Eligibility of Member of General Assembly to Draw Salary After Accepting Federal Appointment.

ELIGIBILITY OF MEMBER OF GENERAL ASSEMBLY TO DRAW SALARY AFTER ACCEPTING FEDERAL APPOINTMENT.

Office of the Attorney General,
Columbus, Ohio, January 24, 1899.

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

DEAR SIR:—This department is in receipt of a communication from your office of this date, enclosing a brief and inquiry from the Hon. C. A. Leland of the United States District Court of New Mexico.

You desire an official opinion upon the questions submitted therein, viz.: Whether a member of the General Assembly of the State of Ohio, elected in 1897, and during the pendency of his term to-wit: On the 1st day of July, 1898 was appointed by the federal authorities and qualified as an Associate Justice of the Supreme Court of the Territory of New Mexico, could draw his salary subsequent to said date, as a member of the General Assembly of the State of Ohio. This presents the question of whether a member of the General Assembly or of the Legislative Department of the State can hold such office and draw compensation in the way of salary, from such State office, covering the same period that he is a duly qualified and acting justice of the Supreme Court of the Territory of New Mexico.

And second, whether you, as a financial officer of the State, have any power to pass upon the validity of his voucher as presented to you for payment, as a member of the General Assembly.

The Statutes of Ohio, sections 153 and 154 make you the chief accounting officer of the State, and provides that no money shall be drawn out of the treasury except upon a warrant of the auditor, and that you shall examine all claims presented for payment out of the state treasury, and if you find such claims legally due, and there is money in the treas-

ury duly appropriated to pay the same, the auditor shall issue to the party entitled to receive the money thereon, a warrant on the state treasury for the amount so found due.

Second: The auditor shall not draw any warrant on the treasury for any claim unless he finds the same legal, and that there is money in the treasury which has been duly appropriated to pay the same.

Two propositions are required of you before a warrant can be issued:

First: You must determine whether such claim is legal or legally due, and,

Second: Whether there is money in the treasury duly appropriated to pay the same.

There is no contention as to the last proposition, but that you, as accounting officer will be obliged to determine whether any amount is legally due on the voucher of Judge Leland. That brings us to the first proposition, viz.:

Does the acceptance of a federal judicial position by the claimant vacate the office, he at the time held in the State of Ohio, to-wit: as a member of the General Assembly?

CONSTITUTIONAL PROVISION.

Article 2, section 4 of the Constitution of 1851, provides:

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

It is conceded by the statement of Judge Leland attached to your inquiry, that he is now holding a judicial position or office under the authority of the United States, and has held

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such office ever since the first day of July, 1898, in a distant territory. As such office is held under the authority of the United States, and not included in the exception of the above section, it then remains to be seen, whether under said section he is yet a member of the State Lgislature. The terms "shall be eligible to or have a seat in the General Assembly," for some purposes are synonymous, or, the second is explanatory to the first.

The same contention as to the definition of eligibility was made by counsel in the late case of the State on Relation vs. Heffner, viz.: That if a sheriff was eligible at the time of his election, that his eligibility would remain with him, notwithstanding some event took place during his term that otherwise would have rendered him ineligible to the office at its inception.

This view was contended for by counsel in the argument of said case under section 3 of article 10, which provides:

> "No person shall be eligible to the office of sheriff or county treasurer for more than four years in any period of six."

The decision rendered January 17, 1899, and the Supreme Court in that case necessarily held the converse of that proposition, that the term eligibility means as well disqualification to hold an office as disqualification to be elected to an office. Under section 4 above named it might be well argued that a person holding an office under the United States government could be elected to the General Assembly, but before he qualified by taking his seat therein, he would be obliged to resign his federal appointment. but the converse of the proposition with them is clearly sustained, viz.: That if he was eligible when he was elected to the State position, and during such term he rendered himself ineligible by any act on his part the ineligibility would apply at the moment he so qualified, to-wit: July 1, 1898.

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The adjudicated definition of the word ineligibility when applied to holding public offices was defined by Judge Lyon in the case of State vs. Murray, 28 Wis., on page 99 as follows:

> "The term ineligibility means as well disqualification to hold an office as disqualification to be elected to an office. This was but following an early case in 14 Wis., 497."

Throop, on Public Officers, lays down the same proposition, in California under a similar constitutional provision in words as follows:

> "No person holding any lucrative office under the United States shall be eligible to any civil office of profit under the State."

It was held that eligibility to hold office as well as to be elected to it was implied in this term and hence disqualifies a person holding a civil office under the State, viz.: That of county supervisor from continuing to hold his office after he had received and entered upon a lucrative office under the United States, as that of postmaster. 73 Cal. 230.

14 Pacific Rep., 853.

In the State of Indiana under a similar constitutional provision it holds:

> "That no person shall hold more than one lucrative office at the same time. It was held: That one who at the time of his election to one lucrative office, that of township trustee, held another lucrative office, that of United States postmaster, he vacates the office held under the state."

VACATION OF OFFICE.

Where it is the holding of two offices at the same time, which is prohibited by the constitution or the statutes, or from incompatibility of the offices by their nature, it is well

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settled that the acceptance of the second office of the kind prohibited operates *ipso facto* and to absolutely vacate the first.

People vs. Brooklyn, 77 N. Y., 503.
33 American Rep. 659.
Shell vs. Cousin, 77 Va. 328.

No judicial determination is therefore necessary to declare the vacancy of the first, but the minute the incumbent accepts the new office, the old one becomes vacated, as it is said in one case, his acceptance of the one was an absolute determination of his right to the other, and left him no shadow of title, so that neither quo warranto nor a motion was necessary.

Meecham on Public Officers, Sec. 429.
77 N. Y., 503.
2 Hill (N. Y.,) 93.
People vs. Nostrand, 43 N. Y., 381.
People vs. Green, 48 N. Y., 304.

Hence we conclude from the fair construction of this constitutional provision that the acceptance of the federal position on July 1, 1898, operated as a vacation of his office as a member of the General Assembly, and that he has no claim against the State on and after he entered upon the emoluments of a lucrative federal office. Independent of the constitution the courts have frequently decided certain offices to be incompatible.

The following is a list of incompatible offices:
Town clerk and that of alderman.
Trial justice and deputy sheriff.
Sheriff and coroner.
Sheriff and justice of the peace.
City solicitor and a member of congress.
Councilman and city marshal.
Judge of a district court and deputy sheriff.
Postmaster and judge of a county court.
Justice of the peace and treasurer of the state.

Reporter of the Supreme Court and county auditor.
Judge and a member of the Legislature.
These are supported by the following authorities:

64 Me., 195.
18 American Rep., 251.
25 Conn., 265.
68 American Dec., 375.
73 Me., 129.
3 Me., 486.
14 American Dec., 84.
56 N. H., 220.
2 Oregon, 346.
2 American St. Rep., 921.
4 Buch., 89.
Woodside vs. Wags, 71 Mo., 207.

Under this class of cases the court laid down a few propositions that determine the incompatibility independent of the constitution. They analyze the nature and duties of the two offices and determine whether their duties directly or indirectly would interfere or render it improper from considerations of public policy for one person to retain both offices.

15 Iowa, 538.
58 N. Y., 295.
64 Mo., 195.
18 American Rep., 351.

It must be inconsistency in the functions of the two offices rather than the physical inability to be in two places at the same moment. The incompatibility in its application to this matter is that from the nature and relations to each other the two places ought not to be held by the same person from contrariety which would result in the attempt by one person to faithfully and impartially discharge the duties of the one towards the incumbent of the other.

Applying the principles laid down by the highest courts in determining what is incompatibility, I am unable to find

anywhere that the position of a judge whose duty it is to interpret the law is compatible with that of the Legislature, whose duty it is to enact the law. The federal judge would be obliged to take judicial notice of a State statute when that statute was involved in any proceeding before him as judge, and there are many ways in which such statutes are called into question in the federal courts. We would then have the anomalous condition of affairs of a member of State Legislature enacting a law with one breath by his vote and putting on the judicial ermine the next morning and construing his own act, so that independent of the constitution and the statutes it is clear to me that a judicial and a legislative position held by the same person at one and the same time would be wholly incompatible and repugnant, and you will therefore find under section 154 of the Revised Statutes of Ohio that the voucher is not legal, that the claim is not legally due Judge Leland, for the reason that under the constitution of the State of Ohio he has vacated his office as a member of the Legislature by accepting the position of judge of the United States court on July 1, 1898, as he states in his application.

And second, that independent of the constitution or common law rule of the acceptance of a second office that is incompatible with the first *ipso facto* vacates the first office, you as an executive officer are justified in refusing the payment of such vouchers.

This opinion, of course, will not deprive Judge Leland of having a full opinion or of having judicial construction of his right, as the appropriation for the payment of salaries for members of the Legislature will not lapse for upwards of one year, and this department would be very much gratified indeed to have a judicial ruling upon this proposition in the State of Ohio.

Yours very truly,
F. S. MONNETT,
Attorney General.

PLANS OF JAILS, ETC., MUST BE SUBMITTED FOR APPROVAL.

Office of the Attorney General,
Columbus, Ohio, January 28, 1899.

Hon. Joseph P. Byers, Secretary Ohio Board of State Charities, Columbus, Ohio:

DEAR SIR:—I find upon my desk, unanswered, a letter addressed by your board to me of several months since, which in the rush of business in this department, has been overlooked.

The inquiry contained in the same is with relation to the construction of section 656 of the Revised Statutes of Ohio:

> "All plans for new jails, workhouses, infirmaries, State institutions and municipal lockups or prisons, and for important additions to or alterations in such eixsting institutions shall, before their adoption by the proper officials, be submitted to the board for criticism and approval."

It is apparent to me that from this portion of that section, the object of the statute is to give to your board a supervisory relation with regard to the plans for all such structures, and while I do not think that plans and specifications cannot be adopted by the proper officials without first securing your approval, yet I am of the opinion that you have power to review all such plans, and they must "be submitted to the board for criticism and approval."

The object of the statute is to correct existing abuses in such institutions, or rather in their faulty construction, by pointing out to the proper officials the defects as viewed by the board, which they have gained from their experience in noting what is best in the various plans submitted to them. You will notice that the statute does not say that before their adoption that such plans *must* be approved by the board, but rather that they shall be submitted to the board

for criticism and approval. It is supposed that the change or alteration of the plans suggested by the board would be mutually agreed to, without any proceeding being had to secure such agreement. The latter part of the section refers to investigation by the board of the management of any such institution, and granting powers to the board to send for persons and papers, and do other things necessary to secure the object of the statute; that is, a full investigation of the matters in dispute.

You have not called my attention to any particular action or case contemplated, and with these few remarks upon the general powers granted you, and what I understand to be the spirit of the law, I hope I have answered sufficiently the query raised. I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

SEPARATE SCHOOLS FOR COLORED CHILDREN NOT AUTHORIZED.

Office of the Attorney General,
Columbus, Ohio, January 28, 1899.

Hon. L. D. Bonebrake, Commissioner of Common Schools, Columbus, Ohio:

DEAR SIR:—Referring to the enclosed letter and answering your inquiry as to whether or not there is any law compelling or permitting the establishment of separate schools for colored children and investing the board of education with authority to see that such children attend schools thus organized, I beg to reply as follows:

In 1878 (75 O. L., p. 513) the Legislature passed a law which provided for the establishment of separate and distinct schools for colored children, when, in the judgment of

the board of education it was to the advantage of the district to do so. This section, known as 4008 of the Revised Statutes of Ohio, was repealed February 22, 1887, and since that time there has been no legislation affecting the matter in question. The right of the board to establish separate schools for colored children and require such children to attend schools thus organized, was the cause of an action styled, The State of Ohio ex rel. Perry Gibson vs. The Board of Education of the Village of Oxford, Ohio, found in 2 Circuit Court Reports, p. 557. The court in this case said:

> "Since the passage of the act of February 22, 1887, repealing section 4008, Revised Statutes, a board of education of this State no longer has the right to organize separate schools for colored children, and legally require such children who are entitled to the benefits of the public schools of a district, and who desire to avail themselves of such right, to do so, *only* in a school, organized, maintained or set apart by such board, solely for the education of the colored children of such district."
>
> "Said section 4008, while in force, did expressly confer such power upon the boards of education, and section 4013 was not intended to, and did not at the time of its enactment give the *same* authority. And the repeal of section 4008 did not so operate, as to give to section 4013 any different meaning or effect than it had before such repeal.
>
> "The fact that prior to the repeal of section 4008, a board of education had under its provisions, established a separate school for colored children, does not authorize it to continue the same after such repeal, and to require the colored children, against their will, to attend the same, and unless they do, to be deprived of the benefit of the public schools of the district. The Legislature, as to the conduct and management of the public schools, and the powers of the board of education is supreme. The law repealing section 4008 was not one affecting vested rights, or in any way impairing the obligation of contracts."

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This case was carried to the Supreme Court, and affirmed in the 45 O. S. I am of the opinion therefore that the superintendent has no power to compel such colored children, as desire, to attend the school to which the white children go, to attend any colored school that may be in existence.

Respectfully submitted,
GEO. C. BLANKNER,
Assistant Attorney General.

SOLDIERS OF SPANISH-AMERICAN WAR ELIGIBLE TO ADMISSION TO OHIO SOLDIERS' AND SAILORS' HOME.

Office of the Attorney General,
Columbus, Ohio, January 30, 1899.

Hon. Asa S. Bushnell, Governor of Ohio, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a request from your department for an official opinion as to the construction of the statute governing and controlling the Ohio Soldiers' and Sailors' Home at Sandusky in this, to-wit: Whether the statute as it now exists will permit a disabled soldier of the late Spanish-American war to be admitted thereto. You further state that the applicant is not eligible to the National Home and that the said applicant is broken in health and in destitute circumstances.

In reply would say that the original act passed April 30, 1886 (83 O. L., 107), provides for the establishment and maintenance of a home for disabled and indigent soldiers, sailors and marines of Ohio. Section 1 thereof provides that there shall be established an institution under the name of the Ohio Soldiers' and Sailors' Home, which institution *shall* be a home for honorably discharged soldiers, sailors and marines.

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Section 2 provides that all honorably discharged soldiers, sailors and marines who have served the United States government in any of its wars, and who are citizens of Ohio at the date of the passage of this act and are not able to support themselves and are not entitled to admission to the National Military Home, or cannot gain admission thereto, may be admitted to the home first aforesaid, under such rules and regulations as may be adopted by the board of trustees hereinafter provided for; provided the preference shall be given to persons who have served in Ohio military organizations. The subsequent provisions of said act provide for the acquirement of real estate in fee and the building of permanent structures on such selected site, and provisions for the organization and equipping the said institution.

Subsequent to said original act several amendatory acts have been passed, to-wit: 88 O. L., 139 and the act of 89 O. L., 39. This latter provision now known as section 674-11 R. S., so modifies the above section 2 as to practically repeal it by implication. It provides in substance that all honorably discharged soldiers who have served the United States government in *any* of its wars, and who are citizens of Ohio at the date of the passage of this act or shall have been citizens of Ohio one year or more at the date of making application for admission, and who are not able to support themselves and are not entitled to admission to the National Military Home, or cannot gain admission thereto, * * * may be admitted to the Ohio Soldiers' and Sailors' Home under such rules and regulations as may be adopted by its board of trustees; provided, that as to honorably discharged soldiers who have served the United States government preference shall be given to those who have served in Ohio military organizations.

It is therefore my conclusion that from the language of the original act providing for a site or the acquirement of real estate in fee and of permanent buildings as well as the

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amendment to original section 2, or it is preferred to treat it as the repeal of the act of 89 O. L., 39, I am of the opinion that if the applicant has an honorable discharge as a soldier of the United States government in the late Spanish-American war, and that he was a citizen of Ohio one year or more at the date of making his application for admission and that he is not able to support himself, and if he is not entitled to admission to the National Military Home, or cannot gain admission thereto, then he is eligible to be admitted to the Ohio Soldiers' and Sailors' Home under such rules and regulations as may have been adopted by the board of trustees.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

MAYOR GOOD, OF SPRINGFIELD, ELECTED TO FILL UNEXPIRED TERM.

Office of the Attorney General,
Columbus, Ohio, February 1, 1899.

Hon. Asa S. Bushnell, Governor of Ohio, Columbus, Ohio:

DEAR SIR:—As I understand it, you desire the opinion of this office upon the following state of facts:

Good was elected to the office of Mayor of Springfield; later he was ousted from said office by reason of his having violated the provisions of what is known as the "Corrupt Practices Act," and Kirkpatrick was appointed to fill the vacancy thus created. Good was again nominated and elected to the office from which he had been ousted. Query: Was he elected for the unexpired or full term?

Section 3022-11 of the Revised Statutes says that vacancies caused by the ousting of an officer for violating the

Corrupt Practices Act shall be filled as provided by the constitution of the State or by law. There is nothing in the constitution of the State which provides for the filling of vacancies in the offices. Sec. 6 of the constitution leaves the organization of cities, etc., to the General Assembly. We must, therefore, consult the statutes of our State in order to answer the question.

Section 1754, R. S., reads:

> "In case of the death, resignation, disability, or *other* vacation of his office, the council may, by the vote of a majority of all the members elected, appoint some suitable person within the corporation to act as mayor, and discharge the duties of the office until the vacancy is filled, or the disability removed; *provided*, that at the next annual municipal election occurring more than 30 days after such vacancy a mayor *shall be elected for any unexpired term*, unless the disability is of a temporary character."

This, then, would seem to be the section to apply in the present case, and Mr. Good would serve for the unexpired term.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

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ELIGIBILITY OF MEMBERS OF GENERAL ASSEMBLY TO DRAW SALARY AFTER ACCEPTING OTHER POSITIONS.

Office of the Attorney General,
Columbus, Ohio, February 13, 1899.

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

DEAR SIR:—This office has the honor to acknowledge receipt of your communication, 8th inst., in which you state you have been advised that a number of the members of the General Assembly are holding lucrative federal and state positions, some of which are permanent while others are only temporary. The question arises, you say, whether or not such members are entitled to receive salaries as members of the General Assembly for the year 1899. Inasmuch as you have a written opinion from this department relative to those who are occupying federal positions, this letter will be confined to clerks in federal offices and those who are temporarily employed in or under State departments.

In United States vs. Hartwell, 6 Wall. (U. S. R.) p. 385, it was held that "a person in the public service of the United States appointed pursuant to statute authorizing an assistant treasurer of the United States, to appoint a *clerk, with salary prescribed*, whose tenure of place will not be affected by the vacation of office by his superior, and whose duties (though such as his superior in office should prescribe), are continuing and permanent, is an officer within the meaning of the sub-treasury act of August 6, 1896 * * * and, as such, subject to the penalties prescribed in it for the misconduct of officers."

The court in rendering decision in the above case, said:

> "An office is a *public* station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties.

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> "The employment of the defendant was in the *public* service of the United States. He was appointed *pursuant to law,* and *his compensation* was *fixed* by law. * * * His duties were continuing and permanent, not occasional or temporary, They were to be such as his *superior* in office should prescribe."

A clerkship in the treasury department and one in the attorney general office, are offices, within a provision forbidding one person from drawing the salary of two different offices. (Talbot vs. U. S. 10 Ct. of Cl. 426.) A clerk in the office of the secretary of state is an officer, 8 Cal., 39.

I would, therefore, give it as my opinion that members who are occupying positions of clerical character, said positions having been provided for by the government with a definite salary attached thereto, and which are of a continuing and permanent nature, come within the provisions of our constitution, article 2, section 4, which prohibits a person holding office under the authority of the United States, etc., from having a seat in the General Assembly.

