
World's Fair Managers; Payment of Treasurer Who is Otherwise Employed by State.

WORLD'S FAIR MANAGERS; PAYMENT OF
TREASURER WHO IS OTHERWISE EMPLOYED
BY STATE.

Office of the Attorney General,
Columbus, Ohio, January 3, 1894.

Mr. W. T. Alberson, Secretary Board of World's Fair Managers, Columbus, Ohio:

DEAR SIR:—In your favor of the 26th ult., you submit to me a question relative to the payment of the salary of your treasurer, Mr. L. N. Bonham, asking whether section 2 of the general appropriation bill (90 O. L., page 252) can operate to annul a contract which the Board of World's Fair Managers made with Mr. Bonham prior to the passage of said act, and prohibit the payment to Mr. Bonham of the compensation stipulated in such contract.

The clause of the act referred to, being a provision of the general appropriation bill, passed last April, reads as follows:

“No moneys appropriated to the Board of World's Fair Managers shall be used for the payment of per cent., salary, per diem or otherwise (except actual traveling expenses) to any officer, member or employe of said board, who is drawing salary or compensation for any other services from any other appropriation made by the State.”

In an opinion given you, under date of May 5, 1893, I held that Mr. Bonham came within the prohibition of the provision already quoted, preventing any person “who is drawing salary or compensation for any other service from any other appropriation made by the State,” from receiving any money as compensation for services as treasurer of your board out of moneys appropriated for the Board of World's Fair Managers, Mr. Bonham being secretary of the Ohio State Board of Agriculture, and drawing a compensation

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for his services as such officer, paid out of an appropriation by the State for the encouragement of agriculture.

In view of the wording of the clause quoted in the appropriation bill, I am unable to alter the conclusion I reached that the money appropriated for the Board of World's Fair Managers under the last appropriation bill, cannot be used to pay Mr. Bonham's compensation for services as treasurer of your board.

If your board had authority to enter into a contract with Mr. Bonham for services as treasurer, covering a period for which no appropriation had been made—and it is not necessary for me to pass upon this question—still such contract could not operate to control subsequent appropriations to be made by the Legislature. Each Legislature is at liberty to make whatever appropriations it sees fit, and upon whatever conditions it thinks proper. Money appropriated must be paid out in strict accordance with the limitations of the appropriation. If the appropriations of a Legislature, under the conditions and restrictions attached by the Legislature, do not serve to discharge in full measure all the obligations of the State, the only recourse is an appeal to some subsequent Legislature. And this it seems to me is the remedy of Mr. Bonham and the Board of World's Fair Managers. Assuming they entered into a contract with Mr. Bonham for certain services at a stipulated compensation, and that the last Legislature refused to appropriate money to pay such compensation, application should be made to the present Legislature to appropriate the amount necessary to carry out the contract of the board and discharge its obligation to Mr. Bonham.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Board of Health; Contracts of Subject to Burns Law.

BOARD OF HEALTH; CONTRACTS OF SUBJECT
TO BURNS LAW.

Office of the Attorney General,
Columbus, Ohio, January 22, 1894.

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

MY DEAR SIR:—In reply to your inquiry of the 19th inst., I beg to say that under sections 2115, 2131, 2133 and 2135 of the Revised Statutes, a local board of health is authorized to appoint a health officer, a clerk and certain other employes, when deemed necessary, and to "define their duties and fix their salaries."

By section 2140, it is made the duty of the council, upon application and certificate from the board of health, to pass the necessary appropriation ordinance to pay the expenses incurred and certified by the board of health.

Of course, contracts entered into by the local board of health are subject to the restriction set out in section 2702, namely, the money required to pay the expenses must be in the treasury to the credit of the proper fund before the expense is incurred.

Very respectfully,
J. K. RICHARDS,
Attorney General.

Institution for Deaf and Dumb; Qualifications of Superintendent.

INSTITUTION FOR DEAF AND DUMB; QUALIFICATIONS OF SUPERINTENDENT.

Office of the Attorney General,
Columbus, Ohio, January 14, 1894.

Hon. M. D. Follett, Chairman of the Committee of the Board of State Charities, engaged in the investigation of the charges against the Superintendent of the Institution for the Deaf and Dumb:

DEAR SIR;—You have personally, on behalf of the committee of which you are chairman, requested my opinion upon the meaning, when applied to the superintendent of the Institution for the Deaf and Dumb, of the following words, contained in section 647 of the Revised Statutes, prescribing the qualifications of superintendents of benevolent institutions:

“Superintendents shall be persons of acknowledged skill, ability, and experience in their profession.”

The Institution for the Deaf and Dumb of Ohio is not a reformatory but an educational institution. In section 659, Revised Statutes, regulating the admission of pupils, the institution is designated, “the institution for the education of the deaf and dumb.” It is required to be kept open to receive such deaf mutes, residents of the State, as may be “suitable persons to receive instruction.” Provision is made for the graduation of pupils.

The provision in section 647 that the superintendent of the institution for the education of the deaf and dumb shall be a person of acknowledged skill, ability, and experience in his profession, can mean but one thing, and that is that he must be a person of acknowledged skill, ability, and experience in the profession of the education of the deaf and dumb. The superintendent of an insane asylum must under this re-

*Penitentiary; Detention of Prisoner in Pending Suspension
of Execution.*

striction, be a person of acknowledged skill, ability, and experience in the profession of the care and treatment of the insane. The State establishes and supports insane asylums for the care and treatment of the insane, it establishes and supports the institution in question for the education of the deaf and dumb. The law requires that at the head of each institution shall be a person of acknowledged skill, ability, and experience in the profession, the exercise of which is required, in order successfully to conduct the institution. Skill, ability, and experience in the profession of the education of the deaf and dumb requires in the superintendent acquaintance with the sign language, through which alone communication may be made with the pupils and instruction carried on. That the law contemplates in the superintendent acquaintance with the sign language and ability to communicate with the deaf mutes entrusted to his control, is conclusively shown by the concluding sentence of section 647, which reads as follows: "The superintendent of the institution for the deaf and dumb shall have power, by virtue of his office, to solemnize marriages." How marry those with whom one cannot converse? Authority to marry is granted because knowledge of the sign language is required.

Very respectfully,

J. K. RICHARDS,
Attorney General.

PENITENTIARY; DETENTION OF PRISONER IN
PENDING SUSPENSION OF EXECUTION.

Office of the Attorney General,
Columbus, Ohio, February 27, 1894.

*Mr. Robert F. Price, Prosecuting Attorney Hocking County,
Logan, Ohio:*

DEAR SIR:—I have given what consideration my other duties permitted to the question propounded in your favor

Penitentiary; Detention of Prisoner in Pending Suspension of Execution.

of the 20th inst., with regard to the duty of the sheriff in the case of Isaac L. Edwards, convicted of murder in the first degree, at the January term of the Court of Common Pleas of your county, and sentenced to be hanged. A motion for a new trial was made and overruled in his case, and a petition in error filed in the Circuit Court, and on February 13, two judges of said court, on motion, suspended the execution of the sentence of the Court of Common Pleas. The question you desire answered is, must the sheriff, notwithstanding the suspension of sentence, convey the prisoner to the penitentiary, or must he retain him in your jail?

