of solicitor in whose favor they had been made, or, at least, so long as the order remains unrevoked and unaffected by subsequent action of the county commissioners.

Yours very truly,
U. G. DENMAN,
Attorney General.

EMPLOYEES OF PUBLIC SAFETY AND PUBLIC SERVICE DEPARTMENTS WITHIN CLASSIFIED LIST — EXAMINATION OF — PERSONS APPOINTED AFTER JANUARY 1ST, 7910, AND BEFORE ORGANIZATION OF CIVIL SERVICE COMMISSION.

Members of police and fire department appointed prior to January 1st, 1910, immune from examination at present time; may only be removed after suspension by departmental chief and full hearing by Civil Service Commission upon charges preferred; other persons within public safety and public service department occupying positions within classified service and appointed prior to above date may be removed at will, and hence required to take civil service examination.

April 11th, 1911.

HON. EGAR L. WEINLAND, *City Solicitor, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of March 19th, submitting for my consideration and opinion the following questions arising under the civil service law pertaining to cites:

> 1. Are subordinate officers and employes of the public safety and public service departments occupying positions within the classified service, as defined by the present law, who were appointed or employed prior to January 1, 1910, now subject to examination?

2. What is the status of such officers and employes in said departments, and occupying such positions, who were appointed or employed after January 1, 1910, and before the organization of a civil service commission? That is to say, are such appointments or employments to be regarded as emergency appointments or employments or are they permanent; and if permanent, are the incumbents subject to discharge or removal; and if they are subject to removal by what procedure may they be removed?

3. The members of the civil service commission having qualified for office, and having organized the commission, but not having adopted any rules or held any examinations, what is the status of persons appointed to or employed in such positions subsequent to the date of such organization?

All three of these questions directly raise a fundamental question, the solution of which will be necessary to the formation of a conclusion in each case, viz: What law, if any, governs the status of persons holding positions within the classified service, as defined by the so called Paine law, but who have not themselves acquired membership in such classified service by appointment under Section 4481 General Code (Sec. 160, 99 O. L. 566)?

Again all the questions above stated and suggested must be answered in regard to two general classes of officers and employes, those in the fire and police departments, and those in other subdepartments of the departments of public service and public safety.

The first question submitted by you has already been partially answered in an opinion of this department. I have heretofore held that persons holding positions in the department of public service and in the department of public safety, other than the police and fire departments *need not be* compelled to take examinations when the civil service board is prepared finally to hold such examinations. All such persons, however, being appointed or employed without definite term, and not themselves being subject to civil service, may be discharged at any time. If discharged after the creation of an eligible list by virtue of submission to examination by the civil service commission, their places must, of course, be filled by appointment from such eligible list and the recipients of such appointments would be entitled to the protection of civil service rules. This leaves for our consideration that portion of your first question which relates to the members of the police and fire departments.

The former civil service law, as is well known, authorized the adoption and enforcement of such rules with regard to the police and fire departments only. These laws were in effect repealed on August 1, 1909. This has been virtually decided by the Supreme Court in the case of State ex rel. v. Noble, in which your department was of counsel. However, Section 166 of the Paine law, which went into effect on that date, sought to guarantee the protection of the old civil service law to subordinates in these two departments — a thing that might possibly have resulted from simply leaving Section 152 M. C., unrepealed. Section 152 was, in point of fact, left intact when the Paine law was enacted, and is simply adopted by reference in Section 166 which adds nothing to it. Section 152 M. C., is in part as follows:

"The chief of the police and the chief of the fire department shall have the exclusive right to suspend any of the deputies, officers or employes in his respective department * * *.

"If any such employe be suspended as herein provided, the said chief of police or the chief of the fire department * * * shall

> * * * certify such fact to the mayor, who shall * * inquire into the cause of such suspension and render his judgment thereon, and his judgment in the matter shall be final."

This section unmolested, as it was, remained the law from the date of its enactment in 1902, at least until the adoption of the General Code. It now constitutes Sections 4379, 4380 and 4381, General Code, which are as follows:

> "Section 4379. The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause."

> "Section 4380. If any such employe is suspended as herein provided, the chief of police or the chief of the fire department, as the case may be, forthwith in writing, shall certify such fact, together with the cause of such suspension, to the civil service commission, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon and such judgment in the matter shall be final, except as otherwise provided in this subdivision."

> "Section 4381. The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

Under these sections, members of these two departments, whether appointed under civil service rules or not, may not be removed for failure to take an examination.

None of the foregoing discussion is in point if it be concluded that any of the appointments described by you are temporary or emergency appointments unless they were so characterized by the appointing authority at the time they were made, and at any rate I am satisfied that the mere failure of the civil service commission promptly to discharge its duties, as required by law, has not created such an emergency as need give rise to appointments under this list.

The *appointments*, especially those in the fire and police departments, are then to be regarded as permanent appointments and the tenure of office of the appointees is to be safe-guarded by the provisions of Section 152 M. C. It will be understood, of course, that so far as the public service department, and those departments in the department of public safety, other than the police and fire departments, are concerned, the distinction between temporary and permanent appointments is immaterial until there are persons in the civil service in such departments who have been appointed under civil service rules. Employes and subordinate officers may be removed at will, so far as any civil service rules are concerned.

The sole question remaining for determination, before consideration of the separate specific questions submitted by you, is as to when the new civil service rules become effective. The answer to this question, it seems to me, is clear from a consideration of Section 4481, General Code, being a portion of Section 160 of the Paine law, which is in part as follows:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of *any vacancy* to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest * * *. Such board or officer shall thereupon appoint one of the three so certified * * "

Considering this language particularly in the light of Section 162 of the Paine law as originally enacted, wherein it is said that no person within the classified service "who shall have been appointed under such rules" shall be removed except upon the filing of charges, etc., it becomes apparent that the new civil service does not become effective at all until examinations are held and the certified lists of eligibles are prepared and then, indeed, the rules are not applicable to a given position until there is a vacancy therein, and the same is filled by the appointment of one of the list of eligibles. The law will be searched in vain for a provision making it mandatory upon any officer or authority to remove any person who has not submitted to the civil service examination. However, this may clearly be done by any officer or board, excepting as to members of the police and fire departments. These, as has been seen, are still protected by Section 152, M. C., which provides that they must be removed, if at all, by the mayor, after suspension upon charges by the chiefs of the respective departments.

Answering your questions specifically, the following conclusions are reached.

1. Members of the police and fire departments appointed prior to January 1, 1910, are immune from examination at the present time. They may only be removed after suspension by their departmental chief and full hearing by the civil service commission upon the charges preferred. All other persons within the public safety and public service departments occupying positions within the classified service, and who were appointed prior to that date, may be removed at will, and hence, may be required to take the civil service examinations.

2. The answer to this question is the same as that to the first question, that is to say, members of the police and fire department cannot be compelled to take the examination, while others within the classified service *may be* required to do so.

3. The same rule above defined applies to persons appointed and employed after the civil service commission is organized but before any examination has been held. Members of the police and fire departments are immune from examination. Others are not immune but need not be compelled to take the examination.

The whole matter may be summed up in a word so far as the positions in the new classified list outside the police and fire departments are concerned, viz: No incumbents of such positions will be necessarily subject to or protected by any civil service rules excepting those who have been appointed to fill vacancies after examination by the civil service commission.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—RIGHT OF PETITIONER UNDER SECTION 3772 OF THE GENERAL CODE TO WITHDRAW NAME—FULLY DISCUSSED.

March 10th, 1910.

HON H. R. HILL, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "On November 27, 1909, the council of Ashtabula passed an ordinance granting a renewal of franchise to the local street railway company. On December 23, following, a petition was presented to council purporting to be signed by 15% and more of the qualified electors of the city, requesting election as provided by law. Some time in January, 1910, another petition was presented to council by different signers of original petition asking that their names be withdrawn from the original petition. Within a week or so thereafter a third petition was presented to council by some of those who had signed this withdrawal petition indicating that they had changed their minds, and asking that their names be replaced on the original petition requesting election. You desire to know.
>
> "First: Had the signers of the original petition the right to withdraw their names before the council took action?
>
> "Second: Had the signers of the withdrawal petition the right to have their names replaced on the original petition after thirty days had elapsed after having previously withdrawn them?"

Answering your first and second questions I beg to call your attention to Section 3772 of the General Code which is as follows:

> "If, within thirty days after the passage of an ordinance granting a franchise, extension or renewal thereof, to a street railroad, there is presented to the council or filed with its clerk a written petition signed by fifteen per cent. of the qualified electors of such municipality, to be determined by the highest number of votes cast for the mayor of the municipality at the last preceding municipal election, requesting such ordinance to be submitted to a vote of the electors thereof, the ordinance shall not become operative until it has been so submitted and has received a majority of the votes cast thereon."

By the terms of the above statute after the required petition is filed with council requesting an ordinance granting franchise to be submitted to a vote,

> "The ordinance shall not become operative until it has been so submitted and has received a majority of the votes cast thereon."

The filing of the petition acts as a veto, and as soon as the petition is filed the ordinance becomes inoperative, and will continue so until it has been submitted to an election and has received a majority of the votes cast thereon. It is not within the power of the signer of such a petition to withdraw his name from the same after the required number has been secured and submitted to council, nor is it within the power of council to permit a name to be withdrawn. The moment the required petition is filed with council requesting that such an ordinance

be submitted to a vote, the ordinance becomes inoperative, by the terms of the above statute, and may not become operative until such ordinance has been submitted and receives a majority vote thereon.

I have examined the authorities which you submitted in your letter to this department, and I do not think any of them are in point, for the reason that the filing of the petition protesting against an ordinance granting a franchise does not confer any jurisdiction upon council, but merely, as clearly stated in the statute, renders the ordinance inoperative.

I am, therefore, of the opinion that the signers of the original petition have not the right to withdraw their names from the same.

Yours very truly,
U. G. DENMAN,
Attorney General.

CIVIL SERVICE COMMISSION — APPOINTMENTS OF.

February 3d, 1910.

HON. HAROLD W. HOUSTON, *City Solicitor, Urbana, Ohio.*

DEAR SIR: — I am in receipt of your letter of January 31 in which you ask to be advised whether or not a majority of the commission which appoints the civil service commission must concur in every appointment to the civil service commission, or whether each member of the appointing commission may, independent of the others, select a man to serve upon the civil service commission.

I beg to call your attention to Section 157 of the Paine law which is, in part, as follows:

> "In all cities, the president of the board of education of the city school district in which the city is located, the president of the board of sinking fund commissioners, and the president of the council *shall constitute a commission which shall appoint* three resident electors of the city to be known as civil service commissioners. * * *"

You will note from the above section that the above enumerated officers "shall constitute a commission" and that the commission shall appoint the civil service commissioners. Nothing whatever is said in the above section about any one particular member of the commission appointing a member of the civil service commission, but the commission, as a board, are to make the appointment.

Yours very truly,
U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION ACT — REGULATION OF CHAUFFEURS BY MUNICIPALITIES.

Municipal corporation may regulate use of streets by operators of motor vehicles other than registered chauffeurs.

July 28th, 1910.

HON CHARLES C. CONNELL, *Village Solicitor, Lisbon, Ohio.*

DEAR SIR: — You have submitted to me for my opinion thereon the following question:

May a municipality by license or ordinance, or otherwise prescribe the qualifications of a chauffeur or impose conditions as to the *persons* operating motor vehicles upon its streets?

This question involves the construction of the following provisions of law:

Section 6291 General Code. "The term 'chauffeur' includes every person operating a motor vehicle for hire or as an employe of the owner thereof."

Section 302 General Code. "A person operating a motor vehicle as a 'chauffeur' shall file an application for a registration in the office of the secretary of state * * *"

Section 6304 General Code. "Upon receipt of such application the secretary of state shall file it * * * He shall forward a list of such registered chauffeurs * * * to the county clerk in each county in this state.

Section 6305 General Code. "Upon the registration of a chauffeur the secretary of state shall forthwith issue to him a badge * * *."

Section 6307 General Code. "Local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution * * *"

Section 3632 General Code. (All municipal corporations shall have the general power) "to regulate the use of * * * automobiles and every description of carriages *kept for hire or livery stable purposes;* to license and regulate the use of the streets by *persons who use vehicles or* solicit or transact business thereon; * * *"

It is elementary that if the general assembly has itself enacted laws of state-wide application on either of the subjects concerning which you inquire, the city may not exercise its general regulative and licensing powers with respect thereto. That is to say, if there are laws relating to the licensing of chauffeurs and the qualification of persons operating motor vehicles within the state, such laws would supplant and qualify a general municipal power to regulate the use of public streets and to license persons using vehicles upon such streets.

An examination of the foregoing sections, which I believe to be the only ones applicable to the question submitted by you, discloses the fact that the automobile law, so called, being the chapter of the General Code relating to motor vehicles, does not assume to regulate or to prescribe the qualifications of persons operating motor vehicles other than those employed by the owners. That is to say, while a person who operates a motor vehicle as an employe of its owner, or for hire, must be registered as a chauffeur, the owner himself or whoever he permits to operate such motor vehicle need not be registered. Thus a member of the owner's family would not be a "chauffeur" within the meaning of the automobile law.

It is apparent then that the state law does not completely regulate the operation of motor vehicles, and does not completely prescribe the qualifications of persons operating the same.

In the statutes above quoted will be found ample municipal authority to act in cases not covered by the state law. It is clear therefore, that the council of a municipal corporation may, by license or otherwise, regulate the use of its streets by operators of motor vehicles *other than registered chauffeurs.* Any reasonable

personal qualification exacted of owners or other persons, aside from registered chauffeurs, by a municipal corporation, as a condition of the right to operate a motor vehicle upon its streets, is valid under existing laws.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL ELECTRIC LIGHT PLANT—COUNCIL MAY DETERMINE AMOUNT CHARGEABLE AGAINST CITY FOR CURRENT USED BY IT.

September 22d, 1910.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 30th, enclosing a communication addressed to you by Hon. E. J. Parrish, Mayor of the City of Conneaut, in which he states that the council of said city has from time to time assumed to fix the rate which shall be charged against the city by the director of public service for electric current produced in the electric plant owned by the city and consumed in the lighting of the streets and public places of the city.

You request my opinion as to the authority of council to take such action. There is no provision of law expressly requiring or authorizing any charge of this sort to be made; as a matter of business management and book-keeping it is doubtless expedient and advisable.

Section 4366 General Code provides that,

> "The director of public service shall manage municipal * * * lighting * * * plants."

Section 4211 provides that,

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever * * *"

Section 4240 General Code provides that,

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided * * *"

Under these three sections a very difficult question arises as to what municipal authority possesses the rate-making power in connection with a municipal electric light plant. The exercise of such power is expressly vested in the director of public service as to municipal waterworks, but, as above stated, there is no corresponding provision as to municipal lighting plants.

Your question, however, does not relate to the fixing of rates chargeable against private consumers. What the mayor terms "the charge payable by the city" is really the amount which the city contributes from its general revenues raised by taxation for the support of the plant. It is elementary that council and

council alone has the power to determine the amount of money which is to be expended from the proceeds of taxation for a given municipal purpose.

It matters not, therefore, which, as between council and the director, has technically the rate-making power. Council has the undoubted and exclusive power to determine how much money the city will pay for the support of the electric light plant from its general revenues. Such a payment, of course, can only be made from an appropriation made in accordance with law by council.

The mayor suggests that it is not fair to private consumers that the city should pay less for the current consumed by it than such consumers are obliged to pay. However, this action is within the powers of council and council may, if it sees fit, refuse to apply any moneys raised by taxation to the support of the municipal plant, and thus require that the rates charged against private consumers shall pay for the light furnished the city.

Ricker v. Lancaster, 7 Pa. Sup. Ct., 149.
Preston v. Water Comrs., 117 Mich. 589.
Gallipolis v. Waterworks Trustees, 2 N. P. 161.

Yours very truly,
U. G. DENMAN,
Attorney General.

CITY SOLICITOR—SALARY OF.

Council may not provide additional salary for city solicitor for services as prosecuting attorney of mayor's court.

October 6th, 1910.

HON. A. E. JACOBS, *City Solicitor, Wellston, Ohio.*

DEAR SIR:—In your letter of September 10th, receipt whereof is acknowledged, you state that the Bureau of Inspection and Supervision of Public Offices has disapproved an ordinance of the council of the city of Wellston prescribing additional compensation for city solicitor as prosecuting attorney of the mayor's court, and making such compensation in the nature of a percentage of fines and costs collected in said court.

The criticism of the Bureau was based upon the fact that the Municipal Code requires council to fix a "salary" for the city solicitor. You question this ruling and refer to Section 137 Municipal Code as amended 99 O. L., 458, which provides in part that the solicitor as prosecuting attorney of the mayor's court "shall receive for this service such compensation as council may prescribe." You request my opinion as to the question thus presented.

Whatever may have been the rule prior to the enactment of the General Code I am clearly of the opinion that at the present time council is without authority to provide additional compensation in the shape of a separate salary or a separate schedule of fees, or anything of the sort for the solicitor as prosecuting attorney of the mayor's court. In carrying the provisions of the act in 99 O. L., 458, into the General Code, the general assembly has stricken out the provision for additional compensation and has simply made it a part of the official duties of the city solicitor to act as prosecuting attorney of such mayor's court. See Sections 4306 and 4307 of the General Code.

The compensation of the solicitor then is to be provided by council in the discharge of its power and duty to fix the *salaries of all municipal officers*. Inasmuch as the General Code was adopted on February 15, 1910, it is apparent that it is the law by which the validity of the ordinance in question must be tested.

While the question is not free from doubt inasmuch as council seems to have authority to fix the "compensation" of officers in the city government, I am of the opinion that the compensation of the solicitor must be a salary and that at any rate council has no authority by separate ordinance to provide a special salary or measure of conpensation for the solicitor as prosecuting attorney of the mayor's court.

Yours very truly,
U. G. DENMAN,
Attorney General.

COUNCIL MAY TRANSACT GENERAL BUSINESS AT SPECIAL MEETING.

September 19, 1910.

HON. THOMAS C. DAVIS, *City Solicitor, Massillon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 6th in which you submit for my opinion thereon the following question:

> May business other than that specified in a call for a special meeting of council be lawfully transacted at such meeting?

In my opinion when council has been lawfully called together in special meeting it is assembled for all purposes and may lawfully undertake any action within its powers. It will be observed that the General Code, section 4239, which provides for special meetings, does not require that notice of the business to be transacted thereat shall be served upon the members. Such a specification of business would seem, therefore, to be superfluous. Council, under section 4238 General Code, has authority to "determine its own rules." If council has adopted a rule respecting the matter, such a rule will govern. In the absence of such a rule I am of the opinion that council is not limited in its authority to transact business at a special meeting to such business as is specified in the notice. See generally, Young v. Rushsylvania, 8 C. C. 72; Shaw ex rel v. Jones, 4 N. P. 372; Magenau et al v. Fremont, 9 L. R. A. 787 (Neb.).

Yours very truly,
U. G. DENMAN,
Attorney General.

SINKING FUND TRUSTEES—POWER TO LOAN MONEY.

Sinking fund trustees, power to loan money on certificates of indebtedness issued in anticipation of the collection of taxes.

April 14th, 1910.

HON. W. R. WHITE, JR., *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—Your letter of March 28th is received in which you ask my opinion upon the following question:

> "Can the sinking fund trustees of this city lend the department of safety and department of service money on a certificate of indebtedness such as they are allowed to issue in anticipation of the collection of taxes?"

In reply thereto I beg leave to submit the following opinion:
Sections 3912 and 3913 of the General Code read as follows:

> Section 3912. "Municipal corporations shall have special power to borrow money and to maintain and protect a sinking fund. The power to borrow money shall be exercised in the manner provided in this chapter."
>
> Section 3913. "In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest."

It is under these sections that the certificates of indebtedness, concerning which you speak, are issued. The only power given to the trustees of the sinking fund to invest in the obligations of the municipality is found in sections 3922 and 4514 of the General Code, which read in part as follows:

> Sec. 3922. "When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. * * * *."

Section 4514 reads as follows:

> "The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be re-invested in like manner."

This power is limited by the two above quoted sections of the General Code to investments in the *bonds* of the municipality, and the enumeration of the securities in which the sinking fund may be invested by trustees of that fund found in Section 4514, *supra.*, excludes, by the well known rule of enumeration and exclusion, the investment of such fund in any other form of securities.

I am, therefore, of the opinion that the sinking fund trustees of your city cannot lawfully lend money from the sinking fund on indebtedness issued by the departments of safety or of service.

Yours very truly,

U. G. DENMAN,
Attorney General.

ELECTIONS — SPECIAL.

Special election on question of issuance of bonds may be held on date of primary election, and at same polling places.

April 25th, 1910.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of April 7th in which you submit for my opinion thereon the following question:

> "Can the local board of education submit to the electors at the primaries to be held in May the question of a bond issue for school house purposes: If so, is such primary "a general election" under Section 3991 R. S., or could it be considered, the necessary preliminary publication being made by the board, such a "special election called for the purpose" as to satisfy said statute?"

Section 3991 Revised Statutes, cited by you, is Section 7625 General Code, and provides in part as follows:

> "When the board of education of any school district determines that * * * it is necessary to purchase a site * * * to erect a school house etc. * * * the board shall make an estimate of the probable amount of money required * * * and at a general election, or special election called for that purpose, submit to the electors of the district a question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

The primaries do not constitute a *general election*. This is clear from a consideration of section 1 of the Primary Election Law, Section 4148 General Code. It is also clear upon consideration of the fact that not all of the qualified electors of a sub-division are permitted to vote at the primaries.

The exact question for determination is, it seems to me, whether or not notice may be given of the holding of a special election on the date of holding the primary. It is undoubtedly true that much confusion would result from proceeding in this manner. The qualifications of electors entitled to vote at the primaries would be entirely different from those of electors entitled to vote at the special election. Separate ballot boxes would have to be provided for the special election, and for many similar reasons I am reluctant to hold that elections may be held upon the same day.

However, the question is one of power and not of convenience, and unless a positive prohibition against holding a special election on the date of a primary and, of course, at the same polling places, can be found, I am of the opinion that the power to do so exists. There is no such provision of law.

Section 3991 Revised Statutes was enacted before the primary election law. Under its provisions special elections might be held, after advertisement, on the day subsequently fixed by law for the holding of primaries. The primary election law did not expressly amend or, in part, repeal Section 3991. Repeals by implication are not favored. So long as it is possible to hold the two elections at the same time, — and this can not be questioned — there could not be said to be any legal inconsistency between the two acts. They would both have to stand, therefore, and the power to advertise and hold a special election on the date of holding the primaries would have to be upheld.

Very truly yours,

U. G. DENMAN,

Attorney General.

BOARD OF HEALTH — MEMBER MAY NOT BE SALARIED CLERK OF.

April 25th, 1910.

HON. JAMES C. ELLIOTT, *City Solicitor, Greenville, O.*

DEAR SIR: — I beg to acknowledge receipt of your letter of April 9th in which you request my opinion as to the right of a member of a city board of health to serve, by election of said board, as clerk thereof, and to receive a salary therefor.

Section 2115 Revised Statutes, present Section 4412 General Code, provides as follows:

> "The board shall have exclusive control of its appointees, defining their duties and fix their salaries, but no member of the board of health shall be appointed as health officer, nor shall a member of the board of health nor the health officer be appointed as one of the ward physicians."

As you suggest, there is a principle of statutory construction, designated by the phrase *expressio unius excluso alterius est,* upon which it might, with some show of reason, be argued that because the general assembly had undertaken to prohibit certain appointments being made by the board of health and had failed to prohibit this particular appointment to be made, therefore, the intention was to permit the latter to be made. This principle, however, is, in my judgment, overridden in the case submitted by the paramount principle of public policy that prohibits a member of an administrative board from holding a salaried position under the authority of such board; the two positions are incompatible, and unless the general assembly has expressly authorized them to be held by the same person they may not be so held. It will not be presumed under favor of any "rule of construction" that the general assembly intented to abrogate a principle of public policy in a given case.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SINKING FUND TRUSTEE MAY NOT BE MEMBER OF CITY BOARD OF REAL ESTATE ASSESSORS — OFFICER TRANSPORTING WORKHOUSE PRISONERS ENTITLED TO MILEAGE FOR HIMSELF ACCORDING TO TRIPS MADE.

April 25th, 1910.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 8th submitting for my opinion thereon the following questions:

> 1. May the offices of member of the board of sinking fund trustees of a city, and member of the board of assessors of real property of the same city be held by one person?
>
> 2. Is the officer transporting workhouse prisoners to the Columbus workhouse under contract as provided by law entitled to mileage for himself for each convict transported, when more than one convict is taken on a single trip?

The principle upon which your first question may be answered were laid down in a previous opinion addressed to you. It was then held that where a power to be exercised by the president of a board, elected from its membership, conflicts or is incompatible with a power to be exercised by the incumbent of another office, the same person might not hold membership in the board, implying the possibility of election as president, and at the same time hold the other office in question. As you point out, Section 3 of the act providing for the election of assessors of real property, now Section 3369 General Code, provides that,

> "If * * * there is a vacancy in such office in any city it shall be forthwith filled by the mayor, city treasurer, and the president of the board of sinking fund trustees, or any two of them."