As to those who have temporary employment, such as attorneys for dairy and food department, etc., it would seem that the decision in their cases would rest upon the definition of the word "office."

In the case of United States vs. Maurice, 2 Brock. (U. S. C. C. 96) Chief Justice Marshall, in speaking of public offices, said:

> "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 o implied, to perform a service without becoming an officer."

The Supreme Court in 36 Miss., p. 273, defined office as follows:

> "The term 'office' has no legal meaning attached to it different from the ordinary acceptation.

> An office is a continuing charge or employment, the duties of which are defined by *rules prescribed by law,* and *not by contract, etc.*"

Again, in the case of Bunn et al. vs. The People ex rel. 45 Ill., 397, the court said:

> "A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, *ipso facto,* terminates the employment, is *not an officer,* in the sense in which that term is used in the constitution."

The act creating the dairy and food department vested the commissioner of that department with power to employ counsel whenever he deemed it necessary for the proper administration of his office. Up to within the last year the commissioner appointed attorneys in different parts of the State, and they were paid, not a regular salary, but fees in each particular case based upon the amount of work performed, the same as in any other litigation. The attorneys for that department are today receiving for their work, pay at local bar rates, not to exceed, however, a certain sum during the year. They are paid as they do the work, not a regular salary, but fees. In other words, they are practicing law. It has been decided in a number of cases that the practice of law is not an office. The court in Benjamin Watkins Leigh's case, (decided in 1810) 1 Munf. (Va.) p. 468, said:

> "The practice of law is not an *office* or *place* under the commonwealth."

The Supreme Court of California has held that an attorney does not hold a "public trust" within the meaning of the constitution. The Supreme Court of the United States in ex parte Garland, 4 Wall. U. S. 333 has held that at-

torneys are not officers of the United States but of the courts. It is said that the weight of authority in the modern American cases, is decidedly in favor of the doctrine that an attorney is not a public officer.

The attorneys for the dairy and food department are employed by *contracts,* not under any law. There is nothing of a continuing or permanent nature attached to their contracts. They attend to the prosecution of dairy and food cases along with the rest of their practice, and when the same is brought to their attention.

I would, therefore, give it as my opinion that those who are looking after the legal business of the dairy and food department, or other departments, receiving compensation for each particular case, and in accordance with the service rendered, are not officers, and do not come within that section of the constitution prohibiting those holding offices under the Federal or State government from having a seat in the General Assembly. They are merely attorneys practicing their profession. Respectfully submitted,

F. S. MONNETT,
Attorney General.

TAXATION OF PROPERTY OF NATIONAL BANKS.

Office of the Attorney General,
Columbus, Ohio, March 3, 1899.

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

DEAR SIR:—I have the honor to receive from you a communication addressed to you by the Auditor's Association of the State of Ohio, in which they submit to you questions for your consideration, and referred to this department by you.

In answer thereto I would say that I herewith submit the questions with my views of the answers thereto.

First. What rule is employed in taxing the property of national banks?

Answer. In answer to this I would say that the Supreme Court of Ohio lately decided an important case raising the question that has been mooted by the different taxing boards and officers in the State, as to whether they had a right to depart from the constitutional rule in taxing that class of property, viz.: The rule which requires that all property be listed for taxation at its true value in money; and our court in passing upon the case of John A. McCurdy, guardian, vs. John M. Prugh, treasurer of Miami County, found in volume 41 Western Law Bulletin, page 49, that where property has been valued for taxation and taxed at its true value in money, it is no defense against the payment of such taxes, that all other property within the State through the mistaken or imperfect judgment of the taxing officers and equalizing board, has been valued for taxes materially below its true value in money.

In other words that if certain individuals return their property, either national bank stock, or any other class of property at less than its true value in money, such practice will not justify anyone in returning their property at less than its true value in money, and all the taxing boards and officers should be instructed against listing any class of property below its true value in money. They should by their endeavors raise all persons' returns to their true value in money and not lower than below the constitutional rule. This decision fixes the one portion of the question implied, that is at what valuation it should be returned.

The Supreme Court of the United States on the 27th day of February, 1899, affirmed the case of the First National Bank, of Wellington, Ohio, vs. H. P. Chapman, treasurer of Lorain County, and thereby established the rule beyond all question to be as our Supreme Court had held it to be in the 56 O. S. page 310. That rule as therein laid

down was that no owners of national bank stock could be permitted to deduct from the true value of the shares of said stock any portion of their indebtedness, so that the taxing officers should be instructed to permit no one to deduct any portion of his indebtedness from his holdings of national bank shares, and the same should be compelled to be returned for taxation at its true value in money.

Second. Should Young Men's Christian Association's real estate, and real estate of like societies, be exempted from taxation where it is in part used for secular purposes?

Answer. A question very similar to this was decided by the Supreme Court of Ohio in the case of the Cleveland Library Association vs. Pelton et al., 36 O. S., page 253.

It was there held by said court that exemptions from taxation should be strictly construed, and that an entire building used for a library association, although not at the present time necessary for the objects of the association might become so in the future. The court said:

> "When this shall become necessary for the objects of the association, when this shall become the case, the entire building or any additional parts are so used, the parts thus withdrawn from renting, cease to be leased or otherwise used with a view to profit and fall within the exemption. The fact that the building is so constructed that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for purposes of taxation having due reference to the taxable value of the entire property."

They further examine such question and consider the section under which exemptions are made, viz.: 2732 of the Revised Statutes of Ohio and their reasoning as there applied to public libraries is certainly in my opinion applicable to the case of the Y. M. C. A. buildings. If, as is implied by your questions, that portion of the building is used for other purposes than those provided by Section 2732 of the

Revised Statutes such parts of said building and the appurtenances thereto as are rented or otherwise used would not be exempt from taxation, and the value of such part can be found by the taxing officer by comparing such part of said building with the taxable value of the entire property. I would therefore hold in answer to this question that such building if used entirely for public charity or for similar purposes as are mentioned in subdivision 1, of section 2732, Revised Statutes, the same would be exempt from taxation, but if any portion of it is used for other purposes than those contemplated by that section, I would hold that such part so used for any other purpose would be liable for taxation.

Third. Where an incorporated company whose home office is in Ohio has machinery and tools employed in other states, should this machinery be taxed at the home of the incorporation or where the personal property is temporarily situated?

Answer. Under section 2744 which governs and controls the returns of corporations generally, it is provided that the returns shall be made by the president, secretary or principal accounting officer of such corporation therein mentioned verified by the oath of the person so listing all of the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, the moneys and credits of such company or corporation *within the State,* at the actual value in money. Then follows a description of the manner in which the returns shall be made.

It is also provided that the value of all movable property shall be added to the stationary and fixed property and real estate and apportioned to such wards, cities, villages or townships pro rata in proportion to the value of the real estate and fixed property in such ward, city, village or township, and all property so listed shall be subject to and pay the same taxes as other property listed in said ward, city, village or township.

It is further provided by said section that it shall be the

duty of the accounting officer to make return to the auditor of state during the month of May of each year an accurate amount of all property by him returned to the several auditors of the respective counties *in which the same may be located.* Referring to this provision of the statute which I have underscored above, it will be seen that the situs of all property so to be returned by the officer of the corporation shall be located "within the State," and it is my opinion that unless such corporation has temporarily removed such property mentioned in the above question for the purpose of keeping the same from being placed upon the tax duplicate, that its removal in good faith without the State would be a good reason for such officer not returning the same for taxation. For it is supposed that the corporation will truthfully return such property in such foreign jurisdiction where ever it may be situated.

Fourth. Can special assessments for public benefit, such as pike assessments, be collected from railroads?

Answer. Under section 2777 of the Revised Statutes of Ohio which governs the levy of taxes to construct and repair one mile assessment pikes a decision was rendered by the Supreme Court of Ohio entitled Railroad vs. Commissioners, found in 48 O. S., page 249. In that decision the Supreme Court held that it is within the power of the Legislature and within the power of the taxing authorities to levy a tax for the purpose of constructing one mile assessment pikes, upon a railroad right of way, and that its payment cannot be defeated by showing that no direct or indirect benefit will accrue to their property or its owner from the proposed expenditure of the funds raised by the taxes, and that a railroad track is subject to taxation in the proportion that the mileage of its track situated in the taxing district bears to its whole track, according to the rules prescribed by sections 2770 and 2776 inclusive, Revised Statutes for taxing railroads in this State.

It was further held by the Supreme Court of Ohio in the 10 O. S., page 159, and 19 O. S., page 589, that land ap-

propriated for a railroad track may be assessed for local improvements, and in that regard the railroad company stand in the same light as all other property owners within the taxing district, and they should be subject to the same degree of taxation as all other property located within the municipal taxing district in which the improvement is being made.

Fifth. Have the county commissioners, under the late decision of the Supreme Court, power to contract with and pay the county auditor for making plats for the use of the decennial appraisers?

Answer. This question can be determined by examining Section 2789 of the Revised Statutes of Ohio. It is my opinion that the county auditor should be paid for such maps and plats as are provided for under said section as necessary for use by the decennial appraisers. This is made evident from the fact that the county commissioners of any county may advertise for four consecutive weeks in one or more newspapers of general circulation in the county for proposals to construct necessary maps and plats to enable the several district assessors in the county to accurately appraise the real estate. That, of course, contemplates that such person as should be awarded the contract to do the work therein contemplated, should be paid for it. And if the auditor makes the *maps* and *plats* by direction of the county commissioners as therein provided, he should be entitled to pay for the same; but in the forepart of that section it provides that he is required to make plat books to enable the assessor to make a correct plat of each section and survey in his district. It would seem to follow from the decision of the well known case of Jones vs. County Commissioners, found in 57 O. S., page 189, that this duty being imposed upon him by law, and there being no special provision made for his payment, that he is required to do the same for the salary that is allowed him by law without any extra compensation, but with regard to the maps and plats I think that that contemplates that he who does the work shall be paid

a compensation therefor, and that would not exclude the auditor if he was the person chosen to make such maps and plats.

Yours respectfully,
F. S. MONNETT,
Attorney General.

MEMBERSHIP IN GENERAL ASSEMBLY COMPATIBLE WITH SERVICE AS OFFICER OF MILITIA ON DUTY.

Office of the Attorney General,
Columbus, Ohio, March 15, 1889.

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

DEAR SIR:—Your esteemed favor making inquiry as to the issuing of vouchers to Senator May and the Hon. Chas. W. Parker, members of the General Assembly, duly received. As I understand from the record and facts in these cases that each of these members of the General Assembly are officers of the volunteer service in the late Spanish-American war.

Article 2, section 4, of the constitution provides that no person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to have a seat in the General Assembly, but this provision shall not extend to *officers of the militia.*

The Federal constitution provides: "For calling forth the militia to execute the laws of the Union, suppress insurrections, provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the State respectively the appointment of the officers."

Membership in General Assembly Compatible With Service as Officer of Militia on Duty.

This Federal office, if it may be so called, being the single exception that the State reserved unto itself as Congress has no power to vest the appointment of United States officers in any authority except the president, the courts of law and the heads of departments.

Without herein setting forth further details and authorities upon which this opinion is based, it is my opinion and conclusion that the Hon. Henry J. May and the Hon. Chas. W. Parker, as members of the General Assembly come within the exception of the above constitutional provision, and should be treated as officers of the militia in the meaning of that section, and are entitled to seats in the General Assembly, and for pay from the state treasury for their services, notwithstanding their holding such commissions. The only Ohio precedent at hand is the one that appears in the appendix to the House Journal of the General Assembly of the State of Ohio for the year 1864, page 75, under the report of the committee on privileges and elections when a similar question was raised against the Hon. Wm. P Johnson, a representative from Athens County, in the year 1863 and 1864, having in the meantime accepted the office of surgeon in the 18th O. V. I., in the service of the United States while a member of such house, which report you have at hand.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

CONTRACTS BETWEEN RAILROADS IN CASE OF SALE, REORGANIZATION OR APPOINTMENT OF RECEIVER.

Office of the Attorney General,
Columbus, Ohio, March 31, 1899.

Hon. R. S. Kayler, Commissioner of Railroads, Columbus, Ohio:

My Dear Sir:—I have the honor to receive from you a communication of the 30th inst., regarding the question of the effect of the appointment of a receiver for railroad companies, and inquiring if a contract between two railroad companies would be axected or annulled in the event one or more of the roads would be placed in the hands of a receiver.

Second. Or in the event of the reorganization of either of the roads through foreclosure or sale.

Third. Would a contract made between a narrow gauge and compromise or standard gauge road, be affected in the event that the narrow gauge was reorganized and merged into, and under the control of some other company, and made a compromise or standard gauge?

Answering these questions in their order, I would say:

(1). The mere placing of the road into the hands of a receiver does not operate as a dissolution of the corporation itself, but the fact that a receiver is appointed by the court, merely changes the management of the road from the railroad company to the court operating through the receiver, and with that principle in view, it would be easy to determine that the receivership does not annul or affect contracts made between railroad corporations, which are of a nature that show the contracts are meant to be performed for a specified term. The appointment of a receiver would not shorten nor would it lengthen the term of the contract, or in any manner destroy the contract if it was such a one as

could be enforced against either of them. In a well adjudicated case, it was held that the appointment of a receiver over a railroad will not be allowed to disturb the rights of a vendor who had sold lands to the railway company, and all of his rights would be maintained upon application to the court which appointed the receiver, just the same as they would have been maintained prior to the appointment of such receiver. In another instance the court held that when two insolvent railway companies are in the hands of receivers appointed by the same court, the court may, upon application of either receiver modify a contract made by the companies before their insolvency for the use by one company of the tracks and terminal facilities of the other, but the exercise of that power was challenged as impairing the obligation of contracts. It would be a safe rule to assert that no rule would be adopted by a court having charge of a receiver for a railroad company that would violate or impair the obligation of any existing contract made by the road prior to such appointment.

(2). Your second inquiry is, would such a contract in the event of the reorganization of either of the roads through foreclosure or sale be annulled. When a railroad company is reorganized pursuant to section 3393 of the Revised Statutes, you will find that there is a provision in said section for the payment of the unsecured debts of the company of certain classes, which in the event of a reorganization pursuant to said section, must be paid. The contract existing as you have mentioned may create a debt of the class referred to, but in the event of a foreclosure and sale under foreclosure proceedings, the same rule applies to railroad property as applies to all other property sold under foreclosure, and that is, that the purchaser takes it freed from all the liens and obligations that were before that time entered into by it.

To this rule there are so many exceptions that I could not definitely state whether a contract would be modified in

any way, or annulled, unless I had the particular contract before me, to which your question might refer.

To illustrate. It has been held by our Supreme Court that a contract made by a railway company in acquiring right of way, to erect and keep up fences, is a contract that runs with the land; such a contract, in my opinion would not be annulled.

Again, such an agreement, as is mentioned in section 3407, Revised Statutes, is protected when the road is sold, when the particular steps are taken as therein required.

So, that in one class of contracts, it would follow they might be affected by sale under foreclosure of the road, and in another class not.

It certainly cannot affect any class of duties, provided by contract, that the road owes to the public.

A reorganization of a road is in a manner a sale of such road, and when the usual re-organization committee obtain the title by decree of court, they take it freed and in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder, which subsisted prior to the sale and reorganization. Therefore in the event of foreclosure proceedings and sale as provided by statute, the particular contract made with such railroad company need not necessarily be carried out by its successor, dependent upon the character of the same, but for violation of such contract the aggrieved party would have to look to the old road for damages sustained by him, if any.

(3). A contract between a narrow gauge and standard gauge road would not be of any different character or placed upon any different basis than contracts in general, and will be governed by the same principles as above set forth.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Salary of Prosecuting Attorney Recoverable From Unlawful Incumbent of the Office.

SALARY OF PROSECUTING ATTORNEY RECOVERABLE FROM UNLAWFUL INCUMBENT OF THE OFFICE.

Office of the Attorney General,
Columbus, Ohio, April 12, 1899.

Hon G. W. Gaghan, Bowling Green, Ohio:

DEAR SIR:—In your favor of the 12th inst. you ask the opinion of this department upon the following state of facts:

"On June 17, 1898, John W. Canary was appointed prosecuting attorney to fill a vacancy caused by the death of Mr. A. B. Murphy. At the November election of 1898, E. G. McClelland was elected to the office of prosecuting attorney, and after qualifying according to law demanded of Canary that he be given possession of the prosecutor's office, which request was refused, the said Canary claiming and assuming to exercise the duties of prosecuting attorney under any by virtue of an act passed April 19, 1898, the substance of which was to change the time of the commencement of the term of office of the prosecuting attorneys. This law was, on the 30th day of March, 1898, declared to be unconstitutional by the Supreme Court of our State. The proposition upon which you desire our opinion is: Who is entitled to the salary attached to said office of prosecuting attorney from the time Mr. McClelland demanded possession to the time the law was passed upon by our courts?"

While this question does not seem to have been passed upon by the courts of Ohio, yet the matter has received attention at the hands of the legal tribunals of other states.

In the case of Sarah E. Nichols, Admin., vs. Charles F. McLean, 101 N. Y., 526, the court said:

> "While the Legislature may abolish an office * * * subject only to constitutional restrictions, yet within these limits the rights to an office

> carries with it the right to the emoluments, and an officer unlawfully dispossessed of his office may, upon his reinstatement therein, maintain an action against an intruder, to recover the damages resulting from the intrusion; as a general rule, the salary or fees of the office received by the intruder are the measure of damages."

The judge, in the above case, remarked at the close of his opinion:

> "The defendant took the risk of the validity of his title and the loss should fall upon him rather than upon the plaintiff."

In Kessel vs. Zeiser, 102 N. Y., 115, the court said:

> "The right to recover is not affected by the fact that the usurper was put in possession of the office under a judgment of the Supreme Court, where such judgment was reversed and final judgment rendered in favor of the rightful incumbent."

So in Mayfield vs. Moore, 53 Ill., 428, it was held:

> "The legal right to an office confers the right to receive and appropriate the fees and emoluments thereof, he will be liable in an action for money had and received to him who holds the legal title, for the amount so received, deducting therefrom, however, the reasonable expenses of earning the same, where the person receiving the fees acted under an apparent right, and in good faith.
>
> "Nor will the recovery in such case, by the party having the legal title to the office, be limited to such fees as might be received after his right is judicially determined, but his right of recovery will embrace all fees received from the time his title accrued.
>
> "But inasmuch as the person who assumed to exercise the functions of the office without legal title, did so in apparent right, having his certificate

Salary of Prosecuting Attorney Recoverable From Unlawful Incumbent of the Office.

> of election and commission and it not appearing he had acted fraudulently in respect thereto, he was allowed to deduct from the fees received by him his reasonable expenses incurred in earning them."

In Dolan vs. The Mayor, 68 N. Y., 274, it was held that an appointment although made under an ambiguous statute, under a claim of right, and was regular in form, yet this would not protect him against a suit by the officer *de jure* to recover the salary received by him.

> "A *de jure* officer who has been excluded from his office by a person not legally entitled to it, may in an action on the case, recover from such person for the injury sustained by such exclusion.
>
> "Where a person exercised the duties of the office of sheriff under an apparent claim of right, and it was subsequently judicially determined that the office did not belong to him, the rightful officer may recover from such person, the fees and perquisites received by him while in office after deducting the necessary expenses of earning them."

Bier vs. Gorrell, 30 W. Va., 95.