Section 6808 provides, that a person convicted of murder in the first degree "shall suffer death." Death is the punishment provided by law for this crime. Section 7338 provides the mode of inflicting the death penalty, within the walls of the Ohio Penitentiary. Section 7339 provides for the conveyance of the sentenced prisoner to the penitentiary. "The sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within the next thirty days thereafter, in as private and secure a manner as is possible to be done, convey the prisoner to the Ohio Penitentiary." The prisoner shall be received by the warden, and "securely kept until the day designated for his execution."

This provision, regulating the conveyance of a prisoner sentenced to death, to the penitentiary, is distinct from the provision in section 7330 where imprisonment in the penitentiary is the punishment for the crime. Section 7330 reads: "A person sentenced to the penitentiary shall, within thirty days after his sentence, *unless the execution thereof be suspended*, be conveyed to the penitentiary by the sheriff of the county in which the conviction was had." Here is express provision that the suspension of the execution of the sentence shall prevent the conveyance of the prisoner to the penitentiary. This is because imprisonment in the penitentiary is the punishment for the crime. To the same effect are the provisions of section 7325. The felony referred to in that section is other than a capital felony.

Sheriff; His Compensation by Mileage.

There is, however, no exception in section 7339 as in section 7330. Section 7339 makes it the duty of the sheriff within thirty days after the prisoner has been convicted and sentenced to death, to convey him to the penitentiary, irrespective of whether the execution of sentence be suspended or not.

The effect of the suspension of execution of sentence in a capital case, is set out in section 7343. It suspends the infliction of the death penalty, it does not relieve from detention in the penitentiary pending such suspension. This is apparent from the provisions of section 7362a enacted April 27, 1893 (90 O. L., 363), permitting a defendant convicted of felony, whose sentence has been suspended, to be returned from the penitentiary to the county jail, *except where he was convicted of murder in the first degree.*

On the whole, while the statutes are not as plain as could be wished, I am disposed to agree with you that Edwards should be taken to the penitentiary.

Very respectfully,

J. K. RICHARDS,

Attorney General.

SHERIFF; HIS COMPENSATION BY MILEAGE.

Office of the Attorney General,

Columbus, Ohio, March 3, 1894.

Mr. H. A. Mykrantz, Prosecuting Attorney, Ashland, Ohio:

DEAR SIR:—Under section 208 as amended, I think I have no authority to give you official advice upon the question submitted in your favor of the 28th ult., respecting the fees to be paid under section 719, as amended April 8, 1892 (89 O. L., 241), to the sheriff and his assistant for conveying an insane person to an asylum. Before this amendment, the provision of the section was plain; since the amendment the

*Costs; State May Not Pay for Re-Examination of Prisoner
Before Probate Judge.*

provision on this subject is susceptible of two interpretations.

The most any one can do is to make a guess as to the proper interpretation. My guess is—and I say this unofficially—that while under the former statute the sheriff got mileage at the rate of ten cents per mile, and his assistant got mileage at the rate of five cents per mile, now under the amendment the sheriff is entitled to mileage at the same rate as before, ten cents per mile, and the assistant is entitled to mileage at the same rate as the sheriff, ten cents per mile. The only other construction to be placed on the amended provision is, that the ten cents a mile for the sheriff is to cover the expenses and compensation of both himself and his assistant or assistants. This seems to me an **unreasonable construction**. I do not understand how a sheriff and an assistant can pay their traveling and hotel expenses and receive proper compensation for the one mileage of ten cents per mile.

Very respectfully,
J. K. RICHARDS,
Attorney General.

COSTS; STATE MAY NOT PAY FOR RE-EXAMINATION
OF PRISONER BEFORE PROBATE JUDGE.

Office of the Attorney General,
Columbus, Ohio, March 3, 1894.

Mr. W. D. Guilbert, Chief Clerk Auditor of State's Office:

DEAR SIR:—You have submitted to me the question, whether under the provisions of section 7337, and preceding sections, the auditor of state should issue his warrant for the costs of a re-examination in the Probate Court under section 7165.

*Costs; State May Not Pay for Re-Examination of Prisoner
Before Probate Judge.*

The proceeding under section 7165, is not a proceeding in the line of prosecution for an offense, but an application for discharge on the part of the prisoner which, when properly made, entitles him to a re-examination before the Probate Judge.

Section 1306 describes the costs growing out of preliminary proceedings, which are to be paid by the State in felonies, when the defendant is convicted. The costs, additional to those defined in this section, which the sheriff is entitled to collect from the State upon delivering the prisoner at the penitentiary, are described in section 7333, which reads: "Upon sentence of any person for felony, the officers claiming costs made in the prosecution shall deliver to the clerk itemized bills thereof," etc.

Costs made on a re-examination are not costs made "in the prosecution." The re-examination is at the request of the prisoner, not of the officers of the State.

The law is defective in not providing how costs made under section 7165 shall be paid, but since the auditor of state can only draw his warrant with safety where there is authority of law for him to do so, and since there is no authority of law in this case, the safe plan for him to do is to strike out all such costs, and refuse to pay them, until there is legislation requiring him to do so.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Representative; Salary of Begins When He Qualifies, Takes His Seat and Begins Services as a Member of the General Assembly.

REPRESENTATIVE; SALARY OF BEGINS WHEN HE QUALIFIES, TAKES HIS SEAT AND BEGINS SERVICES AS A MEMBER OF THE GENERAL ASSEMBLY.

Office of the Attorney General,
Columbus, Ohio, March 7, 1894.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—You have referred to me a communication to you from Hon. John R. Malloy, Clerk of the House of Representatives, stating, that on the 18th of February, 1894, at a special election held for the purpose, Joseph B. Cummings was elected a member of the House of Representatives, of the Seventy-first General Assembly, to fill a vacancy caused by the death of Hon. John B. Allen, who was elected at the general election held November 7, 1893, but who died before qualifying as such member. Mr. Cummings presented his credentials and was sworn in as a member, February 21, 1894.

The question submitted is, whether Mr. Cummings is entitled to a full year's salary for the year 1894, and if not, what portion of said year's salary is he entitled to?

The question presented is not a new one. The same question was submitted to my predecessor, Attorney General Watson, and in an opinion given to Hon. John L. Geyer, under date of April 30, 1890, he held, that the right to compensation of a person elected to fill a vacancy, began when such person qualified and took his seat and began his services as a member of the General Assembly.

In accordance with this decision, you refused to pay a full year's salary to several members of the Sixty-ninth General Assembly, elected to fill vacancies occasioned by death; and the General Assembly, by a special appropriation, paid such members the balance of the full salary which you, under

Boards of Education; Appointment of Treasurer and Payment When City Official Refuses to Act.

the decision of Attorney General Watson, declined to pay them.

Again, in the case of a member of the last General Assembly, you enforced the rule laid down by Attorney General Watson, and this member was required to go to the General Assembly for compensation.

In view of these facts, it seems to me that the decision to which I refer has been adopted as a rule of action in your department, and by the Legislature, and while the question is not free from doubt, and while, if it were primarily presented to me, I might hold differently, still, under all the circumstances, I do not feel warranted in overruling the decision of Attorney General Watson.

Very respectfully,
 J. K. RICHARDS,
 Attorney General.

BOARDS OF EDUCATION; APPOINTMENT OF
 TREASURER AND PAYMENT WHEN CITY OF-
 FICIAL REFUSES TO ACT.

Office of the Attorney General,
 Columbus, Ohio, April 12, 1894.