It is my opinion that offices are incompatible when one of them is to be filled by appointment by the incumbent of the other.

In addition to this reason there is another suggested by you that the duties of the board of real estate assessors in fixing the valuation of real property are in a sense inconsistent with those of the board of trustees of the sinking fund in fixing the rate of tax necessary to provide for the sinking fund of a city, and with those of the same board as city tax commissioners, in approving the general levies for municipal purposes as certified by council.

Your second question, it seems to me, is clearly answered by consideration of Section 6801a Revised Statutes, now Section 12385 General Code, which provides that,

> "* * * officer transporting a person to such workhouse shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting *each* convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases * * *"

Under this section, in my opinion, mileage is receivable by the officer for himself according to the number of trips made, and not the number of convicts transported.

You also ask what authority determines the necessity of taking a guard. In my opinion this question is to be determined by the exercise of the discretion of the officer, or his superior, in the department of public safety.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—SINKING FUND LEVY.

Provision of statute as to time when trustees of municipal sinking fund must certify rate of tax for sinking fund purposes is directory.

April 21st, 1910.

HON. CORNELL SCHREIBER, *City Solicitor, Toledo, Ohio.*

DEAR SIR:—I am in receipt of a letter dated April 15th from the Board of Trustees of the Sinking Fund of the city of Toledo, calling my attention to the provision of section 108 M. C., section 4513 General Code, which requires said trustees to certify to council *on or before the first Monday in May of each year,*

the rate of tax necessary to provide a sinking fund for the future payment of bonds, etc., and stating that owing to the forthcoming appraisement of real property, the trustees are unable to estimate the aggregate valuation of property subject to taxation in the city for the year 1910. The trustees feel that they are unable for that reason to fix the rate of tax necessary, and to certify the same to council at this time. The board, therefore, desired me to advise it as to whether the provision as to time, embodied in the above cited section, is directory or mandatory.

Ordinarily I should have, of course, referred this inquiry to you as legal adviser of the board. It seemed to me, however, that the question was urgent and called for immediate answer. I have, therefore, taken the liberty to regard the inquiry as coming from you and to address the opinion thereon to you, with the request that you advise the trustees in the premises in accordance with your own best judgment.

In my opinion the provision above referred to is directory. It is a part of section 4513 General Code, which also provides that,

> "The council shall place the several amounts so certified *in the tax ordinance* before and in preference to any other item, and for the full amount certified."

The "tax ordinance" referred to herein is evidently that required by section 3794 General Code, formerly section 30 M. C. It need not be passed so as to take effect before the first Monday in July. Inasmuch as the duty of council, to include the levy certified by the trustees of the sinking fund in said ordinance without question or revision, is mandatory, there seems to be no necessity whatever requiring the trustees to make the certification sooner than a reasonable time prior to the time when council must act.

It is by no means clear, however, that council need act on the exact date prescribed in the statute; the contrary has been held in this state. (Gates vs. Beckwith, 2 W. L. M. 589.)

It is a general rule of statutory construction that provisions as to time are presumed to be directory unless the contrary plainly appears. Another cardinal rule is that a statute will be regarded as directory unless it clearly appears that the legislative intent was to make non-compliance with the statute fatal to the exercise of the power therein provided for. Inasmuch as section 108 M. C. does not confer a *power* but, on the contrary, commands a *luty* it seems clear that it could not have been the legislative intent that these vital proceedings for the levy of taxes should be annulled simply by failure to observe the provisions as to time

For all of the above reasons I am of the opinion that the statute is mandatory, and that the board of sinking fund trustees and the council may both delay the action necessary to fix the levy for taxes for the year 1911 until such time as the total valuation of property subject to taxation in the city may be determined or estimated with some degree of accuracy.

Very truly yours,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—SECRET SERVICE OFFICERS UNDER SECTION 6139 GENERAL CODE, MUST BE APPOINTED BY AND PAID UPON VOUCHER OF DIRECTOR OF PUBLIC SAFETY.

June 13th, 1910.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Your letter of June 7th is received in which you request my opinion on the following question:

> "Section 6139 of the General Code provides that 'council may use any portion of the fines, collected for the violation of the local option law, for hiring detectives or secret service officers, etc.
>
> "1st Question: Who hires such detectives or officers, the council, mayor, or director of safety?
>
> "2nd Question: How are such detectives or officers paid, by voucher approved by the council, mayor, or in what manner?"

In reply I beg leave to submit the following opinion:

Section 6139 of the General Code reads as follows:

> "The council of a city or village, by ordinance, may provide for the destruction of intoxicating liquor found to have been kept for illegal sale or distribution, or implements or vessels used for such illegal sale or distribution. Such council may use any part of the fines, collected for the violation of the local option law, for hiring detectives or secret service officers to secure the enforcement of such law, and may appropriate not more than one hundred dollars annually from the general revenue fund for enforcing the local option law when there are no funds available from such fines so collected."

Under the provisions of the above quoted section 6139 the power is given to the city council to use any part of the fines collected for violation of the local option law for the purpose of hiring detectives or secret service officers to secure the enforcement of such law, but such funds must be used by council in the manner prescribed by law.

Section 4211 of the General Code reads as follows:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

Sections 4168 and 4169 of the General Code read as follows:

> "Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments. He shall be the chief administrative authority of the charity, correction

and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments except as otherwise provided by law. He shall keep a record of his proceedings, a copy of which certified by him shall be competent evidence in all courts."

Section 4369:

"The director of public safety shall make all contracts in the name of the city with reference to the management of such departments, and for the erection or repair of all buildings or improvements in connection with, and for the purchase of all supplies necessary for, such departments, subject to the restrictions imposed by law."

Section 4378 of the General Code reads in part as follows:

"The police force shall preserve the peace, protect persons and property, and obey and enforce all ordinances of council, and all criminal laws of the state and the United States. * * *"

Section 4375 of the General Code reads as follows:

"The director of public safety shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks and employes as are provided by ordinance or resolution of council. He may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as council prescribes."

The above quoted section 4211 of the General Code limits the power of council, and I am of the opinion that, in view of such section, council has no power to hire the detectives or secret service officers, the employment of whom is authorized by section 6139, or to issue vouchers for the payment of the same. The only power possessed by council, under section 6139, is to authorize, in proper legislative form, the expenditure of a part of such fines by the proper municipal officer for hiring such detectives or officers.

I am further of the opinion that, the enforcement of the local option law being within the duties of the police department of a municipality, under section 4378 of the General Code, supra, the detectives or secret service officers provided for by section 6139 of the General Code, should be appointed by, and paid upon the voucher of, the director of public safety, by virtue of the above quoted sections 4368, 4369 and 4375 of the General Code, which place the conduct of such department, the employment of such special officers, and the making of all contracts in regard to such department within the jurisdiction of the director of public safety.

Yours very truly,

U. G. DENMAN,
Attorney General.

APPROPRIATIONS—CAN BE NO SUPPLEMENTAL APPROPRIATION ORDINANCE IN ADDITION TO SEMI-ANNUAL APPROPRIATION MADE FROM GENERAL FUND.

Sections 3623 and 3800 General Code.

Contingent fund, there is only one contingent fund. Can be no contingent waterworks fund. Money appropriated reverts to fund from which taken, when the specific purpose for which appropriated are fully accomplished, or else at end of fiscal year.

June 29th, 1910.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR: — You ask whether or not a supplementary appropriation ordinance can be made at this date appropriating a sum of money from the general fund of the city to a river dredging fund and public land fund, such money to be used for the purpose of dredging a navigable water way and depositing the dredgings upon swamp lands within the municipality.

I beg leave to advise you that appropriations for such purposes can be made only under the provisions of section 3797 of the General Code, "at the beginning of each fiscal half-year" and that, therefore, no supplementary ordinance can accomplish this purpose.

Section 3623, General Code, provides that a municipality shall have power

> "To construct, open, enlarge, excavate, improve, deepen, straighten, or extend, any canal, ship canal or watercourse located in whole or in part within the corporation, or lying contiguous and adjacent thereto."

Dredging a water way is, therefore, one of "the several objects for which a corporation has to provide," within the meaning of section 3797 of the General Code, and since the general fund, as described in sections 3800, 3803, etc., of the General Code, is a fund "available for the general purposes of the corporation," money should be appropriated from this general fund by means of the semi-annual appropriation ordinance for the purpose of dredging the stream within your municipality.

You also ask,

> "Whether or not a supplementary appropriation ordinance can be passed to appropriate $10,000 from what is known as the contingent waterworks fund to a buildings, land and machinery fund of the waterworks department, for the purpose of erecting a sub-pumping station."
>
> You ask what steps should be taken, in case such a supplementary ordinance can not be passed, to get such $10,000 into a fund from which it could be used for such purpose after the passage of the semi-annual appropriation ordinance.

Since the municipal code provides specifically for only one contingent fund for the municipality, namely the contingent fund described in section 3800 of the General Code.

> "* * * to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen",

I am unable to understand exactly what is meant by the term "contingent waterworks fund". If an attempt has been made to provide a separate "contingent waterworks fund" solely for emergencies arising in the waterworks, in that case the attempt to create such a contingent fund is illegal and such money under such circumstances will still remain legally a part of the original fund from which an attempt was made to appropriate such $10,000 for a "contingent waterworks fund". If, on the other hand, you mean by the term "contingent waterworks fund" a particular fund for particular purposes then such an appropriation for the "contingent waterworks fund" could be used only for the particular purposes for which appropriated and no transfers could be made from such waterworks appropriation, but any balances remaining after the objects of the appropriation had been satisfied or abandoned, would revert to the fund from which they were taken either "at the end of the year" or at any time after the fixed charges attaching to such appropriation "shall have been terminated". In either case no supplementary appropriation can be made for the purpose of erecting a sub-pumping station, but an appropriation for this purpose can be made in the semi-annual appropriation ordinance.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—ELECTRIC CURRENT—CONTRACT FOR.

Municipal corporations may purchase electric current from private corporation for the purpose of furnishing its inhabitants therewith as well as for lighting its public places.

July 2nd, 1910.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 20th submitting for my opinion thereon the following question:

> "Have the municipalities of this state the power and authority to purchase electricity from a private corporation or another municipality of this state and use same for lighting streets, alleys and public places and also to sell the current to private consumers in the municipality? That is, could the city of Nelsonville, for instance, purchase its electrical current from the Electric Light and Power Plant located outside the city limits, measured by meter to the corporation line and selling current to private consumers in this city and to use the same for the purpose of lighting its streets, alleys and public places?"

The statement of facts which you make in your letter has been supplemented by a conversation with Mr. E. M. Poston, representing the New York Coal Company, which, I am told, has made an offer to the city of Nelsonville such as is described in your letter.

I beg to quote the following provisions of the General Code which may be of assistance in answering the question:

> Section 3616: "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3618: "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, * * * ".

Section 3990: "The council of a municipality may, when it is deemed expedient and for the public good, erect * * * electric works at the expense of the corporation, or purchase any * * * electric works already erected therein, * * * ".

Section 3994: "A municipal corporation may contract with any company for supplying, with electric light, * * * for the purpose of lighting or heating the streets, squares or other public places and buildings in the corporation limits."

Clearly, as suggested by you, section 3994 does not authorize a municipal corporation to contract with a private corporation for the purchase of electric current which it in turn sells to private consumers.

The special power conferred by section 3990 does not, in my judgment, amplify the general power mentioned in section 3618 so far as the construction of an electric light plant or "electric works' is concerned. The two sections are to be read together and neither is, in this respect, to be regarded as broader than the other,

In my judgment neither the word "plants" nor the word "works" may be so interpreted as to mean simply a distribution system, the current for which is to be purchased by contract. That is to say, both of these terms, in their common and ordinary signification, include, as the especial element of their meaning, the apparatus or machinery by which the electric current is generated.

However, the phrase "to furnish the municipality and the inhabitants thereof with light, power and heat", seems broad enough to include the power to make the contract described in your letter.

It will be found upon examination that in all the related sections beginning with section 5617, General Code, that is to say, all the former sub-sections of section 7, Municipal Code, the word "and" is used in the disjunctive sense to connect words descriptive of independent powers. Regarding the phrase "to furnish" as thus descriptive of an independent power and not to be read in conjunction with "to establish, maintain and operate", the sole question is as to the meaning thereof.

Assuming for the sake of argument that section 3618, General Code, is ambiguous, for the solution of such ambiguity we must look under familiar statutory principles to the original act which has been thus codified. In this case that is section 70, Municipal Code, amended 99 O. L. 34. Therein it will be found that a semicolon separates the words "plants" and "and". Clearly, then, under said original section, the power "to furnish" was separate and distinct from the power "to establish, maintain and operate * * * plants".

In my opinion any city may lawfully furnish electric light, heat and power to its inhabitants whether the same is generated by boilers and dynamos belonging to it or not.

What the municipality may furnish it may lawfully purchase from any person or corporation, especially under favor of the power "to produce everything necessary therefor". I am, therefore, of the opinion that the contract in question may lawfully be entered into.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CODE, SECTION 45, REVISED STATUTES SECTION 6976 CONSTRUED.

Mayor of municipality may not be financially interested in paper publishing municipal ordinances during his term.

January 25th, 1910.

MR. T. J. SUMMERS, *City Solicitor, Marietta, Ohio.*

DEAR SIR: — Your communication is received in which you inquire if the Marietta Daily Journal, a paper published in the city of Marietta, Ohio, may be awarded the contract for the legal printing or advertising of the city of Marietta when the mayor of said city is a stockholder in the company publishing said paper. You further inquire if this paper may do the legal printing or advertising for the city within one year after the term of office of the mayor who holds, and continues to hold such stock, has expired.

In reply I beg to say that the answer to this inquiry is determined by the provisions of section 6976 Revised Statutes (section 45 of the Municipal Code). Looking to the history of this section as it has been amended from time to time it will be seen that the phrase "for one year thereafter" does not modify the first branch of the statute which prohibits an officer or member of the council of any municipal corporation from being interested directly or indirectly in the profits of any contract, job, work or services for the corporation, but that it applies only to the second branch of the statute which prohibits such officer or member of council from being commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed. It therefore follows that the act of council giving to the Journal Publishing Company the public printing does not offend against this section after the term of the mayor has expired.

The first sentence of the section inquired about forbids the mayor to be "interested directly or indirectly in the profits of any contract, job, work or services, etc." In my opinion this section renders void any agreement entered into by the publishing company for work on behalf of the city during the term which a stockholder in that company would serve as a municipal officer.

There is merit in the contention that the statute is criminal in its provision, and does not make it a crime either for the council to let the contract to a newspaper in which a minority stockholder is interested, or for the newspaper to publish the ordinances, etc., but the drastic provision of the statute is that,

> "No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work or services, etc."

But the same reasoning by which we might reach the conclusion that this contract is valid because the mayor holds but a small and minority interest in the publishing company would be equally applicable if he held a larger or controlling interest in the publishing company. It is the true function of those who apply the law to interpret it as enacted by the legislature, and no recognized canon of statutory construction will, in my opinion, justify the conclusion that the council complied with the provision of this statute in letting a contract for public printing to a publishing company in which the mayor of the municipality was a stockholder at the time.

Yours very truly,

U. G. DENMAN,

Attorney General.

MUNICIPAL CORPORATIONS — OFFICERS — INTEREST IN CONTRACTS.

Director of newspaper corporation which has contract with municipality for legal publications may not serve as member of council. Stockholder of such corporation may act as solicitor of village with which the contract is made.

January 17th, 1910.

HON. J. M. PATTON, *City Solicitor, Berea, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 14th in which you submit for my opinion the following questions:

> "Can a councilman who is a director in a printing company which publishes the only paper here, act as councilman and legally vote for a contract to give this company the printing of the village?
>
> "I own stock in this same printing company. Can I act as solicitor for the village, being hired by council and not elected, while the owner of this stock?"

Section 6976 R. S., provides in part that,

> "An officer or member of the council of any municipal corporation * * * who is interested, directly or indirectly, in the profits of any contract, job, work or service for the corporation * * * shall be fined, etc."

The effect of this provision is to render illegal and void all contracts entered into by a municipality in which a member of council or an officer thereof has an interest regardless of whether or not the member of council votes for or against the ordinance by which said contract is entered into.

Grand Island Co. v. West, 28 Neb. 852
Winans v. Crane, 36 N. J. L. 394.
Milford v. Milford Water Co., 124 Pa. St. 610.
Jolly v. Ry. Co., 16 Pa. St. Ct. 1.
Cherry v. Gleason, 21 Misc. 368.
Kennett Electric Light Co. v. Kennett Square 4 Pa. Dis. 707.
Dwight v. Palmer, 74 Ill. 295.
Bay v. Davidson, 133 Iowa 689.

As it appears that the newspaper in question is the only one in the village that the law practically requires certain advertisements to be made in, I am of the opinion, upon the authorities above quoted, that the member of council referred to by you must either dispose of his stock or forfeit his membership in council. The statute in question does not apply to you as you are not an officer of the municipality, nor (without quoting from any of the statutes) is there any provision of law or principle of law which prohibits your sustaining the relation described both to the newspaper and to the municipality.

I therefore conclude that you may act as solicitor of the village without disposing of your stock in the newspaper.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — CONTRACTS — CERTIFICATE OF AUDITOR — APPROPRIATION.

Expenditures of less than $500 in the department of public service from proceeds of water rentals may be made without certificate of auditor that the money is in the treasury, etc., but not without appropriation.

March 22nd, 1910.

HON. T. F. THOMAS *City Solicitor Zanesville Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of March 16th in which you request my opinion as to whether contracts involving expenditures less than $500.00 in the department of public service may be made by the director of said department, without the issuance of a certificate by the city auditor that the money is in the treasury to the credit of the proper fund, and not appropriated for any other purpose, or without any appropriation by council at all, when the money to be expended arises from the proceeds of water rentals?

It has been frequently held by the supreme court of this state that the provision in section 45 M. C., relating to the issuance of a certificate that the money required by the contract is in the treasury to the credit of the fund, etc., does not apply to the expenditure of money not raised by taxation.

Kerr v. Bellefontaine, 59 O. S. 446.
Comstock v. Nelsonville, 61 O. S. 28.
Emmert v. Elyria, 74 O. S. 185.
Akron v. Dobson, 81 O. S. 66.

It would seem, therefore, that it is unnecessary in case of the expenditure of moneys derived from water rentals for the director of public service to secure the certificate of the auditor that the money is in the treasury to the credit of the proper fund, etc.

To conclude, as above, however, is not to conclude that such moneys need not be appropriated by council.

Section 43 M. C., which governs the subject matter of appropriations provides, in part, that,

> " * * * council shall make at the beginning of each fiscal half year, appropriations for each of the several objects for which the corporation has to provide, out of the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes *and all other sources of revenue.* All expenditures within the following six months shall be made with and within said appropriations and balances thereof. * * * Councils of cities or villages may * * * transfer all or a portion of one fund * * * to the credit of one or more funds, but there shall be no such transfer *except among funds raised by taxation* * * * ".

Standing by itself, this section clearly is intended to apply to the expenditure of moneys raised otherwise than by taxation. It is very general in its language, and there is in it no language which would give rise by implication or otherwise to any exceptions to its terms.

This construction of the section is strengthened by consideration of section 43a M. C., which directs the transfer of any unexpended balance of the proceeds of bond issues to the trustees of the sinking fund, to be applied in the payment

of the bonds. There is nothing either inconsistent with these provisions or repugnant to them in the provisions of the municipal act applying expressly to the department of public service. It has been held, however, that section 2407, etc., R. S., applying to water-works, and expressly re-enacted as a part of the village code by section 205 M. C., does as a matter of fact still apply both to cities and villages, and that the provisions relating to the trustees of water-works should be applied to the director of public service. Hutchins v. Cleveland, 29 O. C. C., 697, affirmed 79 O. S. 478.

If this be the case, the conclusion above reached is strengthened. Section 2411 R. S., provides that the trustees may assess and collect water rents.

Section 2412 R. S., relates to the disposition of the surplus, while sections 2413 and 2414 require all moneys collested for waterworks purposes to be deposited weekly by the collectors thereof with the treasurer of the corporation, by him to be kept as a separate and distinct fund, subject to the order of the trustees or board. The requirement that the rentals be paid into the treasury takes such moneys out of the hands of the department of public service, that is to say, the moneys cannot be expended by the department and the excess or balance be paid into the treasury. It seems to me that the latter portion of the last quoted provision to the effect that when paid into the treasury, the money shall be kept as a separate and distinct fund, subject to the order of the trustees of the board, is in part modified by section 43 M. C. Undoubtedly when in the treasury, these moneys constitute a separate and distinct fund, but that they are subject to the order of the trustees or board, i. e., the director of public service, without appropriation, it seems to me is expressly negatived by the provision of section 43 M. C., quoted. Section 43 is the later statute in point of time and must control.

This view of the case was adopted by the general assembly in enacting the General Code, section 3960, which provides as follows:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. *When appropriated by council,* it shall be subject to the order of the director of public service. * * * "

I, therefore, conclude that council should appropriate the water rentals received by the director of public service before they may be, in any amount, expended by him

Yours very truly,

U. G. DENMAN,
Attorney General.

BONDS — WATERWORKS.

Proceeds of bonds issued upon vote of people for construction of waterworks may not be used to purchase waterworks plant.

July 11, 1910.

HON. FRANK A. BOLTON *City Solicitor Newark Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of recent date enclosing ordinance No. 1444, of the City of Newark providing for the establishment, erection, building and maintenance of a water work system in said city.

You inform me that more than one issue of bonds was made upon the

approval of the electors of the city, all, and particularly the last one thus made. being for the purpose of constructing a water works system. Said last issue of bonds so authorized produced a fund more than sufficient to complete the work of construction to a point at least where in conjunction with a system of distribution now owned by a private company, it will secure the needs of the city. It is therefore desired that the balance remaining in the fund created by the sale of bonds be applied to the purchase of the private system which is now offered for sale. In my opinion this cannot be lawfully done.

The purposes of construction and purchase are quite distinct and separate, and it would be an unlawful diversion of money raised by the sale of bonds issued for the first purpose to apply such money, without other proceedings, to the second purpose. The Elyria Gas & Water Company, vs. Elyria, 57 O. S. 374. Nor can the balance remaining in the fund be transferred into other funds and thus made available.

Former section 43, Municipal Code, General Code, section 3799, provided for the transfer of balances remaining in funds *raised by taxation.* Section 22b-1 R. S. and its equivalent in the General Code, provides for the transfer of funds by certain court proceedings. But balances remaining in funds created by the sale of bonds are not subject to transfer. Such balances are disposed of by former section 43a, Municipal Code, and now section 3804, which provides,

> "when any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

I have not examined the authorities cited by you in the Cyclopedia of Law and Procedure, because the statutes of this state seem to me to be so plain as to preclude any question.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — OFFICERS — INTEREST IN CONTRACTS.

The phrase "or for one year thereafter" as used in Section 6976 R. S. does not make it illegal for a municipal officer to be interested in all municipal contracts during the period described thereby; the effect of this phrase is to make it illegal for such officer to act as commissioner, architect, etc., in municipal work undertaken during said period.

January 21st, 1910.

HON. L. C. BARKER, *City Solicitor, Galion, Ohio.*

DEAR SIR:— I beg to acknowledge receipt of the following letter from you:

> "Write you concerning the interpretation of the clause "or for one year thereafter" as used in Section 6976 R. S. O. Would like the ruling of your department as to the application of the above quoted clause; that is, whether this clause applies to 'any contract, job, work or services for the corporation or township', or whether it

applies or modifies the subsequent phrase or clause, 'or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township, during the term for which he was elected or appointed.' There has been much diversity of opinion as to whether the phrase first above quoted modifies or has application only to an officer, acting as commissioner, architect, superintendent or engineer, or whether it likewise applies or modifies the clause second above quoted and prohibits any officer from sharing any profits of any contract, job, work or services for a corporation for one year after the expiration of such officer's term of office."

Section 6976 referred to by you is in full as follows:

"An officer or member of the council of any municipal corporation or the trustee of any township who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed, or for one year thereafter, shall be fined not more than one thousand dollars nor less than fifty dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office."

As your letter suggests, there are, at least, two meanings which might be attached to somewhat ambigous language of this section Indeed careful examination of the section will disclose that it is susceptible to other meanings. The section has been twice amended, in immaterial respects, since the codification of 1880, but an examination of the section as therein embodied will disclose that the same questions could be made upon the language of original section 6976.

Said original section 6976 of the codification of 1880, was a revision of section 92 of the Municipal Code of 1869, 66 O. L. 164. Here we find the law, in its original form, as follows:

"No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work, or services, (other than official services to be performed for the corporation, nor sholl any member or office *act* as commissioner, architect, superintendent or engineer in any work *undertaken* or *prosecuted* by the corporation *during* the term for which he was elected or appointed, or for one year thereafter."