See also 28 Cal. 21; 65 Cal. 472; 20 Ind. 1, 31 Ind. 429; 24 Mich. 458; 40 Mich. 397. In these cases, however, the statutes of the states provided that a *de jure officer* might recover from a *de facto* officer.

In view of the foregoing authorities, we would give it as our opinion that Mr. E. G. McClelland is entitled to the salary attached to the office of prosecuting attorney from the time he demanded possession of the same up to the time Canary was ousted by the court.

Respectfully submitted,

GEO. C. BLANKNER,

Assistant Attorney General.

ARMORY EXPENSES; ITEMIZING OF ACCOUNTS.

Office of the Attorney General,
Columbus, Ohio, April 13, 1899.

Gen. H. B. Kingsley, Adjutant General of Ohio, Columbus, Ohio:

SIR:—I have the honor to receive a communication from your department on the 10th inst., requesting further instructions as to a former opinion rendered to your department on or about February 2, 1899, in reference to filing itemized accounts for rent and expenses for the armory of the respective military organizations, as well as inquiry you made to filing of the separate bond required under Section 3085, R. S. I have carefully examined the authorities cited by you and will further say that your construction of the terms "disbursement of money" as referred to in your code of regulations, does not apply to that part of the money referred to in section 3085 wherein the sum of $300 per year is allowed to each company * * * to pay the necessary rental and expenses of such armory each year, which sum shall be paid to the commanding officer of each company * * *.

The general statutes vest all such powers in the auditor of state, and he is made the statutory disbursing officer of the moneys appropriated by the Legislature. In the said section 3085, he is the disbursing officer even of the amount due the adjutant general, to-wit: $500, but after it is once disbursed by the state auditor and placed in your hands you, in a sense, become a disbursing officer of that amount. Bearing in mind that the auditor is under the constitution and the statutes, the financial officer of the State, and under heavy bond for the proper disbursement of all appropriations made by the Legislature, it therefore becomes his right and duty to determine the forms of blanks or voucher which are to be used under any statute, requiring an itemizing of the ac-

count to his satisfaction and protection as a condition precedent to his issuing warrants on the state treasurer to pay such claims. Section 3085 seems to require a bond expressly from the officer charged with the duty of paying said $300 or any part thereof, for the purposes under section 3085 set forth. Therefore, it is my opinion that the auditor has the authority to prepare the official blanks under this section, which are to be used by the company, battery or troop receiving the money for such purposes, and when so filled out by the proper authority in compliance with said form.

The auditor should then have your approval and order attached to said itemized account, and also a receipt from the commanding officer that is entitled to such appropriation under section 3085.

It is still my opinion that the auditor, being the disburser of this fund primarily, having the right to require the above conditions, is further entitled under section 3085, and the condition attached to the appropriation bill, as well as the general powers vested in him as such auditor to have some official notification that a proper bond has been given under said section to his satisfaction as such disbursing officer, I would therefore suggest that so far as the security of bond under section 3085 is required for this particular fund, that the auditor of state having prepared the form of bond satisfactory to him, as such accounting officer, and approved of the same, that he require its execution and a sufficient bond for the purpose and retain the original in his office, and certify back to your office, for your convenience a copy thereof. Sections 168, 180, 181*a*, and other statutes requiring the auditor to report any defeasances or defaults of such commanding officer receiving such money, to the attorney general for collection, it would appear this would be the most harmonious and natural construction of these statutes for these respective departments.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

SALE OF DISEASED CATTLE BY OHIO AGRICULTURAL EXPERIMENT STATION.

Office of the Attorney General,
Columbus, Ohio, April 24, 1899.

Hon. Charles E. Thorne, Director of Ohio Agricultural Experiment Station, Wooster:

DEAR SIR:—I have before me your communication of the 18th inst., enclosing extensive correspondence with the Cleveland Provision Company, regarding the sale of some cattle slaughtered at the State station together with the autopsy results of the catle slaughered, and in which you reques an opinion from this department, relative to enforcing the agreement made with the Cleveland Provision Company for the acceptance of such meat as would pass inspection, sair company having refused to accept the same.

An answer to your question necessitates an examination of the statutes, to discover the authority under which you have acted, in making the contract to dispose of the meat of the animals in question, and whether, if at all, the same can be enforced by the board, by yourself or by the State.

I understand in the first place, from your correspondence, that the board of control of the Ohio Agricultural Experiment Station are not the parties claiming the authority of either slaughtering the animals in question or making the contract for the disposition of the meat, but that the experiment was conducted by the board of live stock commissioners.

The board of control of the experimental station organized under section 409-1 of the Revised Statutes of Ohio, would have no authority, as I view the law, to slaughter, or cause to be slaughtered, diseased animals for the purpose of preventing the spread of contagious or infectious diseases

among the live stock of the State, for such authority is vested in the said commission board, viz.: The board of live stock commissioners.

What is the limit and extent of their authority in the premises is the material question.

By section 4211-9, it is provided: Said board shall be appointed by the governor, by and with the advice and consent of the Senate. This section provides for the extent of their terms, and their number of meetings, and their organization.

Section 4211-10 designated their duties, authorizing them to use all proper means to prevent the spread of dangerous and fatal diseases among domestic animals, and to provide for the extirpation of such diseases; provides for the examination of all animals suspected of having such diseases to be examined by competent veterinarians; provides for the quarantining of such animals and the quarantining of the farms where such disease has recently existed; and states the object to be "so that no domestic animal subject to such disease be removed from or brought to the place so quarantined." It further gives to the board authority to prescribe such regulations as they may deem necessary to prevent contagion from being communicated in any way from the premises so quarantined.

Section 4211-11 provides that the bodies of all dead animals shall be buried or burned by the owners thereof as provided by law.

Section 4211-12 provides a penalty of $500 upon being convicted of any of the several offenses mentioned in said section; in exposing or moving diseased or exposed animals; or failing to make known to the board the possession of any such animal, etc., etc.; also provides for the expense incurred in the quarantining of such animals, and authorizing an action to be brought in the name of the State of Ohio

for the use of the board of live stock commissioners for the recovery of any such expense. This action being in the nature of a civil action.

The intermediate section provides how the records of the board shall be kept, their report, their expenses, compensation, etc., also the appropriation made for the purpose of the act, the proclamation prohibiting the importation of diseased live stock, and then by section 4211-16, being a supplement to the original act, authority is given to the commissioners to destroy animals affected with, or which have been exposed to any such disease, in order to prevent further spread of any such disease among the live stock of the State; giving such board power to determine what animals should be killed, the appraisal of the same, and provides that "their carcass be disposed of as in the judgment of the commission will best protect the health of the domestic animals of the locality." This section provides also, that no animal shall be slaughtered under the provisions of that act, unless first examined by a competent veterinarian in the employ of the commission, and the disease with which it is affected or to which it has been exposed be adjudged to be a dangerous and contagious malady.

Section 4211-17 provides for the payment of the compensation for animals so destroyed or slaughtered by said board. The remainder of the act, in my opinion, does not bear upon this question at issue, which as I have before said, is as to the authority to make such agreement or contract and the enforcement of the same.

Upon inspection of the correspondence submitted by you, I am led to believe that this test, which you have denominated a "tubercular test," has been made under Federal authority, and not by virtue of any power conferred upon you by the statutes of Ohio. I take this from your circular of March 20, 1899, in which you say the experiment has been conducted "in co-operation with the Bureau of Animal Industry United States Department of Agriculture."

Sale of Diseased Cattle by Ohio Agricultural Experiment Station.

I further gain from the correspondence laid before me, that all of the cattle slaughtered, in some degree reacted to the tubercular test, showing themselves, both by the test and autopsy to have been more or less affected with the disease. These animals were all, as I understand it, kept upon the farm of the experimental station at or near Wooster, and have not been such as have been found in the possession of others infected with the disease in question. They have merely been kept to experiment with, as you have stated, feeding the milk of tuberculosis cows to swine and calves to determine whether or not the disease can be communicated in that way to other animals. The proposition as originally made to the Cleveland Provision Company, and which was answered by them on March 15, was with the intention of using the meat of the animals found to pass inspection, for the purpose of food, and the proposition made to them and accepted by them in a qualified way, was for that purpose alone.

With this conclusion of facts, in my opinion the application of the law is an easy matter. If tuberculosis is a dangerous, contagious or infectious disease among live stock, then by section 4211-16 you may provide to destroy the animals affflicted with it, with this direction, that their carcasses be disposed of within the judgment of the commission, which will best protect the health of the domestic animals of the locality. Reading that in connection with the direction contained in the original act, now being section 4211-11, which is "that the bodies of all dead animals shall be buried or burned by the owners thereof as provided by law," it follows that the object of the Legislature was the entire protection of the flocks and herds of the entire State, and there was no qualification annexed by the Legislature to the extent of the inroads that the disease must have made in the animal before your board would be entitled to have the same destroyed. If such animal was affected in only a slight part, it nevertheless was an affected animal in my

view of the law, and could have been condemned and slaughtered, and when slaughtered, *its body must be disposed of as provided by the act.* That is, shall be buried or burned by the owner therof, or shall be so disposed of as in the judgment of the commission "will best protect the health of the domestic animals of the locality."

I cannot accept any other conclusion than this, that any affected animals, when slaughtered, no matter how slightly affected, must be disposed of as the statutes provides, and no such construction could wit hordinary good sense be given to said act as would lead us to say, that we could protect the health of the domestic animals and not protect the health of the human family.

Again, I do not find any authority for this board, which is a board of extremely limited powers, to sell or dispose of carcasses of slaughtered animals for the purpose in question.

I therefore conclude that as the autopsy and test shows that all animals slaughtered by the State board, and contracted for by the Cleveland Provision Company, were to some extent affected with tuberculosis, it would be against public policy to enforce such contract, and for that, as one reason, I would say the contract cannot be enforced.

Second. That you have no statutory authority to make any such contracts or agreements and it cannot be enforced for want of such authority. I would therefore say that neither the State nor the board could enforce any such contract. I am,

Yours very truly,

F. S. MONNETT,

Attorney General.

LEASE OF CANAL LANDS TO N. & W. RY. CO.; STIPULATIONS.

Office of the Attorney General,
Columbus, Ohio, April 24, 1899.

To The Canal Commission, Columbus, Ohio:

GENTLEMEN:—I have this day received from you your copy of a proposed lease with the Norfolk and Western Railway Company, of certain State lands therein described, situated in Pickaway County, Ohio, as amended by the counsel for said railway company. I have carefully compared the same, and upon examination of the statutes governing and enumerating your powers, would say:

First. With regard to that portion of the lease wherein objection is made to the setting forth that the State owns said lands by title in fee simple, and the qualification of the same by the said railway company, that it should recite that said State "claims ownership and control of said lands," I deem it incumbent upon the commission to make certain findings, and among the findings which the commission should make, is that the property about to be leased is the property of the State of Ohio. I think that the statute contemplates in the light of the decisions, that if it is a part of the canal lands of the State, it has a title in fee simple and no less title than that. So that the lease ought to recite, as you have already incorporated therein, that the State of Ohio owns by title in fee simple instead of the words, that "it claims ownership and control thereof."

Second. You have made as a necessary predicate to the leasing of the land a finding that the land belongs to the State as set forth in sections 218-225 of the Revised Statutes. Such a finding, in my opinion, is a necessary condition precedent to making a lease of any such lands, and this should also be incorporated in the lease as you have set it

forth. It, in my opinion, is necessary as a recital, for no lease can be made by your commission and by the joint board without having made such finding.

Third. With regard to the recital in the lease that "it is upon the application of said second party duly prepared, and filed with said first party for said purpose," I think the statute contemplates that there must be an application made to your board by the proposed lessee, and you must make the finding as heretofore set forth, and as contained in section 218-225, it pre-supposes that there is an application made, upon which a hearing shall be had, and pursuant to which certain findings are made. That application must be before the board for its action, and independent of any application being made, I cannot see how the board would have anything before it upon which to act, for if we were to suppose a case wherein two or more different parties were attempting to lease the same premises, there would undoubtedly be applications made by each of said several parties, and they would be heard together for the purpose of determining the advisability of the lease, and also as to the superior terms offered by either. I am of the opinion that the lease should recite that the application is made by the proposed lessee, and that your action as a board is upon that application. I therefore approve of that portion being inserted in the lease, and think that it ought to be retained there.

Fourth. The recognition of your title by the proposed lessee should not be for any particular portion of the premises named, but should be for the entire length of the same. If there is any dispute between the State and the railway company as to the title of the State in the premises, that ought to be adjudicated and settled by the courts prior to the execution of the lease. Of course you recognize that you are not leasing any lands of which you are not the owners, but you have made this finding that the State is the owner of the premises in question, which finding is presumptive evidence of the ownership of the State, and creates a *prima*

facie title, even in a contest in the courts to determine the same. I cannot agree to the proposed amendment of the lease in the language used by said railway company, to-wit: "Such of said foregoing right of way as may legally belong to the State," because in the opinion of the State it is all theirs, and there should be no admission that any part of it belongs to any other claimant except the State. Another reason is, that the proposed amendment to the lease would refer to the time of the termination of the lease, which would be 15 years hence. In 15 years the evidence of the State's title may all have passed away, and I would therefore insist upon that portion remaining as it is, as it is a material portion of the lease, and not trust to what the proof may show 15 years hence.

Fifth. I approve of the form as heretofore prepared by me and adopted by you with regard to the question of notice. In that you have followed the statutory language, or nearly so, and I do not see that the State is required to give any notice at all to the defaulting lessees, and I do not think that when the lease specifies the times of payment as the statute does, that there should be any notice thereof. The notice recited in the statute is the notice that should govern the contracting parties. Not being able to agree with counsel for the railway company upon these several amendments, I would suggest that the lease be made in the original form as prepared by me.

Yours very truly,

F. S. MONNETT,

Attorney General.

Claim for Damages Against Board of Public Works Not Maintainable.—Bridges Include Approaches and Abutments.

CLAIM FOR DAMAGES AGAINST BOARD OF PUBLIC WORKS NOT MAINTAINABLE.

Office of the Attorney General,
Columbus, Ohio, May 9, 1899.

To the Board of Public Works, Columbus, Ohio:

GENTLEMEN:—I have the honor to reecive from you a communication addressed to Charles E. Perkins by the Smith Milling Company, in reference to the claim of W. H. Wann for a loss sustained by accident on the canal, in the sinking of a boat load of corn, which belonged to Mr. Wann, amounting to 529 bushels. Your inquiry directed to the proposition whether or not the State could pay Mr. Wann anything for such loss or injury. I respectfully refer you to section 218-203 of Bates' Annotated Ohio Statutes, which, in my opinion settles the question adverse to the claim of Mr. Wann. No such claim can be paid out of the state treasury, either directly or indirectly, and the property mentioned in said claim is certainly embraced within said statute. I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

BRIDGES INCLUDE APPROACHES AND ABUTMENTS.

Office of the Attorney General,
Columbus, Ohio, May 20, 1899.

Hon. John Ray, Prosecuting Attorney, Sandusky, Ohio:

DEAR SIR:—This office is in receipt of your favor of the 20th inst, in which you make inquiry concerning the

proper construction of sections 2825 and 2834*b* Revised Statutes of Ohio, and also asking information as to the validity of a contract about to be entered into by the commissioners of your county.

Upon a hasty examination I have not been able to find any decisions in Ohio as to what constitutes a bridge. However a bridge is defined to be "a passageway by which travelers and others are enabled to pass safely over streams and other obstructions; a structure of wood, iron, brick or stone, ordinarily erected over a river, brook or lake. * * * The term *includes* all the appliances necessary to the proper use of the bridge embracing also its *abutments* and *approaches.*" In Tollan vs. Willinton, 26 Conn. 598 Crosen Freeholders vs. Strader, 18 N. J. L., 108; Bardwell vs. Jamaica, 15 Vt., 438, it has been held that approaches are part of the bridge. Likewise in Penn Township vs. Perry County, 78 Pa. St., 457, it has been held that "approaches as well as every necessary appliance for the proper use of the bridge, are parts thereof." To the same effect is the case of The Clinton Bridge, 10 Wall. (U. S.) 462. In view of these decisions, the approaches and everything that is necessary to put the bridge in condition to be used, should be held to be a part of the bridge.

If the cost of the bridge in question, exceeds the sum of $10,000, then, according to section 2825 R. S. of Ohio, the matter must first be submitted to the voters. The section, you will observe, says: "* * * The *expenses* of which will exceed $10,000." The different items you mention are absolutely necessary for the proper construction of the bridge and the court would hardly allow the contract to be so arranged as to have for its sole purpose the evasion of the section mentioned.

Relative to the proper construction of section 2834*b*, it seems as though a certificate from the auditor or clerk to the effect that the money required for the payment of the con-

tract in question has been levied, placed on the duplicate, and in process of collection, would be a sufficient compliance with the section.

Yours respectfully,
GEO. C. BLANKNER,
Assistant Attorney General.

P. S. A very thorough and interesting consideration of this question is found in 5 N. P., 260.

COMPENSATION FOR EXTRA CLERK HIRE FOR DECENNIAL APPRAISEMENT.

Office of the Attorney General,
Columbus, Ohio, June 13, 1899.

Hon. Walter D. Guilbert, Auditor of State, Columbus, Ohio:

DEAR SIR:—I have the honor to receive a request from you as to the construction of section 1076 of the Revised Statutes of Ohio, which reads as follows:

> "The county commissioners of the several counties have authority, and are required to make an additional allowance to the county auditor for clerk hire not exceeding 25 per cent. of the annual allowance made in the preceding sections in the years when real property is required by law to be reappraised."

The question to be determined is when shall the compensation, under said section, begin and end?

Upon an examination of the various statutes governing the duties of county auditors with relation to the decennial appraisement of real estate it is evident that there can be no uniform rule established as to when the compensation pro-

vided for by section 1076 should begin and end, as the labor necessarily performed in connection with said duties will be different in different counties and take a great deal longer time in some instances than in others. I am of the opinion, by an examination of the various sections of the statutes, that the compensation should begin pursuant to said section, when it is rendered necessary to make the additional employment, and should end at the earlist time that the statute contemplates the work to be completed. The different county auditors should be governed by this rule in the employment of such additional help as is provided by that section. It cannot be made the ground for the employment of additional help and continuing such employment beyond a time when the demand and necessity therefor has ceased, and it will be observed that the work contemplated to be performed by such additional help is in connection with the reappraisement of the real estate.

Yours respectfully,
F. S. MONNETT,
Attorney General.

PUBLICATION OF INSURANCE COMPANIES OF THEIR COMPLIANCE WITH THE LAWS, TO BE IN ENGLISH.

Office of the Attorney General,
Columbus, Ohio, June 19, 1899.

Hon. John P. Slemmons, Deputy Superintendent, Columbus, Ohio:

DEAR SIR:—This office has your letter of 5th inst. in which you ask for our construction of section 284, Revised Statutes of Ohio, which said section provides for the publishing, at least once a year in some newspaper of general

circulation, by every insurance company doing business in Ohio, a certificate from the superintendent of insurance that such company has complied with the laws of this State relating to insurance, etc.

In looking into this question we find that the Supreme Court, in Cleveland and Pittsburg Ry. vs. William McConnell, 26 O. S., p. 49, said:

> "Where a statute requires a publication to be made in a newspaper, in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper in any other language is not a compliance with the statute."

It would seem, therefore, from the foregoing opinion, that the publication required of the insurance companies should be made in a paper publishing the English language.

Respectfully submitted,
GEO. C. BLANKNER,
Assistant Attorney General.