Hon. O. T. Corson, State Commissioner of Common Schools:

DEAR SIR:—In your favor of this date, you say “the city treasurer of Fostoria will probably refuse to act as treasurer of the school funds for that district. If he does refuse, and the board of education appoints some one to act, can the person so appointed receive compensation for his services?”

The sections of the statutes bearing upon the question you submit are conflicting, and the correct interpretation of them doubtful, but I am inclined to think that the right of the board of education to compensate in a proper manner

*Water Supply; Examination of and Enforcement of Orders
in Respect to Same.*

services rendered by a treasurer appointed by it, because of the refusal of a public official to serve in that capacity, goes with the power to appoint. It is necessary for the board to have a treasurer, and it is just and proper to pay such treasurer for the care he assumes and the work he does—responsibility and services for which he is not otherwise paid by compensation received as county or city treasurer.

Very respectfully,

J. K. RICHARDS,
Attorney General.

WATER SUPPLY; EXAMINATION OF AND EN-
FORCEMENT OF ORDERS IN RESPECT TO
SAME.

Office of the Attorney General,
Columbus, Ohio, June 25, 1894.

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

DEAR SIR:—In your favor of the 15th inst., you call my attention to section 2 of the act of March 14, 1893, which provides:

“No city, village or private corporation or person shall introduce a public water supply or system of sewerage, or change or extend any public water supply or outlet of any system of sewerage now in use, unless the proposed source of such water supply or outlet for such sewerage system shall have been submitted to and received the approval of the State Board of Health,” and submit the following questions:

I. “If a city, village or private corporation or person introduces a public water supply or system of sewerage, and refuses or neglects to submit the same to the State Board of Health for approval, as

*Water Supply; Examination of and Enforcement of Orders
in Respect to Same.*

required, how will the bonds issued to build a water works, or sewerage system, under such circumstances, be affected as to their legality?"

2. "If the board examines a public water supply or system of sewerage introduced subsequent to March 14, 1893, without its approval, and finds good cause for not approving the source of the water supply or outlet of sewerage system, what action may be taken by the board to prevent the use of such water supply or sewerage system?"

In reply I beg to say:

1. I do not think the bonds referred to will be invalidated for want of the approval of the State Board of Health of the proposed water supply or sewerage system.

2. If a water supply is in use, introduced subsequent to March 14, 1893, which the State Board of Health has, for good grounds, refused to approve, the board might call upon the city authorities to show cause why an order should not be made requiring the city to discontinue the use of the water supply until altered so as to comply with the reasonable views and requirements of the state board. The local authorities should be afforded the opportunity of being heard. After they have been heard, or have refused to avail themselves of the opportunity of being heard, the state board might make such order as the circumstances of the case require, and enforce the order by a prosecution under section 2137, (as extended and made applicable to the orders of the State Board of Health, by section 5 of the act of March 14, 1893), or by suit in court enjoining the further use of the water supply until changed to conform with the order of the board.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Buckeye Lake; Fish and Game Laws on Same Enforceable by Board of Public Works—Health Officer; Council May be Mandamused to Pay Compensation Fixed by Board of Health.

BUCKEYE LAKE; FISH AND GAME LAWS ON SAME ENFORCEABLE BY BOARD OF PUBLIC WORKS.

Office of the Attorney General,
Columbus, Ohio, June 25, 1894.

Mr. H. B. Vincent, President Ohio Fish and Game Commission, McConnellsville, Ohio:

DEAR SIR:—In reply to your inquiry of the 14th inst., I beg to say that, in my opinion, the recent act setting aside the Licking Reservoir as a public park or lake, under the name of the Buckeye Lake, takes away from the Fish and Game Commission the duty and power to enforce the fish and game laws on the reservoir and imposes that duty and vests that power in the Board of Public Works.

Very respectfully,
J. K. RICHARDS,
Attorney General.

HEALTH OFFICER; COUNCIL MAY BE MANDAMUSED TO PAY COMPENSATION FIXED BY BOARD OF HEALTH.

Office of the Attorney General,
Columbus, Ohio, June 25, 1894.

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

DEAR SIR:—In your favor of the 16th inst., you submit to me the following question:

“Where a board of health has been properly and legally organized, and has appointed a health officer and fixed his salary (\$80.00 per annum), and the council upon application and certificate from the board of health refuses to pay the salary of the health officer, what steps shall be taken by the board of health to compel the council to pay the salary of the health officer?”

Leases on Licking Reservoir Prior to Its Dedication as Public Park.

Section 2115, Revised Statutes, requires the board of health to appoint a health officer, and empowers it to fix his salary. Section 2140 of the same chapter provides:

“When expenses are incurred by the board of health, under the provisions of this chapter, it shall be the duty of the council, upon application and certificate from the board of health, to pass the necessary appropriation ordinances to pay the expenses so incurred and certified.”

If the council or other city officers, refuse without just cause to do the duty enjoined by this section, a proceeding in mandamus may be instituted to compel the performance of such duty.

Very respectfully,

J. K. RICHARDS,
Attorney General.

LEASES ON LICKING RESERVOIR PRIOR TO ITS
DEDICATION AS PUBLIC PARK.

Office of the Attorney General,
Columbus, Ohio, June 25, 1894.

To the Board of Public Works:

GENTLEMEN:—In response to your inquiry of the 20th inst., I beg to say that the dedication of the Licking Reservoir as a public park or lake, by the recent act known as the Lane law, is made subject to existing leases. I do not understand that an application for a lease constitutes a lease; to create a lease there must have been not only an application but an acceptance or approval of the proposition by the proper State authorities. If in any case there was, before the passage of the Lane bill, not only an application for a lease but a

Y. M. C. A. Buildings Exempt From Taxation; Drawing of Juries.

resolution by the proper authorities directing the making of the lease, I take it that such action would, in the view of the law, constitute an existing lease, even though the formal document had not been executed.

Very respectfully,

J. K. RICHARDS,
Attorney General.

Y. M. C. A. BUILDINGS EXEMPT FROM TAXATION; DRAWING OF JURIES.

Office of the Attorney General,
Columbus, Ohio, June 8, 1894.

Mr. G. E. Mouser, Prosecuting Attorney, Marion, Ohio:

DEAR SIR:—Absence from Columbus and pressing public duties since my return must serve as my excuse for not sooner answering your favor of the 29th ult.

Under the rule generally adopted in this State, Y. M. C. A. buildings are exempted from taxation. As to the details of this matter, I suggest that your auditor write Hon. E. W. Poe, auditor of state, who is at the head of the taxing department, and can give him the necessary information.

As to the juries in your county, I am inclined to think that juries drawn under the old law, prior to the selection of jurors under the new law, for a term of court beginning the very day the commissioners under the new law sat to select jurors, are valid juries. I take it the decision of the question does not turn so much upon the date of the passage of the new law, as the time when the first selection is made under it. Your juries were drawn and, under section 5167 had to be drawn, before any selection of jurors under the new act could be made.

Very respectfully,

J. K. RICHARDS,
Attorney General.

*Leases on Licking Reservoir Prior to Dedication, Etc.—
School Board; Vacancy May be Filled by a Majority
Vote of a Quorum.*

LEASES ON LICKING RESERVOIR PRIOR TO
DEDICATION, ETC.

Office of the Attorney General,
Columbus, Ohio, June 25, 1894.