It is a familiar principle of statutory construction that the re-enactment of a statute for the purpose of codification and revision is presumed not to change the meaning thereof. If then the original act indicates one of several possible meanings of the revised act, that meaning must be given to the latter. It will be noted with respect to the original act that the subject "no member of the council or any officer of the corporation" is repeated; in fact, the entire structure of the original section indicates clearly that the portion thereof which follows the parenthesis is absolutely separate and distinct from that which precedes, and that it would have been proper grammatically to have placed a period at the division point. This conclusion eliminates one of the possible meanings sug-

gested by you, and indicates clearly that the phrase "during the term for which he was elected or appointed, or for one year thereafter" does not modify the verb "is interested."

I am, however, of the opinion that both of the meanings suggested by you are erroneous.

Looking still to the original section, and particularly to the latter half thereof, it will appear that the phrase "during the term" etc., as above set forth in full, immediately follows the participial phrase "undertaken or prosecuted by the corporation." On the familiar grammatical principle that qualifying words and phrases should be regarded as modifying the next preceding word or phrase susceptible to qualification, it would have to be decided that the last mentioned phrase was the one to which the general assembly intended limitation as to time to apply. In other words, the prohibition against acting as commissioner, architect, ect., is not limited to one year after the expiration of the term, but it is against so acting in any work *undertaken within the year.* Thus, a municipal officer, or a member of council may not accept employment as architect, superintendent or engineer, after the expiration of one year from the end of his term if the municipal work in which he is to act in such capacity was undertaken before the expiration of such year. This, it seems to me, is the plain meaning of the original section. It is, of course, to be observed that the word "work" as used in the latter half of said original section is not synonomous with the same word as used in the first half thereof. The reference is to public improvement etc. in which the services of commissioner and architect, superintentend or engineer might be appropriately employed.

As above suggested, what is ascertained to be the meaning of the original law in this particular must determine the doubtful meaning of the present section 6976.

It is, therefore, my opinion that present Section 6976 should be read as follows:

> "An officer or member of the council of any municipal corporation * * * who is interested, directly or indirectly, in the profits of any contract * * * for a corporation shall be fined. And if such officer etc. acts as commissioner, architect, superintendent or engineer in any work which, during the term for which the officer was elected or appointed, or for one year thereafter, is or has been undertaken or prosecuted by the corporation, he shall be fined."

Very truly yours,

U. G. DENMAN,

Attorney General.

SCHOOLS—BOARDS OF EDUCATION—POWER TO CONTRACT—MEMBER OF INTERESTED IN CONTRACT—WHAT IS SUFFICIENT TO CONSTITUTE SUCH INTEREST IN CONTRACT.

March 7th, 1910.

HON. THOMAS W. LANG, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—Your letter of March 7th in which you request my opinion upon the following statement of facts and questions, is received:

> "1. The board of education of the city of Findlay is about to purchase from the Young Men's Christian Association of said city a

tract of land as a site for a new school building. One of the members of the board of education is a director in the Young Men's Christian Association, a corporation, not for profit, organized under the laws of the State of Ohio.

"This land in question was given to the Young Men's Christian Association a few years ago on the condition that it pay annually to the donors of said land an annuity of two hundred dollars per year during the life of said donors, or either of them. At the time this agreement to pay said annuity was made E. C. Taylor was a director in said association and a member of the board of education.

"Query. Can the board of education, under the above statement of facts legally contract with the Young Men's Christian Association for the purchase of said tract of land?

"2. Since the Young Men's Christian Association made its first proposition to the board of education for the sale of this land, E. C. Taylor resigned as a director in said association, and the association thereafter submitted a new proposition for the sale of said proposed site, and the board of education are about to consummate said sale on the theory that the resignation of said E. C. Taylor, a member of the board of education, from the board of directors of the Young Men's Christian Association, removes the legal objection to the carrying out of said purchase.

"Query. Has the resignation of E. C. Taylor, a member of the board of education, from the board of directors of the Young Men's Christian Association, the effect of making the proposed purchase legal?

"3. I beg to further inform you that there are delinquent taxes and special assessments on the property proposed to be purchased approximating twelve hundred dollars, and that the Young Men's Christian Association is indebted to my knowledge in a sum approximately ten thousand dollars, secured by mortgage on its building and the grounds upon which such building is located, which indebtedness was incurred during the time when Mr. Taylor was a member of the board of directors of said Young Men's Christian Association."

Section 3974 Revised Statutes reads in part as follows:

"* * * no member of a board shall have any pecuniary interest, *either direct or indirect,* in any contract of the board, * * *"

By the above quoted provisions of section 3974 Revised Statutes it is prohibited for a board of education to make any contract in which a member of such board has "any pecuniary interest, either *direct or indirect.*"

Section 3261 Revised Statutes reads as follows:

"The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted."

The Young Men's Christian Association of the city of Findlay, of which Mr. Taylor was a trustee at the time of the making by its board of trustees of the agreement for the two hundred dollars annuity, is, under your statement of

facts, a corporation not for profit, and, therefore, under the provisions of section 3261, *supra* Mr. Taylor was and is personally liable for the payment of such annuity, and indeed for the payment of any other debts contracted by such Young Men's Christian Association during his incumbency as a trustee, and he, therefore, would be personally liable upon the ten thousand dollars of mortgages spoken of in your inquiry above. The result of a sale by such board of trustees to your board of education, therefore, would be to decrease, if not to wipe out, such personal liability of Mr. Taylor, inasmuch as the money derived from such sale would increase the assets of the Young Men's Christian Association and thereby decrease the ultimate personal liability of Mr. Taylor upon the debts contracted by it during his incumbency as a trustee.

I am, therefore, of the opinion that Mr. Taylor has such a "direct or indirect pecuniary interest" in the proposed contract of sale between your board of education and the board of trustees of the Young Men's Christian Association as would render such contract void, and the fact that the statement contained in your letter shows that such Young Men's Christian Association is in more or less straightened financial circumstances, in my opinion, renders such "pecuniary interest" of Mr. Taylor more immediate.

In this connection also I beg leave to call your attention to section 12910 of the General Code, which reads as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

I am further of the opinion that the resignation of Mr. Taylor from the board of trustees of the Young Men's Christian Association does not have the effect of making the proposed contract of purchase legal. Such resignation can not and does not release Mr. Taylor from his personal liability for the debts of the Young Men's Christian Association contracted during his incumbency, of which the aforesaid annuity and mortgage are a part and, therefore, his resignation from such board of directors does not remove his "pecuniary interest" in such contract.

As to the opinion to the State Commissioner of Common Schools to the effect that this sale could be lawfully made, which you say I am being quoted as having rendered, I beg leave to inform you that this opinion was a verbal one and was rendered on an insufficient and incomplete statement of facts given by some person to the State Commissioner of Common Schools, and by him transmitted to me for opinion. In view of the further facts presented by your inquiry of even date the entire situation is changed and such opinion has no force or effect.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION — PLUMBERS' LICENSE LAW UNCONSTITUTIONAL. RESOLUTION APPOINTING BOARD OF ESTIMATE FOR SPECIAL ASSESSMENT NEED NOT BE PUBLISHED.

March 14th, 1910.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of March 1st in which you submit for my opinion thereon the following questions:

> 1. "On page 810 of the Municipal Code, appears the subject of Plumber's License. Are all the sections, in reference thereto unconstitutional, or just the part of that law which discriminates, as set forth in note 1 at the bottom of page 810? We want to provide a board of examiners in accordance with this law, will it be proper?
>
> 2. "Under section 68 of the municipal Code, page 234, in the order of procedure for assessments by benefits, in No. 2, resolution appointing estimating board, should this resolution be published? How long and in how many newspapers? How long after the last publication until the board can begin their work of assessing?

Answering your first question I beg to state that the supreme court of this state in the case of State v. Gardner, 58 O. S. 599, held the entire plumber's license act unconstitutional. The agreed statement of facts set forth on page 600 of said report shows that the defendant was doing business as an individual master plumber and not as a member of any firm or corporation. His conviction before the mayor of Akron was reversed by the court of common pleas and the exceptions of the prosecuting attorney to said judgment of the court of common pleas were overruled by the supreme court. Had the supreme court considered the law unconstitutional *in part only* it would have sustained the exceptions. For your information I beg to state that the General Code, adopted by the general assembly at the present session, omits the entire act. Therefore, there is no authority under this act for the organization of an examining board for the licensing of plumbers.

Answering your second question I beg to state that the action of council under section 68 M. C., in appointing an estimating board is not required to be by ordinance, resolution or any other specific form. The form of resolution, as suggested by the editor of Ellis' Code seems to be the appropriate proceeding. Such a resolution, however, would not be one of a "general or permanent nature" requiring publication under section 1694 R. S. It is not of a general nature because it does not directly affect all the citizens or all the taxpayers of the municipality but simply those taxpayers who own property subject to assessment for the improvement contemplated. It is not of a permanent nature because the duties of the board of estimation are specific and when the same are discharged the board goes out of existence. In my judgment, therefore, such a resolution need not be published. Section 124 of the Code does not in any way add to the list of resolutions and ordinances which must be published under section 1694. It follows, therefore, from the foregoing that the action of council appointing such a board of estimate is effective immediately, and that such board may enter upon the discharge of its powers and duties forthwith.

Yours very truly,

U. G. DENMAN,
Attorney General.

FRANCHISE INDETERMINATE—RIGHTS OF MUNICIPAL CORPORATION.

Ordinance granting to electric light company use of streets and public places for indefinite time creates an indeterminate franchise, not a perpetual one.

Municipal corporation may, by resolution of council, terminate such franchise; in such case, however, company may not be ousted from streets without appropriate judicial proceeding; remedies suggested.

March 22nd, 1910.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR:—Some time ago you submitted to this department certain questions as to the rights of the city of Nelsonville under the following statement of facts:

> In 1888 the council of the then village of Nelsonville passed an ordinance authorizing the Nelsonville Electric Light Company to erect and maintain in the streets and public places in the village, all poles, wires, etc., necessary for conveying and distributing electricity within the corporation. No time limit was fixed during which the grant thus made should be effective. In the same ordinance the council agreed to use a certain number of arc lights at a specified price, for a term of five years.
>
> The grant thus made was accepted by the Electric Light Company. Subsequently another contract was entered into for arc lights, which expired some years ago. Aside from the original grant of the use of the streets, etc., there is now no contract or agreement of any kind between the city and the light company.
>
> On February 24, 1908, the council, by resolution, directed the company to remove its poles, etc., from the streets and public places. A copy of this resolution was served upon the company. The company, however, refuses to remove the poles.

The questions specifically submitted by you are as follows:

> "First. Is above grant to the Nelsonville Electric Light Company, being in terms perpetual, a legal and valid grant? If not, upon what authorities do you base your opinion? If it is legal and valid, why?"
>
> "Second. If the grant is not valid, has the city the power to remove the poles and wires of this company, without resorting to court proceedings to oust the company from the streets of the city? Or must the city bring suit against the company in quo warranto to oust the company?"

Answering your first question, I beg to state that if, as you suggest, the grant to the Nelsonville Electric Light Company is "in terms perpetual," it would not be a legal and valid grant. It is the overwhelming weight of authority that municipalities may not make perpetual grants, unless expressly authorized by the state legislature. However, I am not by any means certain that this would be construed to be "in terms perpetual." The supreme court of this state, in the case of Akron v. Gas Company, 81 O. S., 33, has held that where a franchise ordinance is simply silent as to time limitations, it is not to be construed as an attempt to make

a perpetual grant, but the contract resulting beween the city and the grantee is terminable at the will of either party, and binding, of course, until either party renounces its obligation thereunder. Accordingly, it would appear, upon the statement of facts submitted by you, that the franchise of the Nelsonville Electric Light Company was a legal and valid grant.

The reasoning of the court in the Akron case above cited leads to a middle ground not suggested in your question, that is to say, the type of franchise discussed in the case, and which seems to be exemplified in the franchise of the Nelsonville Electric Light Company, is one which may be terminated at the will of either party. It seems clear from your statement of facts that the will of the city of Nelsonville has been exercised, and that the obligation of the grant is no longer binding upon either party. I should not advise, however, that the city should proceed to remove the poles and wires of the company by summary action. The Akron case, in point of fact, relates to the other side of the question, viz.: The right of the company to withdraw from the city. It leaves somewhat in doubt the definition of all the rights of the city in case the contract is duly terminated. While the franchise of the company may be non-existent or void, nevertheless its corporeal property might, in one view of the case, be not subjected to removal by arbitrary action. It is true that it has been held that a license not coupled with an interest may terminate at will, and the property of the licensee may be arbitrarily removed; and that it has been held that a grant of the sort mentioned amounts to a mere license. However, this is not the holding in the Akron case. Such grants are there called contracts and franchises. On the whole, there seems to be some doubt as to the propriety of proceeding arbitrarily in the matter.

On the other hand, there seems to be an appropriate remedy by which the rights of the adversary parties may be speedily ascertained. It has been held that quo warranto will lie to oust a corporation from the unauthorized occupancy of public lands. (State ex rel v. Railway Company, 53 O. S., 244.)

Again, section 1777 R S., sec. 4312, General Code, provides that,

> "When an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, the solicitor shall likewise apply for the forfeiture or the specific performance thereof, as the nature of the case requires."

This statute was made use of in Railway Co. v. Elyria, 69 O. S., 414, to compel the removal from the public highway of a bridge abutment maintained therein without lawful grant by a corporation to which the right of the use of certain streets had been by ordinance granted. Either one of these remedies, it seems to me, might be available, and I can do no more than to point them out to you and suggest that you proceed as seems best to yourself.

Yours very truly,

U. G. DENMAN,

Attorney General.

SEARCH AND SEIZURE LAW—COUNCIL MAY APPROPRIATE FINES UNDER LOCAL OPTION LAWS FOR PURPOSE OF ENFORCING SUCH LAWS AT ANY TIME.

March 16th, 1910.

HON. WILLIAM H. VODREY, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of March 11th requesting my opinion as to the construction of section 19 of the search and seizure

law, so-called, 98 O. L. 17, sec. 4364-30 R. S., viz., may council under favor of said section appropriate at any time part of the fines collected for the violation of local option laws for hiring detectives or secret service officers, or must such appropriation be included within the semi-annual ordinance?

Inasmuch as the various local option laws authorize certain portions of the fines collected in municipal corporations for violations of the local option laws to be paid into the treasury of the municipality from which they, of course, could be appropriated by council in the semi-annual ordinance in any event without specific authority of law, I am of the opinion that the section under consideration authorizes council to appropriate for this purpose at any time. To hold otherwise would render meaningless the entire clause under consideration.

It is, therefore, my opinion that council may, at any time during the year, appropriate from the general revenue fund, moneys for hiring detectives or secret service officers to secure the enforcement of such local option laws, if there is in the fund any money derived from fines for the violation of such laws, provided that the appropriation does not exceed the amount of such fines.

The fines may not, as suggested by you, be turned over by the mayor to the director of public safety. They must go into the treasury. Council's appropriation need not be specific as to amount, but by special authority under the statute cited, the appropriation may be of a ratable proportion of the total amount of fines collected.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS — COLLECTION OF ASSESSMENTS. SAME — CONSIDERATION FOR FRANCHISE CONTRACTS.

Council may certify to county auditor clerical mistakes in assessments in process of collection; council may not reconsider question as to whether assessment exceeds 33⅓ per cent. of the value of abutting property as improved.

Municipal corporation may impose and collect percentage of gross earnings of street railway company as condition of privilege of using streets.

March 2nd, 1910.

HON. H. R. HILL, *City Solicitor, Ashtabula, Ohio.*

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

> "First. Has the council the right to reduce the assessments regularly made for street improvement when they deem the assessment in excess of the 33⅓ per cent. provided by law?
>
> Second. Has the municipality the right to collect a percentage of the gross earnings of a street railway company when such a provision is inserted in the franchise and accepted by the railway company?"

With respect to your first question I assume that the ordinance determining to proceed with the improvement under section 55 Municipal Code has been passed. If the assessments have not been certified to the county auditor for collection, council has, in my judgment, the right to correct all errors therein which may have occurred through clerical mistake. If the assessment has been certified to the auditor, then he has sole power to make the actual corrections therein, but council may lawfully certify such corrections to him.

If council has reached the conclusion that its former ordinance was invalid as to all or any tracts of abutting property because the assessments provided therein exceeded 33⅓ per cent. of the actual value thereof, and such conclusion is based upon a change of legislative mind, so to speak, as to what will be the "actual value thereof after improvement is made" a much more difficult question is presented. Council is presumed to have given consideration to all such questions before acting under section 55 Municipal Code, and upon consideration of all the related sections, I am satisfied that this finding of a judicial nature can not be reconsidered by council. To hold otherwise would lead to endless confusion, as if one reconsideration of this kind may be had, any number might occur. Furthermore, there is no specific provision of the Municipal Code authorizing such reconsideration of this question of prospective values. On the other hand, sections 2290 and 2291 Revised Statutes, 3902 and 3903 General Code, which provide for reassessment proceedings in certain cases, prohibit by clear implication such a proceeding. The first of these sections provides,

> "When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, *by a court of competent jurisdiction*, the council may order a reassessment, whether the improvement has been made or not."

A mistake in judgment as to the future value of a lot of real estate when improved would not, in my judgement, be an "informality or irregularity in the proceedings." It is an erroneous exercise of judicial power such as must be reviewed "by a court of competent jurisdiction" as suggested in the statute, and only after such court has found that council has exceeded the 33⅓ per cent. provided by statute, can council itself change the whole of any assessment or any portion thereof.

Answering your second question, I beg to state that council has undoubted authority, under section 29 Municipal Code and related sections, to prescribe the terms and conditions upon which the right to construct a street railway in the municipality may be granted, and may create in favor of the city an enforcible right to collect a percentage of the gross earnings of the railway company. Such ordinances have been repeatedly upheld by the courts. See,

Cincinnati vs. Mt. Auburn Cable Ry. Co., 28 Bulletin 276,
Cincinnati vs. Cincinnati Incline Place Ry. Co., 30 Bulletin 321.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW — REMOVAL OF CHIEF OF POLICE BETWEEN AUGUST 1, 1909, AND JANUARY 1, 1910. INCOMPATIBILITY OF OFFICES.

Between August 1, 1909, and January 1, 1910, mayor might remove chief of police without filing charges, etc. Successor might be appointed in city having no classified list, regardless of civil service qualifications.

Member of board of education of city district may not be member of board of sinking fund trustees of city.

February 15th, 1910.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of three letters from you under date of February 8th submitting various questions for my consideration. I feel

obliged to withhold my reply to one of these letters pending further consideration, and at this time shall state my views as to the following questions:

First: "Up until October 1st, 1909, one Isaac Warner was the chief of police of this city. At that time the mayor preferred charges against Isaac Warner, before H. W. Gettle, the director of the department of public safety of this city, the board of safety, as you know, having been abolished August 1st, 1909, by the provisions of the Paine law. The charges against Warner were, upon hearing, sustained by the director of safety, and Warner was dismissed from the office of chief of police. Thereupon, the mayor appointed one Charles Edington as chief of police, the appointment being made on or about the 7th day of October, 1909. Edington was not, at that time, in the classified list of the city, there being in fact no classified list at that time, owing to the negligence of the old board of safety.

"We would like to have your opinion on the following points in this matter: First, did the director of public safety, under the laws of Ohio, have power from August 1st, 1909, to December 31st, 1909, to hear charges against the chief of police? If so, by what authority? Second: As Edington was not in the classified service at the time of his appointment, would his appointment have been legal, even if there had been a vacancy? Assuming that the director of safety did not have power under law to hear these charges against the old chief of police, would it still be legal for the city to pay the new appointee for his services as chief of police? If so, by what authority?"

Second: "About January 15th, 1910, the mayor of this city appointed one T. A. Dowd as a member of the board of sinking fund trustees to fill out the unexpired term of one A. L. Pritchard. This Pritchard did not resign, and still wants to exercise the duties of this office, but at the last November election, he was elected to the office of member of the board of education of the city of Nelsonville, and afterwards qualified and entered upon the duties of that office, and is still doing so.

"1. Was the appointment of T. A. Dowd, as a member of the board of sinking fund trustees legal? Dowd is now in the office ,and exercising the powers and duties of the same. Kindly bear in mind, in reaching your decision, that Pritchard, if allowed to hold both offices, could participate in the election of the presidents of these two boards, or even be elected president of both boards, and thus either directly or indirectly have two voices in selecting the civil service commission provided by the Paine law.

"2. Assuming that Dowd is usurping the office, are not his acts while serving in that capacity legal, until he is ousted by Pritchard? That is, would or would not the action of Dowd and two other members of the board, as to matters pertaining to the sinking fund, be legal and binding?"

With respect to your first group of questions, I beg to state that the filing of charges against the chief of police by the mayor before the director of public safety on October 1, 1909, was without warrant of law, as neither the director of public safety nor any other officer or tribunal of the city on that date had authority to hear such charges. However, the removal of the former chief of police was

none the less effective. The mayor had the right under section 129 M. C., as amended 99 O. L. 562, to appoint and remove the heads of sub-departments, and this power of removal was not qualified as to the chief of police by any statute then in force. The fact that the appointee was not in the classified service at the time of his appointment is immaterial.

The old civil service law was not self-executing, and there being, as you state, no classified list in your city on the date mentioned, it becomes unnecessary for me to consider the question as to the appointment of the chief of police under similar circumstances in a city in which there was a classified list at that time. I, therefore, conclude with respect to your first group of questions that the present incumbent of the office of chief of police was legally appointed.

Answering your second group of questions I beg to state that, in my opinion, the appointment therein described was lawfully made. The acceptance by the person in question of his office as member of the board of education of the city school district would *ipso facto* vacate his membership on the municipal board of sinking fund trustees, if the two positions are incompatible. While the authorities have failed clearly to define the tests of common law incompatibility, it seems to me that it may safely be said that, when a sound public policy as evinced by the statutes defining the duties of two offices would seem to prohibit one person from discharging both sets of duties, the offices should be regarded as incompatible; and although the contingency which would give rise to the incompatibility would, in the nature of things, seldom arise, and might be very remote in point of fact, nevertheless, the incompatibility exists.

In the case at hand the two boards in question, as boards, have no duties or powers which could bring them into the position of adversaries. However, section 157 of the Municipal Code as amended by the Paine Law, 99 O. L. 562-565, provides that the president of the board of education of a city school district, and the president of the board of sinking fund commissioners (evidently alluding to the sinking fund trustees) shall be two of three members of an ex-officio board, whose power and duty it is to appoint the civil service commissioners of the city. This appointing board does not discharge its duty once and for all when the periodical appointment is made; the same section above cited provides that the civil service commissioners "may be removed by the appointing commission." From this it follows that the appointing commission exercises a continuing supervision over the civil service commission and, therefore, its duties are both judicial and official in the fullest sense of the word.

It is evidently the policy of this statute that the members of the appointing board shall represent absolutely disassociated branches of the public service, and that in turn they shall be chosen by totally different electorates or appointing powers. If then a single individual may have a voice in the selection of two of the members of this board, this policy is violated, and it is unnecessary to consider the possibility of such person being elected president of both boards, although this possibility would seem to afford additional support to the conclusion which I feel impelled to reach on the main question.

Still another fact which lends support to the same view is that under section 3970-1 Bates' Revised Statutes, the board of commissioners of sinking fund of a city school district *may* be the board of sinking fund trustees of the municipality. Standing alone this point would probably not be sufficient to warrant my conclusion, but in connection with the other facts above stated it is significant.

It is well established, of course, that when two offices are incompatible in the sense above described, the acceptance of the second vacates the first. There was, accordingly, a vacancy in the board of sinking fund trustees immediately

upon the acceptance by its former member of the office of member of the city board of education, and the mayor of your city was justified in appointing another person as member of the board of sinking fund trustees.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS MAY NOT ISSUE NOTES IN ANTICIPATION OF SPECIAL ASSESSMENTS AND DISCHARGE SAME OUT OF PROCEEDS OF BOND ISSUE, NOR PROVIDE FOR CITY'S PORTION OF AN IMPROVEMENT BY ISSUANCE OF SUCH NOTES.

February 23rd, 1910.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 19th, in which you ask the following questions relating to the construction of section 95a Municipal Code, section 3915 General Code, which in its present form is as follows:

> " * * * Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments * * * The notes shall not exceed in amount the estimated cost of the improvement, and shall recite upon their face the purpose for which they were issued. All assessments collected for the improvement, and all unexpended balances remaining in the fund after the cost and expenses of the improvement have been paid, shall be applied to the payment of the notes and the interest thereon, until both are fully provided for * * * ."

The questions are as follows:

> "1. May notes be issued under this section and taken up out of the proceeds of bonds issued for the purpose of constructing the improvement, said bonds *in turn* to be paid out of the proceeds of assessments?"
>
> "2. May the notes issued under said section cover the city's portion of the improvement, and, if so, may bonds be issued to take up said notes as described in the first question?"

The section now under consideration does not seem to authorize the discharge of notes issued under favor thereof out of the proceeds of a bond issue. It is expressly provided in the section that assessments collected for the improvement "shall be applied to the payment of the notes and interest thereon."

I, therefore, conclude, as to your first question, that notes issued under section 95a may not be discharged out of the proceeds of bonds to be issued after the assessing ordinance has been passed.