INFIRMARY DIRECTORS HAVE POWER TO DETERMINE WHAT REPAIRS BE MADE TO INFIRMARIES.

Office of the Attorney General,
Columbus, Ohio, June 20, 1899.

Hon. C. B. Dechant, Prosecuting Attorney; Hon. J. M. Snook, County Commissioner, Lebanon, Ohio:

GENTLEMEN:—This department has the honor to receive a communication from you asking for the construction of sections 791, 871 and 964 R. S., with special reference to the power of the county infirmary directors, to re-

Infirmary Directors Have Power to Determine What Repairs Be Made to Infirmaries.

pair such infirmary, by improving the heating apparatus now therein, to-wit: by making such needful repairs as such board of directors see fit, to the extent of about $900 or less than $1,000. Under the statutes as now governing the relationship existing between the attorney general and the prosecuting attorney of each of the counties, it is scarcely a question that comes within the power of the attorney general to give an official opinion, but so far as we are able to give you the benefit of the construction, we will be glad to do so.

Section 964 provides that * * * "the board of infirmary directors shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including in such amount for all needful repairs at the infirmary; and the county auditor shall place the amount so certified by the infirmary directors on the tax duplicate of the county, and said infirmary directors *shall have full control* of said poor fund and shall be held responsible for the same."

Section 871 R. S. gives the commissioners the authority to erect a county infirmary; also the power to improve or rebuild the same by borrowing money for such purposes, and giving certain details how such loan shall be effected.

Section 795 provides in general terms for the county commissioners erecting certain public buildings or making any additional alteration to the same, with details as to the method by which such changes are made. It then becomes a question of construction in order to harmonize the powers granted by the statutes to these two respective boards. There is not much light thrown upon this question by judicial construction in Ohio. The broad proposition is laid down by the Supreme Court in 57 O. S., 189, as follows:

> "The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute."

Superintendent of Schools May Be Elected For a Period of Three Years.

This proposition is equally true of the board of infirmary directors; before construing the sections cited, if there be any ambiguity that requires construction, I might further say that section 964 was enacted in its present form April 26, 1898, while section 871 was amended April 25, 1898, one day preceding the former act, and then again section 964 seems to delegate to the infirmary directors the special authority of *determining* what are *needful* repairs and also of contracting for the same. It is my conclusion therefore, that section 964 being the more recent act passed and specifically delegating to a special board, the right to determine what are needful repairs and giving them the power over the same and holding them responsible for the same, should control as against the other sections vesting general powers by such earlier statutes, in the board of county commissioners, and until there is a judicial construction to the contrary, I would advise you to follow this construction.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

SUPERINTENDENT OF SCHOOLS MAY BE ELECTED FOR A PERIOD OF THREE YEARS.

Office of the Attorney General,
Columbus, Ohio, June 22, 1899.

To the Board of Education, Mrs. R. G. Murray, President School Board, South Charleston, Ohio:

I have carefully examined the question submitted to me by your board, as to whether or not your board has authority to elect a superintendent of your school for a term

Superintendent of Schools May Be Elected For a Period of Three Years.

of three years, and whether the election of F. S. Main, by your board, for a period of three years from the first day of September, 1898, is legal.

There are two sections of the statute which were amended at the last session of the Legislature, the provisions of which are conclusive of the question. Section 2834*b* as amended April 23, 1898, 93 O. L., 218, provides that the law which prevents contracts or obligations involving the expenditure of money, or resolutions or orders for the appropriation or expenditure of money, from being passed by any board of county commissioners, township trustees or board of education, shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education. This amendment was made to the statute, as I understand, to meet a pressing demand on the part of the board of education, to enable them to make more advantageous contracts for the employment of teachers and superintendents. Many times a better and more qualified teacher can be hired under a contract for three years, than if the board were compelled to hire one for only one year.

The other section of the statute, which bears upon this question, is section 4017 as amended and passed March 11, 1898, found in 93 O. L., 148. It provides that no person shall be appointed for a longer time than that for which a member of the board is elected. My opinion and construction of that language of the statute is, that it applies only to a regularly elected member of a school board for a full term, which is three years. So that under the former section which I have cited above, a school board may elect a teacher or a superintendent, for a period of three years, but cannot elect for a longer period than three years under the section last above cited.

Consequently I am forced to conclude that the election of Professor F. S. Main, by your board on April 25, 1898, for a term of three years, to take office on the first day of

September, was valid and legal, and that the only way of avoiding this contract would be for the board to dismiss the appointee under section 4017. Respectfully submitted,

F. S. MONNETT,
Attorney General.

FOREIGN CORPORATIONS MUST SUBMIT TO REQUIREMENTS OF OHIO LAWS TO DO BUSINESS IN THIS STATE.

Office of the Attorney General,
Columbus, Ohio, June 26, 1899.

Hon. William F. Bruce, Mt. Gilead, Ohio:

DEAR SIR:—Your inquiry in reference to the power of a West Virginia corporation to make contracts in the State of Ohio, duly received. I have insisted in a suit now pending in the Supreme Court, that a corporation formed in New Jersey with a single stockholder's liability of that state, cannot and should not be permitted to exercise any franchise within the State of Ohio, wherein our State constitution demands and exacts of Ohio corporation, a double stockholder's liability. You speak of "a tramp corporation:" Thompson on Corporation applies that term to citizens of one state passing to a foreign state and obtaining a charter under which they seek to operate in their own state, should not be extended, and they should not be empowered to make contracts in Ohio, and should be compelled to reincorporate under Ohio laws, and submit to the obligations of the Ohio constitution if they wish to avail themselves of the benefits of the Ohio laws.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Pamphlet Form; Definition of—Infirmary Directors Have Power to Stipulate Amount of Funds Needed for Maintenance of Infirmary.

PAMPHLET FORM; DEFINITION OF.

Office of the Attorney General,
Columbus, Ohio, June 26, 1899.

Hon. L. Hirsch, Supervisor of Public Printing:

DEAR SIR:—I have your communication requesting of this department an opinion as to the construction of the third contract awarded for the public printing, in which it is said "all reports, communications, etc., printed in pamphlet form, except bulletins of the Ohio Agricultural Experiment Station," constitutes the third contract.

The words "pamphlet form," concerning which you desire a construction, is held to be "a printed work consisting of a few sheets of paper stitched together, but not bound; now, in a restricted, technical sense, eight or more pages of printed matter (not exceeding five sheets) stitched or sewed, with or without a thin paper wrapper or cover."

I am of the opinion that that contract should be construed according to this definition.

Yours truly,
F. S. MONNETT,
Attorney General.

INFIRMARY DIRECTORS HAVE POWER TO STIPULATE AMOUNT OF FUNDS NEEDED FOR MAINTENANCE OF INFIRMARY.

Office of the Attorney General,
Columbus, Ohio, June 27, 1899.

Hon. W. D. Guilbert, Columbus, Ohio:

DEAR SIR:—In answer to the communication of Asa Jenkins, auditor of Clinton County, relating to the construc-

tion of sections 964 and 964*a* of the Revised Statutes of Ohio, referred by you to this department for an opinion upon the same, I will say that the power conferred by section 964 upon the infirmary directors permits them to fix the amount of money they will need for the support of the infirmary for the ensuing year, including the amount needed for repairs at the infirmary. This vests in them the power to determine the amounts needed. over which the county auditor or board of county commissioners have no revisory control; when the amount is properly certified to by the infirmary directors, the auditor places that amount on the tax duplicate of the county. The rate is not fixed by the infirmary directors, but the amount is fixed by them, and the control of the fund thereby raised is placed under the infirmary directors.

As I construe the letter of the auditor, this opinion covers that which is sought.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

COMPENSATION FOR PLATS AND MAPS FOR DECENNIAL APPRAISEMENT.

Office of the Attorney General,
Columbus, Ohio, July 5, 1899.

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

DEAR SIR:—In answer to your inquiry addressed to this department on the 5th of July, requiring a construction of section 2789 and of the special act applying to Cuyahoga County embraced within sections 2789-1, 2789-2, and 2789-3, I would say, that with regard to the first question proposed in your letter I consider that it is fully answered in a circu-

Compensation for Plats and Maps for Decennial Appraisement.

lar letter issued by this department on the 3d of March, 1889, addressed to the Hon. W. D. Guilbert, auditor of state, therein setting forth, that in my opinion, the auditor should be paid for such maps and plats as are provided for under section 2789, as necessary for use by the decennial appraisers, and therein stating my reasons for such a holding. That is on the supposition that the contract is awarded by the county commissioners to the county auditor for getting up such maps and plats, but that opinion was rendered with regard to counties having no special act covering the duties in that regard as Cuyahoga County has, and under section 2789-1, if the work, therein contemplated to be done by the officer known as a draughtsman, be brought down to date, it would appear that there is no necessity of the county auditor in this county making any decennial maps and tracings such as is provided for in section 2789.

But under the enumeration of the powers and duties of the draughtsman found in section 2789-2 it will be observed that it is not incumbent on him to make the maps and plats provided for in section 2789, and that the tracings and maps made by him are for the use of the boards of equalization and the auditor of the county.

There seems to be a lack of power in that special act directing the draughtsman to make these maps and plats for the use of the district assessors, but it follows that if they are made as directed by the special act and placed in the hands of the auditor, the auditor then becomes the party to furnish these to the district assessors. Under such construction it would appear that the maps and plats being furnished by the draughtsman, and being paid for under the salary provided for under that special act, that no extra compensation should be allowed to the county auditor for such maps and plats.

If the work can be accomplished in time by the draughtsman provided for under section 2781-1 I do not find authority for hiring assistants under that act, and would,

therefore, hold that in order to get the work accomplished you would have to look to section 2789 and have it accomplished either by the county auditor or by such persons as the county commissioners may award the contract to, under section 2789.

I consider that from these answers to questions one and two presented by you, in answering question three, it necessarily follows that if the commissioners deem it necessary to the proper appraisal of the real estate of this county to advertise for sealed proposals, the county auditor can be a bidder upon this work and is entitled to the compensation provided for in such contract as the commissioners may make, or the commissioners may award the work to the auditor under section 2789 without advertising the same.

Referring to said section 2789 as to whether this method will be resorted to, is not a question of construction, but a question of policy to be determined by the county commissioners.

This in my opinion, will answer all the inquiries proposed, and the same is respectfully submitted for your consideration.

Yours respectfully,
F. S. MONNETT,
Attorney General.

COSTS TO BE PAID BY STATE IN CASE OF STATE VS. LAWRENCE.

Office of the Attorney General,
Columbus, Ohio, July 11, 1899.

Hon. Walter D. Guilbert, Auditor of State, Columbus, Ohio:

DEAR SIR:—This office has the honor to receive a communication from you, bearing date June 12, in which you ask the opinion of this department as to the liability of the State for costs upon the following state of facts:

Publication of Legal Advertisements; Requirements.

John H. Lawrence, of Erie County, Ohio, was indicted February 7, 1896, tried and convicted on October 27, 1896, and sentenced to 15 years in the penitentiary. A motion for new trial was made and overruled and the sentence suspended until the defendant could file a bill of exceptions. Before the bill of exceptions could be filed, and while the prisoner was out on bail, he committed suicide. His administrator afterwards tried to get the Circuit Court to set aside the sentence of the Common Pleas Court but failed.

Section 1306, Revised Statutes of Ohio, reads: "In all felonies, when the defendant is convicted, the costs of the justice of the peace, * * * the same may be paid to the county out of the state treasury; * * *." In the case in question Lawrence *was* convicted *and* sentenced and the Circuit Court refused to set aside the verdict. Therefore, we would give it as our opinion that the State should pay the costs of the conviction.

Respectfully submitted,
GEO. C. BLANKNER,
Assistant Attorney General.

PUBLICATION OF LEGAL ADVERTISEMENTS; REQUIREMENTS.

Office of the Attorney General,
Columbus, Ohio, August 3, 1899.

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

DEAR SIR:—This department has the honor to receive from you a communication addressed to your office by J. M. Wood, proposing a series of questions which you have sought to be answered by this department as follows:

> "Where a newspaper company issues a weekly or semi-weekly and a daily paper, what insertion of a notice is required to comply with the sec-

> tions which require publication for one, two, three or four weeks respectively, in newspapers of general circulation in the county."

The question propounded does not refer to any special publication or to any specific statute that the party seeks to have construed, but thinking that it may refer more directly to the proceedings of county officers, and possibly to a construction of section 917 of the Revised Statutes of Ohio, I answer it with reference to that section which provides that the report therein provided for shall be published in two weekly newspapers; where the statute in that connection directs the publication of a notice, report or legal advertisement n a weekly newspaper, it means a weekly paper and not a daily paper. As was decided by one of the common pleas judges in Franklin County, this present week, the object of the law is to have the advertisement more generally circulated among the class of citizens receiving the weekly newspaper than among those receiving the daily. So that in order to strictly comply with the statute, the newspaper must be in fact a weekly, printed in the county. As to the duration of the publication, this is dependent upon the section concerning which the construction is sought, but answering it generally, I would say that where the notice is required to be published for one, two, three or four weeks, the number of weeks would mean from the first publication and not merely at the end of the second or third publication respectively. In other words, two publications might be made in weekly newspapers and be only seven days apart, but this would not com- the first publication; three weeks' notice means two weeks from th first publication; three weeks' notice means three weeks from the first publication. As was held in the 2 C. S. C. R., page 44:

> "Where two weeks' notice is directed to be given in one or more daily newspapers of general circulation in the corporation, this is a condition precedent to contracting, and that the contract could not be made until at least two weeks after the first publication."

Publication of Legal Advertisements; Requirements.

A newspaper that circulates especially in a city like Youngstown, and not outside of it, is not in contemplation of law a newspaper of general circulation in the county.

"What would be a legal advertisement, and what insertions may be charged for advertising?" Sheriffs' proclamations, examiners' reports, commissioners annual reports, notice of tax rates. As to what would be a legal advertisement, depends upon what section of the statute the advertisement is sought to be made under, or what particular class of work, or report, or sale, is sought to be advertised. If it is the examiners' report as provided for under section 917 of the Revised Statutes, it must be published in a compact form for one week in two weekly newspapers of different political parties, printed in the county; if there are two such papers published; if not, then the publication in only one paper is required. Since the amendment of that section, contained in 92 Vol. O. L., 188, the report must also be published in one newspaper printed in the German language, if it has a *bona fide* circulation of not less than 600 and in general circulation among the inhabitants speaking that language in the county.

As to what is meant by "compact form," attention is called to section 4369 Revised Statutes, in which that is defined, and the kind of type is mentioned, and the amount of space embraced within a square, to which I refer the inquiring party. As to what rates may be charged for advertising, reference is made to section 4366 Revised Statutes; one dollar for each square for the first insertion; and for each additional insertion 50 cents for each square, and in advertisements containing tabular work an additional sum of 50 per cent. may be charged to the foregoing rates. By reference to this section, and to the various sections, embraced between sections 4366 and 4370 inclusive, an answer may be readily obtained to each of the questions above propounded.

He also inquires as to whether any notice may be pub-

lished in a daily paper in addition to a weekly, and an additional fee to be charged therefore.

An advertisement cannot be inserted in a daily paper unless special provision is made therefor in the statute and compensation specifically allowed.

No additional publication in a daily newspaper can be charged for when the statute directs the publication only to be made in a weekly newspaper. Such publication, if made, is made gratis, unless, as I have said, the statute specially allows for the same.

Hoping that this has fully answered the interrogatories propounded by you, I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

WATERWORKS OF MUNICIPAL CORPORATION EXEMPT FROM TAXATION.

Office of the Attorney General,
Columbus, Ohio, August 4, 1899.

Hon. L. D. Bonebrake, State School Commissioner, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive from you a communication under date of August 4, addressed to you by W. H. Mathews, of Cincinnati, Ohio, relative to the location of the new waterworks, at or within Anderson Township, Hamilton County, Ohio, presenting the question as to whether or not the county auditor, has the authority to place on the tax duplicate of said county, said waterworks property, assessing taxes against the same for school purposes.

Waterworks of Municipal Corporation Exempt From

Under sub-division 8 of section 2732 of the Revised Statutes:

> "All market houses, public squares or other public grounds, town or township houses or halls, used exclusively for public purposes, or erected by taxation for public purposes, notwithstanding some parts thereof may be leased under and by virtue of section 2566 of the Revised Statutes of Ohio, and all works, machinery, pipe lines and fixtures belonging to any town and used exclusively for conveying water to such town, or for heating or lighting the same, and any unpaid taxes assessed against any property comprised in this sub-division, with any penalty thereon, is hereby remitted."

In connection with that subdivision, should be read the beginning to the section, showing that all the property therein classed shall be exempt from taxation. This sub-division has been construed in several leading cases, the principal among which, is the case of Toledo vs. Hosler, 54 Ohio State, 418, where it was held that gas wells, pipe lines, pumping stations and machinery, owned by the city of Toledo, was exempt from taxation. Upon the authority before cited and the construction given to it by the Supreme Court of Ohio, I am of the opinion that the property in question, coming within the exemption above provided, that no taxes can be levied thereon, either for State, county, municipal or township purposes.

Very truly yours,
F. S. MONNETT,
Attorney General.

SALARY LAW APPLICABLE TO OFFICE OF CLERK OF COURT.

Office of the Attorney General,
Columbus, Ohio, August 8, 1899.

Hon. William F. Garver, Prosecuting Attorney, Millersburg, Ohio:

MY DEAR SIR:—I have the honor to receive from you a communication under date of August 7, relative to the application of the county salary law found in 93 O. L., 660, to the office of clerk of court of your county. In your statement of facts set forth in your communication, you recite that the clerk of the court was elected at the November election, 1898; that his term of office began on the 7th day of August, 1899, and the question proposed was, as to whether the salary law above mentioned could apply to and govern the compensation of such clerk. In answer to that I would say, the act in question provides in section 133, when the act shall take effect and be in force, and that is, "from and after the first day of January, 1899." That act fixes by its own terms the date when it should go into operation, no question can be raised with regard to it. By the act in question, the salary of the clerk is fixed at $1,000. By section 1240 of the Revised Statutes of Ohio is provided:

> "There shall be elected, tri-annually, in each county, a clerk of the Court of Common Pleas, who shall hold his office three years, beginning on the first Monday in August, next after his election."

By section 16 of article 4 of the Constitution of Ohio, it is provided:

> "There shall be elected in each county, by the electors thereof, a clerk of the Court of Common Pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified."

It will thus be observed that the constitution fixes the length of the term of his office, but leaves it to the Legislature to fix the beginning of the term. This the Legislature has done, as heretofore shown by section 1240, to begin on the first Monday of August next after his election.

His election took place in November, 1898. The time of his election does not fix his term of office. His term of office was fixed by the statute to begin on the first Monday of August, 1899.

As the act in question went into operation on the first day of January, 1899, it follows that when his term of office was begun, which would be governed by the terms of the act in question, that is, his salary would be fixed by the act which went into operation January 1, 1899, and not under the system or by the plan that was in operation prior to the enactment of said act.

Throop on Public Offices, section 19, provides that it is well settled in the United States that an office is not regarded as held under a grant or a contract within the constitutional provision protecting contracts.

> "But unless the constitution otherwise expressly provides, the Legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the terms, or to abolish the office itself. But if either of those incidents of the office is fixed by the constitution, the Legislature has no power to alter them, unless the power so to do is expressly reserved to it in the constitution itself."