To the Board of Public Works:

GENTLEMEN:—Since writing my letter of this date in response to an inquiry from your board respecting leases of lands in the Licking Reservoir, I have been informed that certain persons and corporations are now occupying and using parts of the reservoir and have made improvements thereon, on the strength of agreements for leases with the Board of Public Works and the Canal Commission, although no formal resolution was passed or lease executed. If this be so, and persons or corporations have altered their positions and made improvements on the strength of such agreements for leases, I am of the opinion that these agreements ought to be carried out and leases made, notwithstanding the provisions of the Lane law already referred to in my former communication.

Very respectfully,
J. K. RICHARDS,
Attorney General.

SCHOOL BOARD; VACANCY MAY BE FILLED BY
A MAJORITY VOTE OF A QUORUM.

Office of the Attorney General,
Columbus, Ohio, August 20, 1894.

Hon. O. T. Corson, State Commissioner of Common Schools:

DEAR SIR:—In response to the inquiries in your favor of the 18th inst., I beg to say:

I do not understand that the filling of a vacancy in a

*Quail Law; Does Not Prohibit Sale; Artificial Fish Pond,
What is.*

board of education under section 3981, R. S., is the same as the election of an officer by such board under section 3982. By special provision under section 3982, it requires "a majority of all the members of the board" to elect an officer; but to fill a vacancy under section 3981 requires simply the action of the board, which may be had by a majority vote of a quorum.

Very respectfully,

J. K. RICHARDS,

Attorney General.

QUAIL LAW—DOES NOT PROHIBIT SALE—ARTIFICIAL FISH POND; WHAT IS.

Office of the Attorney General,
Columbus, Ohio, August 20, 1894.

Mr. H. B. Vincent, President Ohio Fish and Game Commission, McConnellsville, Ohio:

DEAR SIR:—You have recently put to me several questions with regard to the proper interpretation of the act of May 9, 1894, to prohibit the shipping of quail from the State (91 O. L., 210), which I answer in the order put:

1. The act does not prohibit the sale of quail in the markets of this State, but it does make it an offense to kill quail at any time for the purpose of sale in the markets of this State. The person who kills the quail for such purpose is the offender, who should be prosecuted.

2. The act makes it an offense for any person to kill quail at any time for the purpose of conveying them beyond the limits of this State, and also makes it an offense for any person to transport, or have in possession with intent to procure the transportation, beyond the State, of any quail killed within the State. Not only the person who kills quail for

Milk and Cheese; Discussion of Laws Relating to.

transportation beyond this State, but the person who transports the birds beyond this State, or who has the birds in his possession with intent to procure their transportation beyond this State, is guilty of a violation of this act, and liable to prosecution.

3. As to what constitutes "an artificial fish pond" within the exception provided near the close of section 6968, that question can best be decided in view of the circumstances of each particular case; but I take it that a pond owned by a private person and stocked by him with fish, would come within the exception.

Very respectfully,

J. K. RICHARDS,

Attorney General.

MILK AND CHEESE; DISCUSSION OF LAWS RELATING TO.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, August 21, 1894.

Dr. F. B. McNeal, Dairy and Food Commissioner:

DEAR SIR:—In reply to your inquiries of a recent date, I beg to say:

I. Section four of the act of April 10, 1889 (86 O. L., 229) "to regulate the sale of milk," prescribes a standard for unadulterated milk in this State. Under the provisions of this section, milk which upon analysis is shown to contain less than three and one-eighth per cent. of butter fats shall be deemed "to be adulterated, and not of good standard quality."

Section two of the same act makes it an offense to sell or offer for sale, "as pure milk, any milk from which the cream or part thereof has been removed."

Milk and Cheese; Discussion of Laws Relating to.

2. The act of May 19, 1894 (91 O. L., 344), regulating the branding of cheese in Ohio, prohibits the manufacture or sale in this State of "any cheese not made wholly from pure milk or cream, etc.," and provides for the branding of but one kind of cheese in Ohio, namely, "Full Cream Cheese." These provisions taken in connection with the provisions of the act regulating the sale of milk above quoted, warrant the inference that the Legislature intended, by the act of May 19, 1894, to prohibit the manufacture and sale in Ohio of cheese made from milk from which the cream or any part thereof had been taken.

But the fact that section 2 of the act of May 17, 1886, (83 O. L., 173), which is still in force, after prohibiting the manufacture of a substitute for cheese, provides "nothing in this section shall prevent the use of pure skimmed milk in the manufacture of cheese," the fact that the act of March 30, 1892, (89 O. L., 179), provided for the branding of four grades of cheese, only one of which "Ohio Full Cream," was to be made from milk from which none of the butter fats had been removed; and the fact that, in the present cheese branding act, language is used which seems to recognize the existence in Ohio, of industries engaged in the manufacture of cheese from which the butter fats have, in whole or part, been removed; these considerations leave the true construction of the act of May 19, 1894, upon the point mentioned, in such doubt that it seems to me a court, with authority to decide finally and conclusively, should pass upon the matter. I, therefore, suggest that at your convenience you institute such legal proceedings as will put the question to a test of judicial determination.

Very respectfully,

J. K. RICHARDS,
Attorney General.

Direct Inheritance Tax; Estate Deemed to Pass Upon Deaths of Decedent.

DIRECT INHERITANCE TAX; ESTATE DEEMED
TO PASS UPON DEATHS OF DECEDENT.

Office of the Attorney General,
Columbus, Ohio, August 21, 1894.

*Mr. P. H. Tannehill, Prosecuting Attorney, McConnells-
ville, Ohio:*

MY DEAR SIR:—In your favor of the 20th inst., you submit to me the question whether the estate of a decedent whose death occurred before the passage of the act of March 20, 1894 (91 O. L., 166), imposing a direct inheritance tax, but whose will was not probated until after the passage of the act, would be subject to its provisions and liable for the payment of the tax?

The taxes imposed by this act "become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property." (Section 1, near the close.)

Section 2 provides that if the taxes "are not paid within one year after the death of the decedent," interest shall be charged thereon.

For the purposes of this act, the estate is regarded in all cases as passing immediately upon the death of the decedent, and at such time the tax, being a tax upon the privilege of inheritance or succession, becomes payable and a lien upon the property. The act can therefore only apply to estates which pass by death after the passage of the act. To impose the tax upon the property of decedents who died and whose estate passed before the passage of the act, would give the law a retroactive and unconstitutional application.

Very respectfully,

J. K. RICHARDS,
Attorney General.

Inheritance Tax—Sheriff; Expenses of Transporting Insane Patient; By Whom Paid.

INHERITANCE TAX.

Office of the Attorney General,
Columbus, Ohio, August 24, 1894.

Mr. A. M. Morris, Prosecuting Attorney, Caldwell, Ohio:

DEAR SIR:—In your favor of the 23d inst., you submit the following question:

“If a man die intestate leaving \$20,000.00 worth of property which descends to his children in the usual way, would this property be liable to the direct inheritance tax?”

If the property referred to is within the jurisdiction of the State and in value exceeds the sum of \$20,000.00, it is liable to the direct inheritance tax.

Very respectfully,

J. K. RICHARDS,
Attorney General.

SHERIFF; EXPENSES OF TRANSPORTING INSANE PATIENT; BY WHOM PAID.

Office of the Attorney General,
Columbus, Ohio, August 24, 1894.