In my opinion, the city's portion of such an improvement may not be provided for by notes under said section 95a. This object must be achieved by proceeding under section 53 M. C., section 3821 General Code, or under the Longworth Act, section 2835 R S., section 3939 of the General Code. The proper procedure in each of the cases described by you seems to be plainly indicated by statute.

Conclusions different from those which I have reached would necessitate a resort to implication and strained construction, which would be both unnecessary and improper, especially in view of the existence of adequate machinery for accomplishing the same purposes.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—CITIES—SALARY ORDINANCE—PUBLICATION.

Ordinance fixing salaries of city officers must be published; not effective until ten days after the date of first publication. Changes in salaries made by such ordinance not effective as to persons whose terms begin during last ten days.

January 10th, 1910.

HON. VAN A. SNIDER, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 3rd, in which you submit for my opinion the following question:

> On December 3, 1909, an ordinance was introduced into the council for the purpose of fixing the salaries of municipal officers, as provided in section 227 M C., as amended. This ordinance had its third reading on December 13th, and was passed on that date. As enacted by council it provided that it should "take effect and be in force from and after the first day of January, 1910." The ordinance was delivered to the mayor on December 14, 1909, and by him returned unsigned after the expiration of ten days, to-wit, on December 24, 1909. The next two days being holidays, the first insertions for publication of the ordinance could not be made until December 27, 1909. Ten days from that date would fall on January 6, 1910. Certain changes were made in the salaries of the municipal officers.
>
> *Query*: Are such changes effective as to officers who took office on the first Monday in January, 1910, viz., January 3, 1910?

Section 126 M. C., provides as to salaries fixed by council that they,

> "Shall not be increased or diminished during the term for which he (the municipal officer) may have been elected or appointed."

Under the provisions of this section it is clear that if the ordinance in question became effective on January 6, 1910, its changes will not be effective as to those officers who took office on January 3rd. This question, in turn, depends upon whether the ordinance is one of a general and permanent nature requiring publication as prescribed in section 1695 R. S., viz.:

> "By-laws, resolutions and ordinances shall be authenticated by the signature of the presiding officer and clerk of the township. Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corpora-

tion * * * before going into operation. *No ordinance shall take effect until the expiration of ten days after the first publication of such notice.*"

Section 227 as amended, 99 O. L., 567, provides that,

"Council shall by *ordinance or resolution* determine the number of officers * * * and shall fix by ordinance or resolution their respective salaries * * * ."

There is some authority for holding that where an act of council may be performed in one of two ways, as by ordinance or resolution, the choice of the more formal means does not compel the observance of all the formalities prescribed by law in the case of such formal means, but that with respect to such formalities the means employed are to be regarded as in effect and substance the less formal of the two. (Kerlin Bros. v. Toledo, 30 C. C., 604.)

However, the reasoning of that case is not to be extended to the question at hand. It applies primarily to such acts as do not amount to real municipal legislation; that is to say, as do not of themselves bind the city by a permanent liability or involve an expenditure of public money. The act of fixing salaries does not possess these characteristics. It becomes a part of the law of the municipality and of itself authorizes an expenditure of funds of the municipality although the intervention of an appropriation is necessary in order to specifically authorize such expenditure.

This principle is also illustrated in the case above cited as disclosed by the discussion on page 615 of the report, wherein the binding effect of the particular act there in question upon the city was held to be a test.

I therefore conclude that whether the salaries of municipal officers are fixed by ordinance or resolution, such ordinance or resolution must be published, as provided by section 1695, R S., and can not become effective until ten days after the first insertion of such publication. I may add that this has been the previous holding of this department.

In view of the foregoing I am compelled to hold that the changes made in the salaries of certain municipal officers by virtue of the ordinance of the city of Lancaster, as above described, are not effective during existing terms.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—EMPLOYES IN WATER WORKS AND CEMETERY EPARTMENTS—APPOINTMENT AND SALARIES.

February 15th, 1910.

HON. JAMES M. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Replying to your letter of February 7th I beg to state that the *number* of officers and employes in the water works department of cities is to be determined by the director of public service; their appointment, excepting that of the head of the department, is to be made by the director of public service subject to the civil service regulation; their salaries are to be fixed by council.

With respect to the cemetery department, I beg to state that while the Paine Law as enacted seems to confer authority over the cemeteries upon the

director of public safety. the General Code, section 4326, corrects the ambiguity in this particular by placing this department within the control of the director of public service. Accordingly, the above comments will apply to the cemetery department as well as to the water works department. See particularly sections 129, 145 and 227 Municipal Code, as amended 99 O. L. 562.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—CIVIL SERVICE—DEPARTMENT OF PUBLIC SERVICE.

Persons employed in classified service of municipal department of public service prior to organization of civil service commission need not be compelled to take civil service examinations before being permitted to continue in such employments.

February 11th, 1910.

HON. CHARLES A. GUERNSEY, *City Solicitor, Fostoria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 9th in which you request my opinion upon the question as to whether present employes in the department of public service who are within the classified service, as indicated by section 158 of the Municipal Code, as amended in 99 O. L. 565, but who were not originally appointed or employed under civil service rules, must, upon the adoption of civil service rules, take examinations before the civil service commission before entering upon their several employments.

I have carefully examined the so-called Paine Law, 99 O. L. 562, and find therein no provision which expressly or by implication makes it the duty of the director of public service or any other officer of the city to remove or discharge any employe in that department. It is true that the civil service provided in said act is self-executing, and that the provisions relating thereto took effect on the first day of January, 1910. However, inasmuch as the appointment of the civil service commission could not, in point of fact, have been made until after that date, and the organization of the commission and the formulation of it by questions and rules for its examination could not have been consummated until a date still later, it is manifest that the public convenience required the director of public service to make appointments and employments during the interim; otherwise the public service would have been paralyzed. I assume that some such action on the part of the director of public service has given rise to your question, and that the inquiry relates to the status of such persons employed or continued in employment by the director of public service between January 1, 1910, and the date at which the civil service commission became equipped to hold examinations.

As I have above indicated, there is nothing to compel the director of public service to discharge any of these persons. Yet such discharge may be made without filing formal charges. Although the positions held by the persons are within the classified service, the persons themselves have not been "admitted into the classified service" within the meaning of section 159 M. C., amended, which provides that.

> "All applicants for admission into the classified service shall be subjected to examination * * *"

The persons themselves not being within the classified service, they are not protected by that provision of section 162 of the amended code which provides that,

> "* * * No officer or employe within the classified service, who shall have been appointed under such rules, shall be removed * * * or discharged, except for * * * cause * * *"

Nor are such persons protected in their tenure by the prior provisions of said section 162, or those of section 166 of the act which relate exclusively to the department of public safety.

Section 160 of the Paine Law provides that before appointments into the classified service shall be made "the appointing board or officer shall notify the commission of any vacancy to be filled." This section, while not strictly in point, sheds some light upon the question under consideration. It indicates that the civil service rules do not become applicable to a particular position until there is a vacancy; in other words, while the provisions respecting the classified service are self-executing, they do not operate to remove from office or employment an incumbent or employe who has not taken an examination; they simply prevent his place being taken by a successor who has not qualified under the civil service rules.

It is my conclusion, therefore, that the officers and employes described by you can not be compelled to take the civil service examination upon penalty of losing their positions, should they not become qualified in this manner, but that they are subject to removal at any time by the director of public service or other appointing authority; and if it is desired by them to become qualified for the public service, with a view to rendering their positions more secure, they may take such examinations, but will not then be entitled to the benefits of section 162 above quoted until they have been formally appointed under section 160.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL — DIRECTOR OF PUBLIC SERVICE.

Director of public service may be required to perform duties of street commissioner, market master and director; salary may be changed by council at any time.

January 7th, 1910.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR: — I have your letter of January 4th in which you submit the following questions for my opinion thereon:

> "First. Under the Municipal Code as it now stands may the departments of street commissioner, and market master be combined with the office of director of public service, so that the director of public service, can be required to perform the duties of all three departments, or offices?
>
> "Second. The salary of the director of public service and public safety, having been fixed by the old council at a stated sum per year, and the said officers having accepted the positions, and having entered upon their respective duties, if the present council should increase their salary, after they have entered upon the duties of the office, would said officers be entitled to receive the increased salary, or would they be bound by the action of the council?

"Third. The director of public service creates the sub-department of a street commissioner; council fixes the salary and the director of public service fails to appoint a street commissioner, but performs the work and duties of said office himself, would he be entitled to draw the salary fixed by council for the street commissioner, in addition to his salary as director of public service? Or in other words, can the director of public service create sub-departments, then appoint himself to fill these positions and draw the salaries allowed them by council?"

Answering your first question, I am of the opinion that the sub-departments of street commissioner and market master may be combined under the office of director of public service, but whether the director of public service may be required under the law to perform the duties of all of the offices of which you speak, viz., market master, street commissioner and director of public service, is not so clear. The code itself does not create a street commissioner nor a market master. It creates the office of director of public service, and by section 145 authorizes him to determine the number of sub-departments and the number of superintendents, clerks and other employes as may be necessary. The council, however, is to fix the salaries of each and all of these including the director of public service himself. If the city council and the mayor are of the opinion that the director of public service can perform all the duties of which you speak in your first inquiry in any city I can see no reason why the council and the mayor may not entirely control the situation. The director is appointed at the will of the mayor and he may be removed at any time; hence, if he does not see fit to perform the duties requested by the council and the mayor he may be removed and another man appointed in his place who will co-operate with him in an economical administration of the city affairs.

Section 145 M. C., certainly vests some discretion in the director of public service, and if the mayor does not agree with the council, I am of the opinion that it is within the power of the director of public service to determine and name the number of sub-departments and employes to be employed therein. However, it is equally clear that the council is to fix the compensation and their discretion in this regard cannot be controlled by the mayor or director of public service, and they may fix that compensation at such figure as they deem adequate for the services to be performed.

This in effect answers your second question because when an officer is appointed for no definite term, but simply at the will of the appointing power, the statute which forbids the increase or decrease of compensation during the term for which the officer was appointed does not apply.

The statute, section 138 of the code, as amended in the Paine law, 99 O. L. 563 makes the appointment of a director of public service an appointment at the will of the mayor and not for any definite term. The council may, therefore, increase or decrease the salary pertaining to this office at any time.

Answering your third question, I see no reason why the director of public service may not create the sub-departments spoken of therein, and then fill the positions himself but it is within the power of the council to readjust the salaries of any one or all of these places at any time, and the director of public service cannot complain if he sees fit to stay in the position.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL MAY NOT AUTHORIZE DIRECTOR OF SAFETY TO MAKE APPOINTMENT OF PERSON TO CARE FOR MARKET HOUSE.

January 7th, 1910.

HON. G. T. THOMAS, *City Solicitor, Troy Ohio.*

DEAR SIR: — I have your letter of January 5, in which you submit facts and ask my opinion thereon as follows:

> "The city building in which all the offices of the city are located is at the corner of Market and Franklin streets. Just south of this building, and connected with the city buildings, is the fire department, and the only fire department in the city. In the fire department is employed six men. They use a hose wagon, a hook and ladder truck, and in case of need of a steam fire engine. In the room in the city building next door to the fire department is the city market, held in this room twice each week. For some time, a year or more, there has been employed in the city building a janitor whose duty it was to keep clean the city buildin, and for which he received $600.00 salary. He also acted as market master, and kept that room in condition for its use.
>
> In December an ordinance was passed which requires the firemen to care for this city building, and one of the number to act as market master, to be selected by the chief of the fire department. It is insisted that the duties thus imposed are inconsistent with those of the firemen, and that as the control of the building is under one director and the firemen by another will result in confusion. We are very anxious that you will solve the problem and state if the ordinance above referred to is legal and enforceable."

Section 141 of the code, as amended in the Paine law, 99 O. L., 563, provides in part that,

> "The director of public service shall manage all * * * market houses * * * ."

Section 145 of the code, as amended in the Paine law provides that,

> "The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies * * * laborers and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

Section 129 of the code as amended in the Paine law provides that the directors and officers provided for in the act shall have the exclusive right, subject to the limitations prescribed in the act, to appoint all officers, clerks and employes in their several departments or offices and shall likewise have sole power to remove or suspend any such officers, clerks or employes, subject to the limitations prescribed in the Paine law.

The limitations in the Paine law just referred to are the civil service and other provisions regulating the appointment. It is very clear, however, that market houses are to be managed in the department of public service and by the director, and that subject to the civil service rules he is to determine what em-

ployes are necessary in such management, and that the director of public service must make the appointment subject to the civil service rules, unless the director of service should create a sub-department of markets and market houses, and if he does create such sub-department then the mayor would appoint the head of that sub-department under the first paragraph of section 129 as amended as aforesaid, this paragraph providing in part that the mayor "shall appoint and have the power to remove the director of public service * * * and the heads of the sub-departments of the department of public service * * * ."

If any other employes are necessary aside from the person who is at the head of this sub-department, such other persons must be appointed by the director of public service.

I am of the opinion, therefore, that your council was without authority to pass an ordinance providing that the chief of the fire department should appoint a person to care for your market house and markets. The room in which the city market is held is the market house of your city.

Yours very truly,
U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—CONTRACT TO PURCHASE WATER PLANT—NECESSITY TO SUBMIT QUESTION WHEN IMPOSSIBLE TO RAISE BONDS TO PAY FOR SAME.

February 18th, 1910.

HON. J. R. SELOVER, *City Solicitor, Delaware, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 12th, in which you submit the following for my opinion:

> The city of Delaware in 1909 entered into a contract by the terms of which the value, which was to be the purchase price of the water plant, was to be fixed by arbitrators; the city was to submit the question of purchasing the same at the arbitrators' valuation to a vote of the electors within sixty days from the final finding. The amount of property upon the tax duplicate is a little less than $4,000,000. The amount of present bonded indebtedness is over $100,000. The value fixed by the arbitrators is $259,000. The city can not purchase because of section 2837, R. S., and you desire to know whether it will be necessary or not for the city to submit the question of purchase to a vote of the electors.

In reply thereto I beg to say that under provision of the Longworth Bond Act bonds may not be issued to exceed 8 per cent. of the tax duplicate of the municipality. If your present outstanding bond issue of $100,000.00 has been made under authority of the Longworth Bond Act, this together with the proposed issue of $259,000.00 would be an excess of the amount authorized by said act, and, therefore, would be an unlawful issue to the extent of such excess. It would, therefore, be a useless expenditure of public fund to submit the award of your arbitrators to a vote of the people when there is no authority of law to carry out the terms of the contract, even if the vote should be favorable, and, in my opinion, such an election should not be held.

Very truly yours,
U. G. DENMAN,
Attorney General.

DIRECTOR OF SAFETY ACTING AS BOARD OF HEALTH — PUBLICATION OF ORDERS — EXAMINATION OF POLICE AND FIRE DEPARTMENT EMPLOYES — AUTHORITY OF DIRECTOR TO FIX NUMBER AND EMPLOY EMPLOYES IN SUB-DEPARTMENTS — AUTHORITY OF COUNCIL TO FIX SALARIES — SUSPENDED EMPLOYES OF POLICE AND FIRE DEPARTMENT — RIGHT OF APPEAL TO CIVIL SERVICE COMMISSION.

Director of safety acting as board of health must advertise all orders, etc., same as ordinances of cities and villages.

Appointments made in police and fire departments after January 1st subject to examination providing civil service commission is organized and ready to hold examination.

The director fixes number and appoints employes in sub-departments; council fixes compensation.

All suspended employes of police and fire departments have right of appeal to civil service commission.

HON. GEORGE C. STEINEMANN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR: — Your communication of the 24th ult. is received in which you inquire as to the powers of the director of public service as to publication of rules and regulations of a general nature, when this department is, by municipal ordinance, substituted for the board of health; also your inquiry as to the necessity for members of the police and fire departments, appointed since January 1st, 1910, to submit to civil service examination. You further inquire what official authority determines the number of clerks or employes in any department of the civil government, establishes the office and fixes the salary.

In reply thereto I beg to say that your first inquiry is answered by the provisions of section 187 of the Code, and section 1536-730 of the Revised Statutes. From the provisions contained in these sections it seems clear that the director of public service, when acting as the board of health, shall cause all orders and regulations intended for the general public to be "advertised, recorded, published and certified as are ordinances of cities and villages."

As to your second inquiry, section 159 of the Paine Law of 1908, provides that "all applications for admission into the classified list shall be subjected to examination, etc." The successful passing of an examination is a condition precedent to qualification, and the right to draw a salary. That is, this is true as to appointments made in the police and fire departments respectively since January 1, 1910, providing the civil service commission is organized and has made arrangements for holding examinations to fill any possible vacancies. Section 162 of the Code, as amended in the Paine Bill, provides that the chiefs and members of the police and fire department in office on January 1, 1910, may not be removed except in accordance with the provisions of section 152 of the Municipal Code, and provides that the appeal therein provided for shall be had to the civil service commission provided for under the Paine Law, under such rules as the civil service commission might establish.

If a chief or some member of the police or fire department was removed since January 1, 1910, and according to the requirements of section 152 of the Code but before the civil service commission provided for in the Paine Bill had organized or was ready to hold any examinations, I do not believe it would be necessary to leave the place vacant until such time as the civil service commission might be ready to hold examinations. If this could be done the civil service

commission would have it within its power to seriously embarrass and hinder the service in the departments. As soon, however, as the civil service commission was or is organized and conducting examinations for the various positions, and they have taken such examinations and are on the classified list, ready to be certified, all vacancies must be filled from this classified list.

As to your third inquiry, by the provisions of section 145 as amended in the Paine Law, the director of public service determines the number of sub-departments and superintendents, clerks and other employes in the department of public service, and under section 227 council must fix the salaries, compensations and bonds. This section 227 does not give the council authority to establish the positions of superintendents, clerks or other employes in this department, nor does it require that these places be permanent positions. After the director of public service has determined the sub-departments and the different classes of employes, the council may fix the salary or the compensation for these different people by the month, or by the week, or by the day, or for any other period during which the employe may be actually engaged in the work of the city. That is, the council may provide that a superintendent of water works shall receive a certain salary per month, and that a laborer upon the street shall receive a certain compensation for each day he is employed.

In reply to your inquiry of the 29th as to whether a member of the police or fire department, excepting the chiefs of these departments, has the right of appeal to the civil service commission from the decision of the mayor dismissing such subordinate member from either of these departments, in my opinion such member has the right to such appeal. In section 152 of the Municipal Code it is provided that when the chief of either the police or fire department suspends a member of the department below such chief, the fact of such suspension shall be certified to the mayor who shall pass upon the charges and suspension, and the mayor's decision thereon shall be final "except as otherwise provided in this act." It is otherwise provided in section 186 of the Municipal Code, 96 O. L., 79. This section 186 provides that any person in the department of public safety in any city, who shall be removed from his position of employment or appointment by the mayor, shall have the right to appeal from the decision of such officer to the board of public safety, etc.

Now section 152 of the Municipal Code, 96 Ohio Laws, 71, is not specifically repealed by the Paine Law, and it, therefore, remains in full force and effect in all respects except in so far as it may be wholly inconsistent with the Paine Law.

Section 162 of the code, as amended in the Paine Law, provides in part that the chiefs and members of the police and fire department shall not be dismissed except in accordance with section 152, and it provides that the appeal provided for in section 152 shall be had to the civil service commission as constituted under the Paine Law. There is no specific mention of an appeal in the language of section 152, either as to the chiefs, or the members of the safety department below the chiefs. When a chief is suspended, section 152 commands that the mayor shall forthwith certify such fact, with the cause of such suspension, to the board of public safety, which shall within five days from and after the date of the receipt of such notice proceed to hear the charges and render judgment thereon, which shall be final, and this same section provides that if a member below the chief shall be suspended by the chief, such suspension shall be certified to the mayor who must then inquire into the cause of such suspension and render his judgment thereon, and his judgment in this matter shall be final "except as otherwise provided in this act."

In all the language of this section 152 there is nothing which authorizes or requires a chief to appeal to the board of safety, or a member below the chief

to appeal to the mayor. On the other hand, this section makes it the duty of the suspending office to certify the fact of suspension to the authority named in section 152 for the chief or the man below the chief.

The intention of the general assembly, however, as appears from the two sections 152 and 186, seems very clearly to have been to give each person in the department of public safety the right to have the cause of his suspension passed upon by the board of public safety, and this section 186 is the only section which gave the chief or other member of the department of public safety the right to take some action on his own initiative to have his case passed upon by the board of public safety as a board of appeal. But this section does give that right to each and every person in the department of public safety who shall be removed from his position of employment or appointment by the mayor, so that the only appeal which is provided for by section 152 is the appeal referred to in that section by the words "except as otherwise provided in this act," and these words just quoted very clearly refer to section 186 of the Code.

The last sentence in the third paragraph of section 152 reads as follows:

> "In the event that either the said chief of police or chief of the fire department shall be suspended, as herein provided, it shall be the duty of the mayor to forthwith certify such fact together with the cause of suspension to the board of public safety, which shall within five days from and after the date of the receipt of such notice, proceed to hear said charges and render its judgment thereon, which shall be final."

This language, literally construed or read, does not give the chief of police or fire department the right to appeal on his own initiative. On the other hand, as indicated above, it commands the mayor to certify, and the board of public safety thereafter to pass upon the suspension. This procedure as to a suspension of the chief gives him the same remedy as he would have under section 186, that is, his suspension is finally passed upon by the board of public safety, and the procedure is in the nature of an appeal, so that I am clearly of the opinion that both the chiefs and the other members of the police and fire departments are still entitled to have their respective suspensions finally passed upon by the civil service commission provided for under the Paine Law, and this right is secured to them under section 162 as amended in the Paine Bill and sections 152 and 186 of the original code. Section 162 as amended in the Paine Bill substitutes the civil service commission provided for in the Paine Law for the former board of public safety mentioned in sections 152 and 186.

Yours very truly,
U. G. DENMAN,
Attorney General.

DIRECTORS OF SERVICE AND SAFETY — SERVICES RENDERED PRIOR TO TIME SALARY FIXED BY COUNCIL — NOT ENTITLED TO COMPENSATION.

April 4th, 1910.

HON. O. E. IRISH, *City Solicitor, Ironton, Ohio.*

DEAR SIR: — I am in receipt of your letter of February 26th, in which you submit the following for my opinion:

> The city council of Ironton, Ohio, has fixed the salary of the director of public service at fifty dollars per month and that of the

director of public safety at twenty dollars per month. This ordinance will be in effect the first of March, 1910. On August 1, 1909, the director of public safety was appointed, but his salary has never been fixed by council until now. On January 1, 1910, the same director of public safety was reappointed. The present director of public service was appointed on January 1, 1910. You desire to know what salaries shall be paid these directors for services rendered prior to March 1, 1910. That is the date when the ordinance of council fixing their salaries goes into effect.

I beg to advise that neither of the directors will be entitled to any compensation whatever for services rendered prior to March 1, 1910, as it is specifically provided by section 227 of the Paine law that council shall, by ordinance or resolution, fix the salaries and compensation of each officer in any department of the city government, and the directors will not be entitled to any compensation for services rendered prior to the time their salary and compensation has been fixed by council.

Very truly yours,

U. G. DENMAN,
Attorney General.

MEMBER OF COUNCIL INTERESTED IN PURCHASE OF SUPPLIES — AUDITOR SHOULD NOT PAY BILL.

February 17th, 1910.

HON. GEORGE C. STEINEMANN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR: — I am in receipt of your letter of February 15th, in which you submit the following for my opinion:

> A corporation doing business in this city sold a bill of goods amounting to $3.33 to the city. The president of the corporation, who is actively engaged in the business, is a member of our city council, and you desire to know whether or not the city auditor has authority to pay this bill.

I call your attention to section 120 of the Municipal Code, which in part provides that a member of council shall not be interested in any contract with the city.

Section 45 of the Municipal Code provides in substance that no member of council shall have an interest in the expenditure of money on the part of the corporation other than his fixed compensation.

From the above two sections I am of the opinion that the member of council who is also president of the corporation from which the city recently bought a bill of goods is interested in the expenditure of money of the city, and that the city auditor should not pay the above bill.

Very truly yours,

U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION ACT — MUNICIPALITIES MAY DEFINE CLOSELY BUILT UP PORTIONS OF CITY.

June 1st, 1910.

HON. B. F. LONG, *City Solicitor, Shelby, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 27, in which you submit the following for my opinion:

> The question has arisen as to whether it is necessary to take advantage of section 15 of the automobile act, 99 O. L., 541, for the council of a municipality to pass an ordinance to define what are the business and closely built up portions of a municipality.

I beg to call your attention to section 15 of said act, which is as follows:

> "In no event shall any automobile, motorcycle or other motor vehicle be operated at a greater rate of speed than eight miles an hour in the business and closely built up portions of any municipality in this state, no more than 15 miles an hour in the other portions of such municipalities, no more than 20 miles an hour outside of such municipalities, which rates of speed shall not be diminished nor prohibited by any ordinance, rule or regulation of any municipality, board or other public authority, but municipalities may by ordinance define what are the business and closely built up portions of such municipalities."