It will thus be observed that the constitution, by section 20 of article 2, provides:

> "The General Assembly, in cases not provided for in this constitution, shall fix the term of office

> and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Here, the change that the present clerk complains of, was not made during his existing term, but was made some eight months before his term began, and was in operation that long prior to the beginning of his term, so that the change from the fee system to the salary system was established long prior to his term, and it could not be said that such change took place during his existing term, because it did not. The Legislature has been duly empowered by said act to fix the term of office of the clerk of the Court of Common Pleas, as well as his compensation, and have so fixed it by the statute in question. I therefore hold in view of these sections of the constitution, and the constructions which they have received by our own Supreme Court, that Mr. Mily should be paid such salary as is provided in said act, and that he has no authority to retain the fees, costs, etc., collected by him as such officer, but the same must be paid into the county treasury, as provided by section 2 of said act. I remain,

Very truly yours,
F. S. MONNETT,
Attorney General.

Nuisance, a Cause for Damage Though Board of Health Provide no Deposit for Garbage, and Board Cannot Compel Council to Provide Means to Care for Garbage.

NUISANCE, A CAUSE FOR DAMAGE THOUGH BOARD OF HEALTH PROVIDE NO DEPOSIT FOR GARBAGE, AND BOARD CANNOT COMPEL COUNCIL TO PROVIDE MEANS TO CARE FOR GARBAGE.

Office of the Attorney General,
Columbus, Ohio, August 10, 1899.

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

DEAR SIR:—This department is in receipt of a communication from you in which you desire an answer to the following questions:

(1). Whether the fact that no place has been provided for the deposit of garbage by the municipality would excuse the tenant, or owner of the property, for having a nuisance upon his premises, and make it impossible for the board of health to punish him for maintaining such a nuisance.

In answer to the above, I would say that an individual is liable for the creation and maintenance of nuisances, independent of the fact as to whether the municipality has provided for the creation or organization of a board of health, and such individual is liable for depositing any unwholesome material on his own lands or on lands upon which he may reside as a tenant; this liability is independent of any action of a municipality providing any place for the deposit of garbage or unwholesome material, for while it is the duty of a municipal corporation so to provide, yet it does not establish nor does it take away the liability which the individual may incur. It has been frequently held by the courts, both of this State and elsewhere, that depositing anything upon one's own land, which emits an offensive or unwhole-

Nuisance, a Cause for Damage Though Board of Health Provide no Deposit for Garbage, and Board Cannot Compel Council to Provide Means to Care for Garbage.

some smell, that floats over the lands of another, producing unreasonable annoyance, or discomfort, or that is productive of deleterious consequences, is an actionable nuisance, as decayed vegetables, dead animals or anything that produces injurious results in the manner named.

It has been held in this State by the Supreme Court, that a municipal corporation is not liable to a person aggrieved, for the failure of its board of health to act in the cases and in the manner provided by law. It will thus be seen that a board of health might refuse to act, and no damage could be recovered from the city for such refusal, but although that may be true, yet the individual who suffers garbage or other noxious substances to accumulate on his premises, would still be liable for the maintenance of a nuisance, and the same could be abated by a local board of health under the powers already provided by statute, and should the individual refuse to abate the same, he can be compelled by civil action to do so, and also by criminal prosecution.

Therefore, in answer to this question, I would say that because the municipality has not provided a place for the deposit of garbage, that cannot be urged as a reason why the individual should be permitted to create a nuisance upon his premises, and would serve as no excuse therefore, and the local board of health may prosecute him for maintaining such a nuisance. Also those in the same neighborhood who are affected thereby.

(2). You also inquire, whether the board of health would be authorized in enforcing an order requiring council to provide a place or some means whereat or whereby, garbage may be properly cared for; and, if this question is answered in the affirmative, what means should be taken by the board of health to enforce such an order.

In answer to the above, I would say that under the enumeration of powers vested in cities and villages by sec-

Nuisance, a Cause for Damage Though Board of Health Provide no Deposit for Garbage, and Board Cannot Compel Council to Provide Means to Care for Garbage.

tion 1692 of the Revised Statutes of Ohio, full power is given to the municipality to prevent injury or annoyance from anything dangerous, offensive or unwholesome and to cause any nuisance to be abated. Also by sub-division 24 of the same section, villages and cities as well, have the power to establish a board of health and invest it with such powers and impose upon it such duties as may be necessary to secure the inhabitants from the evils of contagious, malignant and infectious diseases. They have certain other enumerated and express powers, as well as implied powers, to carry into effect the express powers enumerated, which in my opinion are broad enough to authorize the city or village council to provide a place or means whereat, or whereby garbage may be properly cared for. This power has been frequently exercised in Ohio, and has not been seriously questioned. But your question suggests, when the council of the city or village, refuses to provide such a place, can the board of health enforce an order requiring the council to provide such place, or such method, as will effectively dispose of the garbage of a city or village?

This produces a question that the law has not presumed to exist. That is when a city or village council has a duty to perform, made so by the statute, and the power to perform it, that they will refuse to do or perform such duty.

In the consideration of such question as you have presented, it must be determined by the comparative powers of the city or village, and the boards of health. In discussing these powers, it must be borne in mind that the council is the legislative body of the city or village, and the one that has the power to pass and create the ordinances for the government of the city or village. The board of health is a subsidiary board in comparison with the city or village council. The board of health may by the express powers vested in it, make such orders and regulations as it may deem nec-

Nuisance, a Cause for Damage Though Board of Health Provide no Deposit for Garbage, and Board Cannot Compel Council to Provide Means to Care for Garbage.

essary for its own government, for the public health, the prevention and restriction of diseases, and the abatement and suppression of nuisances. All such order and regulations have the same force and effect as is given ordinances of such city or village, when regularly passed; in that respect the board of health is itself a legislative body. When it comes to the enforcement of such order and regulation, it will be noticed that the employment of scavengers for the removal of garbage, etc., may be made by the board of health, but such contracts are subject to the approval of the council, and must be signed by the proper officers of the council. This is merely cited to show that the board of health is subordinate to the council in certain matters. If then, the council being the superior body in the matters suggested by you, and if the power to provide a place for depositing the garbage of the city or village be vested in the council, and they should refuse to do so, I do not think that it lies within the jurisdiction of the board of health of such city or village to enforce an order against the city or village to compel them to purchase a garbage crematory or a place upon which to deposit the offal of a city. This question being one in which the common council may exercise a discretion, and one for which it is necessary to appropriate money I do not think it is such an order or regulation as is contemplated by section 2122 of the Revised Statutes of Ohio, as within the power and authority of the board of health to pass. I therefore, hold that the local board of health would have no such authority as suggested in your question, and could not compel the council to act in such matter, if they refused to act therein.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Medical Attendance Included Under Incidental Expenses in Sections 631 and 632.

MEDICAL ATTENDANCE INCLUDED UNDER INCIDENTAL EXPENSES IN SECTIONS 631 AND 632.

Office of the Attorney General,
Columbus, Ohio, August 14, 1899.

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

DEAR SIR:—I have this day received a communication from you in connection with one addressed to you by Hon. A. W. Stiles, superintendent of the Girls' Industrial Home, asking for a construction of sections 631 and 632 of the Revised Statutes of Ohio, with reference to whether or not the term "incidental expenses" as used in those sections, embraces bills for medical attendance, for services in attending an inmate of said home. Answering your communication and the inquiries there arising, would say that the only construction placed by the Supreme Court of Ohio, upon this or similar sections of the statute, from which we can derive any light in the solution of the present question, was given in the case of the State vs. Kiesewetter, 37 O. S., 546. The question there presented was whether or not the clothing that was required to be furnished by section 631, and embraced within certain accounts paid out of the appropriation, of the Columbus Asylum for Insane, one of the benevolent institutions of the State, should or should not be allowed. The Supreme Court on page 548, said:

> "It is claimed that the clothing which the persons admitted into the institution, or those having them in charge, is required to furnish under section 631, refers only to such clothing as they are required to have at the time of their admission. We cannot assent to this claim. It seems plain to us that the obligation imposed by this section for the supply of clothing to persons admitted into the institution, continues as long as they remain in it; and in the case of patients in an asylum for the insane such expenses are chargeable on their es-

Medical Attendance Included Under Incidental Expenses in Sections 631 and 632.

> tate, or on those who would be legally bound to furnish such clothing if they were not in the asylum. If the duty thus imposed by section 631 should not be performed, the remedy in such case of failure is found in section 632, which is the mode adopted in the present case for reimbursing the institution."

This construction shows plainly, one fact with regard to the "incidental expenses," that is, that the "incidental expenses" must be construed to mean not only the "incidental expenses" made necessary by their admission to the home, but by their continuance therein. To place the same construction upon those words, as is placed by the Supreme Court upon the words "requisite clothing," we would have to say that the obligation thus imposed, is a continuing obligation, and continues as long as the individual remains in the home. It is plain that if the patient in the case of a commitment to an asylum, has an estate out of which the expenses can be paid, that such persons should be permitted to have granted free to him or her, the charity of the State, but if able to pay the duty is plain, such individual should pay for the expenses and clothing incurred while in the asylum.

The Girls' Industrial Home was created for the purpose of instructing, employing and reforming of evil disposed, incorrigible and vicious girls. (Sec. 675.) If any such have estates out of which such expenses may be collected, they should be collected out of the estate of such individuals or in the absence of any estate, there is a provsion made for the payment of the same out of the treasury of the county from which the person came. The policy of the law seems to place the burden of the maintenance of such institution, directly upon the State as a whole; but with regard to the "incidental expenses" and "requisite clothing" provided by the State for the individual inmates thereof, the same must be borne by the counties from which the individual came. There

National Croation Society Must Qualify Under Section 3631-13 to Transact Business in Ohio.

is in this distribution of expenses a seeming fairness and justice which would visit on the individual counties sending the greatest number of inmates, their portion of the burden thus imposed, and to those counties that have none of the individuals mentioned in section 675 R. S., the burden is lightened in the same degree, and they would thus not be compelled to pay the clothing, bills and incidental expenses of those properly chargeable to other counties. As I view the question, "incidental expenses" are bills within the same category as "requisite clothing," and I would construe medicne and medical attendance as part of the incidental expenses. In my opinion, it would be perfectly reasonable that medicines should be placed on as high a plane, and is of as great necessity to the inmate, as is clothing. I therefore would hold that the term "incidental expenses" as used in sections 631 and 632 of the Revised Statutes, embraces bills for medical attendance and all such bills should be, under section 632, forwarded to the auditor of the county from which the person came, and he should pay the amount of such bill out of the county funds to the financial officer.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

NATIONAL CROATION SOCIETY MUST QUALIFY UNDER SECTION 3631-13 TO TRANSACT BUSINESS IN OHIO.

Office of the Attorney General,
Columbus, Ohio, August 16, 1899.

Hon. Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—I am in receipt of a communication addressed to you by Archibald Blakeley, Esq., of Pittsburg, Pa., attorney for the National Croation Society, in which the

National Croation Society Must Qualify under Section 3631-13 to Transact Business in Ohio.

inquiry is made of you, as to what said association must do to qualify under the laws of Ohio, to be permitted to do business herein. Such communication and inquiry being referred to me, I examined the constitution and by-laws of said society, and find that the same come within the definition of what is known as fraternal beneficiary associations, as defined by House Bill No. 370, passed April 27, 1896.

By section 1, article 10, of the by-laws of said society, it is provided, "that the beneficiaries of a deceased member holding a certificate in said society, shall receive therefrom the sum of six hundred dollars ($600), less the funeral expenses which shall not exceed the sum of one hundred dollars ($100)."

I cite this section of the by-laws in order to direct the attention to the provisions made in section 13 of said act, which provides:

> "That no society, lodge or body of any secret or fraternal society or association, * * * paying only sick benefits not exceding two hundred and fifty dollars ($250) in the aggregate to any person in any one year, or a funeral benefit to those dependent on a member not exceeding three hundred and fifty dollars ($350), shall be required to make any report thereof under this article, or under other articles of the insurance laws."

The society in question, fixes a funeral benefit fund of at least five hundred dollars ($500), therefore, they are not excused from the operation of the preceding section of said act. Further, they constitute such an association as has been construed by the insurance department of this State, as being with a view to profit. They will, therefore, be compelled to qualify as provided for in the act in question.

I herewith attach to this communication, a copy of said act, and when you answer the letter referred to, you might

Treasurer Not Allowed Additional Compensation for Back Taxes on National Bank Shares Voluntarily Paid.

forward to the writer thereof, the same for his information, and as to the method of procedure, the society must adopt in order to qualify under the laws of Ohio. I am,

Very truly yours,
F. S. MONNETT,
Attorney General.

TREASURER NOT ALLOWED ADDITIONAL COMPENSATION FOR BACK TAXES ON NATIONAL BANK SHARES VOLUNTARILY PAID.

Office of the Attorney General,
Columbus, Ohio, August 16, 1899.

Hon. W. H. Halliday, Auditor of Franklin County, Columbus, Ohio:

DEAR SIR:—I have your communication of this morning, submitted to this department, relative to the right of the county treasurer of Franklin County to receive any compensation for the collection of taxes under the following circumstances: It would appear from the statements made to me, that certain of the national banks, located within said county, have for the past four or five years, refused to pay the taxes assessed against their bank shares, claiming the right to deduct the debts of such individual shareholders from the value of their shares before the payment of the taxes thereon, and that the taxes could only be computed on the net amount remaining, after deducting the *bona fide* debts from the value of the bank shares, and under this process, the banks contend that bank shares in national banks, were credits, as defined by the statutes of Ohio, and being credits they claim this privilege of deducting the debts of the shareholders therefrom. The claim has been made on the part of the shareholders, by the banks, and the banks are re-

quired by the statutes of Ohio to pay the taxes on the shares and deduct the same from their earnings. The banks thereby become the paymasters for the shareholders, and hence the claim made by them.

This question was litigated through the various courts of Ohio, and to the Supreme Court of the United States. The case carried to the Supreme Court of the United States, involved this question, being the First National Bank of Wellington, Ohio, vs. H. P. Chapman, treasurer of Lorain County, and was decided by the Supreme Court of Ohio, in 56 O. S., 310, in which our court held that the national bank shares are not credits as defined by the statutes of Ohio, but that they are investments in stocks as defined by our statutes, and consequently no right is given to deduct any debts of the shareholders therefrom. This decision was affirmed February, 1899, by the Supreme Court of the United States in volume 173, U. S. Rep., 205.

Since that time, I am informed by you, that the national banks of this city, and county, have paid without process being issued against them of any kind the back taxes covering four or five years, and the question presented to me, is whether the county treasurer shall be allowed any compensation for the collection of such taxes as delinquent taxes under any contract made with the county commissioners, or otherwise?

Answering the same clearly, a resume of the statute is necessary.

Under section 1094 of the Revised Statutes, there is no doubt but what this amount so paid by said banks was delinquent, and being delinquent, it is contended that when the same was paid, the treasurer was entitled to his compensation thereon.

The methods for the collection of delinquent taxes is provided for by the following sections of the Revised Statutes of Ohio: Sections 1095, 1097, 1102, 1104 and 2859. These various sections of the statute empower the county

Treasurer Not Allowed Additional Compensation for Back Taxes on National Bank Shares Voluntarily Paid.

treasurer to proceed at any time for the collection of delinquent taxes, and it is expressly made his duty to do so. The compensation provided for is upon the theory that he perform his duty. This is true, both with regard to delinquent taxes on personalty, and on real estate. Section 2844 of the Revised Statutes, suggests that it be collected by distress. Section 2856, Revised Statutes, says the treasurer may collect the taxes and penalty by any of the means provided by law, and for his services he shall be allowed 5 per centum, etc. If there was any contract made by the county commissioners with the county treasurer for the collection of delinquent personal taxes, it must have been by virtue of section 2856, Revised Statutes.

The various sections that I have above cited, have been construed many times by the Supreme Court of Ohio. Among other cases, may be stated State ex rel. vs. Cappeller, 39 O. S., 207, in which the Supreme Court said:

> "The State is not liable for any part of the fees or expenses of the county treasurer or county auditor, or their assistants, except where such liability is created by statute."

Also the case of Hunter, Treasurer, vs. Borck, 51 O. S., 320, in that case the treasurer of Lucas County mailed notice to taxpayers, notifying them by what time their taxes must be paid, together with the penalty thereon, by which process a great amount of back taxes were collected, and upon which the treasurer claims compensation, in addition to that provided by law for the performance of his duties. The Supreme Court of Ohio, in passing upon that question, said:

> "To entitle the treasurer to the compensation allowed under section 1094, he must render the prescribed service. He must proceed to collect, *and collect* the delinquent taxes by distress or otherwise, together with the penalty of 5 per centum on the amount of taxes so delinquent. It is con-

Treasurer Not Allowed Additional Compensation for Back Taxes on National Bank Shares Voluntarily Paid.

> ceded that the treasurer cannot earn his commission by merely standing behind the counter and receiving the tax the next day after the 20th of December. If he would proceed to collect, *and collect* the delinquent tax otherwise than by distress, he may collect by procuring a rule of court, as provided by section 1097 of the Revised Statutes; or, by attachment and garnishee process as described in section 1102 of the Revised Statutes; or, by action as provided in section 1104 of the Revised Statutes; or, by special effort in person or through agent, and not by simply holding himself out as ready to receive the taxes due, or making a formal request of the taxpayer, or giving notice to taxpayers generally to pay their delinquent taxes."

In the case at bar, the efforts made by the treasurer to collect the taxes and assessments, were not such as would meet the requirements of the statute, and no suit was begun by him. No attempt was made to collect by distress, and there was no resort to any other or similar mode of procedure. Under this authority, and being acquainted with the facts and circumstances under which the banks are now paying these back taxes, I am of the opinion that the county treasurer should not be allowed any additional compensation, unless he actually collects the same or part of the same by distress, or by some one of the various methods suggested by the statutes. The suit which determined the liability of the banks was begun in Lorain County and carried through the various courts of the State to the United States Supreme Court, by the law department of the State. This I do not think is the bringing of such an action as the statute contemplates It must be brought by the county treasurer in order to entitle him to receive extra compensation therefore.

Considering the importance of the subject and that this attempt has been made in other parts of the State, by the treasurer to collect additional compensation, when such back

taxes were paid, I thus have gone at length into the consideration of the question, in citing the authorities which in my opinion, bearing upon the question at issue.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

COSTS IN TRIAL FOR INSANITY TO BE PAID BY COUNTY.

Office of the Attorney General,
Columbus, Ohio, August 17, 1899.

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

DEAR SIR:—This office has the honor to acknowledge receipt of your favor of recent date asking for the opinion of this department as to the liability of the State for costs incurred in the following case:

A person having been indicted for a felony, was first tried for insanity, and being found sane, was then prosecuted on the indictment, convicted and sentenced to the penitentiary. Your query, as I understand it, relates merely to the State's liability for costs made in the trial for insanity.

I would direct your attention to section 7241, Revised Statutes, which reads in part as follows:

> "If the jury find the accused to be sane, and no trial has been had on the indictment, a trial shall be had thereon, as if the question had not been tried; if the jury find him to be not sane, * * * the accused shall, until restored to reason, be dealt with by such judge as upon inquest had."

You will observe the language of the foregoing section, viz.:

Costs in Trial for Insanity to be Paid by County.

> "If the jury find the accused to be sane, * * * a trial shall be had thereon (the indictment) as *if* the question *had not been* tried."

