abandoned Ohio Canal, said line being approximately the southerly line of a tract of land conveyed by the State of Ohio to Peter J. Blosser, by deed, dated January 8th, 1915.

Upon examination of this lease which, I assume, is one executed under the authority of the Act of June 7, 1911, 102 O. L. 293 and of Sections 13965 et seq. General Code, I find that the same has been properly executed by you and by Walter W. Boulger, the lessee named therein. Upon examination of the provisions of this lease and of the conditions and restrictions therein contained, I find the same to be in conformity with the above noted and other statutory enactments relating to leases of this kind.

I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1395.

TAX PAYMENTS—LIABILITY OF COUNTY TREASURER BY REASON OF HIS CREDITING TAX PAYMENTS AS IN PAYMENT OF TAX ITEMS OTHER THAN THOSE FOR WHICH PAYMENT WAS RECEIVED—O. A. G. NO. 4781, 1932, FOLLOWED.

SYLLABUS:

Opinion of the Attorney General (1932 *O. A. G. No.* 4781) *concerning the liability of a county treasurer by reason of his crediting tax payments as in payment of tax items other than those for which the payment was received, discussed, approved and followed.*

COLUMBUS, OHIO, August 14, 1933.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request that I consider the opinion of my predecessor in office, rendered to the Bureau of Inspection and Supervision of Public Offices under date of December 3, 1932, bearing No. 4781. Along with such request you enclose two briefs which have been submitted to you concerning the liability of an officer for loss of funds coming into his official possession.

Inasmuch as you ask my opinion on the statement of facts submitted to my predecessor, forming the basis of such opinion, it might be well to re-state herein such facts. Such facts, in so far as they are material to the questions of law presented, are as follows:

> "Our examiners, in their examination of the Treasury of Cuyahoga county as of December 17, 1931 (report released and filed April 11, 1932), charged that there was a cash deficit of $475,000.00. This amount consisted of 2416 items of tax paid to the treasurer, as evidenced by his records, prior to the date of the examination, which were not reported to the county auditor as taxes collected, and therefore, not included in the

auditor's balance sheet charge to the treasurer, but which money was used by the treasurer to balance the amount charged to him upon the auditor's accounts.

On April 13, 1932, the treasury was closed and an examination made as of April 23, 1932, disclosed a cash shortage of tax money amounting to $477,000.00. The auditor's February, 1932, settlement with the treasurer shows a charge in excess of collections reported amounting to $477,000.00.

A further examination of tax collections discloses that conditions similar to the above stated existed in former years. It is found that taxes collected during the closing weeks of a collection have not been reported to the auditor, nor included in the settlement, but that the money for the same has been used to balance the treasury against the auditor's charge.

These manipulations took place over a period from August, 1926, to December, 1931, and cover the administrations of three treasurers, as follows:

Treasurer No. 1.—1926 to January, 1929.

Treasurer No. 2—January 1, 1929, to September 2, 1929.

Treasurer No. 3—September 2, 1929, to date.

The examination so far has disclosed that a diversion of tax moneys occurred during August, 1926, and that during November and December, 1928, a partial restoration was made. The remainder was kept under cover by delayed accounting for taxes received.

Analysis of the treasurer's records of taxes collected, shows that various items received during the administration of Treasurer No. 1 were accounted for during the administration of Treasurer No. 2; and that various items collected during the administration of Treasurer No. 2 were accounted for during the administration of Treasurer No. 3. At this time it appears that the shortage was ever increasing, and was covered in the delayed accounting for taxes collected.

Question: Under the conditions as above stated, as a matter of law and accounting, are we right in assuming that each treasurer and his bond is liable for the entire amount of taxes received during his administration, as evidenced by his cash stubs?

Or, to state it in another way:

If the total tax stubs stamped 'paid' by Treasurer No. 1 during his term of office, exceed the amount of taxes reported to the country auditor during such term, are he and his bond liable for such differences, although such difference is accounted for by Treasurer No. 2 during his term? (The same to apply to the change from Treasurer No. 2 to Treasurer No. 3.)