You will note the above section authorizes a municipality to define by ordinance the business and closely built up portions of such municipality, and I am of the opinion that it would be much easier to sucessfully prosecute a case for violation of speed in the closely built up portions of a municipality, if such municipality had an ordinance specifically defining what is the closely built up portion. However, I am also of the opinion that such ordinance is not absolutely necessary, and, in the absence of the same, the closely built up portions of a municipality will be a question of fact.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Village Solicitors.)

VILLAGES—CONFIRMATION OF TRUSTEE OF PUBLIC AFFAIRS BY COUNCIL UNDER CERTAIN CIRCUMSTANCES.

President pro tem of council succeeds to office of mayor when mayor removes from village. If before vacancy in council has been filled question of confirmation of appointment of trustee of public affairs is submitted to council, a quorum being present, the vote is a tie, the mayor casts deciding vote.

March 14th, 1910.

HON. OTTO E. VOLLENWEIDER, *Village Solicitor, McArthur, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 10th, requesting my opinion as to the following facts:

> "The mayor has moved away, and a few days since the acting mayor made an appointment of a trustee of public affairs and when the matter came up for confirmation by the council there were only five members of council present, including the acting mayor. The council consists of six members. When this motion for confirmation came up, two of said councilmen voted against it, and the other three members of said council, including said acting mayor, voted for it."
>
> *Query:* Was this confirmation legal?

The question thus presented is very difficult of solution under the provisions of the municipal code.

Section 193 thereof provides that,

> "The legislative power of every village shall be vested in and exercised by a council, composed of six members, who shall be elected by the electors of the village, at large, for terms of two years, and shall serve until their successors are elected and qualified."

Section 195 provides that,

> "The council shall at the first meeting in January of each year immediately proceed to elect a president pro tem. from their own number, and from time to time provide such employes for the village as they may determine. The president pro tem. of council shall serve until the first meeting of the council in January next after his election, but the employes can be removed at any regular meeting by a majority of the members elected to council. When by reason of the absence of the mayor from the village, or the mayor is unable for any cause to perform his duties, the president pro tem. of council becomes acting mayor, he shall have the same powers and perform the same duties as the mayor."

Section 200 provides in part that,

> " * * * The mayor shall be the president of council and shall preside at all regular and special meetings thereof, but shall hove no vote except in case of a tie.

When the mayor is absent from the village, or is unable for any cause to perform his duties, the president pro tem. of council shall be acting mayor. In case of the death, resignation or removal of the mayor, the president pro tem. of council shall become the mayor and serve for the unexpired term, and until the successor is elected and qualified, and the vacancy thus created in council shall be filled as other vacancies therein, and council shall elect another president pro tem. from their own number, who shall have the same rights, powers and duties as his predecessor."

Upon your statement that the "mayor has moved away" I assume that there was a vacancy in his office and that the president pro tem. of council, instead of being *acting mayor*, as assumed by you, is, in fact, the mayor of the village under section 200 above quoted. Your question also discloses the fact that the vacancy in council created by the elevation of the president pro tem. to the mayoralty has not been filled as directed in said section. Accordingly the membership of council consists of five persons, and as held in State ex rel v. Orr, 61 O. S. 384 a majority of the members elected would be a majority of five—that is to say three members.

At the meeting described by you there were four members of council present. This was a majority of all members elected and was, of course, a quorum sufficient to authorize the doing of business. Nowhere in the code is there any definite rule as to the number of members required for the confirmation of appointments. In the absence of any rule I am of the opinion that the action of council may be by motion. I appears from the statement of facts that the vote wau substantially a tie—two for and two against the confirmation. This department has already held that the mayor has the right to cast the deciding vote in case of tie upon the question of confirmation of one of his appointees. There being a legally constituted quorum present and the vote being a tie, the conclusion follows that the mayor, exercising his right to cast the deciding vote, could determine the action of council.

I therefore conclude that the confirmation in question was lawfully made.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRESIDENT PRO TEM. OF VILLAGE COUNCIL MAY NOT EXERCISE JUDICIAL FUNCTIONS DURING ABSENCE OF MAYOR.

February 17th, 1910.

HON. JOSEPH M. BRANT, *Village Solicitor, Blanchester, Ohio.*

DEAR SIR: — In your letter of February 9th, the receipt whereof is acknowladged, you request my opinion as to the power of the president pro tem. of a village council to exercise the judicial functions of the mayor during the absence of the latter official. The president pro tem. does not possess this power. (State v. Hance, 26 Circuit Court 273).

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

VILLAGE CLERK—VACANCY IN OFFICE OF—HOW FILLED.

June 29

HON. WILLIAM A. REITER, *Village Solicitor, Miamisburg, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 27th submitting for my opinion thereon the following question:

> How may a vacancy in the office of village clerk be filled?

I have carefully examined the provisions of the General Code pertaining to municipal corporations and find therein, as you suggest, no provision for filling vacancies in village offices other than those of mayor and members of the board of trustees of public affairs. There is here a plain defect in the law.

Section 4252 of the General Code is a re-enactment of section 228 M. C., and provides for the filling of all vacancies not otherwise provided for by appointment by the Mayor. In terms it applies only to cities.

Section 4280 General Code, providing for the duties of the village clerk, is in part as follows:

> "The clerk shall attend all meetings of council, and keep a record of its proceedings * * *. In case of the absence of the clerk, council shall appoint one of its members to perform his duties for the time."

This section, however, in my opinion, applies only to the discharge of the duties of the clerk, as clerk of council. In so far as the village clerk is, so to speak, a permanent officer, having the powers of an auditor, I do not believe that this section applies. Accordingly it is my judgment that council is not therefore authorized to appoint to fill a vacancy in the office of village clerk.

There should be no difficulty, however, in meeting the emergency which has arisen in your village. The making of an appointment to fill a vacancy is, broadly speaking, an executive function.

Section 4252 of the General Code, while it has no legal bearing upon the question, should, in my judgment, be a guide, and your mayor should proceed under it just as if it were applicable to him, unless some question were raised; and a person thus appointed by him would certainly be de facto village clerk, and would be entitled to discharge the duties of that office, and receive whatever compensation attaches thereto so long as his tenure of office were undisputed. Indeed, the title of such appointee could not be successfully disputed by any other person claiming to be entitled to hold the office.

I, therefore, advise, more as a matter of convenience, than a matter of law, that the mayor appoint a successor to the resigned village clerk without the confirmation of council.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROAD LABOR — APPLICATION OF LAWS RELATING TO, OR TO INHABITANTS OF TERRITORY ANNEXED TO VILLAGE.

Liability of inhabitants of a given territory to perform road labor attaches as of date of order to perform, and annexation of territory to village before actual performance does not discharge such liability.

Annexation on application of corporation effective upon filing of transcripts with auditor or clerk thereof.

August 29th, 1910.

HON. W. F. SMITH, *Village Solicitor, Barnesville, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 23rd requesting my opinion upon the following question:

> "In the last week of March of this year the commissioners of Belmont County made an order annexing certain territory to the Village of Barnesville. This was certified to the clerk of the village about July 4th. Sixty days have not passed since the certification to the corporation clerk, and the council has not yet passed an ordinance accepting the territory. The land annexed does not go on the tax duplicate of the village until 1911. The application for the annexed territory was made by the village. The trustees of the township in which the village is situate are insisting that the land owners within the annexed territory shall either perform the two days labor on the roads or pay the amount in lieu of the same. Are these land owners bound to perform this labor or pay the amount in lieu of the same, or under the present situation are they acquitted of the same?"

Section 3564 General Code, being one of the sections relating to annexation on application of the corporation, provides that

> "When the annexation of such described territory has been completed, it shall be deemed a part of the municipal corporation, and the inhabitants residing on the territory shall have all the rights and privileges of the inhabitants residing within the original limits of the corporation."

It seems, under this section, that annexation is not effective as affecting the rights and liabilities of the inhabitants of the annexed territory until the proceedings have been completed. This fact is necessary to determine the point at which proceedings to annex upon application of the corporation are complete.

Sections 3558 to 3560 General Code provide, in effect, that when a corporation desires to annex contiguous territory, the council shall pass an ordinance authorizing such annexation to be made, and that the solicitor shall file with the county commissioners a petition for such annexation.

Section 3561 provides as follows.

> "When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as required in case of annexation on application of citizens in this chapter."

In my opinion this section operates to adopt, by reference, only those proceedings in case of annexation on application of citizens as are properly

applicable to annexation on application of the corporation. Those proceedings are, in short, the filing of the petition in the office of the county auditor, the fixing of time of hearing not less than sixty days after filing the petition, publication of notice, the holding of the hearing, the making of maps, and making and certifying of transcripts. The requirement of Section 3550 that the council of the corporation must accept the annexation is not, in my opinion, adopted. It is not such a provision as is applicable to annexation on application of the corporation. The corporation itself is the petitioner and it would be ridiculous to hold that a matter for which a corporation petitions must, upon being awarded to it, be accepted by it.

I am, therefore, of the opinion that upon the making and filing of the transcript with the auditor or clerk of the municipality, the annexation of the described territory is complete, within the meaning of Section 3564. On your statement of facts then, I am of the opinion that since July 4th the territory in question has been a portion of the village of Barnesville and that the inhabitants thereof are to be regarded as citizens of the village of Barnesville.

It does not necessarily follow, however, from this conclusion that the persons in question are not subject to road labor in the township. Section 3377 General Code provides that,

> "Between the fifteenth day of April and the first day of July, annually, each road superintendent shall order out every such person resident in his district, and direct him to do and perform such work on the public roads within the district.".

From this and other provisions of the road labor law applicable to townships, it is apparent that if the road superintendent, before July first, has served on the residents of the annexed territory, otherwise liable for road labor, notice to perform work upon the public road, then and thereupon such residents become liable to perform the work or to pay the equivalent, and this liability is not extinguished by reason of the subsequent annexation of the territory to the village.

Under Section 3379 the trustees of the township have authority to "direct the time when the labor shall be performed," and the mere fact that they may have prescribed a time subsequent to the time at which the annexation proceedings were completed does not, in my opinion, affect the validity of their order.

I am, therefore, of the opinion, on the facts stated, that the inhabitants (not the "land owners") within the territory recently annexed to the village of Barnesville, and otherwise liable to perform road labor, are now, if the proceedings of the township authorities have been in strict accordance with law, liable to perform road labor under the direction of such township authorities.

Yours very truly,
W. H. MILLER,
Ass't Attorney General

VILLAGE COUNCIL — COMPENSATION OF MEMBERS.

December 21st 1910.

HON. F. W. WOODS, *Village Solicitor of Leroy, Medina, Ohio.*

DEAR SIR—Answering your letter of December 20th asking my opinion as to whether members of the village council of the village of Leroy, Ohio, may lawfully receive two dollars ($2.00) per meeting of the council under an ordinance passed by the members now in office, I beg to advise that our supreme court

has held in a late case that the statute absolutely gives to the members of a village council a compensation of two dollars ($2.00) per meeting for not to exceed twenty-four meeings in any one year. No ordinance, therefore, was necessary, and the members fo your council may, under the law draw two dollars (2.00) each per meeting not to exceed twenty-four meetings in any year. Under the decision above referred to this has been the law since the passage of the statute construed in that case, which was Section 197 of the Municipal Code, as amended in 1904, 97 O. L. 118.

The case referred to is Walker et al vs. The Village of Dillonvale, and it will be reported in 82 Ohio State, 137. The second paragraph of the syllabus reads as follows:

> "Section 197, Municipal Code, as amended in 1904, (97 O. L. 118), fixes the compensation of a member of council of a village at two dollars for each meeting, not to exceed twenty-four meetings in any one year, and it is not necessary that it should have been fixed by an ordinance, passed before the commencement of his term of office, but the council may authorize its payment by a resolution passed after the services have been rendered."

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SILICITOR—SPECIAL COUNSEL IN DEPARTMENT OF, MAY NOT BE EMPLOYED BY ANY OTHER CITY OFFICER, REGARDLESS OF ORDINANCE OF COUNCIL.

August 31, 1910.

HON. EUGENE QUIGLEY, *Solicitor for the City of Newburgh, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 30th, enclosing copy of ordinance No. 396 of the city of Newburgh, and requesting my opinion as to the legality thereof.

The ordinance, in effect, appropriates the sum of Two Hundred ($200.00) dollars from the contingent fund within the general fund—the recital of necessity on account of an unforeseen emergency being made—for the employment of special counsel, and authorizes the mayor to employ such counsel, subject to the approval of the council, at a salary of Fifty ($50.00) Dollars per month and imposes upon such counsel the duty of giving bond.

In my opinion this ordinance is illegal. Newburgh being a city the city solicitor is in full charge of the legal department thereof, and the authority of council with reference to assistants and legal counsel is limited to the allowance of assistants under Section 4306 General Code, and the fixing of their compensation and bond under Section 4214 General Code. From another point of view the mayor is not authorized by law to appoint or employ persons in the legal department of a city government, and his authority in this connection can not be enlarged by council. See Section 4250 General Code.

In general it is the policy of our law with respect to the organization of city governments that the legal department shall be administered exclusively by the solicitor—an elective officer—and shall be absolutely independent, both of council and of the mayor.

Yours very truly,

W. H. MILLER,
Ass't Attorney General.

TRUSTEES OF PUBLIC AFFAIRS—NO AUTHORITY TO PASS BY-LAWS AND RESOLUTIONS.

August 1st, 1910.

HON. C. C. MIDDLESWART, *Legal Counsel for Village of Matamoras, Marietta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 26th in which you call attention to the fact that the General Code does not expressly empower boards of trustees of public affairs to adopt by-laws and regulations. You cite several sections of the Revised Statutes and the General Code, and indicate your view that the General Code has so changed the former law as to do away with this power which had previously existed.

I have carefully examined the General Code and have come to the conclusion that the board of trustees of public affairs no longer has direct authority of law to pass by-laws and resolutions.

Section 4361 of the General Code confers upon the board "all the powers and * * * duties provided in this title, to be exercised and performed by the trustees of waterworks." There is now no office such as "trustees of waterworks." The powers formerly conferred upon such trustees of waterworks are now conferred by the General Code upon the director of public service, a *city* officer. (See sections 3956 et seq., General Code.)

However, there is ample provision in the Code whereby the difficulty of this situation may be over-come.

The latter part of section 6341 General Code is to the effect that the "trustees of public affairs shall perform such other duties as may be prescribed by *law or ordinance* not inconsistent herewith."

Inasmuch as the board of trustees of public affairs is provided for the specific purpose of operating public utilities, I am of the opinion that it would not be "inconsistent herewith" for council by ordinance to confer upon the trustees of public affairs all the powers *conferred by law* upon the director of public service in cities with respect to waterworks. If this action should be taken I am of the opinion that the trustees of public affairs could lawfully pass by-laws and resolutions. In the meantime, I shall make an effort to have what is apparently a defect in the General Code corrected.

Yours very truly,

U. G. DENMAN,

Attorney General.

ROADS AND HIGHWAYS—LABOR REQUIRED TO BE PERFORMED UPON.

Unmarried man voting and paying taxes in Pennsylvania where parents reside but boarding and working at Dresden must perform two days labor at Dresden.

Subject of foreign countries residents of Dresden must perform two days labor at Dresden.

June 13th, 1910.

HON. PAUL BAINTER, *Village Solicitor, Dresden, Ohio.*

DEAR SIR:—You ask, *first*, whether an unmarried man, who votes and pays taxes in the State of Pennsylvania and whose parents reside in Pennsylvania, but who has worked as a roller in the sheet mills of Dresden since last October,

and who boards at Dresden, is required to perform the two days' labor on the streets of the Village of Dresden or pay three dollars in lieu thereof, under the provisions of Section 1536-165 of the R. S. and *second,* whether a subject of the British Crown, who is a resident of Dresden, is required to perform such labor or cause it to be provided, or, in lieu thereof be required to pay three dollars as provided in such section.

Section 3375 of the General Code, as amended by the act approved May 13, 1910, provides as follows:

> "Except honorably discharged soldiers who served in the United States army during actual war, pensioners of the United States government, acting and contributing members of companies, troops and batteries of the Ohio National Guard during membership, and members of a fire engine, hook and ladder, hose or other company, for the extinguishment of fire or the protection of property at fires, under the control of the corporate authorities of any municipal corporation or township outside of municipal corporation who receives no pay for their services as such acting members, all male persons between the age of twenty-one and fifty-five years, able to perform or cause to be performed the labor herein required, shall be liable annuall, to perform two days' labor on the highways, under the direction of the road superintendent of the road district in which he resides."

Section 3382, General Code, which succeeds former Section 1536-165 of the Municipal Code, provides as follows:

> "For the purposes provided for in the preceding sections, the residence of a person who has a family shall be held to be where his family resides, and the residence of any other person shall be held to be where he boards in a road district."

You will note that the law makes no mention as to where a man votes or pays taxes, or as to his citizenship. The intention is that a person should perform such labor if he resides in a community and has the benefit of the roads of such community, and that, for the purposes of this law, the residence of a person without a family, such as an unmarried person, 'shall be held to be where he boards in a road district." The person mentioned in your first question is of age and his residence for the purposes of this law cannot be determined by the locality in which his parents reside, but should be determined by the locality in which he boards; were he a married man, supporting a wife or children, the situation might be somewhat different.

As to your second question, a person who is a subject of another country and has the advantages of our laws, and the advantages of our roads, may be made subject to our laws in the same manner as persons who are citizens of this country.

For the above reasons I am of the opinion that persons of both classes set out in your letter may be required to perform such road labor on highways as provided in Sections 3375, et seq., of the General Code.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION — STREET ASSESSMENT — PLANS MAY BE CHANGED BEFORE ADOPTION OF RESOLUTION OF NECESSITY BUT NOT AFTERWARD.

August 25th, 1910.

HON. W. R. HARE, *Village Solicitor, Upper Sandusky, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 11th and to express at the outset my regret that the pressure of business in this department prevented my answering the same before the 15th inst. as requested by you.

You ask that this department render its opinion as to the power of council after having adopted plans and specifications for a street improvement, the cost of which is to be in part assessed upon the owners of abutting property, and after having passed the preliminary resolution of necessity to change the specifications.

You do not specifically state in your letter as to whether the resolution of necessity above referred to, being that one required by Section 51 M. C., Section 3814 General Code, has been passed. If it has not been passed. I am of the opinion that the council may lawfully change the plans and specifications and, rescinding its former adoption of the plans, require new ones to be prepared at any time before passing the resolution of necessity.

If the resolution of necessity has been adopted, however, the situation is entirely different. It is this resolution, notice of which is required to be served upon owners of abutting property in order to afford to such owners an opportunity to file objections and claims for damages. This being the case I am clearly of the opinion that after such resolution is adopted there is no power vested in council to change the plans, unless the same exists by virtue of some specific provision of law. I have been unable to find any such provision.

I am, therefore, of the opinion that after the resolution of necessity has been passed council may not change the plans of a street improvement, but must abandon the improvement as such and inaugurate a new one by adopting plans and specifications and passing another resolution of necessity. As above stated, however, if the resolution of necessity has not been passed I am of the opinion that the change may be made; in such case the rescission of council's action and the adoption of amended plans may be made by a majority vote of council, and the mayor of a village would have the right to vote in case of tie.

Yours very truly,

W. H. MILLER,
Ass't Attorney General.

(Miscellaneous Opinions.)

RED BIRDS—UNLAWFUL TO HAVE IN CAPTIVITY.

April 18th, 1910.

HON. JOHN C. SPEAKS, *Chief Warden, Fish and Game Commission of Ohio.*

DEAR SIR:—This department is in receipt of your letter of April 8th, in which you request an opinion upon the following question:

> "Is it lawful to hold red-birds in captivity or for purposes of domestication and propagation under the provisions of Section 32 of the fish and game laws?"

I call your attention to Section 1409 of the General Code, which is as follows:

> "No person shall * * have in his posession, either dead or alive, a * * , grosbeck or red-bird, * * , or any wild bird other than a game bird. * *"

The above section makes it absolutely unlawful to have in possession in this state a red-bird for any purpose whatsoever.

Section 1411 of the General Code suspends the operation of Section 1409 relative to possession by persons holding a permit issued by order of the commissioner of fish and game, authorizing the collection of birds, etc., for scientific purposes only.

Section 1419 of the General Code, which is Section 32 of the fish and game act, is as follows:

> " * * no provision of this chapter shall prohibit having *game birds* or squirrels in enclosures for domestication or propagation or the keeping of rabbits and squirrels as pets."

You will note the above quoted section only authorizes the having in the possession of *game birds* in enclosures for the purposes of domestication and propagation and has no application to birds other than game birds. Section 1412 of the General Code enumerates the birds that are to be known and classed as *game birds* in contradistinction to all other birds mentioned in the fish and game act. Red-birds are not mentioned in Section 1412 and therefore must be considered as birds other than game birds.

I am of the opinion that it is unlawful to hold red-birds in captivity within this state for any purposes whatsoever except in the manner provided in Section 1411 of the General Code.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO AGRICULTURAL EXPERIMENT STATION — CONTRACT OF EMPLOYMENT — FORM OF.

February 16th, 1910.

MR. W. H. KRAMER, *Bureau, Ohio Agl. Experiment Station, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 11th in which you enclose blank form of contract and ask to be advised as to the legality of the same.

I beg to call your attention to the following clause of the contract:

> "This contract may be terminated, provided that a mutual agreement has been reached and thirty days notice of intention to terminate the same has been given to the other party."

In connection with this clause I desire to call your attention to Sections 409-4 and 409-5 of the Revised Statutes. Section 409-4, relative to the powers of the board of control of experimental stations, is in part as follows:

> "They shall fix the salaries and terms of office of all officers and employes of the station; *and they shall have power to remove at any time for cause*, sustained by written charges, any officer or employe of the station."

Section 409-5 relative to the powers of the director, is in part as follows:

> "The director *shall have authority to suspend any officer or employe of the station for cause.*"

From the above two sections you will note that the general assembly has placed the power in the hands of either the board of control or the director to remove employes of the station, and I am of the opinion that it would be impossible for your department to contract away the above power. I suggest, therefore, that the above quoted clause of your form of contract be left out.

Yours very truly,

U. G. DENMAN,
Attorney General.

MAYOR OF VILLAGE — CHANGE OF RESIDENCE — NOT ENTITLED TO COMPENSATION.

April 21st, 1910.

HON. E. D. KECK, *Acting Mayor, McArthur, Ohio.*

DEAR SIR:—I have your letter of April 20th submitting for my opinion thereon the following facts:

> "Mr. A. F. Huhn was elected mayor of our village last fall; about Feby. 1st he rec'd appointment as steward of the Girls' Industrial Home at Delaware. He took charge of his duties under said appointment soon after and moved his family about the first of April, leaving no property here.

"Mr. Huhn refuses to resign as mayor and continues to draw his salary. As we have no solicitor I have been asked to write you for an opinion as to what steps the council should take to have Mr. Huhn removed, or stop him from drawing salary when he is doing nothing to earn same."

When Mr. Huhn left the village of McArthur and accepted the position of steward in the Girls' Industrial Home at Delaware, moving his family to that place, he changed his residence and accepted a position which I take it will prevent him from giving any attention to the duties of the office of mayor of the village of McArthur. This was an abandonment of the office, and whether he expressly resigned or not could not effect the case. This, I take it, is not an instance of temporary absence from the village, or inability for the time being to perform the duties of the office, but Mr. Huhn has accepted a permanent position, the duties of which will require his whole time and attention, and such a situation is entirely inconsistent with a proper performance by him of the duties of mayor.

I am, therefore, of the opinion that under the law this action on his part works an abandonment of the office of mayor of the village of McArthur, and that he should not receive the compensation or salary attached to that office. The clerk and treasurer of the village should refuse to issue any voucher or pay any money to him as such mayor, and if any such money has been drawn by him it should be returned to the treasury of the village. When the Bureau of Inspection and Supervision of Public Offices comes to examine the financial affairs of the village this finding will undoubtedly be made against him unless the money is sooner returned.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUVENILE JURISDICTION — AUTHORITY OF JUDGE EXERCISING, TO COMMIT CHILD.

Judge exercising juvenile jurisdiction may commit child to any institution enumerated in section 1562 General Code, but not to a workhouse or jail; such commitment, when made to state institution, imposes duty on authorities thereof to accept child as inmate, regardless of previous discharge of such child on ground of unfitness for the institution.

August 11th, 1910.

HON. RICHARD W. DOVEL, *Probate Judge, Lawrence County, Ironton, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 6th, setting forth the following statement of facts and questions based thereon, upon which you request my opinion:

"On the 20th day of May, 1909, I committed under the Juvenile law, one Bessie Shope to the Girls' Industrial School at Delaware, Ohio, and she was received at that institution on the 21st day of May 1909, and on the 22nd day of October, 1909, she was discharged from the institution on account of incorrigibility, vicious temper and criminal disposition under section 773 Revised Statutes, and this discharge

was approved by the Governor. Upon her return to this community we have endeavored to hold this girl in our county infirmary but have been unable to do so. I have secured her several positions and have endeavored to make the best of the matter that we possibly can. Again on the 21st day of June, 1910, upon various acts committed since her discharge from the institution, we again had her in Juvenile Court upon the following charges: Incorrigibility, vicious conduct, immoral conduct and drunkenness, and upon the proceedings had under these charges I again, on the 23rd day of June, recommitted her to the Girls' Industrial School and she was taken to said institution on the following day. The superintendent of said institution has refused to receive her and at their Board meeting on the 16th day of July, 1910, they refused to accept her at this home.