The examination as to the sanity of the prisoner was at his own request, not that of the officers of the State, and was entirely separate and distinct from that of the prosecution which followed. Granting, for the sake of argument, that the prisoner had been found insane, placed in the proper institution, remained there for some time, was then discharged, and then held to answer, as the law provides for the crime he had committed, it could not be contended that the State would be liable for the costs made upon the hearing that resulted in the prisoner being found insane. The section herein quoted provides that "if the jury find him (the prisoner) to be not sane, the accused shall, until restored to reason, be dealt with as *upon inquest had,*" and this being the case, the proceeding should be considered as an inquest of insanity and the costs incurred in such examination should be paid as provided for by statute in lunacy cases.

The second case you submit is somewhat different from the first in that the prisoner had been tried and convicted before his sanity was questioned. Acting under section 7240 of the Revised Statutes, a jury was empaneled to try the prisoner on the question of his plea of insanity, and said trial resulted in finding the prisoner to be sane. Your inquiry in this case, as in the one above, is whether or not the State should pay the costs made on the trial for insanity.

The same conclusion is to be reached in this case as in the former. The trial as to the sanity of the prisoner was no part of the prosecution, it being raised at the instance of the prisoner, not to prove that he did not commit the crime, but to prevent, if possible, having him sentenced to pay the penalty provided by statute. Had he been found to be insane, he would have been dealt with as stated in section 7240,

Compensation for Clerk of Court for Supplying Information for Secretary of State.

"as upon inquest had," but the conviction would have stood until he had been released, when he would have had to face the bar of justice and receive his sentence.

Respectfully submitted,
GEO. C. BLANKNER,
Assistant Attorney General.

COMPENSATION FOR CLERK OF COURT FOR SUPPLYING INFORMATION FOR SECRETARY OF STATE.

Office of the Attorney General,
Columbus, Ohio, June 18, 1899.

Hon. Charles Kinney, Secretary of State:

DEAR SIR:—I have the honor to receive from you an inquiry under date of the 16th inst., containing a communication from Hon. P. H. Kaiser, county solicitor of Cuyahoga County, in which an opinion is sought from this office, relative to the construction of sections 1248-1250 of the Revised Statutes of Ohio, in reference to the amounts to be paid to the clerk of the court, for furnishing to the secretary of state, upon his request, the information required by section 1248.

Answering the same, I would say that section 1248 of the Revised Statutes, in the main, refers to criminal cases, and for each case so reported by the clerk, not exceeding 50 in number, the clerk shall be entitled to 25 cents, and for each additional case above 50, he shall receive 10 cents. But at the close of section 1248 appears this clause, "and such other information as the secretary of state requires." Under section 139 of the Revised Statutes, the secretary shall annually prepare from official reports, and from whatever other reliable sources he may have access to, the statis-

tics of the State; and by section 140, it is made the duty of every state, county and other officer, to answer fully and promptly, without compensation, such special and general questions as the secretary may propose, with the view of securing statistical information. Construing these two sections, together with section 1248, I am of the opinion that the question of what shall constitute "statistics" is left with the secretary of state to decide. The latter clause in section 1248 assists in leading me to this conclusion. I do not think that if the secretary should require from the clerk of the court upon the blank to be furnished by him, any data for statistical purposes referring to civil cases and the judgments recovered therein, or matters relating thereto, that the clerk of the court would be required to furnish this information without compensation, and if the secretary should require information as to civil cases, I think the same compensation would apply as applies to criminal cases. The one class of reports would require as much labor to secure as the other class, and simply because the statute mentions criminal cases, is no reason why civil cases should not be paid for, if demanded by the secretary of state. The requiring of such data seems to be left to him exclusively. I remain,

Very truly,

F. S. MONNETT,
Attorney General.

COSTS IN THE ATKINSON AND O'NEIL CASES.

Office of the Attorney General,
Columbus, Ohio, August 23, 1899.

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

DEAR SIR:—Referring to the enclosed bills which were submitted to this office for advice, as to the State's liability for certain charges therein made, I beg to advise you as follows:

Nuisance Damaging Waterworks Cause for Suit for Damage by Municipality.

The four bills for expert testimony, amounting to $200 should not be allowed. The matter of paying expert witnesses has been passed upon by Attorney General Monnett's predecessors, namely, by Hon. D. K. Watson on January 3, 1890, and by Hon. J. K. Richards on May 21, 1892, both holding that such witnesses are not entitled to more than the regular compensation provided by law. The item of $13.50 for meals furnished the jury, as well as that of Frank Koehne for $20.80 for notary fees should be disallowed. The account rendered by Sheriff Young for $128 ($64 in each case) for death watch over Atkinson and O'Neil, should be stricken from the amount to be paid by the State. As I understand this matter, Sheriff Young, without instructions from anyone took it upon himself to place guards over these men, while they were in the county jail and after they had been convicted. I cannot find any law which would justify the sheriff taking the course he did, and I would, therefore, advise you to refuse to pay the amount so charged.

Relative to the amount of $150 for making a survey and plat of the Ohio Penitentiary, I would advise you to allow the gentleman who did the work $75 for the same.

Respectfully submitted,
GEO. C. BLANKNER,
Assistant Attorney General.

NUISANCE DAMAGING WATERWORKS CAUSE FOR SUIT FOR DAMAGE BY MUNICIPALITY.

Office of the Attorney General,
Columbus, Ohio, September 8, 1899.

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

DEAR SIR:—I have the honor to receive from you a communication under date of September 8, in which you

Nuisance Damaging Waterworks Cause for Suit for Damage by Municipality.

state that the city of Wellston, Jackson County, Ohio, has public waterworks, and obtains its water supply from a small creek into which a slaughter house is permitted to discharge much filth and material, by emptying into a brook that discharges into such creek, and you inquire what is the proper body to begin necessary action to abate the nuisance thereby created, and just what steps such body should take to have the slaughter-house removed.

My answer to the same is as follows:

1. The owners of the slaughter-house, or the parties responsible for its condition, may be prosecuted criminally, by anyone, under section 6921 of the Revised Statutes of Ohio.

2. The city of Wellston may prosecute the owners of the slaughter-house or those responsible for its condition, under section 2433 of the Revised Statutes of Ohio.

3. The township board of health of the township in which the village of Hamden, Vinton County, Ohio, is situated, may begin an action by injunction under the powers conferred upon them by section 2116, of the Revised Statutes of Ohio, and thereby abate the nuisance created. Under section 2121 of the Revised Statutes, the township board of health consists of the trustees of the township, and if this particular nuisance is outside of the village of Hamden, the action should be brought by the township board of health, and if within the village of Hamden, there is a village board of health, the action should be brought by the village board of health.

4. Further, I have no doubt, whatever, that the city of Wellston, if it owns the waterworks in question, can itself commence an action by injunction against the parties maintaining such slaughter-house, enjoining them from permitting the filth to discharge into such brook, and can apply to a court having equity powers for a mandatory injunction abating such nuisance.

This would have to be done by the employment of coun-

sel and the filing of a petition in the Court of Common Pleas of the county in which the nuisance existed. The details of the proceedings necessary would be familiar to any attorney of experience.

Hoping that this has fully answered the questions propounded by you, I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

STYLE OF DEED TO COUNTY COMMISSIONERS.

Office of the Attorney General,
Columbus, Ohio, September 12, 1899.

Ohio Canal Commission, Columbus, Ohio:

GENTLEMEN:—I have the honor to receive a communication from you inquiring to whom land shall be deeded when purchased by the commissioners of a county, referring in your letter to the sale of a portion of the abandoned Walhonding canal.

If the purchase is by the commissioners of the county the proper grantee to be named in the deed would be, "The County Commissioners of Coshocton County, Ohio, their successors and assigns." I assume in answering the above that it is a case wherein the commissioners are authorized to make purchases of land. I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

VACCINATION MAY BE REQUIRED BY BOARD OF HEALTH.

Office of the Attorney General,
Columbus, Ohio, September 20, 1899.

Hon. C. O. Probst, Secretary Board of Health, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a communication from your office under date of September 18, 1899, tasking for a written opinion upon certain propositions therein set forth, to-wit:

First. Whether in consideration of the facts in your communication narrated, boards of health of Ohio would have authority to enforce an order requiring vaccination of school children.

Second. Whether a board of health of a city, village or township where smallpox is actually present, has statutory authority to enforce such a rule.

In the data and preamble of these inquiries you inform this department that Ohio is now and has been suffering in many portions of the State with an epidemic of smallpox for more than 18 months past, and that the disease is still present in several communities of the State, and is still prevailing to considerable extent in other and adjoining states; that there is a well grounded reason to fear that the citizens of this State shall have another epidemic of the disease to contend with during the coming winter.

As I have stated to you in former opinions in reference to the powers of the health board, both State and local, they have been delegated to your respective boards by the Legislature, and the Legislature obtained its right and power through the constitution, and the courts, both State and Federal, have from time to time sustained many of these powers so granted to health boards under the police clause of the constitution of the respective states. The constitu-

tional clause relied upon by the courts is usually found in the preamble and bill of rights and based upon the fundamental principle, that the purpose of government is to promote the common welfare and to preserve life and protect property and obtain happiness and safety.

The powers so vested in the Legislature by the constitution have been exercised in the State of Ohio under the various acts creating and delegating powers to all boards of health, both State and local.

Section 2 of the act (90 O. L., 94) in broad terms delegates to the state board of health the supervision of all matters relating to the preservation of the life and health of the people of the State.

Among such powers it expressly provides:

> "The board may make special or standing orders or regulations for the prevention of the spread of contagious diseases or infectious diseases, * * * and such other sanitary matters as admit of and may best be controlled by a universal rule. * * * it may also make and enforce orders in local matters when an emergency exists and the local board of health has neglected or refused to act with sufficient promptness or efficiency. * * * * It shall be the duty of all local boards of health, health authorities, officials, officers of State institutions, police officers, sheriffs, constables, and all other officers or employes of the State, county, city or township thereof, to enforce such quarantine and sanitary rules and regulations as may be adopted by the State Board of Health, and in the event of failure or refusal on the part of any member of said boards or other officials * * * * they shall be subject to a fine of not less than $50 upon conviction, upon two offenses not less than $100. The board shall make careful inquiry as to the cause of disease, especially when contagious, infectious, epidemic or endemic, and take prompt action to control and suppress it."

Vaccination May Be Required By Board of Health.

Section 2116 (O. L., 90, p. 88) gives further directions by statutes to the local board in words as follows:

> "And when complaint is made, or a reasonable belief exists, that an infectious or contagious disease prevails in any house or other locality, the board may cause such house or locality to be inspected by its proper officers, and on discovering that such infectious or contagious disease exists, may, as it deems best, send persons so diseased to the pest-house or hospital, or may restrain them and others exposed within said house or locality from intercourse with other persons, and prohibit ingress or egress to or from such premises."

Sections 2129 and 2137 provide for penalties for the disobedience of the orders of the boards of health so made.

In addition to said general powers so named, section 2135 (90 O. L., p. 91) provides that the "board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination, and may furnish disinfectants and enforce disinfection. It may afford medical and other relief to and among the poor of the corporation as in its opinion the protection of the public health may require, and during the prevalence of any epidemic may provide temporary hospitals for such purposes; and the said board is hereby required to inspect semi-annually, and oftener if in the judgment of the board it shall be deemed necessary, the sanitary condition of all schools and school buildings within its jurisdiction and may, during an epidemic or threatened epidemic close any school, and prohibit public gatherings for such time as it may deem necessary."

The Standard Work on Public Health and Safety by Parker & Worthington, section 123 states:

> "It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under the direction of the

> health authorities. This requirement is a constitutional exercise of the police power of the State, which can be sustained as a precautionary measure in the interest of the public health. But as incidental to their general powers relating to the prevention of contagious diseases, the health authorities have the right to prescribe regulations with reference to vaccination, and they may require vaccination whenever, in their judgment, the interest of the public health will be thereby subserved. To this end they are authorized and even directed to provide a suitable supply of fresh vaccine virus, of a quality and from sources either approved by the State Board of Health, or in their judgment proper and reliable, and to furnish the means of thorough and safe vaccination to all persons who may need the same, and without charge to such persons as are unable to pay for the same."

In the case of Abell vs. Clark, 84 Cal. 226, the court says in passing upon the statute governing the subject of compulsory vaccination:

> "The Legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the State, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects.
>
> "It is for the Legislature to determine what is for the public good, and what are necessary and salutary burdens to impose upon a general class of persons to prevent the spread of disease, and its discretion cannot be controlled by the courts, if its action is not clearly evasive and unlawful under pretense of lawful authority."

This was passing upon an act of 1891 which provided for the vaccination of all children attending the public school and for the exclusion of unvaccinated children therefrom. The court further stated:

> "The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much dreaded disease. While vaccination may not be the best and safest preventative possible, experience and observation the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the world, has proved it to be the best method known to medical science to lessen the liability to infection with the disease.
>
> "This being so, it seems highly proper that the spread of smallpox through the public schools should be prevented or lessened by vaccination, thus affording protection both to the scholars and the community.
>
> "Vaccination, then, being the most effective method known of preventing the spread of the disease referred to it was for the Legislature to determine whether the scholars of the public schools should be subject to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class."

The importance of the questions herein submitted and the interference with private rights by harsh enforcement of the rules laid down by other states prompts me to furnish the above details and authorities for your reference.

The general powers given to the state board seem, standing apart from the subsequent modifications of section 2135 to be comprehensive enough to answer your first inquiry in the affirmative, viz.: That they have the authority to enforce an order requiring vaccination of school children or any other citizens whose occupation or profession is such as would spread the disease if affected thereby. But the Legislature seems to have modified the broad terms given to the State and local boards in other sections by section 2135 in applying the rules to vaccination and in using the language therein, viz.: "That the board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination and may furnish disin-

fectants, etc., in connection with the remaining part of the section when properly construed, I hold to vest in the state board the power to issue orders to the local boards of cities, villages and townships, to enforce vaccination where smallpox is actually present, but I do not believe the authority has been expressly granted in view of this limitation to enforce an order requiring vaccination of school children without immediate and imminent danger of epidemic or threatened epidemic, the power being given to such board to close such school and prohibit public gatherings for such time as the board may deem necessary. This power seems to be given rather as an alternative than one that the boards of health should resort to wherever the same will afford the necessary precaution and in the immediately infected districts, may take measurers for gratuitous vaccination.

In addition to the above statutes, section 3986 provides for boards of education enforcing certain rules and regulations, to secure the vaccination of, and to prevent the spread of smallpox among the pupils attending such schools.

Your inquiry did not extend to your powers to be exercised in connection with the school boards, and I have not entered into that discussion.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

National Guard Cannot Be Paid From Appropriation For Camp Purposes to Take Trip Beyond State Limits.

NATIONAL GUARD CANNOT BE PAID FROM APPROPRIATION FOR CAMP PURPOSES TO TAKE TRIP BEYOND STATE LIMITS.

Office of the Attorney General,
Columbus, Ohio, September 25, 1899.

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

DEAR SIR:—This department has the honor to receive a request for a written opinion upon the following propositions, to-wit:

> "The Legislature, during the last session, appropriated certain sums of money for the purpose of defraying the expenses of the national guard of Ohio in camps of instruction, as provided by law—that is, for pay of guard while in camp and for the subsistence and maintenance of the same upon such duty.
>
> "Owing to the Spanish war, and the disintegration of the old guard as a consequence thereof, the encampment of 1898 was dispensed with. Now that the guard has been reorganized, it is proposed in lieu of the encampment for 1899, to take the guard to New York to participate in the welcome and celebration of Admiral Dewey's return to this country.
>
> "To meet the expenses of this trip, would the State be warranted in construing the maneuvering that would attend such a trip as a camp of instruction, and would I be justified in drawing upon the funds appropriated as designated, to defray the expenses that may come upon the State in the carrying out of such project?"

The above propositions involve the construction of several statutes, and basing my opinion upon the facts set forth in your inquiry, and advising you as to your duties in the premises, I find that under the general statute, section 154,

National Guard Cannot Be Paid From Appropriation For Camp Purposes to Take Trip Beyond State Limits.

R. S., it is your duty to examine all claims presented for payment out of the state treasury, and if you find any such claim legally due, and that there is money in the state treasury duly appropriated to pay the same, you shall issue to the party entitled to receive the money thereon, a warrant upon the state treasury for the amount so found due, and take receipt, etc., and you shall not draw any warrant on the treasury unless you find the same legal, and that there is money in the treasury which has been duly appropriated to pay the same. Analyzing your inquiry under this section, I find you must come to two conclusions. First. Whether the debt created under such circumstances by the militia or the officers thereof, would constitute a legal claim. Second. If the same be a legal claim, whether within the life of the respective appropriations of 1898 and 1899, there is money in the treasury duly appropriated to pay the same.

First proposition: Would the claim be a legal one under the statutes controlling the militia and military affairs?

Chapter 2 of title 15, relating to the organization of the militia provides for the organization of the active militia in times of peace.

Section 3034 says:

> "The active militia shall be known as the Ohio National Guard, and may be ordered into active service by the governor to aid the civil officers to suppress or prevent riot or insurrection, or to repel or prevent invasion."

There is no contention that the debt is created under that section. The provision for legally created debts by the enlisted militia or the officers thereof, provides for time, place and duration of encampments, as follows:

> "Sec. 3078: The national guard shall encamp not less than six nor more than eight days in each year, and unless the commander-in-chief prescribes the time, place and manner of assembling the

> troops for that purpose, the commander of each regiment, battalion, troop and battery shall order the encampment for his command at some time during the months of May, June, July, August, September or October, upon such date as shall be approved by the commander-in-chief."

In the absence of any adjudicated definition of the term encampment or encamp, I find the Century dictionary defining encamp, as follows: "To go into camp; form and occupy a camp; settled in temporary quarters, formed by tents as an armory or company. 2. To form into or fix into a camp."

"Encampment. 1. The act of forming and occupying a camp, establishing in a camp. 2. A place where a body of men are encamped."

Webster gives substantially the same definition, to-wit: "The act of pitching tents as by an army or traveling company for temporary lodging or resting. 2. The place where an army or company is encamped; regular order of tents or huts for the accommodation of an army or troop."

Section 3079, laying down the rules in force during the active service and encampment, provided that:

> "Whenever any portion of the national guard shall be ordered into active service that while on duty at any encampment, the rules and regulations of war and general regulation of the government of the army of the United States shall be considered in force. * * * While in camp the troops shall be thoroughly exercised in military drill and in the routine of camp duty * * * If any person shall temporarily erect any stand * * * for the purpose of exposing for sale, gift or barter or otherwise keeps any spirituous or intoxicating liquors whatsoever, at or within a distance of one mile from any such encampment, he may be put immediately under guard * * * * and such officer may turn over such person to any police of-

National Guard Cannot Be Paid From Appropriation For Camp Purposes to Take Trip Beyond State Limits.

> cer or constable of the city or township or town where any such duty, parade, drill or encampment or meeting is held, for trial, etc."

Section 3082 provides that:

> "Officers and enlisted men shall receive pay for each day actually spent by them on duty at the annual encampment, at the following rates, together with all necessary transportation, quartermaster's stores and medical supplies. For each day's service: Each colonel shall recive $4.50, etc., * * * for each day's service performed each enlisted man shall receive $1 and commutation of rations at the rate of 40 cents a day."

Section 22, article 2, of the constitution provides that no money shall be drawn from the treasury except in pursuance to a specific appropriation made by law, and no appropriation shall be made for a longer period than two years. The courts in passing upon this in the case of the State vs. Medbery, 7 O. S., 522, says:

> "No officer of the State can enter into any contract except in cases specified in the constitution whereby the General Assembly will, two years after be bound to make appropriations, either for a particular object or a fixed amount. The power and discretion intact to make appropriation in general involving upon each bi-annual assembly. The whole power of making appropriation of the public revenis vested in the General Assembly. It is the setting apart and appropriating by law a specific sum of the revenue for the payment of the liabilities which may accrue. No claim against the State can be paid, no matter how just or how long it may have remained overdue, unless there has been a *specific* appropriation made by law to meet it. By virtue of this power the General Assembly exercises its discretion in determining what claims exist or debts of the State shall be paid as well as the amount of expenses which may be incurred."