Hon. Thomas F. Ham, Probate Judge, Wauseon, Ohio:

DEAR SIR:—In your favor of the 23d inst., you state that you recently committed a patient from your county to the Epileptic Hospital at Gallipolis. The railroad fare of the officer from Wauseon to Gallipolis and return was about \$16.00, and the fare of the patient about \$8.00, making the traveling expenses of the attendant and patient about \$24.00, which the institution paid under authority of the act of

Sheriff; Expenses of Transporting Insane Patient; By Whom Paid.

March 27, 1894 (91 O. L., 97.) The officer, however, claims that, under section 719, as amended April 8, 1892 (89 O. L., 24), he is entitled to mileage at the rate of ten cents per mile going and returning, which amounts (the distance from Wauseon to Gallipolis one way being 270 miles) to \$54.00, which, added to the fare of the patient, \$8.00, makes a total of \$62.00.

You submit the question whether the allowance authorized by the statute of ten cents per mile going and returning is not an "incidental expense" of the patient, to be paid by the institution.

The latter part of section 8, referred to above, provides: "The traveling and incidental expenses of the patient and also of the officer or other person or persons in charge of said patient, to and from said institution, shall be paid by the institution. The fees of the probate judge, physician and other officers, witnesses and persons growing out of the admission of a patient to the hospital, shall be paid to the same amount, and in the same manner as are similar fees when earned in connection with the commitment of an insane person to a State asylum."

The mileage of the sheriff under section 719 is a part of the fees which are to be paid out of the county treasury, upon the certificate of the probate judge, and not a part of the traveling and incidental expenses to be paid by the institution. I think that, under the circumstances you are justified in issuing your certificate for \$38.00, the balance of the fees due the sheriff after deducting the traveling expenses paid by the institution.

Very respectfully,

J. K. RICHARDS,
Attorney General.

Notaries Public; Women May Not Be.

NOTARIES PUBLIC; WOMEN MAY NOT BE.

Office of the Attorney General,
Columbus, Ohio, September 21, 1894.

Hon. William McKimley, Governor:

In reply to your inquiry of this date, I beg to say that section 4 of article 15 of the constitution, provides that no person shall be elected or appointed to any office in this State, unless he possesses the qualifications of an elector. What constitute "the qualifications of an elector" are defined in section 1 of article 5 of the constitution, which reads: "Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year next preceding an election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

If the position of notary public is "an office" within the meaning of the section of the constitution I have quoted, then I take it that a woman cannot be appointed a notary public, for she does not possess the qualifications of an elector, as defined in the constitution. Such is the effect of the decision of the Supreme Court in *Warwick vs. State*, 25 O. S., 22, 24.

But it is said that women now have the qualifications of an elector in school elections by virtue of the act of April 24, 1894 (91 O. L. 162). But this is a limited right. The act gives women the right to vote at school elections, and also to be voted for at such elections. The fact that women are now permitted by legislative act, to vote and be voted for at school elections, does not make a woman eligible to hold any office in this State. And yet, if this power to vote at school elections makes a woman eligible to be a notary public, it makes her eligible to be elected or appointed to any office within the State.

In the above, I have given my view of what the law is, not my opinion as to what it ought to be. I think it would

Municipality; Indictment of For Public Nuisance.

be a good thing if women were eligible for appointment as notaries public.

Very respectfully,
J. K. RICHARDS,
Attorney General.

MUNICIPALITY; INDICTMENT OF FOR PUBLIC
NUISANCE.

Office of the Attorney General,
Columbus, Ohio, October 3, 1894.

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

MY DEAR SIR:—In reply to your inquiry of the 19th ult., I beg to say, that an examination of the law upon the subject leads me to believe that a municipal corporation, which constructs a sewer with an outlet emptying into an open ditch within the corporation, thus making a public nuisance, may be indicted for creating and maintaining a public nuisance.

I refer you to: 2 Wood on Nuisance, page 1004; 2 Dillon Municipal Corporations, section 932, and the cases there cited; also, more especially to the case of State of Maine vs. The City of Portland, 74 Maine, 268, in which case an indictment against the City of Portland for constructing a public sewer in such a way that the outflow therefrom created a public nuisance, prejudicial to the public health, was sustained. In the report of this case, the indictment is set out in full and reference given in the opinion to many cases bearing upon this subject.

Very respectfully,
J. K. RICHARDS,
Attorney General.

*State Board of Veterinary Examiners; Construction of Law
Enacting Same.*

STATE BOARD OF VETERINARY EXAMINERS;
CONSTRUCTION OF LAW CREATING SAME.

Office of the Attorney General,
Columbus, Ohio, September 11, 1894.

Dr. C. O. Probst, Secretary State Board of Veterinary Examiners:

DEAR SIR:—In reply to the questions put to me in your favor of the 10th inst., with respect to the power of the State Board of Veterinary Examiners, under the act passed May 2, 1894 (91 O. L., 391), "to regulate the practice of veterinary medicine and surgery," I beg to say:

1. In view of the fact that section 1 of the act requires all persons practicing veterinary medicine and surgery in this State to be examined as to their qualifications by the State Board, excepting only those who have been engaged in such practice for at least three years prior to the passage of the act, I am inclined to think that the board may require a person practicing veterinary medicine and surgery to submit to an examination or satisfy the board that he has in fact been in the practice for the required time. If the board can do this, I think the board may issue a certificate to a practitioner stating that he has satisfied the board that he has been in the practice for three years prior to the passage of this act; but I do not believe the board can charge a fee for such certificate.

2. I do not think the board has the power to issue two forms of certificates, one of letter size for which no extra charge will be made, and one of larger size and finer quality suitable for framing, for which a proper sum will be charged. The law fixes the fees to be charged. A candidate who passes an examination is required to pay a fee of \$5.00 and is entitled to a certificate from the board. A candidate who submits a satisfactory diploma is required to pay \$2.50, and is entitled to a certificate. It seems to me the law contem-

Fish Chutes Over Dams; Mandatory in Certain Cases.

plates that the certificate to be issued shall be similar to certificates and commissions issued by boards and officials empowered by law to put forth such certificates of authority. A candidate who pays his fee and passes his examination will expect such a certificate, and I submit that the board would lay itself open to criticism and censure if it required an extra sum to be paid before giving such a certificate or commission as is usually given under like circumstances.

Very respectfully,

J. K. RICHARDS,
Attorney General.

FISH CHUTES OVER DAMS; MANDATORY IN
CERTAIN CASES.

Office of the Attorney General,
Columbus, Ohio, October 17, 1894.

To the Board of Public Works:

GENTLEMEN:—In your favor of the 14th ult., you state that petition has been made, in accordance with the provisions of section 4219, for the construction of a chute or fish way over the State dam which crosses the Cuyahoga river near the village of Peninsula, and you desire to know whether the provision in this section requiring the construction of such chute by the Board of Public Works is mandatory or directory.

The first part of the section says that upon petition of not less than five freeholders, there *shall* be erected by the county commissioners of any county where there is a dam across any stream, a sufficient passageway or chute for the passage of fish. The section closes with the following proviso:

*Supervising Architect of Construction of Ohio Reformatory;
Employment of May Terminate at Will of Board of
Managers.*

"Provided, however, when any dams are owned by the State across said streams, said chutes or passage ways shall be built by the Board of Public Works."