"I am now at the end of my judicial acts, as this girl was 15 years of age on the 1st day of April, 1910, and I am at a loss to know what disposition to make of her if the state institutions refuse to receive her.

"The following opinion is asked:

"Is it mandatory upon the superintendent and the authorities of the Girls' Industrial Home to receive this ward when legally committed under a separate and distinct charge?

"Can she be committed to the Cincinnati Work House upon a criminal charge?

"Can a girl of 15 years of age be committed to the Cincinnati Work House for any misdemeanor?"

Section 2112 of the General Code provides that:

"A girl duly committed to the (girls' industrial) home shall be kept there, disciplined, instructed, employed and governed under the direction of the trustees, until she is either reformed or discharged, or bound out by them according to their by-laws, or has attained the age of twenty-one years. With the approval of the governor, after a full statement of the cause, the trustees may discharge and return to the parents, guardian or probate judge of the county from which she was committed, who may place her under the care of the infirmary directors of the county, any girl whom they think ought to be removed from the home. In such case, they shall enter upon their record the reason for her discharge, a copy of which, signed by the secretary, shall be forthwith transmitted to the probate judge of the county from which the girl was committed."

Section 1652, General Code, provides in part that:

"In case of a delinquent child the judge * * may commit such child * * if a girl over the age of nine years, to the girls' industrial home, or to any state institution which may be established for the care of delinquent girls. * *"

The above section, which is very long, also authorizes commitments to various other charitable and correctional institutions, but not to a work house or jail. In fact, without quoting authorities, the legislative intent evinced by all of the provisions of the juvenile act, read together, is to separate entirely what may be

termed juvenile delinquency proceedings from criminal proceedings, except in case of felony. This being the case, I am satisfied that the general statute authorizing commitments of persons found guilty of misdemeanors to work houses and other penal institutions, cannot be invoked in the case submitted by you and that, accordingly, the last two questions which you ask must be answered in the negative.

Upon careful consideration of the first question which you ask, I am of the opinion that it should be answered in the affirmative. It is true that under sections 2112 and 2113 General Code, it might with some show of reason be urged that, the girls' industrial home, being a reformatory institution, a discharge therefrom of a girl deemed unfit for confinement therein might authorize the superintendent of the institution to refuse to accept her upon a separate commitment. Some color is lent to this view of the case also by section 1652, above quoted, which affords to the probate judge a wide latitude in his determination of the place to which a delinquent girl shall be committed, and which in no case provides a *punishment for crime* but merely a means of attempted reformation.

These general considerations, while valid, cannot, however, in my opinion, override the plain recital of power in section 1652 and duty in section 2112. Under the former section the judge exercising the juvenile jurisdiction "may commit such girl to the girls' industrial home," and there is no express or implied restraint upon his judicial power in this respect. Under section 2112 a commitment duly made must be honored by the superintendent and the girl must be received into the home and there is no warrant or authority of law for the superintendent's refusal to honor a commitment regular on its face, even though it purports to deliver to his care an individual already adjudged unfit for detention in the institution. It is true that the girl may again be discharged from the girls' industrial home, but such action requires the concurrence of the trustees and the approval of the governor.

I have not cited any judicial decisions inasmuch as the statutes construed are in part of recent origin and because, further, the meaning thereof seems to me to be plain.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

COUNTY TREASURER — VACANCY IN OFFICE — APPOINTEE HOLDS FOR UNEXPIRED TERM.

April 20th, 1910.

HON. LEWIS ENGLEBRY, *Member Board of Deputy Supervisors of Elections for Erie County, Vermillion, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of April 19th in which you request my opinion as to the following question:

> "Will you kindly give me your opinion in the following instance in this county where the county treasurer who was elected at the last regular election for the election of state, county and other offices could not qualify and never took the office, whereupon the county commissioners appointed a treasurer to fill the vacancy, now does this hold for the regular term or would the treasurer elected this fall take the office as soon as elected and qualified. If such would be the case, would

it be necessary for a candidate to run for a short and long term and that his name would need to be on the ballot for the short term and also for the long term. As petitions for nominations must be filed by April 27th, I would consider it a great favor if you would let me hear from you at once regarding this to allow the candidates to be governed accordingly."

Your question involves consideration of the following statutory and constitutional provisions:

Section 1079 Revised Statutes, 2632 General Code):

"A county treasurer shall be elected biennially in each county, who shall hold his office for two years from the first Monday of September next after his election."

Section 1082 Revised Statutes (section 2636 General Code):

"When the office of county treasurer becomes vacant * * * the commissioners shall forthwith appoint a suitable person to fill such vacancy."

Section 2 of Article 17 Constitution of Ohio:

"* * * any vacancy which may occur in any elective state office other than that of member of the general assembly or governor, shall be filled by appointment by the governor until the disability is removed, or a successor is elected and qualified * * * All vacancies in other elective offices shall be filled *for the unexpired term* in such manner as may be prescribed by law."

There are no other statutes or constitutional provisions defining the tenure of office of a person appointed to fill a vacancy in the office of county treasurer. Having regard to the joint effect of these sections, I am of the opinion that such person holds his office until the expiration of the term of the person elected thereto and whose failure to qualify caused the vacancy.

It follows that, in printing the ballots for the primary and general elections of this year, provision need not be made for a "short term."

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTIONS—QUALIFICATIONS OF ELECTORS.

April 2nd, 1910.

HON. J. W. MONROE, *Justice of the Peace, Rockeby Lock, Ohio.*

DEAR SIR:—In your letter of March 30th, receipt whereof is acknowledged, you submit the following question for my opinion thereon:

"Can one vote at the primary election who becomes 21 years old after the primary, but before the election in November?"

Section 26 of the primary election law, 99 O. L. 214-221, being section 4980 General Code, provides that:

> "At such (primary) election only legally qualified electors *or such as will be legally qualified electors at the next ensuing election may vote* * * ."

Your question appears to be answered in the words of the statute itself. Any person who will become a legally qualified elector after the date for holding the primary, but before the date of the next ensuing general election may vote at the primary.

Yours very truly,

U. G. DENMAN,
Attorney General.

GOVERNOR — CONTRACT TO BE MADE WITH FEDERAL GOVERNMENT IN RE EXPENSES OF CO-OPERATIVE TOPOGRAPHIC SURVEY — FULLY DISCUSSED.

April 2nd, 1910.

PROF. C. E. SHERMAN, *Inspector, Ohio Co-operative Topographic Survey, Columbus, Ohio.*

DEAR SIR:—On May 21, 1909, you submitted to this department the question as to whether the Governor might enter into a co-operative arrangement with the United States Geological Survey, providing for the expenditure out of the appropriation for such co-operation, of an amount greater than that apportioned to the State of Ohio by the department of the interior of the federal government.

The appropriation affected by such an agreement, and from which the funds to execute the same were to be drawn, provided that the money should be "paid upon vouchers approved by the governor, and the governor is hereby authorized to see that such work is carried on *as heretofore arranged.*"

Upon consideration at that time you were advised that the phrase "as heretofore arranged" in the light of the history of the conduct of the work of completing a contour topographic survey and map of this state, by co-operation with the federal government, and the appropriations theretofore made in pursuance thereof, evidently referred to a customary equal division of expenditures between the state and the federal government. It was, therefore, deemed to be a limitation upon the power of the governor, and upon the amount of the appropriation which could be actually expended.

You have now submitted a similar inquiry under the appropriation for the same purpose as carried in the partial appropriation bill recently passed and approved. The appropriation in full is as follows:

"TOPOGRAPHIC SURVEY."

> "For co-operation with the U. S. geological survey, in the preparation and completion of a contour topographic survey and map of this state, balances and ..... $15,000.00 to be paid upon vouchers approved by the governor, and the governor is hereby authorized to arrange for carrying on such work with the representatives of the U. S. geological survey; and if he finds it necessary to have an assistant in this work he may employ a competent person and pay him a reasonable compensation out of this appropriation."

It is apparent, at a glance, that the general assembly has left out the qualifying phrase "as heretofore arranged." The omission of this phrase, in my judgment, does away with the reasons underlying my former opinion. As it stands, the governor is authorized to enter into any agreement which may be effected with the representatives of the United States Geological Survey for the preparation and completion of a contour topographic survey and map of this state, and to approve vouchers in pursuance of such agreement, payable out of the fund thus created, in an aggregate amount not exceeding the balances and the $15,000.00 thereby appropriated.

I am, therefore, of the opinion that the governor has discretion as to the exact terms of the contract or arrangement which he is to enter into on behalf of the state with the representatives of the federal government, and that in the exercise of such discretion he may, if he deems it advisable, agree on behalf of the state to defray more than half of the expense of the co-operative work, so long as the amount agreed to be expended does not exceed the amount appropriated, including balances.

Yours very truly,

U. G. DENMAN,
Attorney General.

AUTOMOBILE LAW—JUSTICE OF THE PEACE HAS NOT FINAL JURISDICTION—FINES MUST BE PAID INTO COUNTY TREASURY.

August 24th, 1910.

HON. WILLIAM BROWN, *Justice of the Peace, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 17th requesting my opinion upon the following questions:

> "1. Has a justice of the peace final jurisdiction without a waiver of trial by jury in prosecutions under the automobile law?"
>
> "2. What disposition is to be made of fines collected in such cases?"

Although it is not the general practice of this department to advise justices of the peace, the importance of the question submitted by you seems to justify an official ruling of this department.

Section 13423 General Code, defines the final jurisdiction of justices of the peace, and no mention is therein made of cases of violation of the automobile law. The automobile law itself, sections 12603 to 12628 inclusive, defines a number of criminal offenses, punishable by fine only. There is no provision expressly conferring upon justices of the peace final jurisdiction in such cases, or any of them.

Section 12626 General Code contains the following somewhat ambiguous provision:

> "A person taken into custody, because of the violation of any provision of this subdivision * * * shall forthwith be taken before a magistrate or justice of the peace * * * and be entitled to an immediate hearing."

From this and other provisions of this section an intent might be imputed to the effect that persons charged with violation of the automobile law should have an immediate trial, but such is not the language of the law. There is nothing in this section inconsistent with the general rule that justices of the peace "shall have jurisdiction to inquire into the complaint, and either discharge or recognize him to be and appear before the proper court * * *" (Section 13422 General Code).

From all the foregoing as to the first question asked by you I am of the opinion that justices of the peace do not have final jurisdiction in automobile cases, so-called, unless the defendant pleads guilty or waives trial by jury under section 13511 General Code.

Answering your second question I beg to state that section 13429 provides that,

> "Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection, unless otherwise provided by law."

I have carefully examined all provisions of the General Code relating to motor vehicles, both civil and criminal, and find therein no provision requiring a disposition of fines collected and prosecutions under such laws, other than that above provided for. I am, therefore, of the opinion that fines collected under the automobile law should be paid into the county treasury.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

NORMAL SCHOOL SITES—WHAT IS A "COLLEGE" WITHIN THE MEANING OF ACT PROVIDING FOR SELECTION OF.

September 22nd, 1910.

PROF. C. L. MARTZOLFF, *Chairman State Normal School Commission, Athens, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 12th enclosing certain correspondence between yourself and Mr. H. G. Yocum, President and General Manager of the Yocum's Schools, a corporation. The principal place of business is in its articles of incorporation recited as being in Massillon, Stark County, Ohio. In the same connection I have considered the articles of incorporation of this company and the by-laws and regulations thereof submitted by Mr. Yocum. I quote the following provisions from these several papers as bearing upon the nature of the institution or institutions operated by this corporation:

> "Said corporation is formed for the purpose of promoting commercial, and industrial education and the maintenance of an educational institution or schools in all those branches of literature, science and art, or either of them, that pertain to commerce and industry * * * establishing and maintaining auxiliary and branch schools to aid and support the work of the home institution; appointing commit-

> tees of experts to direct special lines of research and investigation and conducting special schools and classes; imparting knowledge by either correspondence or home study methods of instruction, or both, as well as by the usual methods of class and individual instruction; establishing and maintaining libraries; publishing and distributing documents * * and granting certificates and diplomas and conferring suitable degrees upon such persons as may be worthy thereof." (Purpose clause, articles of incorporation).

The same provision is carried into the first article of the code of regulations adopted by the stockholders of the company. The by-laws are silent as to the exact nature of the business to be conducted.

The question you submit is as to whether the foregoing powers constitute the said Yocum's Schools a "college" within the meaning of section one of the act of May 10, 1910, 101 O. L. 320, which provides as to the normal schools to be established in Northern Ohio that, "neither of said schools shall be located in any city or village which now has a college located therein."

It is very well known, I take it, that the word "college" has become a very elastic term. Yet the general assembly must have intended to use it in some definite sense. I assume that the primary meaning of the word is "an institution of learning devoted to the promotion of education, religion, morality or the fine arts." The foregoing being quoted from section 9922 General Code, formerly section 3726 Revised Statutes.

While the articles of incorporation of the company in question, as above quoted, do not confer upon the corporation the power to promote education generally, but restrict the scope of its activities to the promotion of commercial and industrial education, yet I am of the opinion that so far as this restriction is concerned the same is immaterial and that the corporation has power to conduct a college within the meaning of the term as used generally throughout the statutes, and particularly in the act of May 10, 1910.

The mere extent of the corporate powers of the company, however, is not conclusive as to the nature of the institution by it conducted. Though the corporation has the power to operate a college the institution which it in fact operates, may be a school or some other educational institution of technicality lower than that of a college.

The essential characteristic of a college in the original sense of the word, and one which is recognized by our statutes, is the power to confer degrees. (Sec. 9922 General Code above cited). This power the corporation has acquired so far as it could acquire the same by filing articles of incorporation. But it does not appear that the institution has yet fully acquired the power to confer degrees and issue diplomas. Section 9923 General Code provides as follows:

> "But no college or university shall confer any degree until the president or board of trustees thereof has filed with the secretary of state a certificate issued by the state commissioner of common schools that the course of study in such institution has been filed in his office, and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and the number of students in actual attendance so as to warrant the issuing of degrees by the trustees thereof."

Until an educational institution has filed with the Secretary of State the certificate of the State Commissioner of Common Schools respecting the course

of study, equipment and facilities of the institution, it has no power to confer degrees and in my opinion does not constitute a "college" within the meaning of our statutes, and particularly the act of May 10, 1910.

I am not advised as to whether or not Yocum's Schools has been empowered by the State Commissioner of Common Schools to confer degrees. Unless this power has been granted, however, I am of the opinion that it does not constitute a college within the meaning of said act.

I herewith return to you letter of Mr. Yocum and copy of the articles of incorporation submitted by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—RESOLUTION OF NECESSITY TO PROCEED WITH SEWER IMPROVEMENT—PUBLICATION.

June 23rd, 1910.

HON. F. G. LONG, *Attorney-at-Law, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 21st in which you request my opinion as to what publication of a resolution of necessity, in case of the construction of a sewer by a municipal corporation, is required by law.

You cite particularly sections 84 and 124 M. C.

Section 84 M. C. applies specifically to the resolution of necessity in case of the construction of a sewer, and it concludes with the following clause:

> "The council shall cause the resolution to be published once a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation."

Section 124 M. C. provides that,

> "*Except as otherwise provided in this act,* in all municipal corporations, the resolutions required by this act * * * shall be published in two newspapers of opposite politics of general circulation therein if such there be in the municipality * * *"

I am of the opinion that it is "otherwise provided" as to the publication of resolutions of necessity in the case of sewer improvements, and that section 124 M. C. has no application to the publication of such resolutions. Therefore, that publication which is prescribed by section 84 M. C. is sufficient. It is not necessary under said section 84 that the newspaper in which the publication is made profess allegiance to any political party.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMBER BOARD OF PUBLIC AFFAIRS MAY NOT MAKE SALES TO VILLAGE.

April 21st, 1910.

MR. D. F. PFOUTS, *Member Board of Public Affairs, Dresden, Ohio.*

DEAR SIR: — I have your letter of April 20th in which you submit for my opinion thereon the following facts:

> "The board of public affairs of the village of Dresden passed a resolution requiring all patrons of the municipal water works to install meters. Meters to be bought and owned by the parties using water but inspected by the superintendent. It is unlawful for me to sell the meters, I being a member of the board? Or is it lawful for me to sell any material used in plumbing to private parties, such as brass, bath tubs, pipe, etc.?"

The statutes of the state forbid a municipal officer being interested in any contract, work or job for the municipality, and his participation in any of these is made a criminal offense. You being a member of the board of public affairs for your village, I am clearly of the opinion that it would be unlawful for you to sell to the village the meters mentioned in your letter as quoted above. The purchase of a meter or any other article or commodity by the municipality is a contract of sale and purchase, and therefore within the statutes referred to.

It would not be illegal, however, for you in your private business to sell commodities, articles or things to private persons, firms or corporations.

Yours very truly,

U. G. DENMAN.
Attorney General.

COUNTY COMMISSIONERS MAY NOT DONATE LAND OF COUNTY FOR PUBLIC PURPOSE.

October 13th, 1910.

PROF. C. L. MARTZOLFF, *Secretary, Commission on Normal School Sites, Athens, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letters of October 5th and October 10th, enclosing letters addressed to you by Mr. E. P. Wilmot, of Chagrin Falls, Ohio, together with certain briefs and copies of proceedings of the board of commissioners of Cuyahoga County, Ohio.

The papers submitted disclose that the Cuyahoga County Agricultural Society has been using as a fair grounds certain premises in or near Chagrin Falls, Ohio, the title of which is in the name of Cuyahoga County, and the money for the purchase of which was paid by the county commissioners of that county out of funds raised by taxation on the general duplicate of the same. It is now proposed that the county, upon the petition and approval of a majority of members of the agricultural society, sell the premises in question to the State of Ohio to be used as a site for a state normal school in consideration of the sum of one dollar. The proceedings thus far taken are as follows:

The board of directors of the Cuyahoga County Agricultural Society on the petition of a majority of the members thereof adopted a resolution directing the

president and secretary of the society to execute and deliver to your commission an option to purchase the tract in question. The directors thereupon petitioned the county commissioners to grant a like option, whereupon the county commissioners adopted a resolution granting such option and fixing the purchase price at one dollar.

You request my opinion as to the legality of this procedure and as to the right of the commissioners to complete the same in the event of the selection of the site by your commission.

Section 9906 of the General Code provides in part that,

> "When the title to grounds and improvements occupied by agricultural societies is in the county commissioners, the control and management of such lands and improvements shall be vested in the board of directors of such society so long as they are occupied and used by it for holding agricultural fairs. * * *"

I have carefully examined all the other related provisions of the General Code, and find therein nothing pertaining to the disposition of lands owned by the county and abandoned by the agricultural society. The plain intention of the law, however, is that such lands shall become for all purposes the property of the county and may be dealt with by the county commissioners in accordance with their general power over county lands.

Section 2447 of the General Code defines the power of the commissioners in this respect, as follows:

> "If in their opinion the interests of the county so require, the commissioners may sell any real estate belonging to the county and not needed for public use."

The resolution of the board of commissioners, with a copy of which you have furnished me, recites that the interests of the county require that the commissioners sell the territory in question; but does not contain a recital to the effect that the same is not needed for the uses of the county. While the use to which the premises are to be put, if the wish of the members of the agricultural society are carried out, is public, still I think that the commissioners must determine before selling any land owned by the county that the same is not needed for any public *county* use. This finding furthermore must not be merely formal. The plain intent of the statute is that the commissioners must not sell any land that is actually needed for county uses, and if the land proposed to be used is needed for county uses its sale could be enjoined by taxpayers.

I seriously doubt the authority of the commissioners to sell land belonging to the county for the consideration of one dollar. Such a proceeding amounts to a mere donation. Commissioners are given no power to donate land. If they dispose of it they must sell it. That is to say, if the legal title of land owned by the county is to pass from the county, though to another public agency, such a change of title must be supported by a valuable and substantial consideration.

For the foregoing reasons I do not believe that the proceedings proposed to be followed by the county commissioners of Cuyahoga County would be legal.

Yours very truly,

U. G. DENMAN,
Attorney General.

LUNACY HEARING—FEE OF MEDICAL WITNESSES.

October 13th, 1910.

HON. J. A. MARBURGER, *Probate Judge, Circleville, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 22nd in which you call the attention of this department to a slight change in section 1981 of the General Code insofar as the same applies to the payment of fees of medical witnesses, and ask to be advised whether or not, in case there is no medical certificate made out, such witnesses would be entitled to any fees, merely for attending the case as a witness.

The part of section 1981 of the General Code prior to the amendment in the 101 O. L., page 359, material to the inquiry is as follows:

> "* * * to medical witnesses who make out the certificate, two dollars, and witness fees allowed by law in other cases; to witnesses and constables, the same fees as allowed by law for like services in other cases; * * *"

Under the section in the above form, medical witnesses, when no certificate was made out, were allowed ordinary witness fees.

Section 1981 in its present form is as follows:

> "* * * to medical witnesses who make out the certificate, three dollars and mileage as allowed by law, in civil cases each; to witnesses and constables, the same fees as allowed by law for like services;"

You will note the section in its amanded form authorized medical witnesses who make out the certificate, three dollars, but this provision of three dollars only applies to one class of medical witnesses, to-wit: those who make out the certificate. However, in case no certificate is made out such medical witnesses would be considered the second class of witnesses, who are entitled to the same fees as allowed by law for like services.

Yours very truly,

U. G. DENMAN,
Attorney General.

EMPLOYERS' LIABILITY COMMISSION—CHAIRMAN MUST USE DUE DILIGENCE AND REASONABLE CARE IN APPROVING VOUCHERS.

November 23rd, 1910.

MR. JAMES HARRINGTON BOYD, *Toledo, Ohio.*

DEAR SIR:—I have your letter of October 22nd but have been delayed in answering the same on account of the present rush of office matters.

You ask my opinion as to whether the chairman of the Employers' Liability Commission in approving a voucher which has been filled out with the expense account of a member of the commission, receipted and endorsed by him, is bound to know the truthfulness of the amounts certified to by the said member of the

commission, and whether the chairman would be liable in case some of the items so certified were false and fraudulent.

The statute requires the chairman of the commission to approve the vouchers of the various members for expenses, and, in my opinion, this requires the chairman to use due diligence and reasonable care to ascertain the facts as to such expenses. He may do this by requiring each member to keep an itemized expense account, showing the various trips he makes by rail or otherwise, and the amount of money expended for each trip, as railway fare or other transportation fare, and showing the amount paid for each meal and for his lodging at hotels, with the dates of the same, and in a similar manner the chairman may require each member to give an itemized bill showing dates, amounts and articles purchased. This would be exercising due and reasonable care, and I believe that anything less than this would not be reasonable supervision. If this is done, however, it is my opinion that the chairman has done all that can reasonably be expected of him, unless he should find some item which seemed to be listed at an improbable price or unreasonable price, and then he should make further inquiry about such matters.

If this course is followed by you I am of the opinion you will have exercised due and reasonable care in the inspection of the members' accounts, and that more than this can not be required of you.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE — ELECTRIC LIGHT PLANT — MANNER OF OPERATING.

November 7th, 1910.

HON. O. G. CARTER, *President Board of Public Affairs, New London, Ohio.*

DEAR SIR: — Through Mr. C. L. Rorick of New London, Ohio, I have your request for my opinion upon the power of the village of New London to enter into an arrangement with The Arnold-Creager Company of your village whereby that company shall operate the switch board and attachments, wires, connections, equipment and appurtenances of the electric light plant of New London, and supply to the patrons and customers of the village light and power as now furnished by said village during the day-time, and all in accordance with a stipulation or memorandum of agreement entered into or suggested between Messrs. Arnold and Rorick of the Arnold-Creager Company on the one side, and the Board of Public Affairs and the village council of the village of New London on the other, a copy of which stipulation or suggestions is attached hereto and made a part of this opinion.

I notice that in this stipulation or in these suggestions, so made, the words "lease" and "rental" are used, but on reading the whole instrument it is my opinion that it provides for an arrangement whereby The Arnold-Creager Company shall operate the switch board and attachments, wires, connections, equipment and appurtenances and for its service in this behalf receive from the village a certain portion of the rate fixed by the village and charged to customers for the power or light, and the village is to receive the remaining portion of said rate. This is a service or arrangement which, in my opinion, is within the power of the Board of Public Affairs of the village to contract for. In other words, the village may operate this plant or these particular parts of the plant, in one

of two ways: They might hire the necessary labor and material and make the necessary repairs from time to time and sell the light or power; or they may make the arrangement described in this stipulation, a copy of which is hereto attached, by which The Arnold-Creager Company shall operate the switch board, attachments, wires, connections, etc., and receive or retain a proportion of the rates as named in the stipulation, and as fixed by the village as the company's compensation for such operation, turning the balance of the rates so charged to the village, which I suppose would represent a profit to the village.