National Guard Cannot Be Paid From Appropriation For Camp Purposes to Take Trip Beyond State Limits.

Recurring to House Bill No. 667, making appropriation for the last three-quarters of the fiscal year ending November 15, 1898, and the first quarter of the fiscal year ending February 15, 1899, the following sums, for the purposes therein specified under the constitution, were specifically appropriated out of the general revenue, to-wit:

Ohio National Guard	$45,000
Subsistence of Ohio National Guard	16,000
Fuel, lumber, straw and medical supplies.	4,000
Transportation Ohio National Guard....	15,130
Horse hire Ohio National Guard.....	4,950
Forage for horses Ohio National Guard.	825
Uniforms, overcoats and blankets.....	23,000

House Bill No. 842, known as the appropriation bill for the year 1899 up to February 15, 1900, pays substantially a like amount under like specified items to be expended under the constitutional laws for the specific purposes therein set forth, and for none other. The two sources of power and authority to create debt to absorb these specified items arise either from active service or from a legal national encampment. As suggested in your letter, and as appears from the auditor's books, the only amount expended out of these respective appropriations on the items above named have been for active service in the riots at Cleveland and other active services. Dost of the bills for the same have alreadp been presented, audited and allowed, and the remaining fund unexpended amounts to $67,564.65 under the items of "Pay of Ohio National Guard;" and the sum of about $26,926.70 under subsistence, and under transportation the sum of $23,614, and a like appropriation for fuel, horse hire and forage, making a total unexpended reserved for encampment of about $115,000.

I might further call your attention to title 15 governing the militia and military affairs, which provides: That the militia shall consist of citizens of this State. The duties of

National Guard Cannot Be Paid From Appropriation For Camp Purposes to Take Trip Beyond State Limits.

the national guard seem to be provided for by statute and by implication for the benefit of the State, and within the jurisdiction of the State and except when called into the voluntary service of the United States, the commander-in-chief and the subordinate officers and appointees under such commander-in-chief would apparently get their authority to act within the territorial limits of the sovereignty that elected them and commissioned them to serve either as executive or military officers.

There seems to be no extra territorial powers under the constitution or under the statutes granting the authority delegated to any such officers, and indeed under the constitution I do not clearly see how they could well have extra territorial powers. It is therefore my conclusion that it is the duty of the auditor of state, as accounting officer under the general statutes, to determine whether this is legal and whether there has been an appropriation made, if legal, for such expenses as inquired about in your favor of the 25th inst., and having submitted it to this department for legal construction of the statutes, it is my opinion that the encampment provided for by statute above set forth, should be held within the boundaries of the State; that the kindred statutes above cited all construed clearly indicate the purpose of the Legislature to have the encampment within the jurisdiction of the criminal officers or the immediate vicinity controlling the morals of the camp; and the definition of encampment as above cited by the recognized lexicographers, and the specific directions of the soldiers while in camp, together with the amount appropriated specifically for transportation, to-wit: about $1.70 for each soldier then enlisted as a militiaman when the appropriations were made, and the amount of subsistence, together with the amount donated for each day's pay, aids me in the construction in giving it the effect of purely State encampments.

Second—The appropriation being specifically made for the various items therein set forth as above enumerated,

when properly construed, must be either for active service or for encampment duties expended in the respective ratios therein set forth; and your inquiry as to whether the expenditure in taking the guard to New York to participate in the welcome and celebration of Admiral Dewey's return to this country is contemplated under such appropriation, my answer would be in the negative. I might further suggest as an executive officer that you would not have the discretion to legislate, but are obliged to enforce the laws as they exist, and neither your department nor this department can take into consideration the benefit that might accrue from the substitution of a trip to New York for that of encampment as prescribed by statute. These are purely legislative matters, and if the Legislature has the power it can make an appropriation for this class of military drill, transportation and maneuvering.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

VACCINATION MAY BE REQUIRED BY BOARD OF HEALTH AS A CONDITION FOR SCHOOL ATTENDANCE.

Office of the Attorney General,
Columbus, Ohio, October 4, 1899.

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

DEAR SIR:—This department has the honor to receive a further communication from your board in reference to the construction to be given to section 3986 of the Revised Statutes.

Vaccination May Be Required By Board of Health as a Condition for School Attendance.

This section provides:

> "The board of each district may make and enforce such rules and regulations to secure the vaccination of, and to prevent the spread of smallpox among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public requires; and the boards of health and councils of municipal corporations, and the trustees of townships, shall, on application of the board of education of the district, provide at the public expense without delay, the means of vaccination to such pupils as are not provided therewith by their parents or guardians."

As I indicated in my former communication, the Legislature has vested in the boards of each district, as therein stipulated, a wide discretion and all such necessary rules and regulations that they may see fit to regularly adopt to secure the vaccination of and prevent the spread of smallpox as therein given. The limitation seems to be only that the safety and interest of the public may require it.

In further answering your inquiry as to the power of the school boards to enforce such order, I cannot but repeat the specific grant of power set forth in the statute, viz: That if the safety and interest of the public require it, such board may demand that all children should show evidence of vaccination. It is a fair rule of construction to state that the board must have the inherent power to carry out the duty imposed upon them. Such board would have the power to make a rule or regulation covering the subject matter, viz.: To prevent the spread of smallpox, and such rule could include the prohibition of attendance to the public school by such unvaccinated pupils. The power thus granted to one board representing the State for that purpose, to-wit: The school board would be a sufficient defense and protection against arrest for a violation of the truant laws. In the ab-

sence of more definite legislation I can suggest no other remedy or safely construe the language of the statute so as to vest in the board other powers than above stated.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

COMPENSATION OF SCHOOL EXAMINERS.

Office of the Attorney General,
Columbus, Ohio, November 1, 1899.

Mr. C. H. Wood, Prosecuting Attorney, Mt. Gilead, Ohio:

DEAR SIR:—I have received your esteemed favor of the 31st ult., relative to compensation of school examiners. This office has promulgated no opinion on this question.

Section 4029-4 provides specifically for the payment of compensation and contingent expense of examiners for attendance both at examinations and commencements, and says that such amounts shall be paid in the *manner* simply, and not as provided for in section 4075, which section, you will observe, is a provision for the compensation for examining *teachers*. While, under such a construction, the statutes do not provide a specific amount to be paid for the holding of examinations and commencements under section 4029, yet a reasonable remuneration is due, and it is to be presumed that if the amount provided for examining teachers in section 4075, is a reasonable amount for that service, a like amount would be appropriate for services under section 4029.

Trusting that this construction will seem clear to you, I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

Certificate to Practice Medicine May be Revoked for Certain Causes.

CERTIFICATE TO PRACTICE MEDICINE MAY BE REVOKED FOR CERTAIN CAUSES.

Office of the Attorney General,
Columbus, Ohio, November 1, 1899.

Ohio State Board of Medical Registration and Examination, Columbus, Ohio:

GENTLEMEN:—I have the honor to receive from your secretary a communication dated October 24, 1899, placing before me circumstances in which certain persons are practicing medicine within the State of Ohio under the firm name of Dr. Stevens & Company, and Dr. France & Company, and therein requesting an opinion upon the following questions:

1. Where one person not in possession of the necessary certificate to practice medicine, is having the prescribing, directing or recommending for the use of any person any drug or medicine by and through a physician who has legally received a certificate, and has been legally registered as such practicing physician; does such action on the part of the one who has not received such certificate permit him to evade the penalties prescribed by law for the illegal practice of medicine?

In answering the above question, it is admitted that the scheme above set forth, as adopted by the individuals named, is a mere subterfuge, but whether or not the same would make the individual practicing it liable to a penalty under the act to regulate the practice of medicine in the State of Ohio, will depend upon the construction of section 4403*f* and section 4403*g*.

Section 4403*g* so far as it could have any application to this question is as follows:

> "Any person practicing medicine or surgery as defined in section 4403*f* in this State, without having first complied with the provisions of sec-

> tion 4403*c* and section 4403*d*, except as herein provided, shall be deemed guilty of a misdemeanor, and shall be fined not less than $20 nor more than $500 or be imprisoned in the county jail not less than 30 days nor more than one year, or both."

Within the same section are certain penalties for illegally practicing mid-wifery, and the description of certain other crimes and misdemeanors such as filing or attempting to file a medical diploma or the certificate of another as his own; filing or attempting to file a forged affidavit of his identity; willfully swearing falsely to any questions propounded to him on his examination or to any affidavit required to be made or filed by him with your board.

I review these for the purpose of inquiring whether or not the facts charged against said individuals would amount to a crime or misdemeanor under the act.

The practicing of medicine or surgery under section 4403*g*, is such practicing as is defined in section 4403*f* of the Revised Statutes. If upon examination of section 4403*f* it be found that by a reasonable construction of said act and such conduct on the part of an individual as is described in the above interrogatory could be embraced, such individual might be charged as illegally practicing medicine or surgery.

Turning to section 4403*f*, we find the practice of medicine or surgery defined as follows:

> "Any person shall be regarded as practicing medicine or surgery within the meaning of this act who has appended the letters M. D. and M. B. to his name, or for a fee prescribes, directs or recommends for the use of any person any drug or medicine or any other agency for the treatment, cure or relief of any wound, fracture, bodily injury, infirmity or disease."

While the individuals described as thus practicing medicine under the firm name of Dr. Stevens & Company, and

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Dr. France & Company do advertise as a partnership in their "special system," yet when it comes to the material part of that which has been described in the statute as a misdemeanor, they seem to very guardedly abstain from doing the things therein defined, viz.:

(*a*) The individual who has no certificate does not attach M. D. or M. B. to his name.

(*b*) They do not prescribe, direct or recommend for the use of any person any drug, medicine or any other agency for the treatment, cure or relief of any wound, fracture, bodily injury infirmity or other disease. If such person did these things or either of them, he would be regarded as practicing medicine or surgery within the meaning of said act. Such prescribing, directing or recommending, you say, is always done by the person who has the certificate from your board. The "Co." attached to the name is the person in the business who is disqualified to practice. He does not practice as defined by section 4403*f*; for his partner has a certificate duly registered and issues all prescriptions and directs and recommends the drugs or medicines or other agencies, and it is not a prescription or direction or recommendation of the disqualified partner, but the one who is thus qualified. The mere fact of their association together under a partnership name, while all the prescribing is done by the qualified partner, cannot under these circumstances, in my opinion, hold the one guilty who does not prescribe, direct or recommend. There may be things that he can engage in under such partnership, as a lawful occupation. He may be of utility to the qualified partner in getting business, in keeping office, in nursing patients, not requiring any qualification under the aw for these things, or many other things that might be mentioned, and the partner might divide the income with him, which might tecnically be considered a division of fees, but the test of the crime and misdemeanor is not in receiving money, but would be for receiving the fee for prescribing, directing or recommendiny charped in the statute, I would therefore

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conclude this branch of the inquiry by saying that this appears to be a cleverly concocted scheme on the part of such disqualified partner to avoid all liability under the act, and in my opinion, such disqualified partner, under the facts as stated by you, cannot be held liable under said act

The second inquiry is, would such association and practice on the part of the duly registered members of such firms be sufficient grounds for the revocation of their certificates issued by your board?

This question was answered under a former communication to your secretary from this office, in which in substance I held, that the same grounds upon which your board may refuse to grant a certificate to any applicant, may be urged after such granting of the certificate as a reason for revoking the same. Under the act (section 4403*c*) the grounds for refusing to grant or after granting to revoke a certificate are three:

(1). Guilty of felony.

(2). Gross immorality.

(3). Addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery.

The first and third grounds are express in form, and concerning them your board has not such wide discretion as in the definition of the second ground, viz.: gross immorality.

In my view, when a person secures a certificate from a registration with your board authorizing him to practice medicine, it is an authority for him to practice medicine in a lawful way and not in an unlawful way. I believe that the courts would construe the word "gross immorality" to be sufficiently comprehensive to embrace facts like you have narrated, and to be sufficient to authorize your board to revoke any certificate that you may have issued to any person authorizing him to practice medicine or surgery, after a lawful notice and hearing having been given to such person, and he having been found guilty. I therefore would

Game Wardens Cannot be Appointed, But Other Police Officers to Act.

answer your last question in the affirmative, and hold it would be sufficient grounds for the revocation of the certificate issued by your board to such person. I am,

Yours very truly,
F. S. MONNETT,
Attorney General.

GAME WARDENS CANNOT BE APPOINTED, BUT OTHER POLICE OFFICERS TO ACT.

Office of the Attorney General,
Columbus, Ohio, November 6, 1899.

L. H. Reutinger, Esq., Secretary Ohio Fish and Game Commission, Athens, Ohio:

DEAR SIR:—I have your esteemed favor requesting an opinion from this office as to the effect of the recent decision announced by our Supreme Court, relative to county game wardens, and also soliciting an opinion as to how to enforce the laws governing the fish and game commission, if such power no longer is vested in the county game wardens.

The decision of the Supreme Court announced on October 31, was in the case of Armstrong vs. W. H. Halliday, and as the opinion has not as yet been promulgated, I give you the syllabus announced by the court, which is as follows:

> "The office of 'county warden' created by section 409, R. S., is a county office and cannot be filled by appointment, article 10, section 2, constitution. Demurrer to answer overruled and petition dismissed."

There is nothing in this opinion that affects the position of the chief game warden, nor is there anything to affect the

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appointment of a special warden for Lake Erie, and for the Mercer County, Lewiston, Six Mile, Licking, Laramie and Sippo reservoirs of the State, as provided for under section 409.

The scope of the decision only embraces county wardens, holding them to be county officers, which cannot be true of the special wardens, nor of the office of chief warden.

Since this decision all power is, of course, taken from the county wardens, and as such they have no right to perform any of the duties devolving upon them as county wardens by the provisions of the fish and game chapter.

There was no power given under the sections of the law cited to county wardens to serve any process. They had certain powers vested in them, among others, they could arrest under section 409, all violators of the laws of the State enacted for the protection of fish and game, wherever found in the State. They could, under section 6968-2, seize, remove, and forthwith destroy any net, etc., used in violation of any law enacted for the protection of fish. But by the same section all such nets used in violation of law, might be abated and summarily destroyed by any person, and in that respect the county game wardens did not have any more power than any private individual, but the law merely provided that while such nets, etc., may be abated and summarily destroyed by any person, it was expressly made the duty of every game warden, deputy game warden, sheriff, constable or other police officer to seize, remove and forthwith destroy the same.

In the first instance the statute is a general delegation of power to any person to abate and summarily destroy any net, etc., and in the second place it seems to have been the object of the Legislature to have enjoined it upon the officers named, as a special duty to likewise seize and destroy the same. Now since the decision in the above case has been announced, and since the commission has largely relied upon

Game Wardens Cannot be Appointed, But Other Police Officers to Act.

the county game wardens for the enforcement of the laws, the question is proposed by you, how can the law be enforced without the county game wardens to enforce it?

You still have the chief game warden and the special game wardens not affected by this decision. They can act in the premises, and in addition thereto every sheriff, constable, or other police officer is authorized and commanded to enforce the provisions above mentioned.

In addition to these I am of the opinion that any person may be engaged by you to see to the enforcement of the laws and execute the powers vested in "any person" under section 6968-2, but such person acting under such employment from the commission would not be considered a special constable, nor a deputy sheriff, nor would he have any special designation by virtue of such appointment, nor is it necessary for him to have any designated title in order to authorize him to perform the powers under section 6968-2, which are:

> "To abate and summarily destroy any net or other means or device whatever for taking or capturing fish or whereby they may be taken or captured, located, set, put, floated, had, found or maintained in or upon the waters or streams of this State or upon any boat engaged in fishing in any of the waters of this State, in violation of any law enacted for the protection of fish."

Special constables may be created for the purpose and by the authorities named in sections 603, 608, 616 and 6685, Revised Statutes of Ohio; and deputy sheriffs may be appointed and created under the authority conferred by section 1209 of the Revised Statutes; and upon examination of the same I do not think that their appointment could be made as such special officers to enforce the provisions of this act, but by the employment of individuals to do the things specified in section 6968-2 above cited, by your commission, I think the full enforcement of the law can be lawfully secured.

Affidavits as to the violation of these laws can be made by such persons, but the serfice of warrants, summons and other process must be performed by such officers as are now legally authorized to do and perform such acts. I am,

Yours very truly,

F. S. MONNETT,

Attorney General.

COMPENSATION FOR AUDITOR FOR INDEXING JOURNAL OF COUNTY COMMISSIONERS.

Office of the Attorney General,
Columbus, Ohio, November 29, 1899.

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

DEAR SIR:—This department has the honor to receive from you a communication under date of November 25, containing certain inquiries made by the auditor of Delaware County, to which you desire an answer.

Taking them up as presented in your communication, they are as follows:

1. Can an auditor, under section 850 of the Revised Statutes of Ohio, make or keep an index to the county commissioners' journal direct and reverse and charge therefore 10 cents for each such index?

In answer to the above query I would say, that by an examination of section 850 of the Revised Statutes the following language will be found:

> "And the clerk (referring to the county auditor) shall receive for indexing provided for in this section such compensation as is provided for like services in other cases."

This expression takes this particular item of labor out from the rule as set forth in the case of Jones, Auditor, vs.

Compensation for Auditor for Indexing Journal of County Commissioners.

Commissioners, 57 O. S., p. 189, wherein it is held that where certain labor incorporated in the statute is required of a county auditor and no compensation is provided therefore, that the law presumed conclusively that the labor thus mentioned shall be performed by the county auditor without any extra compensation therefore. But here in this act it is provided that the clerk, viz.: The auditor "shall receive for indexing * * * such compensation as is provided for like services in other cases."

The query naturally arises in the solution of this question as to what is meant by "such compensation as is provided for like services in other cases." It is plain to be seen that there are no such "like services" provided by statute to be done by the county auditor, and I am of the opinion that when it uses the expression "like services" that it refers to services in indexing by other county officers. As indicative of this, I refer you to the following sections of the statutes which provide for like services in other cases, viz.:

The sheriff of the county, pursuant to section 1213, Revised Statutes, is entitled to 10 cents for indexing.

The clerk of the county under section 1257 of the Revised Statutes, is entitled to 15 cents for indexing.

Under section 1263, of the Revised Statutes, in another form of indexing, the clerk is entitled to eight cents for indexing.

Under section 1183*m* the county surveyor has his compensation provided for in the following language:

> "The same fees as those of other officers for like services."

Under sections 1155 to 1157 of the Revised Statutes, the county recorder is allowed 10 cents for indexing.

Under the special law incorporated in the charter governing the city of Cleveland, found in volume 93, page 674, of the Ohio Laws, I have taken the pains to inquire as to

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the construction adopted by the law department of that county, and am informed by the county solicitor's office that the auditor is allowed 10 cents each way.

I have gone into this summary of the laws seeking to arrive at an interpretation of what is meant by the language "such compensation as is provided for like services in other cases."