It seems to me the clear intent of this section is to *require* the erection and maintenance of passageways for fish over dams, under certain circumstances. The conditions of the section being complied with, the chute or passageway must be built. I am constrained to say, therefore, that in my opinion the provision referred to is mandatory.

Very respectfully,

J. K. RICHARDS,

Attorney General.

SUPERVISING ARCHITECT OF CONSTRUCTION
OF OHIO REFORMATORY; EMPLOYMENT OF
MAY TERMINATE AT WILL OF BOARD OF
MANAGERS.

Office of the Attorney General,
Columbus, Ohio, November 10, 1894.

Hon. S. P. Wolcott, Member Board of Managers Ohio Reformatory, Kent, Ohio:

MY DEAR SIR:—You have submitted to me the minutes of the Board of Managers of the Ohio Reformatory, and the correspondence, relative to the employment in 1884 and 1885 of Levi T. Scofield, as supervising architect of the construction of the buildings of that institution, and requested my opinion upon the point whether or not there now exists between the State of Ohio and Mr. Scofield a contract which obliges the State, through the managers of the Ohio Reformatory, to continue the employment of Mr. Scofield at

*Supervising Architect of Construction of Ohio Reformatory;
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Managers.*

the salary fixed in 1885, as general superintendent of construction of the buildings, until the buildings shall have been completed.

In the proposal made by Mr. Scofield on August 18, 1884, is the following proposition, which the same day was accepted by the then board of managers:

“I will give the construction of the buildings general superintendence and will attend the regular and special meetings of the board of managers, whenever required, and will visit the building each month while the work is in progress, and at such other times as my services are required, for the sum of one hundred and fifty (\$150.00) dollars per month, the State to pay my traveling expenses; or when the building is located, I will make a new proposition for superintendence, which in addition to the above amount will include an estimated average cost of traveling expenses.”

Subsequently on July 14, 1885, Mr. Scofield submitted the following new proposition, covering both services and expenses, which the same day was accepted by the board:

“In my proposition of August 18, 1884, offering my services as architect in preparing the drawings of your new building for the sum of \$3,500.00, I added that I would superintend the work in a general way, that is, to visit the building and attend your board meetings once a month or oftener if required, for the sum of \$150.00 per month and my traveling expenses, or that I would make a new proposal for superintendence after the building was located. Now that the location has been made at Mansfield, Ohio, I propose to do that work and pay my own traveling expenses for the sum of \$208.33 per month from date.”

In order to answer the question you submit, there are two things to be considered: First, what contract was created, and second, what contract could lawfully be created.

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Managers.*

It is noticeable in each of the propositions made by Mr. Scofield, that there is no term of service stated. The proposal to superintend the construction of the buildings was entirely distinct from the proposal to prepare the plans and specifications and to do the work usually done by architects preparatory to the advertisement for bids. All this latter work Mr. Scofield proposed to do for \$3,500.00, and he was paid that amount for doing the work. The proposal we have under consideration is a proposal to give the construction of the buildings general superintendence; in doing this, he says he will attend the meetings of the board whenever required, and will visit the building each month while the work is in progress, and at such other times as his services may be required, for the sum of \$150.00 per month, and his traveling expenses. Afterwards, he fixed the gross sum of \$208.33 per month for his work and expenses. Nothing is said in this proposal as to the length of time he is to be employed as superintendent of construction. He simply says, in his proposal, that he will superintend the work and pay his expenses for \$208.33 per month. He does not say that he is to be employed until the buildings shall have been completed. He does not say that he is to be paid \$208.33 a month until the buildings shall be completed. He does not say that he is to receive \$208.33 per month until the buildings shall be completed, no matter whether the work of construction is going on or not. He simply fixes a price per month for his services and expenses while engaged in superintending the construction of the buildings. He probably knew, when he made the proposal, that no proposition that the board should retain and employ him until the construction should be completed would have been accepted. For who knows when the construction will be completed? More than ten years has passed already, and yet the buildings are not completed, and only \$50,000 this year and \$50,000 next year have been appropriated toward their construction.

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Managers.*

In my opinion there was no contract created by the proposal and acceptance referred to which binds the board of managers to retain Mr. Scofield as superintendent of construction any longer than they see fit to retain him. The board may by giving him a month's notice, terminate his employment at any time. The board cannot say whether the work of construction of the buildings shall go on or not; that is a matter within the discretion of the Legislature. The board cannot compel the Legislature to appropriate money sufficient to keep up continuously the work of construction. If construction is not going on, there is no need to pay \$208.33 a month for a superintendent of construction. If construction goes on only part of the time, only a few months in the year, the board obviously is not justified in paying \$208.33 a month for work which is not required to be and cannot be done. In the very nature of things, the board must have the right to determine from time to time whether a superintendent of construction is needed, and if there is no need of one, it is absurd to say that the board must pay for something of no benefit to the State or the institution placed in their charge.

But there is another reason for reaching the conclusion I have set forth, as to the character of the contract created. To say that the board is bound to retain Mr. Scofield and pay him \$208.33 a month for an indefinite period and until the construction of the building is completed, is to say that certain officers of the State, namely, the managers of the Ohio Reformatory, in 1884 and 1885 had the power to make a contract good for ten years and an indefinite time thereafter, which imposed and imposes on the State the liability to pay \$2,500 a year to a certain person for an indefinite time, regardless of whether the work thus paid for is or is not needed by the State. Whether the work is needed by the State depends on the appropriations to be made by the Legislature. No appropriation, according to the constitu-

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Managers.*

tion, can be made which is good for more than two years. Each new Legislature has a right to determine what amount of money shall be raised and what amount of money shall be expended. But if the board of managers of an institution can make a contract good for ten years which imposes a liability of \$2,500 on the State for each year, then subsequent Legislatures cannot determine just what money shall be expended by the State. The board of managers of the Ohio Reformatory could not in 1885 enter into a contract which could bind a succeeding General Assembly or succeeding General Assemblies, to make appropriations to pay Mr. Scofield \$2,500 a year. The board of managers at that time could make no contract binding on the State for a longer period than that for which appropriations were then made and were then available. Your present board can enter into no contract looking to the construction of buildings unless an appropriation is available to meet the liabilities thus incurred. You cannot enter into a contract creating liabilities which must be met by the appropriations of a subsequent General Assembly. Mr. Scofield's employment has continued and continues now, simply by ratification and acquiescence of each successive board, and your board or any succeeding board may terminate his employment, as I have before stated, whenever in your judgment the interests of the State and of the institution confined to your care demands such action on your part.

Very respectfully,

J. K. RICHARDS,

Attorney General.

*Insurance Companies; Restriction Covering Rights to Hold
Real Estate Apply Only to Ohio Corporations.*

INSURANCE COMPANIES; RESTRICTION COVER-
ING RIGHTS TO HOLD REAL ESTATE APPLY
ONLY TO OHIO CORPORATIONS.

Office of the Attorney General,
Columbus, Ohio, November 28, 1894.

Hon. T. R. Fletcher, Deputy Superintendent of Insurance:

MY DEAR SIR:—In your favor of the 27th inst., you submit to me the question whether the provisions of section 3649, Revised Statutes, apply "to companies organized under the laws of other states of the United States, or of foreign governments." The section to which you refer reads as follows:

"No company organized under this chapter shall purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth, to-wit:

"1. Such as is requisite for its convenient accommodation in the transaction of its business; or

"2. Such as is mortgaged to it in good faith, by way of security for loans previously contracted, or for money due; or

"3. Such as is conveyed to it in satisfaction of debts previously contracted in its legitimate business, or for money due; or

"4. Such as is purchased at sales upon judgment, decree, or mortgages obtained or made for such debts.