Since the stipulation or suggestion presented to me really describes an arrangement whereby The Arnold-Creager Company is to operate the switch board and attachments, the wires, connections, equipment, etc., rather than a lease of the same from the village, I would suggest that in preparing the final agreement to perfect the arrangement, you use the words "operate for" rather than the words "lease of" as found in the first line of the second paragraph, and that you further change the wording as indicated by myself in lead-pencil in the beginning of the last paragraph on the first page of the stipulation, that is, that you omit the first two lines of this last paragraph which I have enclosed in parenthesis in lead pencil. The arrangement is one for operation and not a lease, and in fact, in my opinion, the arrangement for operation is legal without any question, whereas there might be some difficulty in the way of a lease.

Yours very truly,

U. G. DENMAN,
Attorney General.

LAW LIBRARY ASSOCIATION—TRUSTEE MAY NOT ACT AS LIBRARIAN.

December 14th, 1910.

HON. M. L. SPOONER, *Secretary Wayne Co. Law Library Association, Wooster, Ohio.*

DEAR SIR:—I have your letter endorsed by the prosecuting attorney of Wayne County in which you submit to me for an opinion the following question:

> "Can a trustee of the Wayne County Law Library Association be appointed librarian of the association and continue after his appointment as librarian to act as such trustee?"

Your association was incorporated by virtue of an act entitled "An Act to provide for the administration of property given for the promotion of science, art, and like purposes, and to protect the same from waste," which act was passed May 7th, 1878, 75 O. L. 135. This act has since been amended, Ohio Laws 83 p. 40, and 84 p. 31, but section 1, being section 9972 of the General Code, or at least that much of section 1 describing the kinds of associations subject to the act, has not been substantially changed.

Section 5 of the act, being section 9976 of the General Code, has not been amended and appears in the General Code in its original form as follows:

> "No trustee of such corporation shall be eligible to any office or agency of the corporation to which a salary or emolument is attached, nor shall the trustees be allowed any salary, emoluments, or perquisites, except the right of free ingress to the grounds, rooms, and buildings of the corporation."

It is a well-settled rule in this state that for the powers of a corporation we must look absolutely to its charter, the act creating it and the laws of its place of incorporation; corporations have such powers and only such powers as the act creating them confers.

Your corporation was created by virtue of the act above referred to of May 8th, 1878, 75 Ohio Laws 135, and is necessarily bound by section 5 of the act which renders a trustee ineligible to any office or agency of the corporation to which any salary or emolument is attached.

Your association is necessarily subject to all provisions, which have not since been repealed, of the act by virtue of which it was created, and section 3058 of the General Code does not exempt your association from the provisions of the act creating it.

I am, therefore, of the opinion that a trustee of the Wayne County Law Library Association can not be appointed librarian and continue to act as such trustee, after his selection as librarian.

Yours very truly,

U. G. DENMAN,
Attorney General.

EXTENT OF POWER OF THE STATE TO PREVENT CONCERNS FROM DISCRIMINATING IN SELLING PRICES OF A COMMODITY IN DIFFERENT PARTS OF THE SAME STATE.

At first view of this subject we are brought to the conclusion that it can not be discussed independent of natural civil rights, and further contemplation on it, aside from historical development of the law in England and in this country, leads to the further conclusion that if such power exists in the state to any extent it must necessarily to that extent limit the natural rights of man to enter into agreements or other arrangements in the conduct of their business affairs. The subject suggests an inquiry as to what circumstances or conditions may exist under which the state may say to one or more of its citizens, "You, in the ordinary course of your business, may not part with your merchandise or wares at a certain less valuable consideration to one person, your friend, while at the same time you require a certain other more valuable consideration from another persons, enemy, friend or of other description." In other words, this question makes inquiry as to when and under what circumstances the state may place limitations upon the right of its citizens to enter into a certain class of contracts, namely: contracts of sale. It has often been said, in effect that

> "As an abstract proposition, it would be nowhere questioned that the right to make whatever contract one pleases is guaranteed by all the American constitutions, Federal as well as state; at least, by necessary implication from the constitutional guaranty that no man shall be deprived of liberty or property, except by due process of law. Nor is it necessary, under the prevalent rules of constitutional interpretation and construction, to rely upon any unwritten law: for, while the phrase, freedom or liberty of contract, is not to be found in the bill of rights of any American constitution, in almost all of them the right to acquire and possess property and to pursue happiness is declared to be inalienable. And this it has been rationally declared

'includes the right to make reasonable contracts, which shall be under the protection of the law.'

"In all the constitutions of the United States, it is substantially declared that 'no man shall be deprived of his life, liberty and property, except by due process of law' (sometimes 'except by the judgment of his peers and the law of the land'). And one's liberty, as well as property, is infringed, if his liberty to make reasonable contracts is taken away or restricted by unreasonable regulations."

Tiedeman, State & Federal Control, 294.

What has just been said includes the further abstract proposition announced by Judge Cooley, at page 278 of his work on Torts, that,

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice;" and it is true that, "In an ordinary private business relation, the state can not constitutionally interfere, whatever reason may be assigned for one's refusal to have dealings with another. It is no concern of the state or of the individual, what those reasons are. It is his constitutional right to refuse to have business relations with a particular individual, with or without reason."

Tiedeman, State & Federal Control, 296.

And again it is stated by this same authority that,

"Free trade is an undoubted constitutional right. Every man has the constitutional right, not only to determine with whom he will have business dealings, and to whom he shall offer his goods or his services, but he also has the right, in most cases, whether he shall offer them to any one at all. He may refuse, without giving any reasons, to sell his goods or to tender his services. He cannot ordinarily be compelled to do either. The only exceptions that suggest themselves, are cases in which the right of eminent domain is exercised, and those in which the state in the emergency of war makes forced sales of the property of private individuals for war purposes, and all cases of compulsory performance of duties of the state. In all other cases a man cannot lawfully be compelled to part with his property, or to render services against his will. Circumstances may conduce to make a particular business a virtual monopoly in the hands of one man or one partnership. But I apprehend that he cannot for that reason be subjected to police regulation. Because one man has the capital where with to buy up all the corn or wheat in our great Western markets, and to cause in consequences a rise in the values of these commodities, does not justify state interference with his liberty of action, any more than would police regulation of the whole capitalist class be permissible. And yet this one man occupies an economical position, differing only in degree from the capitalists as a class. The same qualities and characteristics which enable him to become a capitalist, will urge him to make the most of the wealth he has accummulated or inherited, and he will so manipulate it as to increase its returns if possible. Each successful increase in the returns from capital, increases the price of

> the commodity, in the manufacturing or preparation or handling of which the capital has been invested. It is only in extraordinary abnormal cases that any one man can acquire this power over his fellow-men, unless he is the recipient of a privilege from the government, or is guilty of dishonest practices. The remedy for the first case, in a constitutional government, is to withhold dangerous privileges, or if the grant of them is conducive to the public welfare, to subject their enjoyment to police regulation, so that the public may derive the benefit expected and receive no injury. In the second class of cases, a rigid prosecution of dishonest practices will be an efficient remedy."

These statements, however, just quoted from these authors are only general propositions of law to which many exceptions have been made by law-making bodies and the judicial power from the beginning of politically organized society under regulative governments, from the inception of such governments until the present time. So numerous, in fact, are these exceptions that exceptions have almost come to be the rule, and the general proposition is only a faint shadow of its former self. This condition is the outgrowth of society and the necessary consequence of the social and commercial development of the world, and this is especially true of England and of this country. If these propositions stated the whole law governing the conduct of men in commercial transactions, we would not have governments regulating society, and there would, in fact, be no law. There would only be unrestrained freedom, which can only exist in the absence of law. The constitutions of the various states do provide, in effect, that all men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety, and by these constitutions it is further provided that all political power is inherent in the people; that government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary, and they provide that no special privileges or immunities shall be granted to one set of persons that is not given to others under the same or similar circumstances. The right of trial by jury is preserved. Courts are erected and kept open where every person, for an injury done him in his land, goods, person or reputation, shall have remedy, by due course of law, and justice administered without denial or delay, and private property is held inviolate except subservient to the public welfare.

Further protection and assurance of liberties are granted by the Tenth Amendment to the Federal Constitution, which declares that

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

And by the first section of the Fourteenth Amendment which declares that,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Looking only to the literal reading of these provisions, the general statements made by the authors referred to would seem to be reinforced by these declarations of the people in the social compact, but if this were done the purposes of government under written constitutions would be defeated. The object of government is civil liberty, and civil liberty is defined by Blackstone to be,

> "That of a member of society, and is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

Another author, Mr. Paley, says that,

> "Civil liberty is the not being restrained by any law, but what conduces in a greater degree to the public welfare."

And another eminent writer, though not a lawyer, has defined,

> "Civil or legal liberty to be that which consists in a freedom from all restraints except such as established law imposes for the good of the community, to which the partial good of each individual is obliged to give place."

In his discussion of natural and artificial rights, absolute rights of individuals, and political or civil liberty, Blackstone asserts that,

> "The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further), as is necessary and expedient for the general advantage of the public. Hence we may collect that the law which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves,

whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society which alone can secure our independence."

He then further states,

"But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."

So then government is not so much to secure natural rights, in the primary meaning of there words, as it is to secure civil liberty, which means that in the exercise of our natural inherent rights we must be restrained by human laws beneficial and for the good of all.

"A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."
Massachusetts Constitution.

It was stated by Chief Justice Waite in Hunn vs. Illinois, 94 U. S., 113, that,

"This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorp vs. N R Co., 27 Vt. 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *'Sic utere tuo ut alienum non laedes'*. From this source come the police powers, which, as was said by Chief Justice Taney in the License cases, 5 Howard, 583,

'Are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.'

"Under these powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

Viewed in the light of these authorities on the objects and purposes of government our state and federal constitutions, though nowhere expressly defining the extent of the power of the state concerning which inquiry is made in the subject under discussion, should not be difficult of construction—construction under which the law making power, subject to review by the courts, may regu-

late and restrain persons, firms and corporations in the conduct of their business with other citizens of the state in such manner and to such extent, and in every case that will promote the public peace, safety, good order, morals, decency, fair and honest business intercourse, public convenience and general welfare of the people of the state. However, since these constitutions do not give all this power of internal regulation (except as the federal constitution gives congress the right to regulate interstate commerce) by express provision, but have been adopted by the people for the purposes hereinbefore referred to, we must find the limit of that power as implied from these instruments and those purposes or from some authority existing inherently in the government as a sovereign power independent of these written fundamental laws, whether they be grants or limitations of power, or we must find the limit of the extent of the power of the state to regulate the business internal to the state of its citizens in both such implied and inherent powers. Such implied power as is necessary to carry into effect the powers expressly granted has ever been ascribed to the governmental agency upon whom the duty rests to carry out the express grant, and while it has been said in many cases that there is a power, commonly known as the police power, which is inherent in every government and which does not depend upon constitutional or legislative grants or limitations, it is my notion that the better and more logical view under written constitutions, such as ours, is that the police power is a power implied under these instruments to carry into effect the grants therein specifically stated, among which specific grants, of course, is the grant by the people of legislative power to the law making department of the government.

In adopting our federal constitution the people declared that it was done,

> "in order to form a more perfect Union, establish justice, insure domestic tranquility, provided for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

This same declaration, in effect, is carried into each state constitution, and these latter instruments almost invariably have embodied in them a bill of rights declaring, as heretofore stated, that all men are by nature free and independent, having certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety; that all political power is inherent in the people, and that government is instituted for their equal protection and benefit. And they have declared in effect that no special privileges or immunities shall be extended to any citizen which are not extended to all citizens under the same or similar circumstances. There are other guaranties common to practically all of them; there are certain powers specifically granted and certain limitations are imposed, but in none of them is there found a specific enumeration of all the powers necessary to carry out the preamble or other declaration of purposes, nor, with few exceptions as to particular agencies or subjects, is there in any of the state constitutions a declaration that the governmental agency created thereunder shall exercise only such powers as are in the constitution enumerated, although it is stated in each of them in effect, as is stated in the Ohio constitution that, "this enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated remain with the people."

Since, therefore, all powers are not specifically enumerated, it must be that some are implied in order that the governments created by these constitutions

may meet the purposes thereof as declared in the preambles and bills of rights. In other words, as is continually stated and held by the courts, the state constitutions are limitations only on the power of the law making body, and the federal constitution is a grant of power to the legislative department. It is difficult to see how any power may be exercised by any governmental agency, executive, legislative or judicial in the face of an express constitutional limitation forbidding the same, and this applies as well to any attempted exercise of the police power as to any other power. Surely no regulation would be warranted in the face of an express prohibition thereof. Our governments, however, are instituted to establish justice and to promote the general welfare. Certain grants by the people, most important among them the legislative power, are specifically given to accomplish these purposes, but all contingencies are seldom provided for in specific terms in these fundamental laws, thus leaving many conditions to be met as they arise affecting the public interest, and to be dealt with under implied privileges and powers consistent with the preliminary declarations and other provisions of these instruments indicating the scope and purpose of the governments which they institute.

The better view is, therefore, as I believe, that whatever powers may be exercised under governments founded on written constitutions, in addition to powers expressly granted, are the implied grants necessary to accomplish the purposes of the governments as evidenced by the whole instrument, declaratory or prescriptive, and, in my judgment, what is commonly known as the police power falls within these implied grants, under and along with, and growing out of the express general grant of legislative power. It is better that such should be the case. Were it otherwise there might be no limitation except the whim or caprice of the law making body or of the courts upon whom devolves the duty of passing upon the reasonableness of the action of that body. On the other hand, if the police power is not within the constitution but is a power outside of and independent of the constitution, then our governments are not wholly founded on written constitutions.

Judge Cooley in his Constitutional Limitations at page 829 says that,

> "Frequently when questions of conflict between national and state authority are made, and also when it is claimed that government has exceeded its just powers in dealing with the property and controlling the actions of individuals, it becomes necessary to consider the extent and pass upon the proper bounds of another State power, which, like that of taxation, prevades every department of business and reaches to every interest and every subject of profit or enjoyment. We refer to what is known as the police power.
>
> "The police power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

While this language is broad and comprehensive the context of this treatment of the subject shows that he considers the police power to be a power arising from the express grants of power in written constitutions including, of course, as the principal source of such power the specific delegation of legislative

authority to the law making body, and from the express declarations contained therein of the purposes impelling the adoption of the instruments.

The grant by the people of legislative power to the law making body is usually made in general terms, such for instance as, "The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives," and against and over this delegation of authority are placed in the same instrument certain limitation on such law making body. Certain powers of regulation, of which the power to regulate commerce between states and with foreign countries and among the Indian tribes is an instance, have been granted to the Congress of the United States, and in the federal constitution certain limitations, of which the first section of the Fourteenth amendment is the most important, have been placed on the power of the law making body of the state. Out of this legislative power thus vested by the people of the state in its general assembly, that is, minus the power of regulation granted to the federal congress, and subject to these limitations in both the state and federal constitutions, comes the police power of the state as interpreted and defined by the courts. Specific enumerations of the various things which may be done under this vested power in the general assembly is not made in the state constitution, but the holdings of the courts are that under that vested power any and all things may be done which are necessary to carry out the purposes of the government as evidenced by the whole fundamental instrument, and consistent with the grants of power to the federal congress and the limitations contained in the state and federal constitutions; and in this sense since specific enumeration of the things which may be done under the state legislative power is not made, the power to do those things not so enumerated, but which nevertheless may be done under the general power, may be said to be an implied power, to carry out the purposes of the government as evidenced by the declarations and other provisions of the constitution.

Within this power thus defined and limited is this seemingly Indefinable authority the police power, comprehending for the citizens of a state all that may be included within the terms, good morals, safety, happiness, prosperity, decency, public convenience and general welfare, and all that concerns the welfare of the whole people of a state or any individual within it, whether it relates to their rights or their duties, whether it respects them as men or as citizens of the state in their public or private relations and whether it relates to the rights of persons or of property of the whole people of a state or of any individual within it,

New York v. Miln, 11 Peters 102; 9 Law Ed. 648.

But whatever may be the source from which this power arises it is the power to which we must look for an answer to the question assigned, and in the beginning of a notice of the judicial determination on the subject attention should be given to what has been said and held by the courts as to the power of the Federal government with respect to the regulation of the internal affairs of the respective states.

In Martin vs. Hunters Leases, 1 Wheaton, 304, 326, Chief Justice Marshall says that,

> "The government of the United States can claim no powers which are not granted to it by the Federal constitution; and the powers actually granted must be such as are expressly given or given by necessary implication."

And in Gibbons vs. Ogden, 9 Wheaton. 1, 187, he said, referring to the federal constitution,

> "This instrument contains an enumeration of the powers expressly granted by the people to their government."

In construing the 10th Amendment to the Federal Constitution which provides that,

> "The power not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The court in U. S. vs. De Witt, 9 Wall., 41, held that no power is conferred by the constitution upon Congress to establish more police regulation within the states, and in the Slaughter House Cases, 16 Wall. 36, Barber vs. Connelly, 113 U. S. 27, Mugler vs. Kansas, 123 U. S. 623, it is held that,

> "The 14th amendment does not take from the states police powers reserved to them at the time of the adoption of the Constitution."

In Jones vs. Brim, 165 U S., 180, 41 Law Ed. 677, it is held that the 14th amendment to the Federal Constitution does not limit the subjects upon which the police power of a state may be lawfully exerted.

From there authorities just cited our view is that whatever power rests in the state to regulate the affairs of its citizens within its territory, it still retains that power, notwithstanding the fourteenth amendment to the Constitution, and that this amendment limits that power only in the sense that the state may not

> "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"

and of this limitation we will take notice later on.

Statement has already been made as to the comprehensive limits of the police power, and some elements have been included therein which are usually included in the attempts to define this power. In view of the authorities it would be presumptuous on our part to attempt a complete definition, since the courts and authors have uniformly refused to venture a definition suited to every case that might arise. Many partial definitions, however, or rather, definitions suited to the particular case under consideration, have been framed, and at the risk of being tedious I beg to submit a few of them:

> "Police power in its broadest sense includes all legislation and almost every function of civil government."

Barber vs. Connelly, 113 U. S. 27.

> "Police powers broadly stated, and without any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public."

Lochner vs. N. Y., 198 U. S. 45.

> "The protection of the health, and morals, as well as the lives of citizens is within the police power of the legislature."

Holden vs. Hardy, 169 U. S. 366.

> "The police power of a state extends to everything essential to the public safety, health, and morals, and justifies the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."

Lawton vs. Steele, 152 U. S. 133.

> "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control, in the exercise of which the legislature is vested with a large discretion beyond the reach of judicial inquiry, if it is exercised bona fide for the protection of the public."

L. & M. R. Co. vs. Kentucky, 161 U. S., 677.

> "The police power is not subject to any definite limitations, bus is co-extensive with the interests of the case and the safeguards of public interest."

Camfield vs. U. S. 167 U. S. 518.

An examination of the authorities shows that the extent of this power has been a development from the formation of our government to the present time, and it has from time to time been extended to meet "the necessities of the case" as indicated above, and accordingly, it is said in Chicago B. & Q. R. R. vs. Illinois, 200 U. S. 561, that,

> "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as thos designed to promote the public halth, the jublic morals, or the public safety."

This case arose upon a demand by certain drainage commissioners in Illinois on the railroad company to remove a bridge then maintained by the company over a creek and to erect one that would meet the requirements of a certain plan of drainage adopted by such commissioners. This demand was made under a statute of the state of Illinois, giving the commissioners such authority and making it the duty of the railroad company to comply with the demand, and it was provided that if the company should not comply, after certain notice given by the commissioners for the purpose, such commissioners might remove the bridge and reconstruct another suitable to the purposes, and collect the expense from the railroad. The statute was attacked on the ground that it amounted to the taking of private property for public use without due process of law, and that it denied the company the equal protection of the laws, both as guaranteed by the Federal Constitution, but the court held both of these contentions and defined the police power of the state as above stated. That is, that this legislative act was a regulation designed to promote the public convenience in the State of Illinois, and was, therefore, a valid exercise of the police power.

In the case of Bacon vs. Walker, 204 U. S. 311, it is said that,

> "The police power of a state is not confined to the suppression of what is offensive, disorderly or unsanitary, but embraces regulations designed to promote the public convenience or the general welfare."

As to the limitations upon the exercise of this power by the state it is held that,

> "The states have the right to control purely internal affairs in regard to the health, morals and safety of the people by regulations which do not interfere with the powers or constitution of the general government."

Bowman v. Chicago & M. W. R. Co., 125 U. S., 465, and in Gas Light Company vs. Manufacturing Company, 115 U. S., 650, it is held that,

> "Definitions of the police power of the state must be taken subject to the condition that the state can not in any way encroach upon the powers of the general government nor upon the rights secured or granted by the Federal Constitution."

In the late case of State vs. Drayton, 23 L. R. A., New Series, 1291, the court, in defining the limitations of the police power, uses the language and quotes from the authorities as follows:

> "Many writers have sought to define and prescribe the true extent and limitations of the police power, but none have succeeded to the approval and satisfaction of all. It must be conceded that in its operation there is no distinction between persons natural or corporate. Northwestern Fertilizing Co., v. Hyde Park, 70, Ill. 642. In Tiedeman's Limitations of Police Power, p. 1, it is said: 'The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise,—such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. It involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *Sic utere tuo ut alienum non laedas.* The power of the government to impose this restraint is called 'police power.' By this 'general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned'." In 22 Am. and Eng. Enc. Law, 2d Ed. pp. 915, 918, it is said: 'It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend, and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto. There have been, however, many attempts to define this power in a general way, and the sum of these definitions amounts to this: That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest. * * * The police power is an attribute of sovereignty, and exists without any reservation in the constitution, being founded upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to

the proper maintenance of the government and the general welfare of the community. Upon it depend the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property; and it has been said to be the very foundation upon which our social system rests. It is founded largely on the maxim, *Sic utere tuo ut alienum non laedas,* and also to some extent upon that other maxim of public policy, *Salus populi suprema lex.'*

"It is true that the ultimate question of the validity of a statutory enactment by which this power is sought to be exercised is with the courts, and they will not hesitate to discharge the duty of declaring an act void if clearly so convinced, but subject to the presumptions and limitations herein referred to. The rule upon this subject can perhaps be no more clearly expressed by us than by the following: 'Under the police power the state can interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. But the character of police regulations, whether reasonable, impartial, and consistent with the constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate, and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and, when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's right, for to hold that every act of the general assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground was beyond judicial control would render every guaranty of personal right found in the constitution of little or no value.' 22 Am. & Eng. Ency. Law, 936."

From the above expressions of our courts in the various cases cited, and all of the authors in their commentaries upon the extent of the police power, it may fairly be gathered that the duty of organized government is to so regulate and restrain the action of all citizens subject to its jurisdiction to such extent and in such manner as will promote the general good or welfare of all and no further. The preliminary or preamble declarations, the bills of rights, and other provisions of the constitutions, all taken together simply declare and provide for this general good and welfare of all members of and citizens under the politically organized governments erected through such constitutions. The prescribing of these regulations is a law-making power, and this legislative power of the state is, by the constitution, vested in a governmental agency denominated the general assembly. This delegation is full and complete if the whole legislative power, with the exception of certain limitations expressly imposed by other parts of these instruments, and with the exception of the right and the duty of the courts, when called upon by a citizen according to prescribed procedure, to determine in the case of any attempted regulation whether such regulation is reasonable or unreasonable under all the circumstances of the case. Under these rules and definitions wanton and causeless restraint is not justified and laws attempting to "regulate and constrain our conduct in matters of mere indifference without any good

end in view are regulations destructive of liberty," but "if any public advantage can arise from observing such precepts the control of our private inclinations in one or two particulars will conduce to preserve our general freedom in others of more importance."

Thus Blackstone said that,

> "The statute of King Edward 4th which forbade the fine gentleman of those times (under the degree of a Lord) to wear pipes on their shoes or boots of more than two inches in length, was a law that savored of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles 2nd which prescribed a thing seemingly indifferent (a dress for the dead who are all ordered to be buried in wollen) is a law consistent with public liberty: for it encourages the staple trade on which in great measure depends the universal good of the nation."

One of the limitations of this power, therefore, and, in fact, the first limitation thereon at which we arrive is that however or whenever, on what and under what circumstances it may be invoked, it may only be resorted to for the protection or advancement of the public good or welfare. But when we have reached this conclusion we have only fixed a very general limitation and are only one step removed in fact from the term "police power" itself, namely: that the police power is only exercised for the public good or welfare. Whether any attempted regulation, under the authority of this power, is justifiable rests entirely with the legislature, subject only to the power of the courts to determine whether the particular attempt violates the constitutional provisions or the limitations of reason.

To determine to what extent the state may go in preventing concerns from discriminating in selling prices of a commodity in different parts of the same state, we can only refer to the very few cases decided in this country upon one phase of the question, and then propose another inquiry and reason by analogy from the cases decided as to whether such proposed question may be answered in the affirmative under this pervading power. The few particular cases referred to are:

1st. State vs. Drayton, a Nebraska case, decided September 16th, 1908, and reported 82 Neb. 254, 117 Northwestern 763, and 23 L. R. A., New Series, 1287.