It is plain to be seen that applying the language found in the 57 O. S., page 216, that, "giving this construction to the statute we conclude that the board, being a creature of statute, an agent whose powers are not general, but special, should be held to represent the county n respect to its financial affairs, only in such matters *as are distinctly provided for by statute.* Authority is thus given it to entertain and pass upon claims, *which for some amount may be a legal demand against the county.* * * * Speaking more specifically, the board may properly pass upon a question *whether in fact the given service has been rendered and upon the amount which ought to be paid upon an unliquidated claim,* where in law a claim may exist, i. e., *where it has a legal basis upon which to stand.*" It is merely a question of what such compensation should be, and applying the rules as laid down in the statutes above cited, I would say, that where it has been considered necessary to make the indexes in the manner as done by the auditor of Delaware County, an allowance of 10 cents each way would seem to be in keeping with the rules established in other cases, and would seem to me the common interpretation placed upon similar statutes, and therefore such allowance cannot be considered excessive, and is authorized by the language above quoted from section 850 of the Revised Statutes.

2. Is an auditor of a county entitled to four per cent. on property placed by him on the duplicate as subsequent additions by certificate or otherwise, and on additions made by himself or others co-operating with him, even though not regularly employed as tax inquisitor?

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In answer to the above it can be said that the compensation of an auditor in making additions to the duplicate is not dependent upon whether or not there has been a tax inquisitor employed by the county commissioners to look after such additions. In fact the additions can be made by the auditor if the information comes to him as to any commissions without the service of a tax inquisitor. The office of tax inquisitor is merely to investigate, to inquire, to seek out persons whose returns are false, and who have omitted to make a true return of their property to the assessors, so that the same might be regularly placed upon the duplicate. It matters not through what particular agency additions are made to the duplicate if the county auditor has actively engaged even though in co-operating with others, to place such additions upon the duplicate, he is entitled to his compensation as provided by statute.

Such services for which he may be so entitled, are not necessarily such services as are performed by a tax inquisitor, or by an investigating board or officer; but if the auditor is one of the moving spirits in having such additions made to the duplicate, and his time and talents have been called upon and used for the benefit of the public in increasing the duplicate, it is but ordinary justice that he be allowed the compensation provided by statute for his services in that regard.

I would therefore hold upon the facts made evident by the interrogatories submitted, that the auditor of Delaware County would be entitled to the compensation of four per cent. for such services.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Pharmacists May Leave Place of Business in Temporary Charge of Assistant.

PHARMACISTS MAY LEAVE PLACE OF BUSINESS IN TEMPORARY CHARGE OF ASSISTANT.

Office of the Attorney General,
Columbus, Ohio, December 2, 1899.

W. R. Ogier, M. D., Secretary, State Board of Pharmacy, Columbus, Ohio:

DEAR SIR:—I have your favor of the 22d ult., requesting an opinion upon the construction of section 4405 of the Revised Statutes so far as it refers to assistant pharmacists and as to what extent a registered pharmacist may leave his store in charge of a registered assistant.

Turning to section 4407 there is a distinction made by the Legislature as to a registered pharmacist and a registered assistant pharmacist. Both of them you will notice requires the registry which is probided by the act of April 21, 1898.

When a person registers as either a pharmacist or assistant pharmacist his powers are divided by the act in question, but you will notice that one distinction made between a pharmacist and an assistant is in the age at which he may make application for a certificate, and the pharmacist shall have four years' practical experience, while the assistant shall possess at least two years, subject to the deduction for the time actually spent under instruction in any school or college of pharmacy in good standing, as determined by the board. Then a distinction is borne out also between an assistant pharmacist and a pharmacist in section 4405 which seems to bear the construction that a legally registered assistant may compound, dispense or sell when employed in a place which is under the supervision, management and control of a legally registered pharmacist. Now I do not think that there is any portion of time definitely provided against in this act, or in other words, that so long as the place where the drugs are sold are under the control, management, etc., of a registered pharmacist, his absence for any specified

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length of time does not disqualify the assistant pharmacist from actng in his place and stead, but nevertheless the place, viz.: The pharmacy or drug store must be under the supervision, management or control of a legally registered pharmacist in order to entitle the assistant to so act. I would therefore hold that no extent of time is provided against by the Legislature as to the absence of the registered pharmacist, for if his absence is rendered necessary for any particular time he may still be complying with the act by being in control of the place and likewise in control of the assistant pharmacist. The question cannot be determined upon any hypothetical basis, but in my opinion must be left to await the decision in any particular case, and I think the courts would hold it to be merely a question of fact as to whether the registered pharmacist had entirely abandoned his place and did not longer have it under his supervision, management and control, and if it was considered under a given state of facts that he did have this place under his supervision, management and control even though technically absent therefrom, the assistant pharmacist might legally, if in all other respects qualified, compound, dispense or sell under such circumstances. I am,

Yours very truly,

F. S. MONNETT,

Attorney General.

MAPS AND PLATS FOR APPRAISERS SHALL BE PROVIDED BY AUDITOR UNDER SECTION 2789.

Office of the Attorney General,
Columbus, Ohio, December 14, 1899.

Hon. J. D. Barnes, Prosecuting Attorney, Shelby County:

DEAR SIR:—Your esteemed favor of the 13th inst., asking for the constructon of section 2789 duly received. Basing

Maps and Plats for Appraisers Shall be Provided by Auditor Under Section 2789.

the opinion upon the facts suggested in your letter, it would appear that the county commissioners failing or refusing to find it necessary to the proper appraisal of the real estate of your county on or before the June session the effect of that omission would be, that it was not deemed necessary by said board of commissioners, therefore all that part of the section coming strictly under the proviso referring to advertisement for bids, bonds, etc., is not now under consideration. The statute ending at the first semi-colon seems to be complete in itself; and the second proposition as to how much of the section as is embodied and incorporated in the last clause, to-wit: "But in counties or districts having no maps it shall be the duty of the commissioners to furnish the same under the provisions of this section," this last clause, if applied to the proviso so as to nullify the proviso, it would appear to me would be mere surplusage for the reason that the proviso has set forth in detail how the commissioners shall furnish maps and determine the same before the June session of 1899, and if they already had maps there would be scarcely need of the proviso. Or take another view of the last clause and apply it to the provision relating solely to the auditor it would appear that the directions having once been given to the auditor by statute it is hardly necessary for the commissioners to take further action. But of the two ambiguous positions with which we are confronted I believe this would be the more rational solution. The commissioners are the financial officers of the county. This is an employment or work that requires an expenditure of money. There are two ways in which they may have the work done. One by the county auditor without bids, and the other by beginning with the June session, 1899, and complying with the proviso and to have bids. And in order to give effect to the last three lines of the section I would hold that the county having no maps it was the duty of the commissioners to furnish the same under so much of the provision of section 2789 as is left to them to act upon at this date, which is through the

Member of Board of Trustees of Ohio State University Cannot be a Party to a Contract With Such Board.

county auditor. I suppose the proper practice would be to have an entry finding that there are no maps and to direct the county auditor to make a map of each township and town within such district with such plat books as may be necessary to enable the district assessor to make a correct plan of each section, survey and tract in his district. As to the matter of compensation to the auditor and the men he is compelled to employ to perform such valuable and necessary work, I do not at this time pass upon. Would it not be advisable to suggest to your legislative committee to recommend some additional legislation covering the subject matter of this section that would remove it of this ambiguity.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

MEMBER OF BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY CANNOT BE A PARTY TO A CONTRACT WITH SUCH BOARD.

Hon. W. O. Thompson, President Ohio State University, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a request from you and your board as to whether your board can lawfully enter into a contract with a partnership, association or corporation in which any of your board are interested or connected therewith.

In your inquiry you ask if one of your board of directors is interested as a director in a printing or publishing company would he be at liberty to make a contract with your said board.

The answer to this question resolves itself under two heads:

Member of Board of Trustees of Ohio State University Cannot be a Party to a Contract With Such Board.

1. Is such a contract contrary to the statute, civil or criminal?

2. Is it a void contract and against public policy?

Under the first head, the act of February 23, 1886, provides:

> "No trustee or officer of any benevolent institution may be either directly or indirectly interested in any purchase for or contract on behalf of such institution, and in addition to the liability of any trustee, or officer, violating this inhibition to respond in damages for any injury sustained, by the institution by his act, he shall be forthwith removed."

Examining the history of this statute we find that the original act was passed May (10, 1878, 75 O. L., 178,) being section 19 of said act, and applied alone to the officers, directors or trustees of the asylum for the blind. Subsequently, February 23, 1886, this act was repealed by House Bill No. 135, (83 O. L., 6), enlarging its provisions until the language was general, as now appears by section 628, to-wit: "No trustee or officer of any benevolent institution, etc."

The only other statute bearing upon the subject is section 6969, which is as follows:

> "An officer elected or appointed to an office of trust or profit in this State, and an agent, clerk, servant, or employe, of such officer, or of a board of such officers, who while acting as such officer, agent, clerk, servant or employe, shall become directly or indirectly, interested in any contract for the purchase of any property or fire insurance for the use of the State, county, township, city, town or village, shall be imprisoned in the penitentiary not more than ten years, nor less than one year."

Taking up the last section first, while an officer of your institution might be included in the description of an officer

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in section 6969, I do not think that a contract for advertisement with an advertising company would come within the prohibited act, to-wit:

> "Interested in any contract for the purchase of any property or fire insurance for the use of the State."

Strictly construing the criminal laws it would not be property, and this act would not apply to this class of contracts, and could only be used by the court as an indication of what the public policy of the State might be as expressed by the Legislature in an action brought to avoid such contract as is inquired about, as being against public policy, and void.

In construing section 628, the inquiry would first be directed to the definition of the class of trustees or officers therein referred to, viz.: "No trustee or officer of any *benevolent institution.*" As cited above, this act was originally confined to but one institution in the State, it was subsequently enlarged and made general and has been codified under title 5, chapters from 1 to 12, which chapters do not include the provisions governing the State University. This in itself would not exclude it from being applied to the university if the term "benevolent" could properly be applied to an institution that furnished tuition free and donated the services of a faculty and was otherwise supported in all its buildings and equipments from the State treasury, would not still come within the general definition of "benevolent," notwithstanding the term is more commonly or popularly and synonymously used the same as the term "charitable." There is no doubt it applies to institutions for deaf and dumb, for the blind, Ohio Soldiers' and Orphans' Home, Boys' Industrial School, and other institutions described in said chapter, but whether it applies to an educational institution admits of some question. The term "benevolent" as defined in the Century Dictionary, is as follows: 1st. Having

or manifesting a desire to do good, possessing or characterized by love toward mankind, and a desire to promote their prosperity and happiness. 2nd. Intended for the conferring of benefits, as distinguished from the making of profits, as a benevolent enterprise; a benevolent institution."

Applying the second definition to the purposes, objects and accomplishments of the State University, it is an institution for the purpose of conferring benefits as distinguished from the making of profits

The only legislative construction or analysis of these institutions that I observe is that of the act of 87. O. L., page 241. The Legislature used the terms in that act as having distinct and separate meaning for the purposes therein stated The language is as follows:

> "No member of either branch of the General Assembly shall hereafter be appointed as trustee of any benevolent, educational, penal, or reformatory institution of the State supported in whole or in part by funds drawn from the State treasury."

In this instance the Legislature distinctly classifies or distinguishes the benevolent from the educational. While in the general chapter above cited it is clear that the term "benevolent" applies at least to the Boys' Industrial School and the Girls' Industrial Home, notwithstanding they are also reformatories. If we carry into the construction of section 628 the above distinctions recognized by the Legislature then there is no prohibition to a trustee or officer of the State university of contracting with or buying and selling to his said board. Inasmuch as there is penalty of forfeiture of office attached to section 628, I am inclined to the opinion that the term "benevolent" would not be general enough to include an educational institution as used in this connection, and that such trustee perhaps could not be removed for being interested in a contract on behalf of such institution, if the action was founded on this statute alone.

Compensation of Deputy Supervisor, Judges and Clerks of Election.

Are such contracts void and against public policy?

In view of the provisions of sections 628 and 6969 and section 856 that prohibits a county commissioner from being directly or indirectly concerned in any contract with his said county, and providing penalties and forfeitures, and section 2699 forbidding a member of the city council or board alderman of the city or board, officer or commissioner of the city to have or hold any interest in a contract executed on behalf of the city and in view of the repeated decisions of the courts of the various states and United States on this question of public officers being directly or indirectly interested in contracts with institutions or departments in which they are the officers or trustees, I would hold that a contract made by your board, with a member of your board or with a corporation of which the members of your board or any one of them was a director and had the contracting power of such corporation vested in him, or was a member of a partnership that such contract was being made with, would render such contract void and against public policy. Any other rule would be a dangerous precedent to officially sanction.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

COMPENSATION OF DEPUTY SUPERVISOR, JUDGES AND CLERKS OF ELECTION.

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

DEAR SIR:—In compliance with your request relative to the question whether or not the compensation of deputy supervisor, judges and clerks and the expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, etc., shall be first submitted

to the county commissioners of each county and allowed by them, or whether the county auditor may draw his warrant therefor without such allowance by the county commissioners, I submit you the following opinion:

Section 4 of the act to create a State Supervisor of Elections with deputy State supervisors for the conduct of elections in the State of Ohio, 91 O. L., 121, provides:

> "For attending all meetings the deputy supervisors shall receive as compensation the sum of $2 per day, not to exceed 30 days in any one year, and mileage at the rate of five cents a mile going to and returning from the county seat, if the distance be more than one mile. The compensation above provided for, and all proper necessary expenses in the performance of the duties of such deputy supervisors, shall be defrayed out of the county treasury as other county expenses, and the county commissioners shall make the necessary levy to meet the same."

With reference to judges and clerks section 6 of the same act provided:

> "The judges and clerks shall receive as compensation the sum of $3 a day for their services, which services shall be the receiving, recording, canvassing and making an abstract of all the votes ing compensation of any precinct election officers, that may be delivered to them in the voting precinct in which they preside on each election day."

In reference to the expenses, section 14 of the same act provides that:

> "All expenses arising for printing 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 any 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 apportioned by the deputy State supervisors to the several political divisions and certified to the county auditor. * * *"

The question is determined by two sections of the Revised Statutes, Nos. 894 and 1024, which are as follows:

> "894. No claims against the county shall be paid otherwise than upon the allowance of the commissioners upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which cases the same shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same; but no public money shall be disbursed by the county commissioners, or any of them, but the same shall be disbursed by the county treasurer upon the warrant of the county auditor, specifying the name of the party entitled to the same, on what account, and upon whose allowance if not fixed by law."
>
> "1024. The auditor shall issue warrants on the county treasurer for all moneys payable out of the treasury (except moneys due the State which shall be paid out upon the warrant of the auditor of state) when the proper order or voucher is presented therefore, and shall keep a register of all such orders, showing the number, date of issue, the amount drawn for, in whose favor, and on what fund; but he shall not issue a warrant for the payment of any claim against the county, unless the same is allowed by the county commissioners, except in cases where the amount due is fixed by law, or is allowed by some other officer or tribunal authorized by law to allow the same."

It will be noticed by the above sections that claims in cases where the amount is fixed by law, or is authorized to be fixed by some other person or tribunal, or is allowed by

Compensation of Deputy Supervisor, Judges and Clerks of Election.

some other officer or tribunal authorized by law to allow the same, are especially exempted from consideration by the county commissioners, and the auditor therefore authorized to draw his warrant for such claims without the same having been previously allowed by the county commissioners.

This question was considered by the Supreme Court of Ohio and section 894 construed, in the case of Jones, Auditor, vs. Commissioners, 57 O. S., p. 108, and the court there used this language, having special application to the question here:

> "That is to say, referring to claims other than those of auditors, for the amount it is fixed by law or is to be fixed by some other tribunal, then the commissioners may not act, but if the amount be not fixed in one of the other ways enumerated, then, the demand being one which may form the basis for a claim the commissioners may fix the amount."

Referring therefore to the language found in the election laws under consideration it will be found that the compensation of deputy supervisors is fixed by law at $2 per day not to exceed 30 days in any one year, mileage at the rate of five cents a mile going to and returning from the county seat. And the compensation of clerks is fixed at $3 per day, so that it follows, in my opinion, that the county auditor is authorized to draw his warrants payable to the deputy supervisors and to the judges and clerks for their compensation without the same having been allowed by the county commissioners as their claims fall within the excepted class provided for in sections 894 and 1024.

As to the expenses under section 14 above referred to the acts especially provide that the amount thereof shall be ascertained and apportioned by the deputy State supervisors and certified to the county auditors. This class of claims is within the excepted class provided in both sections 894 and 1024 where the amount is authorized to be fixed by some

Manager of Penitentiary May Hold Position of Warden Within a Year After Vacating First Office.

other person or tribunal, or where the amount is allowed by some other office or tribunal the language, "shall be ascertained and apportioned by the deputy State supervisors," being equivalent to the language used in section 894, "authorized to be fixed by some other person or tribunal," "or is allowed by some other officer or tribunal authorized by law to allow the same."

Ascertaining and apportioning the amount of expenses is the same thing as fixing or allowing the same as provided in the sections above named.

So that the conclusion is that none of the claims must be first allowed by the county commissioners.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

MANAGER OF PENITENTIARY MAY HOLD POSITION OF WARDEN WITHIN A YEAR AFTER VACATING FIRST OFFICE.

Office of the Attorney General,
Columbus, Ohio, December 18, 1899.

Hon. W. D. Cherington, Wellston, Ohio:

DEAR SIR:—This department has the honor to receive a communication from you of recent date as to the construction of section 629 with section 7388-14 and section 7388-20. Section 629 R. S. makes a manager or director of any penal institution of the State ineligible to the office of superintendent or of steward during the term for which he was appointed as well as ineligible for one year after his term expires. Nearly every reformatory, penal or benevolent institution except the Ohio Penitentiary is manned by one chief executive, termed a superintendent, but in the Ohio Peni-

tentiary there seems to be stewards and superintendents with duties independent of that of the warden. There is a superintendent of construction, of subsistence, of piece-price, of State shops and other special heads of departments, said superintendents having duties distinct from that of the warden as well as distinct from that of the steward. The provisions for superintendents is defined by statutes and such office existed at the time of the passage of section 629 R. S., to-wit: March 27, 1889. It can hardly be said that the Legislature failing to mabe the office of warden one of the incompatible offices with that of an ex-manager, it is therefore my opinion that a former manager of the Ohio Penitentiary is eligible to the office of warden even within one year after his term as such manager has expired, such applicant having all other qualifications.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

COUNTY COMMISSIONERS MAY AWARD CONTRACT FOR MAPS AND PLATS FOR DECENNIAL APPRAISEMENT TO AUDITOR.

Office of the Attorney General,
Columbus, Ohio, December 21, 1899.

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

DEAR SIR:—Your inquiry is before me with regard to whether the auditors of the various counties in the State of Ohio, in which there has been no special legislation contravening the provisions of section 2789 of the Revised Statutes can have the contract awarded to them for making

County Commissioners May Award Contract for Maps and Plats for Decennial Appraisement to Auditor.

the maps and plats provided for in section 2789, without the necessity of an advertisement being made to award the same to the lowest bidder as otherwise provided in said section.

In regard to the same I answer that if the county commissioners find that it is not deemed necessary to the proper appraisal of the real estate of such county to advertise for sealed proposals to construct the necessary maps and plats mentioned in said section, then the county commissioners may, by spreading such resolution upon the journal evidencing that it is not necessary to the proper appraisal of the real estate so to do, award the contract to the county auditor of the given county to construct the necessary maps and plats to enable the several district assessors in the county or any district thereof to correctly reappraise all real estate.

Respectfully,
F. S. MONNETT,
Attorney General.