For example: An item of tax amounting to $150,000.00 is paid to Treasurer No. 1 on date of December 28, 1928, as evidenced by the cash stub. The check for this amount was deposited in the county depository to his credit on December 29, 1928, and the same included in the treasury assets on December 31, 1928, at the expiration of his term of office. This tax, according to the records of Treasurer No. 1, was not accounted for to the county auditor on date of December 31, 1928, or prior thereto. But, during January, 1929, Treasurer No. 2 did enter such item in his cash book of tax collected and did report the same to the county auditor as taxes collected during his term of office."

In the briefs accompanying your request numerous authorities are cited and quoted from concerning the following questions of law:

(1) That the sureties on the bond of a public official during his second term of office are not liable by virtue of such obligation for misappropriations of such official which occurred during his first term.

(2) That when during a certain period an employe converts to his own use the funds of his employer, and thereafter, by reason of his receipt of other funds of his employer he so credits such subsequent funds as to conceal such defalcation until a new bond is taken from the employe in place of the one insuring his honesty at the time of the defalcation, and after such new bond has been received continues the practice of falsely crediting new funds received by the employe but nevertheless permitting all funds received during the term of the new bond to remain in the employer's possession that such subsequent acts during the term of the new bond do not constitute a defalcation and the new bondsmen are not liable for such act. This rule is based upon the theory that there was no defalcation during the life of the new bond since the employer received all of the moneys coming into the employe's possession for the benefit of the employer and that the only misapplication of funds happened during the life of the former bond and that the conditions of the bonds in question did not insure against erroneous bookkeeping or accounting.

(3) Numerous cases are also cited and quoted from in support of the proposition that when a public official received funds of a subdivision during his first term of office and converts the same to his own use and during a later term credits moneys received for such subdivision as though in payment thereof or for the purpose of concealing such defalcation the bondsmen during the second term are not liable for the defaulted moneys. The basis of the reasoning in these cases is similar to those cited in support of the first contention, for the reason that all of the funds collected were the property of a single subdivision.

(4) Other cases are cited in support of, or concerning the construction of, and liability of sureties on a bond conditioned for the faithful performance of the duties of the office.

The brief-writers contend that by reason of these decisions such Opinion 4781 rendered by my predecessor in office, is in error.

They also urge that there is some discrepancy between the actual facts and those facts set forth in, and forming the basis of the opinion of my predecessor. I do not herein consider the alleged differences between the real facts and the facts upon which the opinion of my predecessor was asked for I do not believe it can be contended that it is the duty of the Attorney General to determine whether or not the facts underlying a request for his opinion on a legal point are true or hypothetical. The Attorney General renders each opinion as though in answer to a hypothetical question. He assumes for the purpose of the opinion, that each and every fact set forth in the request for opinion is true, and such set of facts so presented are the hypothesis of his opinion. I therefore specifically limit myself in this opinion to a consideration of the law as applicable to the facts set forth in the opinion complained of.

An examination of the opinion in question, of my predecessor discloses that such opinion is based upon the proposition that the county treasurer has a legal duty of collecting tax funds which are assessed by the various taxing authorities within the geographical limits of the county, regardless of a consideration of the question of what tax levying authority levied the tax. Each

year the "Budget Commission" determines what amount of proposed taxes may be levied within legal limitations and reports such fact to the taxing authorities of the subdivisions who thereupon levy the tax. It might be said that as a general rule the amounts of taxes collected by the treasurer against a parcel of property for the benefit of a particular subdivision are not constant, that is, they vary from year to year. For this reason a proportion of an item of tax, as for example, a $100.00 item may be during one year divided among the various taxing subdivisions in one proportion while in the next year it would probably be divided in another proportion.