"No such company shall purchase, hold, or convey real estate in any other case, or for any other purpose; and all such real estate as may be acquired as aforesaid, and which is not necessary for the accommodation of the company in the transaction of its business, shall be sold and disposed of within two years after title thereto is acquired, unless the company procure a certificate from the superintendent of insurance that its interests will suffer materially by a forced sale thereof, when the sale may be postponed for such period as the superintendent shall direct in such certificate."

Building and Loan Associations; Construction of By-Laws.

The section in terms applies only to companies "organized under this chapter," that is, insurance companies other than life organized under the laws of Ohio. I do not understand that the restriction thrown by this section about the purchase and possession of real estate by an insurance company, will apply to a company organized under the laws of a foreign government, and deriving its powers from such authority. This, I understand, has been the holding of your department in the past, and I see no good reason to depart from it.

Very respectfully,

J. K. RICHARDS,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS; CON-
STRUCTION OF BY-LAWS.

Office of the Attorney General,
Columbus, Ohio, December 27, 1894.

Hon. William M. Hahn, State Inspector Building and Loan Associations:

DEAR SIR:—You have called my attention to the following article of the by-laws of a building and loan association, organized under the laws of this State, and requested my opinion whether, under the act of May 1, 1891, regulating building and loan associations, such corporation may legally establish local boards of directors, with the powers attempted to be conferred:

"A local board of directors may be selected in cities and towns where sufficient business is done to warrant it. Such boards may elect a local treasurer, who may receive monthly payments, and who will be deemed to be the agent of the local members and not of the company.

Building and Loan Associations; Construction of By-Laws.

"The officers of the local board should consist of a president, vice president, secretary, treasurer, and a board of not less than five nor more than nine directors, who shall meet not less than once a month.

"All applications for loans shall be submitted to the local board for approval before forwarding the same to the home office.

"Traveling agents of the company are given authority to appoint the first officers of the local boards, provided that officers so appointed shall hold office only for one year or until the members of the local board meet and elect their successors."

If it is intended by this article to authorize the establishment of local branches of a central organization, and confer upon the so-called directors selected by the members of the local branch, the power to approve applications for loans and manage the details of the business of the company in the particular locality, then I am satisfied the adoption of the article and the organization of the local branches is beyond the power of a building and loan association, as limited and regulated by the law of Ohio, for the reason that powers are conferred upon the so-called boards of directors which by law are imposed upon the board of directors of the corporation, elected by all its members.

A building and loan association is organized for the purpose of raising money to be loaned among its members. The business of the company is conducted and controlled by a board of directors elected by all the members. The members who put their money in the association have a right to insist that the money shall not be loaned except to borrowers and upon securities approved by the directors chosen by them. The directors who have assumed this trust cannot delegate any part of their powers to subordinate local boards and shift to the shoulders of such agencies the responsibility of approving of applications for loans. The local board of directors provided for by this article, is an irresponsible body, not known to the law, and yet to it is virtually en-

Building and Loan Associations; Construction of By-Laws.

trusted the most responsible duty to be discharged by the officers of a building and loan association, namely, the approval of applications for loans.

But it may be said that the local board has no power, and acts simply in advisory capacity, the business of the association being transacted by the real board of directors at the central or home office; but, taking this view, I am disposed to think the adoption of the article and the organization of the local branches and boards is beyond the power of the corporation and opposed to the policy of the law regulating building and loan associations. If the local board is to have no power, its organization operates to deceive the people of the locality in which it is instituted, inducing them to become members of an association located elsewhere, and controlled and managed elsewhere, upon the representation, that, through the local board of directors, elected by them, they shall have control of the share of the entire business of the corporation contributed by them. This, of course, ought not to be permitted.

The law of Ohio provides for and recognizes but one board of directors, elected by all the members and having control of all the business of the corporation, and to this one board of directors, building and loan associations ought to be limited in their organization and operation.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Board of Appeals; Decision of as to Liability of Foreign Corporations Under 148c.

BOARD OF APPEALS; DECISION OF AS TO LIABILITY OF FOREIGN CORPORATIONS UNDER 148c.

<p>In the matter of the Appeal of The American Axe and Tool Company, from the decision of the Secretary of State of Ohio, under section 148c, enacted May 16, 1894.</p>	}	<p>Before E. W. Poe, Auditor of State, W. T. Cope, Treasurer of State, and J. K. Richards, Attorney General.</p>
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By J. K. Richards, Attorney General:

The question presented by this appeal, is whether the license tax imposed by section 148c, enacted May 16, 1894, upon a foreign corporation, doing business in Ohio and owning or using a part or all of its capital or plant in this State, shall be computed upon the proportion of the *authorized* capital stock of the company, represented by property owned and used and by business done in Ohio, or upon such proportion of the *issued* capital stock. The secretary of state has computed the tax upon the proportion of the authorized capital stock of the company, while the corporation insists that the tax should be computed upon a proportion of the issued capital stock.

The license tax imposed by this section is exacted by the State of Ohio as a condition upon which a foreign corporation may exercise its franchises in Ohio. By express provision, the section is not to apply to "foreign insurance, banking, savings and loan or building and loan companies; or to express, telegraph, telephone, railroad, sleeping car, transportation or other corporations engaged in Ohio in interstate commerce business; or to foreign corporations, entirely non-resident, soliciting business, or making sales, in this State by correspondence or by traveling salesmen." The license tax is, therefore, imposed only upon those corporations which the State of Ohio, in the exercise of its sovereign

Board of Appeals; Decision of as to Liability of Foreign Corporations Under 148c.

power, may either exclude from the State altogether, or admit upon such terms and conditions as it may see fit to impose.

That a State has the right wholly to exclude foreign corporations not engaged in interstate commerce, or to permit them to do business within the State upon such conditions as the State may think proper to impose, has been repeatedly decided by the Supreme Court of the United States.

Bank of Augusta vs. Earl, 13 Peters, 519.

Lafayette Ins. Co. vs. French, 18 Howard, 404, 407.

Paul vs. Virginia, 8 Wallace, 168, 181.

Ducat vs. Chicago, 10 Wallace, 410, 415.

Doyle vs. Continental Ins. Co., 94 U. S., 535.

Philadelphia Fire Ass'n vs. New York, 119 U. S., 110, 119.

Pembina Mining Co. vs. Penna, 125 U. S., 181, 186.

Western Union Tel. Co. vs. Mayer, 28 O. S., 523.

State ex rel. Insurance Co. vs. Reimund, 45 O. S., 218.

The tax imposed by this section is not a tax upon property, but upon the franchise or privilege of doing business in Ohio. It is an arbitrary tax has no limitation but the discretion of the State. The value of the franchise is not measured like that of property, but is ascertained in whatever manner the Legislature may choose.

California vs. Pacific Ry. Co., 127 U. S., 40.

Home Insurance Co. vs. New York, 134 U. S., 599.