2nd. State vs. Central Lumber Co., two cases, decided December 1, 1909, by the supreme court of South Dakota, and reported in 123 Northwestern, 1, page 504, and

3rd. The Minnesota case decided, as I understand, by the supreme court of the state on the twentieth of this month.

These cases arose out of the class of statutes commonly known as "Local Unfair Discrimination Acts" or "Anti-Discrimination Acts."

The Nebraska statute, in so far as it is important to notice it here, being section 1 thereof, provides as follows:

> "Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state of Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different

sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community, or city than is charged for said commodity by said party in another section, community, or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from a point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful."

The South Dakota statute is practically the same as the above, the first section thereof reading as follows:

"Any person, firm, or corporation, foreign or domestic, doing business in the state of South Dakota, and engaged in the production, manufacture or distribution of any commodity in general use, that intentionally for the purpose of destroying the competition, of any regular, established dealer in such commodity, or to prevent the competition of any person who, in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section, community or city, or any portion thereof than such person, firm or corporation, foreign or domestic, charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom shall be deemed guilty of unfair discrimination."

The first section of the Minnesota statute, passed in 1907, provides as follows:

"Any person, firm, company, association, or corporation, foreign or domestic, doing business in the state of Minnesota and engaged in the production, manufacture, or distribution of petroleum or any of its products that shall intentionally, or otherwise, for the purpose of destroying the business of a competitor or creating a monopoly in any locality, discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community, or city than is charged for such commodity by said party in another section, community, or city after making due allowance for the difference, if any, in the test or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful."

It was urged by the defendant in the Drayton case that the Nebraska Act contravenes the provisions of the Constitution of the United States, and the Constitution of the State of Nebraska. The supreme court of that state, however, held that the statute is within the police power of the state and that it does not contravene either the state or the Federal constitution. In the opinion of the court it is said that,

"It is contended by counsel for defendant that the act interferes with freedom of contract, and is, therefore, violative of the constitutions of both the federal and state governments. As we have already

> indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose and motives of the party in connection with this act, which brings him within the prohibition of the law. It is also contended that the act is void by reason of its classifications and must, therefore, be held invalid on the ground of class legislation. It is said that the act operates upon and against the man who has stores in more than one place and does not affect the dealer in but one place. That keepers of but one store may compete, intend to build themselves upon the ruins of their fellows who maintain single stores or stores in several places, and to ruin their fellows in order to build themselves up, and the law applauds; but keepers of more than one store, doing the very things and with like intentions as single storekeepers, are frowned upon, fined and imprisoned."

To these objections, however, the court made reply that it was unable to find any provision in the act which is susceptible of such construction, and the court in closing the opinion bases its holding upon the modern practice of concerns in selling their commodities at different prices in different parts of the state, and says

> "Common experience and observation, within the knowledge of all, is to the effect that many of the strongest and most grasping monopolies of the state have their places of business — their business homes — in but one place, and yet they are distributing and selling their commodities in practically every city and village within the state. They do not desire competition. They do not hesitate to destroy the business of local dealers wherever found by unjust discrimination. If prompted by that purpose the law is violated, and it is within the power of the legislature to prevent the discrimination."

In the South Dakota case the same constitutional objections were urged as were made in the Drayton case; that is, that the South Dakota act violated the state and federal constitution in that it denies the defendant equality under the law, interferes with the freedom of contract, and, therefore, deprives defendant of its property without due process of law, and it was urged that the law could not be upheld upon the theory that its purpose and effect is to prevent the establishment of a monopoly. The supreme court of South Dakota, however, refused to recognize any of these objections as valid and the act was sustained. The opinion of the court is long and exhaustive of the analogous authorities under the police power, although it is stated in the opinion that it was considered by the court that the Nebraska case, from which the court liberally quotes, was ample authority upon which the South Dakota court might rest its judgment sustaining the South Dakota law. In this opinion the court reviews the history of the development of the law against monoply, and of the particular class of legislation in question, and says, referring to the statutes forbidding combinations and contracts of certain kinds that,

> "They were forbidden not because combinations and contracts were in themselves subjects for police regulation, but were forbidden merely as they might be used as a method or means of creating a monomolp, laws against monopolies being within the scope of police regulation. So it is in the case of the statute before us. Mere dis-

> crimination is not the thing aimed at, nor even unfair competition, but the evil sought to be prevented is monopoly, and the legislature is merely condemning that class of discrimination and competition which experience had taught the public tended to bring to monopoly, and which was then being frequently resorted to for that purpose, and had become a public menace. But appellant says that malicious competition, if an evil, is such under all circumstances, and if it is to be prohibited at all it must be by statutes reaching all methods thus reaching all who are guilty of malicious competition; that otherwise there is an arbitrary and unreasonable classification of persons upon whom the law operates."

In answer to this contention of the appellant, the lumber company, the court said:

> "If such position is sound then the laws enacted against combinations and trusts are unconstitutional for the same reason, and the same plea could be raised against them that they did not reach all who were guilty. That, inasmuch as the object of such laws was to prevent monopolies, and there being many other means by which monopolies could be created — such as the different kinds of unfair competition — such laws are unconstitutional; it being arbitrary classification to attempt to say to the man who enters into a combination in restraint of contract, 'You are guilty of seeking to obtain a monopoly', while at the same time saying of the man who crushes his competitor and thus obtains a monopoly, 'You may go free, as you are guilty of no offense'."

Then the court says further,

> "It is not for the courts to say whether the legislature has passed a wise law, or whether they should have made it more broad."

The Minnesota case, from such meagre report as I have of the same, sustains the Minnesota law quoted above against the objections of the Standard Oil Company as to its constitutionality in a case brought against that company by the state charging that the company made discriminatory prices for its product in places where it had no competition. An action was brought by the state to forfeit the charter of the company to do business in Minnesota, basing its action on alleged acts of discrimination. The district court held the law unconstitutional, but the supreme court reversed this holding and upholds the law. The case, as I understand it, is now to be tried on the facts to determine, I suppose, whether the company had it in mind to suppress competition.

Acts similar to those construed in these three cases have been passed by the legislatures of the states of Tennessee, Kansas, Oklahoma, Michigan and a few others, but the three cases above referred to are the only decisions of courts of last resort thus far reported. Each of these acts prohibit a person, firm or corporation from selling a commodity in one part of the state for a less price than in another part of the state, that is, they prevent discrimination if the act is done "for the purpose of destroying competition or the business of a competitor or creating a monopoly." The phraseology of the respective statutes differs in some particulars each from another, but each of them contains the qualifying clause "for the purpose of destroying competition" or other equivalent expression, and the decisions in the Nebraska and South Dakota cases are each finally and securely

based upon this clause; and in each of them it is held that it is clearly within the police power of the state to prohibit a concern from selling its commodity at different prices within the same state for the purposes of driving its competitors out of business and thereby creating a monopoly, and the court in each of these cases in effect holds that such a monoply, that is, one created in this way, is not different in its effect upon the public from a monopoly created through contract, agreement or other arrangement between two or more persons, firms or corporations to maintain prices, and each of the cases holds that such a statute, like the statutes preventing combinations in restraint of trade, are clearly for the public good and general welfare. The reasoning of the court in each of these cases is without flaw or error in any respect and the new application made therein of the police power to this recent class of legislation must add another salutary and highly beneficent guaranty to the citizens within the jurisdiction of the operation of such statutes and decisions of the court of last resort sustaining them, and they point a clear way to the citizens of other states by which similar abuses and oppressions may be corrected and prevented in such other states.

The controlling provision in these statutes upon which the courts base their reasons for supporting them, and holding them to be within the police power of the state, is that provision qualifying the statute in general by limiting its operation to transactions or acts of discrimination "for the purpose of destroying competition," which is another way of saying "for the purpose of creating a monopoly"; and the court in each case above referred to in its decision holds that it is this purpose or design at which the legislature aimed, and which the statute forbids; that is, the statute forbids the act of selling by a concern certain of its commodities at different prices at different points in the same state for the purpose or design of destroying competition. These statutes do not prevent the making of contracts of sale generally in any manner otherwise lawful, but they do prevent all discriminatory contracts of sale which are based upon a purpose to suppress competition. Such action in business tends to create monopolies in the subject of the business, and monopolies are odious and against the interest and general welfare of the public. This is a matter, therefore, in which the public has an interest. The public has this interest in such matters, because, generally speaking, it is for the good of the public that fair competition exist in business trade and commercial intercourse. Such discrimination is violative of the maxim, "so use your own as not to injure the property of another," because the right to carry on business is property.

Russell on Police Power of the State, page 43.

It is difficult to see upon what theory the Supreme Court of the United States could fail to agree with the courts of last resort of Nebraska and South Dakota and hold that the statutes in question in the cases referred to are violative of the Fourteenth Amendment, and the assertion is ventured that it may be taken as settled that these statutes will stand as a part of the established police power of the state within the specific limitations of these enactments.

Is it, however, within the authority of the State to go further in enactment regulative of contracts of sale of commodities and still be within this broad field of protection to the public, the police power? That is, may the State, under that power, prohibit concerns from discriminating in selling prices of a commodity in different parts of the same state independent of and without any purpose to destroy competition? Or to state the question otherwise, may the general assembly regulate the prices or fix the prices which concerns may charge for a commodity in all parts of the state, making due allowance for transportation charges?

Those questions take us again at once to the expressions of Mr. Tiedeman and other authorities herein before referred to upon the rights of freedom of

contract, both as to what prices a man shall charge for his wares, and as to whether he shall part with them at all to any one. Against this we are compelled to place the established law that when a man enters society he gives up certain natural rights in consideration for the protection afforded him by the government, and the further law that the actions and transactions of each member of the politically organized society must at all times be consistent with the public good and general welfare.

We are also met with the established principle that justice is the object of all government, and that civil liberty is freedom regulated by just laws. It is conceded by all that it is the duty of the state to protect each of its citizens in the honest prosecution of his business, and generally speaking, he is allowed to pursue this business to the full limit of his mental capacity in honest transactions with such property or capital as he may honestly acquire and honestly invest and handle. He must be allowed to, through the superior ingenuity of his mind, and to the full extent of his honest energy, produce a superior commodity by honest ways and means, and to give superior service in the prompt supply of that commodity to the public, but in doing this he may not appropriate to himself the trade names or productions of any kind of some one else, — he must be original — nor may he induce his competitor's customers to violate their contracts with such competitor and come to him. These prohibitions are clearly within the police power because to disregard them is nothing more nor less than appropriation by a private individual of the private property of another, and in which the public can have no interest, except the interest which it must have in protecting its citizens in the enjoyment of their private rights, free from the encroachments thereon, or appropriations thereof, by other private citizens for such other private citizen's individual use.

We argue this branch of the subject only by looking to the decisions and authorities with a view to finding in what instances the courts have limited the abstract right of citizens to freedom of contract by sustaining regulative statutes enacted with reference to the conduct and business transactions of the citizens under the police power and in the interest of the public as such interest is defined in such decisions. But before going to a consideration of a few of the most important American cases on the power of the general assembly to regulate prices it may be well to recall that, as stated by Mr. Tiedeman in commenting upon the right of freedom of contract:

> "The common law did not recognize this view of a right to be free from police regulation, in the matter of trade. While the general right to buy and sell without let or hindrance was recognized, certain sales were held to be illegal, and punished as misdemeanors, which are exceedingly common at the present day, and, if not legal, are acknowledged by the commercial world as legitimate transactions. These were sales, known at common law by the names, forestalling, regrating and engrossing. Says Blackstone: 'The offense of forestalling the market is an offense against public trade.' This, which (as well as the two following) is also an offense at common law, was described by statutes 5 and 6 Edw. 6, ch. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; any of which practices make the market dearer to the fair trade. Regrating was described by the same statute to be the buying of corn or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of provisions, as every successive seller must have a successive profit.

Engrossing was also described to the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity with an intent to sell it at an unreasonable price is an offense indictable and finable at the common law."

So it is stated in Russell on Crimes 168, that,

"Every practice or device by art, conspiracy, words or news to enhance the price of victuals or other merchandise has been held to be unlawful, as being prejudicial to trade and commerce and injurious to the public in general * *. Spreading false rumors, buying things in market before the accustomed hour, or buying and selling again the same thing in the same market, are offenses of this kind. Also if a person within the realm buys merchandise in gross, and sell the same in gross, it has been considered to be an offense of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavor to make his profit off it."

Mr. Tiedeman states that,

"These acts, however, are no longer recognized by the American criminal law as offenses against the public, or as being in any way illegal. The purchase of merchandise, or any other commodity, that may be the subject of sale, expecting a rise in the price, in other words, speculation, is legal whether the buyer intends to sell again, in gross, or in retail. A man has a constitutional right to buy anything in any quantity, providing he use only fair means, and set his own price on it, or refuse to sell at all. Where one man, acting independently, does this, he can be only considered guilty of a wrong to the public, when he secures the possession of these things by the practice of fraud, or endeavors by false reports to enhance the price of a commodity which he offers for sale. These are distinct acts of fraud or deception and it is proper for the law to declare them illegal. Further the law cannot go."

Mr. Bishop in discussing these common law offenses denies that regrating is distinguishable from forestalling and engrossing can be considered a criminal offense in this country, but he recognizes the other two offenses in modified form. In respect to forestalling he says:

"In reason the essence of the common law, on the subject of forestalling, considered distinct from engrossing and regrating, seems to be, that, whenever a man, by false news or by any kind of deception, gets into his hands a considerable amount of any one article of merchandise, and holds it for an undue profit, thereby creating a perturbation in what pertains to the public interests, he is guilty of the offense of forestalling."

Mr. Bishop also holds that engrossing is an offense at the common law, and he says that:

> "Whenever a man, for the purpose of putting things, as it were out of joint, and obtaining an undue profit, purchases large quantities of an article of merchandise to hold it, not for a fair rise, but to compel buyers to pay a price greatly above, as he knows, what can be regularly sustained in the markets, he may, on principle, be deemed, with us, to be guilty of the common law offense of engrossing."

Mr. Tiedeman, however, criticises this statement of the law and says in effect, that it is without doubt an immoral act to ask an unconscionably high price for a commodity, taking advantage of the pressing wants of the people, and under a high code of morals it may be held to be extortion, for one to purchase and hold merchandise for the purpose of gaining from it (its sale) more than a fair profit. But he says it cannot be claimed that this is a trespass upon the rights of others or that the rights of others are thereby threatened with injury; but that one is merely exercising his ordinary rights in demanding whatever price he pleases for his property, and then Mr. Tiedeman says that apart from this objection, "the great difficulty, if not impossibility, in ascertaining what is an extortionate price, and the practical inability, to enforce it, would predetermine such a law to become a dead letter."

In most of the American states there are no crimes except those defined by statute, and while the cases in which the general assembly has, by statute, declared regrating, engrossing or forestalling to be criminal offenses, yet in many instances under the powers delegated by the general assembly, municipal councils have prevented, and are preventing forestalling, regrating and engrossing in the municipal public markets, and these municipal ordinances have been sustained. Such ordinances are based upon reason and common justice as well as upon the right of the municipality to regulate the market places where people are privileged to resort and trade.

It certainly cannot be said that a community of great population would have no right or public interest in the methods or channels through which public provision and food are brought into their midst for their consumption and sustenance, but that they would be compelled to allow any individual, through advantages of great wealth, which he might possess, to "corner" the market, and at the close of each day purchase all of the vegetables and other provisions which might be brought upon the market or the streets of the city the following morning for sale to the people, and compel the people to purchase of him at whatever price he might see fit to ask, and it may be admitted that it is not likely that such transactions will frequently take place, but that does not alter the question of the right and justice of the power of the state to prevent such a condition. Such a situation would result in monopoly, and it is difficult to see how that condition would differ from a condition or situation under which all the numerous people bringing these goods to the doors of the people of the municipality should combine and agree to sell at a certain price only any class or all classes of commodities.

There are statutes in a number of the states prohibiting a "corner," so-called, on the market, and there is never any question about the illegality of combinations to create fictitious prices by the spread of false rumors or other dishonest practices, such as fictitious sales; all such matters being held to be a fraud against the public. Any combination to enhance the price of a commodity is unlawful at the common law even where there is no deception or fraud, and the reason assigned for the rule is that such combinations tend to give to the men-

bers of them an undue and dangerous power over the needs and interests of the people, and for that reason it is a legitimate exercise of police power to prohibit such combinations. Such a law does not interfere with the equal freedom of all to do what they will with their own.

While combinations in restraint of trade were illegal at the common law they, aside from the offenses of forestalling, regrating, etc., were not punishable as criminal offenses. The common law confining its prohibition to a refusal to enforce the contract, and this refusal was based on the ground that such a contract was against public policy in that it tended to restrain trade and competition to the prejudice of the public welfare. Furthermore, it has not declared all contracts in restraint of trade to be against public policy, but only those which, according to judicial opinion, were in unreasonable restraint of trade.

Tiedeman on State and Federal Control, Vol. 1, pages 362 to 372.

Perhaps the best illustration of these two propositions of the common law is the case of Mogul Steam Ship Co. v. McGregor, 21 Q. B. D. 544. In this case a number of ship owners carrying freight from the same English ports entered into an association which brought all the freight business of the members under the regulation of the association. The agreement among those owners controlled the number of ships of each member, the division of the cargoes and freight, and the general management of the business of the port, and to give them complete control of the business they offered a rebate of 5% on all freight to shippers who used their boats exclusively. Any member might withdraw from the association at any time upon giving them certain notice. After the plan was completed the association reduced the rates on freight to such a degree that an independent ship owner could not except at a ruinous loss, compete with the association. The plaintiff ship owners, who were not members of the association undertook to compete, but failed because of the capital and power otherwise of the association. The English courts, from the lowest to the House of Lords denied that the ship owners had been guilty of any conspiracy at the common law for which they were amenable to the plaintiffs, either criminally or civilly, although the agreements of the association were clearly contracts in restraint of trade, which the courts would have refused to enforce between the members thereof, these courts holding that in order that a combination of capitalists may make out a case of actionable conspiracy at the common law they must use unlawful means, such as fraud or other dishonesty, intimidation, molestation or actual malice. It was not sufficient that the inevitable effect of the combination was to drive the plaintiffs out of business, if only the ordinary tactics of commercial warfare were employed.

These rules of common law, however, have been changed by the modern legislation in our states to the effect that such combinations are not only prohibited and declared to be unlawful, and therefore not enforcible, but they are defined as criminal offenses, punishable by fine or imprisonment or both.

Furthermore these statutes go further in many instances and give to any person injured by reason of the combination a right to recover damages from the persons, parties to the agreement or arrangement. This is all in abrogation of the common law and pursuant to a growing sentiment and demand on the part of the citizens of the state for fair play and just treatment by those who deal in commodities which the different members of the public must use. And this legislation is the result of knowledge gained from experience that it is dangerous to the general welfare of the public for two or more persons to be allowed to combine their capital and skill, or either of them, for the purpose of controlling prices. There are certain cases in which it has long been settled that the state

may regulate or control the prices and charges for things and services. Judge Cooley classifies these cases as follows:

> "1. Where the business is one, the following of which is not a matter of right, but is permitted by the state as a matter of privilege or franchise. Under this head may be classed the business of setting up lotteries, of giving shows, and of keeping billiard-tables for hire; of selling intoxicating drinks, and of keeping a ferry or toll bridge.
>
> "2. When the State on public grounds renders to the business special assistance by taxation, or under the eminent domain, as is done in the case of railroads.
>
> "3. When for the accommodation of the business special privileges are given in the public streets, or exceptional use allowed of public property or public easements, as in the case of hackmen, draymen, etc. Commonwealth v. Gage, 114 Mass. 328.
>
> "4. When exclusive privileges are granted in consideration of some special return to the public and in order to secure something to the public not otherwise attainable."
>
> Colley's Principles of Constitution, page 234.

Our question, however, is aside from all these, and if it is to be answered in the affirmative we must look for other reasons than those heretofore mentioned from any of the decisions or authorities including those just stated by Judge Cooley.

It has often been stated in effect that the regulation of price will not be justified in any case where the law merely declares the prosecution of the business to be a privilege or franchise. If it be without legislation a natural right, no law can make it a privilege by requiring a license. The deprivation of the natural right to carry on the business must be justifiable by some public reason or necessity, otherwise the general or partial prohibition is unconstitutional, being unreasonable, and furnishes no justification for the regulation of prices and charges incident to the business.

Perhaps the leading case on the question of the extent of the power of the general assembly to regulate and control business by regulating the charges made in the same, and where no special privilege or franchise is enjoyed, and where there is no legal monopoly but in which there were circumstances which tended to create in favor of a few persons a virtual monopoly in a business of great necessity to the public, is the case of Munn v. Illinois, 94 U. S. 113.

In this case the general assembly of Illinois, by statute, undertook to fix thereby the maximum of charges for the stoppage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored n such a manner that the identity of different lots or parcels cannot be securely preserved. It was claimed by the defendants in the case that such a law was violative of the federal constitution as being an attempt to regulate interstate commerce; violative of that part of section 9 of the same article which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, and that it violated the Fourteenth Amendment, which ordains that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The courts of Illinois sustained the law, and it was afterwards upheld by

the Supreme Court of the United States, Mr. Chief Justice Waite delivering the opinion. Justices Field and Strong dissented. Justice Waite in holding that the act is not violative of the Fourteenth Amendment reviews the many instances of regulation by governments of business, giving the reasons for the right of the same, and states that:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the 5th Amendment in force, Congress, in 1820, conferred power upon the City of Washington, "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. at L., 587, sec. 7; and in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers." 9 Stat. at L., 224, sec. 2.
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> "From this it is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation.
>
> "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does not become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

And the act is finally justified on the ground that through the circumstances existing in the State of Illinois, and particularly in the city of Chicago, the ware-

house business had become a virtual monopoly in the hands of the people owning them, and that they were institutions to which the people of a large territory of the country, by force of circumstances, were bound to resort for service, and that by reason of this, these private properties had become "affected with a public interest," and that upon these grounds it was competent and within the constitution, for the general assembly of Illinois to regulate the prices to be charged.

Mr. Justice Field wrote a long dissenting opinion, in which he says, among other things, in referring to the rule established by the majority that,

> "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the constitution against such an invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature."

And at another part of his dissenting opinion we find the following:

> "The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and 'he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of businesses shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States."

If, then, Mr. Justice Field is right in his construction of the majority opinion of the court in this case of Munn v. Illinois, it is within the power of the general assembly to regulate the price of commodities in other cases than the cases passed upon in the three decisions heretofore referred to from Nebraska, South Dakota and Minnesota respectively, and within the subject under discussion.

Under this view, as stated by Justice Field it would be competent for the general assembly to prescribe the maximum rates to be charged by dealers in provisions necessary to the sustenance of the lives of the people, even though this would violate the long established principle or notion, that competition is the life of trade. It is true that such regulation would not necessarily destroy all competition because there would still be the elements of rivalry in giving prompt service and courteous treatment on the part of vendors and vendees, and there, of course, would be other elements of competition aside from the prices to be charged.

Whether or not, however, this view of Mr. Justice Field is correct as to the extent which he claims the opinion of the majority of the court goes under the police power, we think it may be said without question that it is within the power of the general assembly to impose such regulations as are sustained by the supreme courts of the states of Nebraska, South Dakota and Minnesota and thereby prevent discrimination by concerns in the selling price of a commodity in different parts of the state, based upon a purpose or design to suppress competition.

Secondly, it is competent for the general assembly to regulate the selling price of commodities in different parts of the state in any business which through business, which through circumstances becomes a virtual monopoly — that is circumstances other than contracts, agreements or other combination arrangements which are, of course, illegal, and,

Thirdly, when one devotes his property to such a use, and uses it in such a manner as to make it of public consequence and affecting the community at large, the public gains an interest in that use, and he thereby, in effect, grants to the public such interest, and must submit to be controlled by the common good to the extent of the interest he has thus created; and while he may discontinue the use, yet so long as he maintains it he must submit to the control.

This decision has been criticized by authors, and questioned by courts, and it is well enough for all of us, and for the courts to remember that the principle laid down in Munn v. Illinois might be carried to such an extent as to amount to socialism, and it may be that Mr. Tiedeman states a truth when he says, "the language is broad enough to justify almost any case of regulation of price," and that he states another truth when he says, "Under this rule the abandonment of the object of all individual activity, viz., to make one's self or one's services indispensable to the public, furnishes in every case the justification of state interference. Only the more or less unsuccessful will be permitted to enjoy his liberty without governmental molestation."

I do not believe, however, that such fears need be entertained because I do not believe that our Federal Supreme Court will ever establish in our government the principles of socialism as a governing policy, and we must not fail to keep in mind that combinations of individuals are not the only resting place of large aggregations of wealth, capable of bringing hardships to the people generally, unless restrained by law. In this present day development of commercial intercourse and accumulation there are numerous instances in which one man, through his acquirement of large wealth, is able to virtually control many of the prime necessities of life, but I am fully convinced that the State does have the power, and should have the power to prevent any of the abuses at the hands of single individuals that it is able to prevent at the hands of a combination of two or more of them. Nor would this be violating the civil liberty secured by this government to any man, because under the rules we have noticed it is fully established that he is only entitled to such freedom and liberty as is consistent with the public good and the general welfare.