The opinion of my predecessor assumes that such variation in taxes exists. I am unable to state that my predecessor was unwarranted in making this assumption for it appears that during the years covered by the matter in controversy (1926-1931) the tax rate in the City of Cleveland in such county varied as follows: $2.41, $2.50, $2.53, $2.62, $2.71½ and $2.76, respectively.

While I do not have before me the fluctuation of the value of the taxable property in such city and do not have before me the amount of taxes collected by the county treasurer during such year I have been informed that the reduction in the valuation of the items of taxable property was not in exactly the converse ratio. If such be true, it is self-evident that the county treasurer for the tax year 1929 collected a tax item of $100.00 appearing upon the tax list and duplicate for the year 1929, and in his settlement with the county auditor, reported that such item was collected by him in payment of an item of $100.00 appearing upon the tax list and duplicate for the year 1928, and thereby caused the county auditor to issue warrants authorizing the treasurer to distribute such sum in the manner in which it should have been distributed if collected in payment of the items which the county treasurer reported that it had been collected instead of to the subdivisions for which the $100.00 tax item for the year 1929 was assessed, it is hard to conceive of the line of reasoning which would lead to the conclusion that such item was paid in the manner required by law.

In the case of *Crawn* vs. *Commonwealth,* 84 Va. 282, 10 A. S. R. 839, the court had before it a somewhat similar question to that presented by your inquiry, and the court held as stated in the syllabus:

> "Application of payments by public officer is binding upon his sureties, and they cannot escape liability for his failure to pay over money collected during the term for which they were sureties by showing that he wrongfully applied such money to the payment of deficiencies occuring during the preceding term."

Similarly, in the sixth paragraph of the headnotes of *Inhabitants of Hudson* vs. *Miles,* 185 Mass. 587, 102 A. S. R. 370, it is said:

> "If a collector of taxes who holds office for two terms, with different sureties on his official bonds, applies sums received for taxes during his second term to the payment of taxes due during the first term, which had been collected by him and not paid over, the sureties on his second bond are liable, if the sums so paid were received in good faith by the town."

An examination of the decisions of the various states of the United States disclose a decided conflict among the decisions of the courts therein. However,

even though such doubt exists after an examination of the opinion of my predecessor in office the cases cited therein and the cases in the briefs submitted to this office, I do not feel warranted in overruling the opinion of my predecessor in office.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1396.

PRISONER—PAROLE BOARD UNAUTHORIZED TO RELEASE ON POROLE BEFORE EXPIRATION OF MINIMUM TERM FIXED BY COURT.

SYLLABUS:

1. *A board of parole has no authority to release on parole a prisoner sentenced by a court of competent jurisdiction before the expiration of the minimum term of imprisonment fixed by the court, less good time off as provided by section* 2210, *where the statute (section* 12423-1), *which defines the offense, fixes only a maximum term of imprisonment and does not provide for a minimum term of imprisonment.*

2. *A prisioner committed to the Ohio Penitentiary to serve an indeterminate sentence of four to ten years for the violation of section* 12423-1, *which does not fix a minimum term of imprisonment, is eligible for parole only after serving the minimum term of imprisonment fixed by the trial court, less good time off as provided by section* 2210, *General Code.*

COLUMBUS, OHIO, August 14, 1933.

HON. ELMO M. ESTILL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

> "One charged in our Court with a violation of Section 12423-1 of the General Code, being an assault upon a minor child was sentenced by the Court to the Penitentiary for not less than four years nor more than ten years. You will note that under this Section of the General Code the minimum term is not set. Will you kindly advise whether under our Ohio Law the Defendant so sentenced,
>
> 1. Is eligible for hearing before the Parole Board immediately after his commitment, or
>
> 2. Whether the Parole Board would have jurisdiction for a hearing on the matter of parole prior to the minimum sentence imposed by the Court, there being no minimum sentence expressed in the statute."

Your inquiry raises the question of whether the Baord of Parole can disregard the minimum term of imprisonment imposed by a court on a person convicted of violating section 12423-1, General Code and consider such prisoner as eligible for parole as soon as he is admitted to the Ohio Penitentiary.