Under section 148, known as the Massie law, Ohio corporations are required to pay to the State, for the privilege of becoming incorporated, a fee, or franchise tax, of one-tenth of one per cent. upon the authorized capital stock. It matters not what the subsequent issue of capital stock may be, the fee is based upon the authorized capital stock. Sec-

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tion 148c is evidently designed to impose upon foreign corporations the same burden in the way of a franchise tax or license fee that is imposed upon domestic corporations by section 148. It is apparent from the nature of the statement to be filed with the secretary of State, that the authorized capital stock, and the authorized capital stock alone, is to be considered.

The facts required to be returned as data for the computation of the tax, are:

1. The number of shares of authorized capital stock.
2. The value of the property owned and used by the company in Ohio and the value of the property owned and used outside of Ohio.
3. The proportion of the capital stock of the company which is represented by property owned and used and by business transacted in Ohio.

There is no provision for a return of the issued capital stock of the company. Further on, the section provides that the secretary of state "shall charge and collect from the company, for the privilege of exercising its franchises in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation, represented by property owned and used and business transacted in Ohio, being the same fee required to be paid by corporations formed under the laws of Ohio."

The authorized, not the issued capital stock of a corporation, is taken as the measure of the franchises granted to and enjoyed by it. The issued capital stock of course represents more accurately the property of the corporation, but the tax imposed by this section, is not a tax upon the property, but upon the franchise of the corporation. The property in Ohio, as compared with the property outside of Ohio, is used only to determine the proportion of the authorized capital stock of the company, representing its entire franchise, which is enjoyed in Ohio. It is for the proportion of the franchise exercised, not for the part of the

*Board of Appeals; Decision of Foreign Corporation Must
Pay on Basis of Authorized Capital Under 148c.*

property owned and used, in Ohio, that the exaction is required. It was and is within the power of the State of Ohio to require foreign corporations not engaged in interstate commerce business to pay a license tax based upon the entire authorized capital stock; but the State has been generous in limiting the charge to a proportion or part of the authorized capital stock, as the measure of the franchise enjoyed.

Accordingly, for the reasons stated, we affirm the decision of the secretary of state and direct him to proceed to collect the license tax assessed against this corporation.

June 26, 1894.

BOARD OF APPEALS; DECISION OF FOREIGN
CORPORATION MUST PAY ON BASIS OF AU-
THORIZED CAPITAL UNDER 148c.

<p>In the matter of Appeal of the Shaker Heights Land Com- pany from the decision of the Secretary of State of Ohio, un- der Section 148c, enacted May, 16, 1894.</p>	}	<p>Before E. W. Poe, Auditor of State, W. T. Cope, Treasurer of State, and J. K. Rich- ards, Attorney General.</p>
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By *J. K. Richards, Attorney General*:

This is an appeal of the Shaker Heights Land Company of Buffalo, from the decision of the secretary of state, holding that this company must pay, for the privilege of exercising its franchises in Ohio, a license tax of one-tenth of one per cent. upon the entire authorized capital stock of the company, viz., \$750,000. The return of the company shows

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that the corporation was organized in New York; its authorized capital stock is \$750,000; the paid in capital is \$240,000; of the \$240,000 paid in, \$230,000 was invested in real estate in Cleveland, Ohio, the other \$10,000 being unaccounted for in the return. The real estate purchased and now owned by the company in Ohio is worth \$1,400,000. The company owns no property outside of Ohio, unless the unpaid subscriptions to its capital stock be regarded as property within the meaning of the act.

Upon this state of facts the secretary of state found that the proportion of the authorized capital stock represented by property owned and business done in Ohio is the entire authorized capital stock, there being no property owned outside of Ohio. From this decision of the secretary of state the company appeals.

In the matter of the appeal of the American Axe and Tool Company, we decided that the license tax imposed by section 148c must be computed upon the proportion of the authorized and not of the issued capital stock of the company; and that where a company had only issued a part of its capital stock, investing the capital paid thereon wholly in Ohio, the license tax must be computed upon the entire authorized capital stock, notwithstanding the fact that in the future the corporation might issue the balance of its capital stock and invest the money paid in on the same in states other than Ohio. The controlling facts to be considered by the secretary of state, as found by us in that appeal, are, first, the amount of the authorized capital stock of the foreign corporation; second, the proportion which the capital of the company invested in Ohio bears to the entire capital of the company. If all the capital paid in be invested in Ohio, then the license tax must be paid on the entire authorized capital stock, no matter if only a small portion of the authorized capital stock has been issued.

The principles laid down in that appeal sustain, it seems to us, the finding of the secretary of state in the present mat-

Board of Appeals; Decision of Foreign Corporation Must Pay on Basis of Authorized Capital Under 148c.

ter. The only distinction between the two cases is that here the entire authorized capital stock has been issued, but only a portion of the issued capital stock has been paid in. Nevertheless, all of the money paid in, in other words, all of the capital of the corporations, has been invested in Ohio. All the property bought and paid for and owned by the corporation, as it appears from the return, is situated in Ohio. This property is worth \$1,400,000. The company owes more than \$1,000,000 on property in Ohio, and it neither owns, nor owes on, any property outside of Ohio.

But it is said the unpaid subscriptions, amounting to \$510,000, are property outside of Ohio. We do not understand that this is so.* No doubt the company has a right to call upon stockholders to pay in full the subscriptions to the capital stock. But we do not understand that subscriptions to capital stock become capital and property of the corporation until the money is actually paid in. What is due on the subscriptions may or may not be called for; and if called for, may or may not be paid. The corporation must have not only the right to collect the money, but must have the money itself in order to make that money the property of the corporation. Then the money can be invested as the corporation sees fit.

The object of this act is to compel a foreign corporation to pay this license tax upon the proportion of the authorized capital stock represented by property owned or business done in Ohio. The property actually owned and business actually done by a corporation is regarded as a measure of the enjoyment of the franchise of a corporation. If the property or business be located in more than one state, Ohio is only entitled to a fee based on the proportion of the authorized capital stock represented by the property owned or business done here; but if all the property owned and all the business done by the corporations is in Ohio, then this State is entitled to the license tax computed upon the entire authorized capital stock of the corporation.

Savings and Loan Associations; Enlarging Powers so as to Become Safe Deposit and Trust Companies.

For these reasons, we affirm the decision of the secretary of state and direct him to proceed to collect the license tax assessed by him against this corporation.

In the matter of the appeal of the Long View Driving Park Land Company from the decision of the secretary of state, under section 148c, we sustain the secretary of state in his finding for the reasons set out in our opinion in the matter of the appeal of the Shaker Heights Land Company.

October 16, 1894.

SAVINGS AND LOAN ASSOCIATIONS; ENLARGING POWERS SO AS TO BECOME SAFE DEPOSIT AND TRUST COMPANIES.

Office of the Attorney General,
Columbus, Ohio, January 3, 1895.

Hon. Samuel M. Taylor, Secretary of State:

DEAR SIR:—In your favor of this date, you state that The Dime Savings and Banking Company, of Cleveland, Ohio, was incorporated under section 3797, et seq., of the Revised Statutes relating to savings and loan associations, and now desires to enlarge its purposes by including the powers conferred by law upon safe deposit and trust companies. You desire my opinion whether such an amendment can be permitted.

On the 30th of November, 1894, in reply to a similar inquiry submitted to me by you, and growing out of the attempt on the part of The Broadway Savings and Loan Company, of Cleveland, to amend its articles of incorporation, by adding the powers of a safe deposit and trust company, under section 3821 et seq., I advised you that in my opinion the law of Ohio does not contemplate the union in one corporation of the powers granted by separate sections of the